May It Displease the Court:
Jewish Lawyers and the Democratization of American Law, 1890-1932

By Britt P. Tevis

A dissertation submitted in partial fulfillment of

the requirements of the degree of

Doctor of Philosophy

(History)

at the

UNIVERSITY OF WISCONSIN-MADISON

2016

Date of final oral examination: August 3, 2016

The dissertation is approved by the following members of the Final Orals Committee:
Tony Michels, Professor, History and Jewish Studies
William J. Reese, Professor, History and Educational Policy Studies
Jennifer Ratner-Rosenhagen, Professor, History
Brad Snyder, Professor, Law
David Sorkin, Professor, History and Jewish Studies

[Abstract]

May It Displease the Court shows how turn-of-the-century American Jewish lawyers advanced a more democratic, inclusive, and equitable legal system. American Jewish lawyers were uniquely positioned for this task because of their cultural distinctiveness, status as an ambiguously raced (or white enough) non-Christian minority, and left-leaning politics. These factors, along with anti-Jewish bias within the legal profession, inspired them to make novel arguments and represent legally marginalized people with whom they identified. Focusing on Jewish lawyers' involvement in immigration, labor, and civil liberties cases, this dissertation shows how they pioneered new fields of legal practice and reshaped existing ones. Consequently, American Jewish lawyers redirected the trajectory of twentieth-century American law. Recognizing the unique ways that American Jewish lawyers engaged with the legal system reveals the limits of American Jews' freedoms and recasts the origins of immigration, labor, and First Amendment law.

[Table of Contents]

[Acknowledgements]

I am grateful to a wide network of institutions and individuals without whom completing this dissertation would have been impossible. The Center for Jewish History, American Jewish Archives, Association for Jewish Studies, Myer and Rosaline Feinstein Center for American Jewish History at Temple University, and the Center for Jewish Studies, Department of History, and Graduate School at the University of Wisconsin-Madison helped fund my research. At the Center for Jewish History, I am especially thankful to Judy Siegel, Chris Barthel, and the Mirvis family. Likewise, for their incredible generosity, Julie and Peter Weil and the University of Wisconsin-Madison history department and John Tortorice and the George L. Mosse Program deserve special recognition.

Throughout graduate school I benefitted from the patience and kindness of many people at the University of Wisconsin-Madison. Leslie Abadie, the history department's graduate program coordinator, shepherded me from prospective students' weekend through graduation. She undoubtedly does not get enough recognition for her role in ensuring that the department functions; although a dissertation acknowledgement surely does not remedy this oversight, I thank her nonetheless. I also owe a debt of gratitude to the faculty members who helped me develop this project. Tony Michels has been an exemplary advisor. In addition to being endlessly encouraging, he has given me the perfect balance of guidance and freedom to follow my instincts. Jennifer Ratner-Rosenhagen introduced me to legal realism, which put me on the path toward thinking about how Jewish lawyers operated within the American legal system. David Sorkin helped me to put the endeavors of American Jewish lawyers in a global context. All three exceeded my expectations about what mentorship is by being both incredible scholars and terrifically kind people. I also want to thank Bill Reese, who first

encouraged me to think about the significance of people operating in social networks, and Brad Snyder, who graciously agreed to serve on my dissertation committee.

In addition to faculty members, fellow students helped me along the way. Megan Falater, Rachel Gross, Ariana Horn, Jillian Jacklin, and Chong Moua encouraged me to narrow my understanding of American law in the early phase of this project. For feeding me meals, caring for me when I was sick, lending me your cars, and tolerating my discussions of Jewish lawyers at social gatherings, thank you to Dan Cook, Vaneesa Cook, Josh Duboff, Rachel Gross, Katherine Guenoun, Raf Guenoun, Frank Honts, Katie Jarvis, Christine Lamberson, Irene Toro Martinez, Cam Scribner, Stephanie Scribner, and Debbie Sharnak. A special thank you to Rachel Gross, Katherine Guenoun, Christine Lamberson, Cam Scribner, and Debbie Sharnak for offering invaluable feedback on my writing and engaging in long, meandering conversations about history (and life) with me.

In New York, Ofer Dynes and Jeff Culang spent a great deal of time listening to me work out some of the confusing aspects of the American immigration system. Towards the end of my dissertation Stas Budnitskiy and Matt Phipps became invaluable writing partners. My final chapter benefitted from the insights of Max Baumgarten, Barry Goldberg, and Avigail Oren. Thank you to Chris Barthel, who provided much needed relief by making sure I saw nature a few times a year and to Ofer Dynes, who made sure I periodically made it north of Fifty-ninth Street. Tiff Chen, Amy McKinnon, and Irene Toro Martinez helped me complete this work by being role models of good health. Finally, neither this project nor my life would make sense without Stephen Cox, Sara Mieczkowski (a modern-day crusader for justice), or Chelsea Silverstein; our decades-long friendships have been a constant source of strength and pride.

To my family: What is there to say to a group of people who have given me everything and asked for nothing? Thank you to Barbara Robins for her nurturing positivity and endless support. Thank you to Ray Robins for the enthusiastic feedback on different parts of this work. Likewise, thank you to Edward Leibson, who both pushed me to pursue my degree and sent me hand-written comments on my writing. To Marvin and Lee Leibson, thank you for believing that I can achieve whatever I set my mind to and pressing me to finish. Lastly, to my parents, Nancy Robins, Scott Tevis, and Meisha Leibson: Words cannot sufficiently express my gratitude for everything you have given me. My appreciation for you knows no bounds. Thank you, thank you, thank you.

[Introduction] The New American Jewish Lawyer

Lawyers in the United States commonly introduce themselves at the outset of oral proceedings in court by uttering the ceremonial salutation, "May it please the court." The phrase is a holdover from English courts. It came of use in America in the nineteenth century as a convention of legal etiquette.[1]

During the final two decades of the nineteenth century an increasing number of American lawyers who expressed their desire to "please the court" were Jewish. Soon after the start of mass migration from Eastern Europe around 1880, Jewish bar membership in America surpassed Jewish representation in the general population (which never exceeded 2 to 3 percent). The prevalence of Jewish lawyers in the American bar caught the attention of individuals ranging from non-Jewish lawyers to immigration officials to scholars who studied the phenomenon. The national and regional reports they produced uniformly revealed that, beginning in the first decade of the twentieth century, Jews' bar membership exceeded their representation in the general population.[2] In 1908, for example, an Immigration Commission report noted that, although Jews constituted less than 3 percent of the total American population, Jewish students constituted 13 percent of all students in the nineteen

---

[1] Bryan A. Garner, "Does It Please the Court?," *ABA Journal* 99, no. 4 (April 2013): 24-26.

[2] On Jewish disproportionate representation see David Hollinger, *Cosmopolitianism and Solidarity: Studies in Ethnoracial, Religious, and Professional Affiliation in the United States* (Madison, WI: University of Wisconsin Press, 2006); "Communalist and Dispersionist Approaches to American Jewish History in an Increasingly Post-Jewish Era," *American Jewish History* 95, no. 1 (March 2009): 1-32; "A Yet More Capacious Expanse for American Jewish History," *American Jewish History* 95, no. 1 (March 2009): 73-78. On Jewish lawyers' disproportionate representation in the American legal profession see Marcia G. Synnot, "Anti-Semitism and American Universities: Did Quotas Follow the Jews?" in David Gerber, ed., *Anti-Semitism in American History* (Chicago, IL: University of Illinois Press, 1986), 258-259; Lee J. Levinger, "Jews in the Liberal Professions in Ohio," *Jewish Social Studies* 2, no. 4 (October 1940), 405-406; Leonard Dinnerstein, *Uneasy At Home: Antisemitism and the American Jewish Experience* (New York, NY: Columbia University Press, 1987), 26;

[2] Leonard Dinnerstein, *Uneasy At Home: Antisemitism and the American Jewish Experience* (New York, NY: Columbia University Press, 1987), 26; Richard Abel, *American Lawyers* (New York, NY: Oxford University Press, 1989), 69-71.

law schools surveyed. In 1918, Jews comprised 21.6 percent of students in the 106 institutions studied.[3] Jews' disproportionate representation in the bar was especially pronounced in cities such as New York, Philadelphia, and Chicago. In New York, by the late 1930s, one study approximated "conservatively that more than half" of the city's lawyers were Jewish, "(at least 11,400 out of 22,000)."[4]

Despite expressing the desire to "please the court," late nineteenth- and early twentieth-century American Jewish lawyers often caused dismay. They represented people who existed at the legal margins of American society: immigrants, blacks, laborers, political radicals, conscientious objectors, pacifists, artists who produced obscene works and their publishers, and women who wanted divorces. These were people who state and federal laws and the judges who interpreted those laws imagined as dangerous, immoral, degenerate, corrupt, and otherwise burdensome. Likewise, Jewish lawyers' legal stances often clashed with standard judicial (and popular) interpretations of law. Whereas most American judges and non-Jewish lawyers favored strict interpretation of the country's immigration laws, most American Jewish lawyers advocated for open and liberal immigration policies and argued that immigrants had due process rights. During the so-called Lochner era, from around 1897 through 1937, when the U.S. Supreme Court routinely struck down state economic regulations and issued injunctions against union protestors, most American Jewish lawyers fought to ensure workers' rights to unionize, strike, and boycott. When most American judges and non-Jewish lawyers understood First Amendment rights as inapplicable to state governments and the individuals who lived under their rule, most American Jewish lawyers

[3] Marcia G. Synnot, "Anti-Semitism and American Universities: Did Quotas Follow the Jews?" in David Gerber, ed., *Anti-Semitism in American History* (Chicago, IL: University of Illinois Press, 1986), 258-259.
[4] Richard Abel, *American Lawyers,* 86.

contended that Americans were entitled to the First Amendment guarantees of free speech, press, and assembly and that the U.S. Constitution forbid state censorship. And when most American judges and non-Jewish lawyers took no issue with (and in some instances supported) the intermingling of Christianity and state law, most American Jewish lawyers called for a strict separation of the two. In short, most late nineteenth- and early twentieth-century American Jewish lawyers challenged the legal status quo to the extent that they quickly became perceived as recalcitrant if not dangerous. They represented clients and asserted legal claims that courts were displeased to hear.

As a result of whom they represented and the arguments they made, Jewish lawyers reshaped the trajectory of twentieth-century American jurisprudence. They pioneered the practice of what we know today as immigration law. They led the effort to establish workers' legal rights in courts. They prodded judges into reinterpreting and broadening the meaning of the First Amendment of the U.S. Constitution. It is impossible to understand modern American law, this dissertation contends, apart from the innovations of early twentieth-century Jewish lawyers.

Louis D. Brandeis was and arguably remains the most famous twentieth-century American Jewish lawyer.[5] Born in Louisville, Kentucky, to Jewish immigrant parents from

[5] These works focus on individual Jewish lawyers or a group of Jewish lawyers and spotlight their accomplishments. See, for example, Melvin Urofsky, *Louis D. Brandeis: A Life* (New York, NY: Pantheon, 2009); David L. Stebenne, *Arthur J. Goldberg: New Deal Liberal* (New York, NY: Oxford University Press, 1996); Laura Kalman, *Abe Fortas: A Biography* (New Haven, CT: Yale University Press, 1990); Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago, IL: University of Chicago Press, 1993); On Jewish political appointees see Robert J. Glennon, *The Iconoclast as Reformer: Jerome Frank's Impact on American Law* (New York, NY: Cornell University Press, 1985); Dalia T. Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (New York, NY: Cornell University Press, 2007); Barry Rubin, "Ambassador Laurence A. Steinhardt: The Perils of a Jewish Diplomat, 1940-1945," *American Jewish History* 70 no. 3 (March 1981): 331-346; William Lasser, *Benjamin V. Cohen: Architect of the New Deal* (New Haven, CT: Yale University Press, 2002); On community activists see Charles Reznikoff, ed., *Louis Marshall: Champion of Liberty. Selected Papers and Addresses* (Philadelphia, PA: Jewish Publication Society of America,

Bohemia, Brandeis was educated at Harvard Law School. He represented corporate clients, was a world-renowned legal expert, and served as associate justice on the U.S. Supreme Court from 1916 to 1939. His career represented the pinnacle of professional success. Yet, with the exception of his encounters with antisemitism, Brandeis was an anomaly. By and large, neither the careers nor backgrounds of late nineteenth- and early twentieth-century American Jewish lawyers resembled those of Brandeis or other prominent Jewish lawyers of Central European descent such as Felix Frankfurter, Julius H. Cohen, or Louis Marshall.

Instead, reflecting the mass migration of approximately twenty million people between 1880 and 1924, of whom about two million were Jews, most new American Jewish bar members were working-class immigrants from Eastern Europe or their children. They settled in cities, especially New York,[6] and lived in poor Yiddish-speaking neighborhoods

---

1957); Ann Fagan Ginger, *Carol Weiss King: Human Rights Lawyer, 1895-1952* (Boulder, CO: University Press of Colorado, 1993); Harry Rogoff, *An East Side Epic: The Life and Work of Meyer London* (New York, NY: Vanguard Press, 1930); Norma F. Pratt, *Morris Hillquit: A Political History of an American Jewish Socialist* (Westport, CT: Greenwood Press, 1979); Quentin Reynolds, *Courtroom: The Story of Samuel S. Leibowitz* (Freeport, CT: Farrar, Straus, Giroux, Inc., 1950); Christopher Johnson, *Maurice Sugar: Law, Labor, and the Left in Detroit, 1912-1950* (Detroit, MI: Wayne State University Press, 1988); John J. Abt, *Advocate and Activist: Memoirs of an American Communist Lawyer* (Urbana, IL: University of Illinois Press, 1994); Steve Babson, *The Color of Law: Ernie Goodman, Detroit, and the Struggle for Labor and Civil Rights* (Detroit, MI: Wayne State University Press, 2010); David J. Langum, Sr., *William M. Kunstler: The Most Hated Lawyer in America* (New York, NY: NYU Press, 1999); Susan Braudy, *Family Circle: The Boudins and the Aristocracy of the Left* (New York, NY: Knopf, 2003); Barbara Mills, *And Justice for All: The Double Life of Fred Weisgal, Attorney and Musician* (Baltimore, MD: American Literary Press, 2000). Jennifer M. Lowe, ed., *The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas* (Washington, D.C.: The Supreme Court Historical Society, 1994); Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca, NY: Cornell University Press, 2007).

[6] On Jews in New York see Moses Rischin, *The Promised City: New York's Jews, 1870-1914* (Cambridge, MA: Harvard University Press, 1977); Arthur Goren, *New York Jews and the Quest for Community: The Kehillah Experiment, 1908-1922* (New York, NY: Columbia University Press, 1979); Deborah Dash Moore, *At Home in America: Second Generation New York Jews* (New York, NY: Columbia University Press, 1981); Beth S. Wenger, *New York Jews and the Great Depression: Uncertain Promise* (New York, NY: Syracuse University Press, 1999); Hasia R.Diner, *Lower East Side Memories: A Jewish Place in America* (Princeton, NJ: Princeton University Press, 2000); Hasia R. Diner, Jeffrey Shandler, and Beth Wenger, eds., *Remembering the Lower East Side: American Jewish Reflections* (Bloomington, IN: Indiana University Press, 2000); Ilana Abramovitch and Sean Galvin, eds., *Jews of Brooklyn* (Waltham, MA: Brandeis University Press, 2001); Tony Michels, *A Fire in Their Hearts: Yiddish Socialists in New York* (Cambridge: Harvard University Press, 2001); Irving Howe, *World Of Our Fathers: The Journey of the East European Jews to America and the Life They Found and Made* (New York, NY: NYU Press, 2005).

where they encountered and, often, supported leftist political movements.[7] They probably read the *Forverts*, a socialist Yiddish-daily newspaper, and other Yiddish language publications. More often than not, they enrolled in part-time or night schools, working at factories during the day, and studied law alongside other immigrants. Although all Jewish lawyers were, to varying degrees, exposed to Jewish religious traditions and some maintained formal religious observance, little evidence suggests that religious or theological imperatives motivated their work. Judaism did not seem to be a factor. Experiences as Jews and ties to other Jews did, however, shape the identities and work of the lawyers under discussion in this dissertation. The people identified here imagined themselves as a part of a global Jewish community and their primary relationships were with other Jews. Their families, friends, neighbors, classmates, colleagues, and clients ensured that the professional world of Jewish lawyers was at once large and small. By virtue of their immigrant backgrounds, social ties, leftist politics, and status as non-Christians, their Jewishness was taken for granted; both they and the non-Jews they encountered understood them as Jews.

---

[7] Scholars have identified American Jews' left-leaning politics as a defining characteristic of twentieth-century American Jewry. See Marc Dollinger, *Quest for Inclusion: Jews and Liberalism in Modern America* (Princeton, NJ: Princeton University Press, 2000), 3; Arthur Leibman, *Jews and the Left* (New York, NY: John Wiley & Sons, 1979), 1; Christopher Sterba, *Good Americans: Italian and Jewish Immigrants During the First World War* (New York, NY: Oxford University Press, 2001), 69; Maurice Isserman, *Which Side Were You On: The American Communist Party During the Second World War* (Middletown, CT: Wesleyan University Press, 1982), 120; Theodore Draper, *American Communism and Soviet Russia: The Formative Period* (New York, NY: Viking Press, 1960); Alan Dawley, *Changing the World: American Progressives in War and Revolution* (Princeton, NJ: Princeton University Press, 2003); Joshua Zeitz, *White Ethnic New York: Jews, Catholics, and the Shaping of Postwar Politics* (Chapel Hill, NC: University of North Carolina Press, 2002), 93; Joyce Antler, *The Journey Home: Jewish Women in the American Century* (New York, NY: The Free Press, 1997), 260-261; Justice Vaisse, *Neoconservatism: The Biography of a Movement* (Cambridge, MA: Harvard University Press, 2010), 10. On the Jewish labor movement see Tony Michels, *A Fire in Their Hearts: Yiddish Socialists in New York* (Cambridge, MA: Harvard University Press, 2006).

Various scholars have written about late-nineteenth and early twentieth-century Jewish lawyers in the United States.[8] A significant number of these works are biographies and autobiographies, which examine legal giants such as Brandeis, Benjamin Cardozo, and Felix Frankfurter.[9] Dalia Tsuk Mitchell's intellectual biography, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism*, which spotlights Cohen's role in shaping federal Indian law policy, constitutes one of the best of these.[10] A second set of work discusses American Jewish lawyers and antisemitism.[11] In *Unequal Justice: Lawyers and Social Change in Modern America*, Jerold Auerbach examines anti-Jewish bias among non-

[8] Scholars also have written about Jewish lawyers in Europe. See Benjamin Nathans, *Beyond the Pale: the Jewish Encounter with Late Imperial Russia* (Los Angeles, CA: University of California Press, 2004); Peter Pulzer, *Jews and the German State: The Political History of a Minority, 1848-1933* (Cambridge, MA: Blackwell, 1992); John Cooper, *Pride v. Prejudice: Jewish Doctors and Lawyers in England, 1890-1900* (Portland, OR: Littman Library of Jewish Civilization, 2003); Konrad Jarausch, *The Unfree Professions: German Lawyers, Teachers, and Engineers, 1900-1950* (Cambridge, MA: Oxford University Press, 1990); Konrad Jarausch, "Jewish Lawyers in Germany, 1848-1938, The Disintegration of a Profession." *Leo Baeck Yearbook* 36 (1991): 171-190; Maria M. Kovac's *Liberal Professions and Illiberal Politics: Hungary from the Habsburg to the Holocaust* (Washington D.C.: Woodrow Wilson Center Press, 1994).

[9] See Marc Galanter, "Outside, Inside: Jewish Justices in the Homeless Society," Review of *Two Jewish Justices: Outcasts in the Promised Land* by Robert A. Burt, *Law & Society Inquiry* 14, no. 3 (Summer 1989): 507-526; *Lowering the Bar: Lawyer Jokes and Legal Culture* (Madison: University of Wisconsin Press, 2005); "A Vocation for Law? American Jewish Lawyers and Their Antecedents," *Fordham Urban Law Journal* 26, no. 4 (April 1999): 1125-1148; "A Dissent on Brother Daniel," *Commentary* 36, no. 1 (July 1963), 10-17.

[10] Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca, NY: Cornell University Press, 2007).

[11] On discriminatory hiring practices see Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York, NY: Oxford University Press, 1976); George G. Battle, "Jew and Non-Jew in the Legal Profession," *The American Hebrew*, (September 22, 1922), 449, 503; Barry R Chiswick, "The Occupational Attainment and Earnings of American Jewry, 1890 to 1990," *Contemporary Jewry* 20 (1999): 68-98; Melvin Fagen, "The Jewish Law Student and New York Jobs—Discriminatory Effects in Law Firm Hiring Practices," *Yale Law Journal* 73, no. 4 (March 1964): 625-660; Albert I Goldberg, "Jews in the Legal Profession: A Case of Adjustment to Discrimination," *Jewish Social Studies* 32, no. 2 (April 1970): 148-161; American Jewish Congress, "Commission on Law and Social Action, A Survey of the Employment Experiences of Law School Graduates of Chicago, Columbia, Harvard, and Yale Universities" (1954) (mimeographed), cited in Louis Waldman, "Employment Discrimination against Jews in the United States," *Jewish Social Studies* 18, no. 3 (July 1956): 208-216; Samuel J. Levin, "Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism," *American Journal of Legal History* 47, no. 1 (January 2005): 1-34. On discriminatory admissions see Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (New York, NY: Houghton Mifflin Harcourt, 2005); Mark Kessler, "Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger," *Law and Society Review* 27, no. 3 (1993): 559-598; Marcia Graham Synnot, "Anti-Semitism and American Universities: Did Quotas Follow the Jews?," in David Gerber, ed., *Anti-Semitism in American History* (Chicago, IL: University of Illinois Press, 1986): 233-271.

Jewish elite White Anglo-Saxon Protestant American lawyers.[12] Sociologists and social scientists have revealed how anti-Jewish bias affected Jewish lawyers' careers.[13] From law school admission procedures to hiring practices, these scholars show that from the late nineteenth century until the 1980s, antisemitism pervaded American legal circles and stalled Jewish lawyers' professional advancement.[14] A third body of work about Jewish lawyers highlights ways in which Jews have interacted with American law, which set them apart from non-Jews, especially non-Jewish whites. Hasia Diner's *In The Almost Promised Land*, for example, discusses Jewish lawyers' unique role in the founding of the National Association for the Advancement of Colored People (NAACP).[15] Finally, scholars have discussed Jewish

---

[12] Other works by Jerold Auerbach include *Rabbis and Lawyers: The Journey from Torah to Constitution* (Bloomington, IN: Indiana University Press, 1993); *Justice Without Law?: Resolving Disputes Without Lawyers* (Cambridge, MA: Oxford University Press, 1984); and "From Rags to Robes: The Legal Profession, Social Mobility, and the American Jewish Experience," *American Jewish Historical Quarterly* 66, no. 2 (December 1976): 249-284.

[13] Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Cambridge, MA: Oxford University Press, 1977).

[14] In addition, a number of twentieth-century U.S. Supreme Court histories discuss social antisemitism among non-Jewish legal practitioners. U.S. Supreme Court Justice James C. McReynolds's deep-seeded dislike of Jews and the dynamics of his relationship with fellow Justices Brandeis, Cardozo, and Frankfurter have been discussed by a number of scholars. See Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (New York, NY: Rowman & Littlefield, 1999); Drew Pearson and Robert S. Allen, *The Nine Old Men* (New York, NY: Doubleday, Doron, and Company, 1936). Melvin Urofsky notes that Brandeis was denied an invitation to his law partner's wedding because his partner's bride-to-be refused to invite Jews. See Urofsky, *Louis C. Brandeis: A Life*, 365. Likewise, Quite a few works discuss how Jewish lawyers battled antisemitism as Jews and on behalf of Jews. Jewish lawyers filled the memberships of organizations such as the Anti-Defamation League and the American Jewish Congress, which both pursued more favorable legal standards for Jews as a group through lobbying and litigation. See Stuart Svonkin, *Jews Against Prejudice: American Jews and the Fight for Civil Liberties* (New York, NY: Columbia University Press, 1997) and Marc Dollinger, *Quest for Inclusion: Jews and Liberalism in Modern America* (Princeton, NJ: Princeton University Press, 2000).

[15] Hasia R. Diner, *In the Almost Promised Land: American Jews and Blacks, 1915-1935* (Greenwood, CT: Greenwood Press, 1977). Some historians discuss Jews' use of arbitration as an alternative dispute resolution mechanism before it was an accepted legal practice. See James Yaffe, *So Sue Me: The Story of a Community Court* (New York, NY: Saturday Review Press, 1972); Jerold S. Auerbach, *Justice Without Law*; Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," *The Journal of Legal Studies* 21, no. 1 (January 1992): 115-157. One has written about Jews' preservation of the memory of Oliver Wendell Holmes, Jr., and the philosophy of legal pragmatism (a precursor to legal realism). See David Hollinger, *Science, Jews, and Secular Culture: Studies in Mid-Twentieth-Century American Intellectual History* (Princeton, NJ: Princeton University Press, 1998), chapter two. Another has written about the Jewish origins of entertainment law. See Molly Selvin, "The Loeb Firm and the Origins of Entertainment

lawyers by exploring intersections and disjunctions between American and Jewish law. Many of these works are written from a personal perspective. Sanford Levinson, for example, reflects on tensions between his religious beliefs and professional identity.[16]

Rather than examine Jewish lawyers in order to trace broader changes within Jewish communities, highlight antisemitism, celebrate especially prominent Jewish lawyers, or compare and contrast American and Jewish law, this dissertation explores the professional pursuits of intergenerational cohorts of American Jewish lawyers who were everyday practitioners between the last decade of the nineteenth century and the start of the New Deal. It analyzes how Jewish lawyers challenged prevailing standards and procedural conventions in the fields of immigration, labor, and First Amendment law and shows how they expanded and in some cases pioneered these practice areas. In so doing, this dissertation provides a social history of American law. By focusing on the work of everyday legal practitioners rather than privileging the voices of judges, theorists, and professors, this dissertation reveals how the impetus for turn-of-the-century legal change rested in the everyday circumstances of late nineteenth- and early twentieth-century Jewish life. In so doing, this dissertation also highlights the role of ethnicity in the development of different fields of law. It shows why

---

Law Practice in Los Angeles, 1908-1940," *California Legal History* 10, no. 1 (2015): 135-173. Jewish lawyers' engagement with marriage and divorce laws and their role in the advent of tenant-landlord law have also been studied. See Anna R. Igra, *Wives Without Husbands: Marriage, Desertion, and Welfare in New York, 1900-1935* (Chapel Hill, NC: University of North Carolina Press, 2006) and "Marriage as Welfare," *Women's History Review* 15, no. 4 (September, 2006): 601-610; Samuel J. Levine, "Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study in the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation," *The Journal of the Legal Profession* 33, no. 1 (Fall 2008): 1-28.

[16] Sanford Levinson, "Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity," *Cardozo Law Review* 14, (1992-3): 1157-1612; Alan Dershowitz, *Chutzpah* (New York, NY: Simon & Shuster, 1992). See also Michael J. Broyde, *The Pursuit of Justice and Jewish Law: Halakhic Perspectives on the Legal Profession* (New York, NY: Yashar Books, 2007 sec. ed.); Daniel B. Sinclair, "Advocacy and Compassion in the Jewish Tradition," *Fordham Urban Law Journal* 31 (November 2003): 99-118; Russell G. Pearce, "The Jewish Lawyer's Question," *Texas Technical Law Review* 27 (1996), 1259-1270; and Jerold Auerbach, *Rabbis and Lawyers*; Israel M. Greisman, "The Jewish Criminal Lawyer's Dilemma," *Fordham Urban Law Journal* 29, no. 6 (August 2002): 2413-2434.

Jewish lawyers were drawn to immigration, labor, and First Amendment cases and how they transformed those practice areas.

In addition to providing a social history of American law, this dissertation reshapes American Jewish historians' understanding of Jews and freedom in the United States by foregrounding interactions between Jews and the state. Unlike European Jewish historians, whose focus on the subject of emancipation has made discussion of the relationship between Jews and respective legal regimes central to European Jewish history, most American Jewish historians either have neglected to seriously address American law or have failed to convey when and how American law has been an obstacle for Jews to overcome in order to pursue their respective goals.[17] To the extent that historians have paid attention to American law, they have tended to see it as either benign or as providing a set of established freedoms that enabled Jews to flourish in the United States. In cases when American Jewish historians have acknowledged that American laws were threatening or problematic, they have tended to depict them as anomalous.[18] Examining the pursuits of late nineteenth- and early twentieth-century Jewish lawyers, however, reveals that neither American law nor America was as hospitable as American Jewish historians have thought. Instead, as this dissertation shows, Jews in turn-of-the-century America clashed, sometimes violently, with American legal norms. During the process of immigration, many Jewish aliens were excluded on account of discriminatory immigration procedures. Many were arrested, fined, jailed, and/or imprisoned for their economic and political activities. Some were stripped of their citizenship and some

[17] Jonathan Sarna, for example, notes infringements on Jews' civil rights such as mandatory Sunday closing laws but nonetheless concludes that Jews "had achieved an unprecedented degree of 'equal footing' by the end of the eighteenth century." See Jonathan Sarna, *American Judaism: A History* (New Haven, CT: Yale University Press, 2004), 37-38.

[18] See, for example, American Jewish historians' treatment of the Immigration Act of 1924.

were deported. In short, rather than being "at home in America," a significant number of American Jews found themselves at odds with America—because of the law. It was only due to the persistence of American Jewish lawyers that American law grew to accommodate the varied desires and pursuits of Jewish people in the United States. Rather than an "adventure" the American Jewish encounter with freedom was a hardscrabble, hard-fought, and hard-won courtroom battle.

To show as much, this dissertation includes four chapters: Chapter 1, "The Dawning of Diversity," shows how changes in the late nineteenth-century American legal system facilitated the emergence of large numbers of Jewish lawyers in the United States. It asserts that the expansion of the federal judiciary and state court systems, transformation of the ideal lawyer, rise of corporate firms, formation of bar associations, and birth of modern law schools enabled Jews to enter the legal profession despite the established bar's desires to stop them. Late nineteenth- and early twentieth-century Jewish lawyers, it argues, first introduced sociological, cultural, and religious diversity into the American legal profession. Chapter 2, "Jewish Immigration and Naturalization Services," argues that Jewish lawyers, who empathized with immigrants because of their personal histories, pioneered the practice of immigration law. This chapter highlights the legal complexities of turn-of-the-century Jewish immigration that American Jewish historians have not appreciated and illuminates power struggles between late nineteenth- and early twentieth-century federal bureaucrats and courts over jurisdiction of immigration matters. Chapter 3, "Jewish Labor, Jewish Lawyers," showcases early twentieth-century socialist Jewish labor lawyers in New York. It argues that turn-of-the-century Jewish labor lawyers were the first to recognize and promote workers' legal rights, which were later institutionalized by New Deal legislation. In so doing, they

generated the foundational principles of labor law, a lasting but forgotten legacy of the Jewish labor movement. Finally, Chapter 4, “A Jewish History of the First Amendment,” shows how Jewish lawyers were central to the transformation of twentieth-century First Amendment standards, especially those that concerned free speech. Rather than benefit from exceptionally liberal or permissive First Amendment rights, Jewish lawyers fought, initially with little success, to secure civil liberties, which most Americans now take for granted.

[Chapter 1] The Dawning of Diversity: Jews and Turn-of-the-Century American Law

In 1911, Frederic R. Coudert published an essay entitled "The Crisis of the Law and Professional Incompetency." Explaining "popular distrust of the law and the lawyers," he identified "the admission of a large number of unlearned, unlettered and utterly untrained young lawyers with no *espirit de corps* and little regard for the traditions of the profession," as a key culprit. Coudert was especially worried about "the great increase" of urban lawyers and lax law school admission standards, which enabled them to enter the profession with little difficulty.[1] Four years later, discussing the "deterioration of the bar," the Dean of Columbia Law School (and future U.S. Supreme Court justice) Harlan Fiske Stone addressed "the influx to the bar of greater numbers of the unfit" and lamented America's failure to "insist upon… the services exclusively of an aristocracy of character and training in the administration of its laws."[2] Finally, in 1917, William V. Rowe derided the bar's "foreign element," lawyers "of the blood of southern, eastern, and central Europe… [people] with little inherited sense of fairness, justice, and honor." "How are we to preserve our Anglo-Saxon law of the land" with a bar filled with such lawyers, Rowe asked.[3]

Coudert, Stone, and Rowe's sentiments illuminate the established bar's overwhelmingly hostile response to the emergence of non White Anglo-Saxon Protestant lawyers in the beginning decades of the twentieth century. Until that time, men who "represented old America" had dominated the country's legal profession and, consequently,

---

[1] Frederic R. Coudert, "The Crisis of the Law and Professional Incompetency," *Annual Report of the American Bar Association* 34 (1911): 677-688.
[2] Harlan F. Stone, *Laws and Its Administration* (New York: Columbia University Press, 1915), 170-171.
[3] William V. Rowe, "Legal Clinics and Better Trained Lawyers—A Necessity," *Illinois Law Review* 11, no. 9 (1917): 591-618; "William V. Rowe Dies; Prominent Lawyer," *New York Times*, April 30, 1930, 17.

its legal system.[4] But, beginning in the last decade of the nineteenth century, the social composition of the American bar had begun, ever so slowly, to diversify.

To stop what they saw as an invasion of foreigners, elite practitioners tried to prevent immigrants and their children from becoming lawyers by creating a variety of policies and organizations that made entry into the profession more difficult.[5] They established groups such as the American Bar Association (ABA), which instituted "character review boards" that required sponsor recommendations, which proved difficult for non-white applicants to obtain because they needed to come from existing members. They devised ethical canons, which regulated legal practice in ways that hindered lawyers who served immigrant and impoverished populations. They oversaw the implementation of admission criteria at law schools, which required educational standards beyond the reach of average immigrants. Finally, some cities implemented quotas limiting the number of people who could become lawyers per year.[6] As one scholar writes, "Throughout the first half of the twentieth century, much of the profession's collective energy was devoted to constructing entry barriers that would control both the number of lawyers and their characteristics."[7]

Despite the seeming thoroughness of the systematic impediments created by the established bar to stop immigrants and their children from becoming lawyers, plans to control

---

[4] Lawrence Friedman, *A History of American Law* (New York, NY: Touchstone, 1973), 288.
[5] Jerold Auerbach, *Unequal Justice: Jewish Lawyers and Social Change in Modern America* (New York, NY: Oxford University Press, 1976); Richard Abel, *American Lawyers* (New York, NY: Oxford University Press, 1989), 69-71.
[6] Although this seems to be a seemingly neutral rule, because immigrants were obtaining law degrees at a higher pace than non-immigrants, it disproportionately excluded them from bar admission. See Richard Abel, *American Lawyers*, 69-73.
[7] Richard Abel, *American Lawyers*, 71.

the demographic makeup of the legal profession were only somewhat successful.[8] Many immigrants and their children became lawyers regardless of efforts to stop them. Reflecting Progressive-Era immigrant settlement patterns, the bar's changing demographics was most pronounced in urban environments such as New York, Boston, Chicago, and Philadelphia. In New York, between 1900 and 1910, the population of lawyers increased by 35 percent; simultaneously, the number of immigrant lawyers increased by 66 percent.[9] Between 1920 and 1930, lawyers generally increased at a rate of 57 percent, while the number of immigrant lawyers increased by 67 percent.[10] In Boston between 1900 and 1910, the number of lawyers rose by 35 percent; at the same time, the number of immigrant lawyers increased 77 percent and the number of lawyers with immigrant parents increased 75 percent.[11] In Chicago, 97 percent of the bar association between 1831 and 1850 was Protestant; that figure was only 70 in 1890.[12] Finally, in Philadelphia, between 1920 and 1930, foreign-born lawyers increased at the rate of 72 percent as the general bar only grew at the rate of 21 percent.[13]

Of those immigrant groups who entered the American legal profession en masse, none did so more zealously than Eastern European Jews, whose membership in the bar quickly exceeded their representation in the general population. The two and a half million Jews from Eastern Europe who arrived in the United States between 1880 and 1924 appeared especially enthusiastic about enrolling in American schools. According to a national 1908 survey of nineteen law schools, although Jews constituted less than 3 percent of the total

---

[8] One 1928-1935 study of a Philadelphia bar association that implemented a "character and fitness" test saw a sixteen percent decrease in Jewish applicants. See Richard Abel, *American Lawyers*, 69. Further, it is probable that financial restraints prevented some Jews from going to law school.
[9] 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), 254.
[10] Jerold Auerbach, *Unequal Justice*, 120.
[11] Richard Abel, *American Lawyers*, 85-86.
[12] Richard Abel, *American Lawyers*, 85-86.
[13] Jerold Auerbach, *Unequal Justice*, 120.

American population, they comprised 13 percent of law students.[14] Ten years later, Jews comprised approximately 22 percent of students the 106 institutions studied.[15]

Indicative of Progressive-Era Jewish immigrant settlement patterns, nowhere was Jewish entry into the legal profession more evident than in New York City.[16] Between 1900 and 1910, 26 percent of newly admitted bar members in New York City were Jewish; between 1911 and 1917, 36 percent; between 1918 and 1923, 40 percent; between 1924 and 1929, 56 percent; and between 1930 and 1934, 60 percent.[17] In 1934-35, Jews comprised more than 56 percent of the student bodies in New York City's six law schools.[18] As one historian writes, "In New York City in the 1930s, there were almost as many Cohens and Cohns practicing law as there were Smiths."[19] (Although Jewish bar membership waxed and waned annually, by 1960, Jews constituted an astonishing 60 percent of New York City lawyers.)[20]

Although statistics about the rising number of Jewish lawyers in cities across the country do not exist for the first two decades of the century, statistics about the Jewish

---

[14] Marcia G. Synnot, "Anti-Semitism and American Universities: Did Quotas Follow the Jews?," in David Gerber, ed., *Anti-Semitism in American History* (Chicago, IL: University of Illinois Press, 1986), 258-259.
[15] Marcia Synnot, "Anti-Semitism and American Universities: Did Quotas Follow the Jews?," 258-259; "Professional Tendencies among Jewish Students in Colleges, Universities, and Professional Schools," *The American Jewish Year Book* 5681/1920-1921 (Philadelphia, PA: Jewish Publication Society of America, 1920), 383-393.
[16] One studied estimated that in 1905 there were 400 Eastern European Jewish lawyers in New York. See Jacob Rader Marcus, *United States Jewry, 1776-1985,* Volume 1 (Detroit, MI: Wayne State University Press, 1989), 296.
[17] These figures correspond with a time in which America's population of lawyers as a whole increased. In 1880, there were approximately 60,626 lawyers nationwide; in 1920, approximately 122,519; and by 1930, approximately 160,650. See Richard Abel, *American Lawyers*, 83-84, 281; Lawrence Friedman, *American Law in the 20th Century* (New Haven, Yale University Press: 2004), 33; Jerold Auerbach, "From Rags to Robes," 259.
[18] "Columbia enrolled almost 35 percent Jews (206 out of 592); New York University, 59 percent (735 out of 1,244); and Fordham, almost 24 percent (240 out of 1,003)." See Marcia Synnot, "Anti-Semitism and American Universities: Did Quotas Follow the Jews?," 258-259.
[19] Lawrence Friedman, *American Law in the 20th Century*, 33.
[20] Richard Abel, *American Lawyers,* 86.

lawyers in various American cities from the 1930s suggest that Jewish lawyers appeared en masse in many other places during these same decades.[21] In San Francisco during the 1930s, eighteen of every thousand lawyers and judges were Jews, while only five of every one thousand were non-Jews. In Pittsburgh, fourteen of every thousand lawyers and judges were Jews, while non-Jews constituted four of every thousand lawyers and five of every thousand judges.[22] In Philadelphia, between 1920 and 1930, membership in the bar increased by 21 percent generally, but foreign-born bar membership, which was "mostly Jewish," increased by 73 percent.[23] In the Greater Cleveland area, in the general population, the lawyer-to-individual population stood at 1-to-414; in the Jewish population, by contrast, that figure stood at 1-to-139.[24]

As suggested by the impediments created to stop them, that Jews became lawyers in such high numbers was not inevitable. Instead, the emergence of Jewish lawyers in the American legal profession resulted from a combination of Progressive-Era Jews' particular characteristics and the state of the turn-of-the-century legal system. By the start of World War I, Jews in America had transformed from a group of 300,000 individuals in 1880, primarily of Central European decent, to a group of 3.5 million, 90 percent of whom hailed from Eastern Europe. Regardless of their place of origin, late nineteenth- and early twentieth-century Jews constituted the single largest non-Christian religious minority in the country. They boasted higher literacy rates than their fellow immigrants. At best, they were racially

---

[21] John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur, and Edward O. Lauman, *Urban Lawyers: The New Social Structure of the Bar* (Chicago, IL: University of Chicago Press, 2004).
[22] Leonard Dinnerstein, *Uneasy At Home: Antisemitism and the American Jewish Experience* (New York, NY: Columbia University Press, 1987), 26.
[23] Robert R. Bell, *The Philadelphia Lawyer: A History, 1735-1945* (Cranbury, NJ: Associated University Press, 1992), 237.
[24] This study examined "the eight municipalities comprising Greater Cleveland [that] had 17.5 percent of the total population of Ohio in 1933 and about half the estimated Jewish population of the state." See Lee J. Levinger, "Jews in the Liberal Professions in Ohio," *Jewish Social Studies* 2, no. 4 (October 1940), 405-406.

ambiguous.[25] While not so impoverished as to find it impossible to enter the country, most Jews who came from Eastern Europe were poor and members of the working-class. At their most conservative, they were liberals. Many supported left-leaning political movements such as socialism, anarchism, and, after 1919, communism.[26] These characteristics differentiated Progressive-Era Jews from both white Anglo-Saxon Protestant Americans and other American immigrants, and governed how they approached the law.

The following chapter shows how different aspects of the post-Civil War American legal system spurred the emergence of American Jewish lawyers en masse during the late nineteenth and early twentieth-centuries and how it shaped Jewish lawyers' engagement with the law. The post-Civil War expansion of the federal and state court systems and the rebalancing of the jurisdictional authority between the two created job opportunities (at least at the lowest rungs) and broadened the legal forums in which Jewish lawyers could operate. Likewise, the birth of the modern legal education system, which included part-time and night law schools, enabled working-class immigrants and their children to obtain the knowledge needed to pursue legal work. As new institutional structures enabled Jewish entry into the profession, the dominant American legal philosophies of the Progressive Era put Jews, a non-Christian, largely working-class, left-leaning, immigrant ethnic group, in an adversarial position with the system itself. Progressive Era Jews clashed, sometimes violently, with state officials and prevailing legal norms. The era's dominant legal philosophies compelled Jewish lawyers to try to change the system so that it better reflected their values, preferences, and beliefs. Underscoring Jews' role as the foremost agent of diversity in the American legal

---

[25] Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (Princeton, NJ: Princeton University Press, 2008).
[26] Tony Michels, *A Fire in Their Hearts: Yiddish Socialists in New York* (Cambridge, MA: Harvard University Press, 2005).

profession at the end of the nineteenth century, the chapter concludes with a discussion of the emergence of Jewish lawyers as a distinct cohort in the American bar.

The Growth of Federal and State Courts

Sometime around noon on December 3, 1860, seven men ranging from forty-nine to eighty-three years of age approached a grand chamber on the second floor of the United States Capitol Building.[27] The group had recently returned to Washington D.C. after zigzagging across the country on horseback for several months, adjudicating matters in the nation's circuit courts. As the nation bristled with talk of secession, the men traversed the threshold of a semi-circular space and were greeted by a chandelier hanging from a dome-shaped ceiling, gray walls accented by crimson curtains and carpets, large marble columns, and reddish-brown mahogany furniture.[28] As their memories of the drafty, inadequately lit, and poorly ventilated ground-floor office in which they had previously operated receded, they commenced with their work. Thus began the final term of the U.S. Supreme Court before the start of the Civil War.

Notwithstanding the precariousness of the country's future, the relocation of the U.S. Supreme Court presaged the rising power of the federal judiciary. After the Civil War, the emancipation of four million blacks, continued westward expansion, and rapid population growth propelled evolutions in American legal theory, inspired novel applications of law, and

---

[27] The December 1859 session of the Supreme Court adjourned on May 4, 1860. See "Supreme Court: Its Homes Past and Present," *American Bar Association Journal* 27 (May 1941): 283-289, 289. Justice James Moore Wayne was absent on the first day of the term and Justice Peter Vivian Daniel had died the preceding May. The seven justices present on the first day of the December 1860 term were: Roger B. Taney, Samuel Nelson, Nathan Clifford, Robert C. Grier, John McLean, John Catron, and John A. Campbell. See John P. Frank, *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860* (Cambridge: Harvard University Press, 1964); Charles Warren, *The Supreme Court in United States History* (New York: Little Brown and Company, 1935), 83-84.

[28] David M. Silver, *Lincoln's Supreme Court* (Urbana, IL: University of Illinois Press, 1956), 1.

reshaped its practice. Federal and state legislatures passed new laws, legal institutions mushroomed, and, despite the opposition of southern Democrats (most of whom had links with the former Confederacy), Congress reorganized the federal judiciary, extending its geographical and jurisdictional scope.[29]

After the Civil War, industrialization, the rise of corporations, and the federal government's increased centralization propelled the expansion of the federal court system.[30] Congress had regularly reorganized the U.S. federal courts since the country's birth. In accordance with the Judiciary Act of 1789, by the start of the nineteenth century, Congress carved the country into districts, each with its own judge.[31] (Each state had at least one district and judge, although larger states sometimes had additional judges.) Congress then classified districts into geographically bound circuits and each circuit was assigned to a Supreme Court justice. Justices, who were originally conceived as "republican schoolmasters," physically rode around the federal circuits biannually, usually by horseback, traveling about respective regions and deciding federal cases.[32] (Riding circuit was physically arduous and time-consuming and justices uniformly disliked it, for one, because Congress expected the justices to self-fund these twice-yearly travels.)[33] Periodically, in acknowledgement of America's territorial expansion and the manpower needed to adjudicate

---

[29] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, *The Federal Courts: An Essential History* (New York, NY: Oxford University Press, 2015), 202; Russell R. Wheeler and Cynthia Harrison, *Creating the Federal Judicial System* (Washington D.C.: Federal Judicial Center, 1994), 12; Roscoe Pound, *Organization of the Courts* (Westport, CT: Greenwood Press, 1940).

[30] Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York, NY: Macmillan Company, 1928), chapter 3.

[31] The federal judiciary was established in accordance with the stipulations articulated in the Judiciary Act of 1789, which Congress adopted during the first session of the U.S. Congress, on September 24, 1789. Originally, the act created thirteen judicial districts within the eleven states that had ratified the Constitution. The 1789 act also outlined three categories of federal courts: district courts; circuit courts; and the U.S. Supreme Court.

[32] Joshua Glick, "On the Road," "On The Road: The Supreme Court and the History of Circuit Riding," *Cardozo Law Review* 24 (April 2003), 1802.

[33] Joshua Glick, "On the Road," 1776.

over such territories, Congress increased the number of federal judicial circuits and the number of Supreme Court justices. In 1789, there were three circuits; in 1807, there were seven; and in 1837, with the creation of two new circuits in the West and Southwest, the number increased to nine. Correspondingly, between 1789 and 1869, the Court included as few as five and as many as ten justices at once.[34]

In 1869, Congress passed a judiciary act, which expanded the authority of the federal judiciary even more. The act, proposed by the Senate Judiciary Committee's chairman, Lyman Trumbull, a Radical Republican who co-authored the Thirteenth Amendment, established a permanent judgeship for each of the country's circuit courts. It also combined district and circuit courts into a single institution and then created nine courts of appeals, which heard cases before they went to the Supreme Court.[35] It also permanently fixed the number of sitting Supreme Court justices at a total of nine.[36]

Six years later, in recognition of the growing demands faced by the courts and to satisfy the perceived needs of businesses, Congress passed the Jurisdiction and Removal Act of 1875. This law extended the federal judiciary's jurisdiction to all cases involving questions of federal law and to so-called diversity cases, which involved opposing parties hailing from different states (that also concerned a requisite amount of disputed money).[37] Prior to the war, the Court's authority was limited to cases involving foreign ministers, consuls, ambassadors; cases that arose under the Constitution; cases involving federal law; cases in

---

[34] Joshua Glick, "On The Road," 1753-1844.
[35] Felix Frankfurter and James Landis, *The Business of the Supreme Court*, 71; Roscoe Pound, *Organization of Courts*, 197.
[35] Joshua Glick, "On The Road," 1816.
[36] Felix Frankfurter, "Distribution of Judicial Power Between United States and State Courts," *Cornell Law Quarterly* 13, (1927-28): 499-530.
[37] See William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875," *American Journal of Legal History* 13 (1969): 333-359.

which the federal government was a party; cases between residents of different states; cases between opposing domestic states; cases between a state and foreign citizens or foreign states; bankruptcy cases; and cases of maritime and admiralty law. Federal courts served a small group of "nonresident litigants" who would otherwise face biased judges and juries were their trials to be held in local institutions.[38] Correspondingly, state courts were charged with authority over fields of law that the federal government did not address. Indicative of the U.S. Supreme Court's limited authority before the war, in 1840, the Supreme Court's docket included 92 cases and 253 in 1850.[39] During the decade preceding the Civil War, the Court's trial calendar included, per term, between 250 and 300 cases.[40]

After the war, by contrast, the number of categories that fell under the authority of the federal courts swelled and those assigned to the states shrank.[41] Federal judges now had the legal authority to review state court decisions involving *any* federal law.[42] In fact, the Act of 1875 introduced an array of previously unknown cases and controversies to the federal courts.[43] Reflecting the federal judiciary's newfound authority, the number of cases heard by the Supreme Court increased dramatically: In 1860, the Supreme Court docket listed 310 cases, but by 1880, that number surpassed 1,200.[44]

---

[38] Carl McGowan, *The Organization of Judicial Power in the United States*, (Evanston, IL: Northwestern University Press, 1969), 30.
[39] William H. Rehnquist, "The Changing Role of the Supreme Court," *Florida State University Law Review* 14, no. 1 (Spring 1986), 5.
[40] Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford: Stanford University Press, 2006), 41.
[41] Mitchell Wendell, *Relations Between the Federal and State Courts* (New York, NY: Columbia University Press, 1949), 20.
[42] According historian Erwin Surrency, "this statute was a turning point in the history of the jurisdiction of the federal courts, for they became free to accept jurisdiction of any claim or any right arising under a federal statute." Erwin Surrency, *History of the Federal Courts* (New York, NY: Oceana Publications, Inc., 1987), 105.
[43] Felix Frankfurter and James Landis, *The Business of the Supreme Court*, 65.
[44] William Rehnquist, "The Changing Role of the Supreme Court," 6-7.

As the federal court system expanded in its physical reach and jurisdictional authority, the relative power of state courts shrank. As a result of the Act of 1875, state courts were stripped of "whole categories of cases."[45] Paradoxically, at the same time, state court judges presided more trials than ever before, especially when it came to business cases. The advent of the Fourteenth Amendment's Due Process Clause, which guaranteed procedural fairness in the realm of law; the adoption of lengthier state constitutions; and the passage of increasingly abstruse legislation with "wordy, excessive texts" spurred increased litigation.[46] Furthermore, in the first decade of the twentieth century, many cities, including Chicago and New York, established unified municipal courts, which overheard cases within their territorial jurisdictions.[47] State courts grew according to location, population size, and business interests in given places.[48]

In 1891 Congress extended the reach of the federal judiciary again. The Evarts Act (or Circuit Court of Appeals Act) created nine new courts, each comprised of two circuit judges and one district judge. These circuit courts now adjudicated appeals from the lower district courts; they also certified cases for adjudication by the U.S. Supreme Court. (To the relief of the members of the Supreme Court, the law also eliminated circuit-riding duties.) Illuminating the increased power of the federal judiciary generally and Supreme Court specifically, as a result of this act, the high court's docket swelled in the 1890s.

The blossoming of American legal institutions in the late nineteenth- and early twentieth-century in part explains Jews significant engagement with the American legal

---

[45] William Wiecek, "The Reconstruction of Federal Judicial Power," 358.
[46] Lawrence Friedman, *A History of American Law*, 267.
[47] James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston, MA: Little Brown, 1950), 96.
[48] Bernard Schwartz, *Main Currents of American Legal Thought* (Durham, NC: Carolina Academic Press, 1993), 283.

system. The expansion of the federal court system—the extension of their territorial jurisdictions, enlargement of the types of cases over which federal courts presided, growth in the number of federal courts and judges, and increased number of cases over which they adjudicated—and consequent changes to state courts created new physical forums for late nineteenth- and early twentieth-century lawyers to work. It was in these new institutions that newly minted Jewish lawyers would come to challenge and ultimately change American jurisprudence.

American Legal Thought

In addition to the growth of federal and state courts and the rebalancing of authority between the two, developments in legal thought also help explain Jewish lawyers' engagement with the American legal system. After the Civil War, shifts in America's intellectual and social landscape and the varied processes of urbanization, industrialization, and modernization undermined many Americans' sense of security. Legal elites, aiming to reify their own authority, responded to this existential uncertainty by promulgating "a comprehensive vision on law" known as legal classicism, a philosophy characterized by its central tenets and its core texts.[49]

Chief among legal classicism's intellectual hallmarks was formalism, a theory that posited that law stood apart from social and political institutions and therefore social and political considerations, as well as a mode of expression.[50] Symbolizing the field's desire to

[49] William Wiecek, *The Lost World of Classical Legal Thought*, 4.
[50] Although formalism had roots earlier in the century, it was only after the Civil War that it became the predominant paradigm of judicial thought. See Morton Horwitz, "The Rise of Legal Formalism." *American Journal of Legal History* 19, no. 4 (October 1975), 264; William Wiecek, *The Lost World of Classical Legal Thought*, 5.

depict itself as objective and impartial, formalism prescribed judges' intellectual approach to questions of law by demanding the use of formulaic reasoning.[51] In their rulings, judges stressed logic and deductive reasoning and eschewed the use of empirical and social-scientific knowledge.[52] By framing their decisions in theoretical terms, judges presented their rulings as "timeless, objective, [and] policy-neutral."[53] The aphorism, "Judges did not 'make' law; they 'found' it," expressed legal classicists' understanding of proper judicial reasoning.[54]

Despite its supposed neutrality, formalism betrayed the worldview of its white, elite progenitors. Formalism "not only made the law work for those in power, but also supplied moral and intellectual arguments for denying its benefits to the powerless."[55] Legal classicists used formalism's neutral language to present their decisions as impartial yet their rulings were anything but. As historian Lawrence Friedman explains, formalism was "less of a way of thinking than a way of disguising thought," and the thoughts the judiciary were disguising were those of privileged white elite Americans.[56]

In addition to formalism, legal classicists subscribed to laissez-faire constitutionalism, an ideological stance that favored minimal government regulation.[57] Its basic tenets were first

---

[51] Bernard Schwartz, *Main Currents of American Legal Thought*, 308; Morton Horwitz, "The Rise of Legal Formalism," 251-264. According to Horwitz, social conditions explain formalism's sudden popularity. Alternatively, William Nelson identifies the anti-slavery movement and the Civil War as the causal factor that prompted the favored mode of judicial reasoning to shift from instrumentalism to formalism. See William E. Nelson, "The Impact of the Antislavery Movement upon the Styles of Judicial Reasoning in Nineteenth Century America," *Harvard Law Review* 87, no. 3 (January 1974): 513-566.
[52] William Wiecek, *The Lost World of Classical Legal Thought*, 81.
[53] William Wiecek, *The Lost World of Classical Legal Thought*, 46.
[54] William Wiecek, *The Lost World of Classical Legal Thought*, 6-7.
[55] R. Kent Newmyer, "Harvard Law School, New England Legal Culture, and the Antebellum Origins of Jurisprudence," *The Journal of American History* 74, no. 3 (December 1987): 814-835.
[56] Lawrence Friedman, *American Law in the Twentieth Century*, 288.
[57] Historians debate the origins and substance of "laissez-faire constitutionalism." According to Progressive legal historians, the Supreme Court employed this ideological stance in order to protect corporate interests from government regulation. Others, however, have sought to redeem both Cooley's reputation and the meaning of

disseminated in Thomas M. Cooley's *Constitutional Limitations* (1868), the defining constitutional text of the nineteenth century.[58] Born in 1824 on a farm outside of Attica, New York, Cooley learned law through self-study.[59] In 1843, he moved to Chicago and shortly thereafter to Michigan, where he became a member of the Republican Party and served as the Chief Justice of the Michigan Supreme Court from 1864 through 1885.[60] In *Constitutional Limitations*, Cooley advocated limiting "the state's police powers," that is, states' capacity to regulate behavior.[61] Cooley was not a libertarian nor did he promote a regulation-free legal system. Still, he articulated a number of areas, which, he asserted, states had no right to control. His book almost immediately became a touchstone for a movement that sought to stymie government power.[62] Lawyers and judges cited *Constitutional Limitations* to justify using the newly created Fourteenth Amendment—which forbade states from denying "any person of life, liberty, or property without due process of law"—as a tool to strengthen corporate autonomy while simultaneously denying its authority in protecting former slaves.[63]

---

laissez-faire constitutionalism by depicting it as a check on state constitutional power and as a call for judicial restraint. See Paul D. Carrington, "The Constitutional Law Scholarship of Thomas McIntyre Cooley," *American Journal of Legal History* 41 (July 1997): 368-368; Michael Les Benedict, "Laissez Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3, vol. 2 (Fall, 1985): 293-331, 298; Alan Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration," *The Journal of American History* 53, no. 4 (March 1967): 751-771.

[58] Modern scholarship suggests that the book's influence is nearly impossible to underestimate. See Bernard Schwarz, *Main Currents in American Legal Thought*, 293 and Philip S. Paludan, "Law and the Failure of Reconstruction: The Case of Thomas Cooley," *Journal of the History of Ideas* 33 (1972), 598.

[59] Bernard Schwartz, *Main Currents of American Legal Thought*, 293; Alan Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration," 753.

[60] Despite his lifelong commitment to anti-regulatory policies, Cooley was the first chairman of the Interstate Commerce Commission, the country's first independent federal agency. See Paul Carrington, "The Constitutional Law Scholarship of Thomas McIntyre Cooley," 368-399; Clyde Jacobs, *Law Writers and the Courts*, *The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon Constitutional Law* (New York, NY: Da Capo Press, 1973), chapter 2.

[61] Cooley as quoted in William Wiecek, *The Lost World of Classical Legal Thought*, 95.

[62] Bernard Schwartz, *Main Currents of American Legal Thought*, 293; Jacobs, *Law Writers and the Courts*, 30.

[63] "With amazing swiftness lawyers and judges made the Fourteenth Amendment, intended to protect Negro freedmen, into corporate property. And they used Cooley's writings as their instrument. Again and again counsel turned to *Constitutional Limitations* to argue that their clients might not be deprived of liberty or property without due process of law." See Philip Paludan, "Law and the Failure of Reconstruction," 599.

Christopher G. Tiedeman's *The Unwritten Constitution of the United States* (1890) also advanced a laissez-faire approach to government regulations.[64] Building on Cooley's work, Tiedeman was foremost responsible for laissez-faire constitutionalism's "crystallization into a fixed and pervading paradigm."[65] A native of Charleston, South Carolina, Tiedeman spent two years studying at universities in Gottingen and Leipzig, Germany, after graduating from college. In 1878, he matriculated at Columbia Law School, eventually earning an LL.B, and spent most of his professional career teaching.[66] Foremost among his peers, Tiedeman denounced any and all government involvement with the country's economy.[67] In *The Unwritten Constitution*, he aimed to "awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experiments of social reformers."[68]

Laissez-faire constitutionalism's "hands-off" approach to government oversight pervaded legal thinking in the decades after the Civil War.[69] By century's end, its logic was ubiquitous.[70] Along with the era's tariff and tax laws, the legal mode of thinking benefitted a handful of capitalists.[71] Industrialists liked it because it enabled them to exploit the country's

---

[64] In addition Tiedeman authored *The Law of Real Property* (1883), *A Treatise on the Limitations of the Police Power* (1886), *A Treatise on the Law of Commercial Property* (1889), and *A Treatise on the Law of Sales of Personal Property* (1891).
[65] Clyde Jacobs, *Law Writers and the Courts*, 62.
[66] Clyde Jacobs, *Law Writers and the Courts*, 59.
[67] Bernard Schwartz, *Main Currents of American Legal Thought*, 304.
[68] Tiedeman as quoted in Clyde Jacobs, *Law Writers and the Courts*, 60.
[69] Clyde Jacobs, *Law Writers and the Courts*, 22. On other legal thinkers who advanced laissez-faire ideas in their works, see Bernard Schwartz, *Main Currents of American Legal Thought*, chapter 4.
[70] Laissez-faire constitutionalism also came to define the *Lochner* era, which lasted from 1897 through 1937, a period of American legal history during which the Supreme Court struck down economic legislation that it deemed to be limiting of economic liberty and the so-called freedom to contract. The era's name comes from the U.S. Supreme Court decision *Lochner v, New York*, 198 U.S. 45 (1905).
[71] Clyde Jacobs, *Law Writers and the Courts*, 20.

natural resources and immigrant workers; others applied it in order to justify privileging individual liberty in the arenas of contract and labor law.

In addition to formalism and laissez-faire constitutionalism, legal classicists also embraced ideas inspired by Charles Darwin's theory of evolution as articulated in *The Origin of Species by Means of Natural Selection, or the Preservation of Favored Races in the Struggle for Life* (1859) and *The Descent of Man, and Selection in Relation to Sex* (1871). Darwin's ideas entered American culture through the works of English philosopher and sociologist Herbert Spencer. Spencer authored *The Social Organism* (1860) and *Principles of Biology* (1864). In these works, he posited that human society developed through natural selection or "survival of the fittest."[72] Reflecting its spectacular influence, by the beginning of the 1870s, Spencer's "evolutionary Darwinism" had seeped into the bedrock of various mid-to-late nineteenth-century academic disciplines including law.[73]

Taking their cues from Spencer, legal scholars applied Darwin's ideas about human development to their understanding of American law.[74] In *The Unwritten Constitution*, Tiedeman wrote that for society to "attain its highest development," the government needed to avoid creating regulations.[75] Legal classicists embraced social Darwinism because it complemented their belief in the so-called free-market and the necessity of unrestrained competition. Social Darwinism also explained, at least in their own minds, their legal authority.

---

[72] Richard Hofstadter is responsible for the popularization of the term "survival of the fittest" in the mid-century. See Richard Hofstadter, *Social Darwinism in American Thought, 1860-1915* (Philadelphia, PA: University of Pennsylvania Press, 1944).

[73] Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY: University Press of Kentucky, 1973), 5.

[74] Socialist legal thinkers, for example, embraced Darwinist ideas about nature and natural development. See Mark Pittenger, *American Socialists and Evolutionary Thought, 1870-1920* (Madison, WI: University of Wisconsin Press, 1993).

[75] Tiedeman as quoted in Bernard Schwartz, *Main Currents of American Legal Thought*, 303.

Finally, legal classicists shared a belief in natural law, which posited that judicial law came from "universal principles of justice" articulated by God—and not just any God but Jesus Christ as imagined by the Protestant church.[76] Natural law came to America by way of English common law; its intellectual roots stretched back to the founding of the nation. On both sides of the Atlantic, more so than any other text, William Blackstone's *Commentaries on the Laws of England* (1765-1769) disseminated its precepts.[77] According to Blackstone, law was "a rule of action… guided by unerring rules laid down by the great Creator."

In the nineteenth century, natural law found its greatest champion in Harvard Law School Professor Joseph Story, a U.S. Supreme Court Justice from 1811 through 1845 and author of the esteemed *Commentaries on the Constitution of the United States* (1833).[78] According to Story, natural law regulated human behavior; God and law, therefore, were inseparable.[79] In a widely published essay, Story explained that natural law "comprehends man's duties to God, to himself, to other men, and as a member of political society."[80] Underscoring the specificity of the "God" that legal classicists imagined when they spoke

---

[76] William Wiecek, *The Lost World of Classical Legal Thought*, 12.

[77] Before the advent of modern law schools during the twentieth century, Blackstone's *Commentaries* constituted "both the only law school and the only law library most American lawyers used to practice law in America." See Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentary* (Chicago, IL: University of Chicago Press, 1941), 4; Albert S. Miles, David L. Dagley, Christina H. Yau, "Blackstone and His American Legacy," *Australia & New Zealand Journal of Law and Education* 5, no. 2 (2000): 46-59.

[78] The text espoused the concept of natural law advanced by Joseph Story and widely embraced by legal classicists. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the first edition of 1765-1769*, ed., Stanley N. Katz (Chicago, IL: University of Chicago Press, 1979).

[79] "Story's whole jurisprudence was based upon an indissoluble bond between Christianity and the law." See Bernard Schwartz, *Main Currents of American Legal Thought*, 142. Similarly, writes McClellan, Story understood "Christianity and the common law to be the foundation of the Union, liberty, and social order." See James McClellan, *Joseph Story and the American Constitutional A Study in Political and Legal Thought*. Norman, OK: University of Oklahoma Press, 1971,119.

[80] Story quoted in James McClellan, *Joseph Story and the American Constitutional A Study in Political and Legal Thought*, 313; Joseph Story, "Natural Law," *Encyclopedia Americana: A Popular Dictionary of Arts, Sciences, Literature, History and Biography*, ed., Francis Lieber (Philadelphia, PA: Desilver, Thomas and Company, 1836), vol. 9, 150.

about natural law, when accepting his post at HLS, Story spoke about the underlying Christian principals of American law, explaining, "There has never been a period in which the common law did not recognize Christianity as lying at its foundation."[81]

Story's understanding of natural law as a derivative of Christianity was pervasive among mid- to late- nineteenth-century American lawyers. Even when they did not themselves adhere to Christian doctrine or follow any specific religious practice, legal classicists believed that "the principles that underlay law were harmonious with the commands of the Decalogue and with Christian morality generally."[82] Radical Republicans premised the advancement of black emancipation and, later, black suffrage on the notion of God-given "natural" rights.[83] Similarly, Cooley "identified due process with the doctrine of vested rights drawn from natural law."[84] Indeed, the belief in natural law inspired U.S. Supreme Court Justice David Brewer to declare in 1892, "This is a Christian nation."[85]

As Jews became lawyers, they challenged the tenets of legal classicism because the philosophy re-entrenched the white Anglo-Saxon Protestant power structure. First, they advanced legal realism, also known as social jurisprudence, which was a form of pragmatism

---

[81] James McClellan, *Joseph Story and the American Constitution*, f123.
[82] William Wiecek, *The Lost World of Classical Legal Thought*, 12.
[83] Alexander Tsesis, "Furthering American Freedom: Civil Rights and the Thirteenth Amendment," *Boston College Law Review* 45 (2004), 323-328.
[84] Bernard Schwartz, *Main Currents in American Legal Thought*, 293.
[85] *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). This case raised the question of whether a contract between a New York church and English priest violated the Alien Contract Labor Law of 1885. In his decision, U.S. Supreme Court Justice David Brewer wrote, "These, and many other matters which might be notices, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation." The Court found that the church had not violated the statute because the priest was Christian and that, because of the country's Christian orientation, he was not a foreigner worker. (This case is also well known as an explanation for how judges ought to interpret legislative intent, which is often summarized as the "soft plain meaning rule." This rule posits that statutes should not be interpreted literally if doing so would lead to results that contradict legislative intent.)

as applied to law.[86] Legal realists challenged the idea that law was simply a set of rules applied objective by judges. They also rejected the idea that law was separate from social and political considerations; in fact, they believed that law should reflect the best interests of society and sound public policy. They understood law as a reflection of the desires and beliefs of lawmakers.[87] One upshot of this perception of law was their endorsement of the use of social scientific evidence as a tool for arguing and deciding cases.[88] Likewise, for Jewish lawyers, many of whom themselves toiled in New York City factories or witnessed their parents doing so during their childhoods, laissez-faire constitutionalism was unappealing if not dangerous.[89] As the careers of Jewish labor advocates such as Morris Hillquit and Louis Waldman highlight, many Jewish lawyers championed state regulation of all aspects of labor, from work hours to workplace safety. (Even Louis D. Brandeis, who was not an immigrant and who became an elite figure within the profession, regularly advocated for governmental regulation of business.[90]) Jewish lawyers also took issue with legal classicists' interpretation of social Darwinism, because, like laissez-faire constitutionalism, this idea, when deployed by courts, derailed legal claims asserted by laborers and unions. They also rejected the logical extension of its elitist outlook, which put Jewish lawyers at the bottom of the professional hierarchy. Finally, much like they questioned the other tenets of legal classicism, Jewish lawyers challenged the presumption that Christian law and American law

---

[86] Although Jews were not alone in advancing legal realism, they were among its most important thinkers and promulgators. See Morton J. Horwitz, "Jews and Legal Realism" in *Jews and the Law*, Ari Mermelstein, Victoria S. Woeste, Ethan Zadoff, and Marc Galanter, eds., (New Orleans, LA: Quid Pro Quo Books, 2014), 309-320.

[87] On legal realism see Edward A. Purcell, Jr., *The Crisis of Democratic Theory.*

[88] Louis D. Brandeis' 1908 brief in the case *Muller v. Oregon*, 208 U.S. 412 (1908), an innovative brief that employed more social science reasoning than law, is the most famous example of this tendency. See Melvin Urofsky, *Louis D. Brandeis: A Life* (New York, NY: Pantheon, 2012), 220.

[89] Clyde Jacobs, *Law Writers and the Courts*, 39; Jacobs, *Law Writers and the Courts*, 42.

[90] See Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (New York, NY: Belknap Press, 1986).

were indivisible because, as a non-Christian minority, such an assumption put them at a disadvantage, economically and otherwise.[91]

In short, the prevailing legal philosophies advanced by most late nineteenth century legal thinkers and practitioners proved untenable for Jewish lawyers. They did not accept the tenets of legal classicism—formalism, laissez-faire constitutionalism, or social Darwinism (at least not as interpreted by legal classicists)—nor did they agree with mainstream interpretations of natural law, which linked American law with Christianity. These ideas offended Jewish lawyers' political inclinations, contradicted their personal experiences, and generally opposed their worldviews. Accordingly, they challenged these modes of thought as they engaged with the law.

The Transformed Lawyerly Ideal and the Rise of Corporate Firms, Bar Associations, and Modern Law Schools

In addition to institutional growth and evolutions in American legal thought, changes to the practice of law, the organization of the bar, the rise of corporate law firms, and the birth of the modern law school enabled the emergence of Jewish lawyers and shaped how they engaged with the legal system. During the final three decades of the nineteenth century, as America transformed from "a nation of loosely connected islands" into a centrally

---

[91] For example, in a number of cases in the late nineteenth century, state courts refused to grant Jews special dispensations to violate Sunday "blue" laws, which outlawed working on Sunday, asserting that to do so would show special favor to Jews. See *City of Shreveport v. Levy* (26 La. Am. 671; S.C., 21 Am. R. 552) (1875) and Batya Miller, "Enforcement of the Sunday Closing Laws on the Lower East Side, 1882-1903," *American Jewish History* 91, no. 2 (June 2003): 269-286; David N. Leband and Deborah Hendry, *Blue Laws: The History, Economics, and Politics of Sunday-Closing Laws* (Lanham, MD: Lexington Books, 1987). Although with limited success, Jews' use of litigation in order to separate Christianity from American law began in the nineteenth century and by the end of World War II American Jewish organizations stood "at the forefront of organized efforts to influence the church-state jurisprudence of the Supreme Court.") See Gregg Ivers, *To Build A Wall: American Jews and the Separation of Church and State* (Charlottesville, VA: University of Virginia Press, 1995), 2.

coordinated, bureaucratic, and interconnected society, law became more important in Americans' everyday lives. As this happened, the legal profession became increasingly hierarchical.[92] The perceived ideal practitioner transformed from a country to a corporate lawyer, someone who not only fulfilled his duties as a courtroom advocate but oversaw transactional matters. This new class of practitioners created exclusive associations and bigger law firms, both of which excluded Jews and Catholics and blacks and women. The rise of the corporate lawyer also instigated the birth of the modern legal education system, which included the establishment of elite institutions such as Harvard Law School (HLS) and non-elite institutions such as New York University Law School (NYULS) and Brooklyn Law School (BLS), which primarily served immigrant students.[93]

The first change to the American legal profession, which ultimately gave rise to Jewish lawyers, was the transformation of what Americans thought of as the ideal lawyer. Before the 1870s, the American bar was comprised of two types of attorneys: the country lawyer and the "Tocquevillian aristocrat."[94] The country lawyer, a far more prevalent figure, was a solo-practitioner who learned legal know-how through apprenticeship and/or by reading law books and self-study.[95] He primarily practiced alone. His professional arena was the courtroom, his greatest asset his oratorical skills.[96] The "Tocquevillian aristocrat," by contrast, was a far less common figure who served elites. He was by nature conservative in

---

[92] Robert Wiebe, *The Search for Order, 1877-1920* (New York, NY: Hill and Wang, 1966), 4.
[93] Jerold Auerbach, *Unequal Justice.*
[94] Jerold Auerbach, *Unequal Justice*, 15.
[95] Jerold Auerbach, *Unequal Justice*, 15; Hugh C. Macgill and R. Kent Newmyer, "Legal Education and Legal Thought, 1790-1920," *Cambridge History of Law in America*, eds., M. Gossberg and C. Tomlins (Cambridge, MA: Cambridge University Press, 2008), 36-67.
[96] William R. Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures* (New York, NY: NYU, 1978), 29.

his outlook and strove to ensure continuity. Sometimes this individual attended law school (but the education he received did not resemble that furnished by the modern law school).[97]

Both a symbol and product of modernization, urbanization, and industrialization, in the late nineteenth century, corporate lawyers emerged as the new ideal legal practitioners. They were "skilled negotiator[s] and facilitator[s], [who represented] the practical man of business."[98] Rather than courtroom advocacy, preemptive legal guidance became of primary value.[99] They gained distinction "for work done at their desks and in conference rooms."[100] Unlike the country lawyer who worked on many single-issue cases for many different clients, corporate lawyers had single, large, deep-pocketed clients.[101] With permanent counsel on staff, corporations employed troops of lawyers to lobby politicians on their behalf, wage lawsuits when necessary, and strategize.

As the corporate lawyer replaced the country lawyer, the profession needed new ways to regulate the social composition of the bar. In the past, lawyers' oratorical skill functioned as an internal policing mechanism.[102] Diffuse jurisdictions necessitated that judges and lawyers travel from town to town to perform their jobs. This shared duty fostered intimate professional and personal ties among bar members.[103]

---

[97] Jerold Auerbach, *Unequal Justice*, 14-17.
[98] Wayne K. Hobson "Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915," in *The New High Priests: Lawyers in Post-Civil War America,* Gerard W. Gawalt, ed. (Westport, CT, 1984), 3-28, 9.
[99] William Johnson, *Schooled Lawyers*, xiii.
[100] Jerold Auerbach, *Unequal Justice*, 15.
[101] William Johnson, *Schooled Lawyers*, 62.
[102] As a result of the intimate social and professional circles in which judges and lawyers operated, a poor performance had lasting effects on lawyers' reputations outside the courtroom. Substandard attorneys quickly became known as such. See William Johnson, *Schooled Lawyers,* 38.
[103] In fact, "judges and lawyers often traveled together and usually ate and slept at the same hotels." William Johnson, *Schooled Lawyers*, 30. Thus, "the influence of the court was structured and extended into the community by journey of judge and lawyers from county to county over the judicial circuit." William Johnson, *Schooled Lawyers*, 28.

As the profession grew and the tradition of traveling legal circuits waned, self-regulation through social connectedness became outdated and inefficient.[104] Elite lawyers therefore formed professional organizations.[105] Bar associations were not public or open-membership organizations; rather, they represented and served "the nativist, anti-immigrant sentiments of the patrician leaders of the bar."[106] In 1870, for example, almost two-hundred men gathered on West Twenty-Seventh Street in Manhattan to form the Association of the Bar of the City of New York (ABCNY), the first modern bar association.[107] Bar organizations such as ABCNY insured the homogeneity of its members by using a complex, lengthy, and expensive admissions process.[108] To join, candidates needed recommendations, sponsorships, and references from existing members. They also underwent an interview process and then existing members would vote whether to admit respective applicants. Individuals who successfully navigated this process faced an additional test: money. The organization was financially prohibitive as its initial fee was $50 and annual fee was an additional $40.[109] Consequently, through the first half of the twentieth century, ABCNY's members numbered few, "never including more than twenty percent of all lawyers in the

[104] William Johnson, *Schooled Lawyers*, 40.
[105] Jerold Auerbach, *Unequal Justice*; John A. Matzko, "'The Best Men of the Bar': The Founding of the American Bar Association," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerald W. Gawalt, (Westport, CT: Greenwood Press, 1984), 75-96, 78; Michael J. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* (New York, NY, Russell Sage Foundation, 1988), 11; Louis Anthes, *Lawyers and Immigrants, 1870-1940: A Cultural History* (El Paso, TX: LFB Scholarly Publishing, 2003), chapter 1.
[106] Michael Powell, *From Patrician to Professional Elite*, 14.
[107] Norbert Brockman, "The National Bar Association, 1888-1893: The Failure of Early Bar Federation," *American Journal of Legal History* 10 (1966), 123; Michael Powell, *From Patrician to Professional Elite.*
[108] On ABCNY's admissions procedure see Michael Powell, *From Patrician to Professional Elite*, 29-33.
[109] George W. Martin, *Causes and Conflict: The Centennial History of the Association of the Bar of the City of New York, 1870-1970* (Boston, MA: Houghton Mifflin Company, 1970), 43.

city."[110] In 1871, just a year after forming, of the 462 of the 4,000 lawyers in New York City were ABCNY members.[111]

ABCNY, a state bar association, was a model for other emerging national organizations such as the American Bar Association (ABA), which held its first meeting in late August of 1878 in the town hall of Saratoga Springs, New York.[112] Seventy-five men from across the country gathered at that first meeting.[113] The ABA's organizers had selected Saratoga Springs for its beauty and reputation as a vacation spot for wealthy New Englanders. (Inclusivity, however, was not a priority: just one year before, Henry Hilton, the owner of the Saratoga Spring's Grand Union Hotel—where all the meeting's attendees roomed—denied the well-known businessman Joseph Seligman a room because he was Jewish.)[114] The ABA was the brainchild of a New-Haven-born, corporate lawyer named Simeon Eben Baldwin, a great-grandchild of Roger Sherman, a lawyer and signatory of the Declaration of Independence.[115] (Baldwin was wealthy.[116] He began Yale College in September 1857, continued his education at Harvard Law School, and gained admission to the Connecticut bar in 1863. Active in the Republican Party from college onward, he held an

---

[110] Michael Powell, *From Patrician to Professional Elite*, 44.
[111] George W. Martin, *Causes and Conflicts*, 44.
[112] Michael Powell, *From Patrician to Professional Elite*, xv. On the founding of other bar associations see Dunbar Rowland, *Courts, Judges, and Lawyers of Mississippi, 1789-1935* (Jackson: Mississippi Historical Society, 1935; William H. Bryson, "The Virginia Bar, 1870-1900," in *The New High Priests: Lawyers in Post-Civil War America,* Gerard W. Gawalt, ed. (Westport, CT: Greenwood Press, 1984), 171-185 and John Matzko, "'The Best Men of the Bar'" in *The New High Priests: Lawyers in Post-Civil War America,* Gerard W. Gawalt, ed. (Westport, CT: Greenwood Press, 1984).
[113] Debate exits as to the motivation behind the formation of the ABA. See John Matzko, "'The Best Men of the Bar'," 76; Gerald Carson, *A Good Day at Saratoga* (New York, NY: American Bar Association, 1978).
[114] Stephen Birmingham, *Our Crowd: The Great Jewish Families of New York* (New York, NY: Harper and Row, 1967).
[115] Walker Lewis, "The Birth of the American Bar Association," *American Bar Association Journal,* 996-1002.
[116] His father died when he was young and left him a great deal of money. Jackson, *Simeon Eben Baldwin*, 55.

array of political posts throughout his life.)[117] The men who attended the ABA's two-day, inaugural meeting were lawyers "of unquestionable professional attainments" and, for the most part, knew each other.[118] This was because the organization's first members were culled from Baldwin's personal social network.[119] Consequently, as was the case with members of the ABCNY, the ABA was comprised of individuals whose backgrounds and worldviews mirrored Baldwin's.[120]

Elite lawyers limited bar association memberships as a way to separate themselves from lawyers perceived as unprofessional and, as a result, few lawyers actually joined these organizations.[121] Nevertheless, bar associations helped shape professional norms and regulated the legal marketplace. Local and state bar associations created social and professional delineations and served as gatekeepers within legal practice.[122]

Another new gatekeeper to legal practice was the modern law school. Both before and after the Civil War, few lawyers acquired a legal education in a university setting.[123] In 1850,

---

[117] Baldwin was an associate justice and then chief justice of the Connecticut Supreme Court and served as the state's governor from 1911-1915. He authored numerous scholarly works and taught at Yale Law School from 1869 to 1912. He also had a private practice. In 1902, he served as the president of the Association of American Law Schools. See Frederick Jackson, *Simeon Eben Baldwin: Lawyer, Social Scientist, Statesman* (New York, NY: King's Crown Press, 1955).
[118] Gerald Carson, *A Good Day at Saratoga*, 4.
[119] James Grafton as quoted by Jackson, *Simon Eben Baldwin*, 80.
[120] John Matzko, "'The Best Men of theBar'," 85.
[121] John Matzko, "'The Best Men of the Bar'," 78.
[122] One response to the ABA and ABCNY was the creation of alternative bar associations. For example, the New York County Lawyers Association formed in 1908. Its membership was to include lawyers regardless of religion, race, or creed. Still, it seems that discrimination still seeped into its ranks; at the 1908 NYCLA meeting, for example, Charles A. Boston, the head of the association's ethics committee, urged his fellow members to adopt more rigorous professional protocols. New lawyers with "the ambitious and intellectual capacity of Oriental immigrants, with no apparent conception of English or Teutonic ideals" had hurt bar's reputation and stricter ethical codes would safeguard the field from these bad actors. See Charles A. Boston, "A Code of Legal Ethics," *The Green Bag* 20 (1908): 224-231, 228.
[123] Steve Sheppard, "Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall," *Iowa Law Review* 82 (1996-1997), 564.

America boasted only fifteen law schools. By 1870 that number grew to thirty-one."[124] Beginning towards the late nineteen century, as the corporate lawyer became the professional ideal, and the importance of preemptive and strategic legal counseling increased, modern law schools emerged at an ever-quickening pace. Although not immediately evident, the rise of the modern law school generated an educational hierarchy, which was only amplified by members of the elite bar who hoped to limit non-WASP members of the legal profession. By the 1920s, established white practitioners implemented mechanisms aimed at limiting the number of Jewish students at elite institutions but before this happened, the birth of the modern law school enabled a handful of privileged Jews to learn law, something that was difficult for them to do when legal learning was done vis-à-vis apprenticeship.

The individual primarily responsible for the advent of elite law schools, which eventually redefined the contours of the legal profession by distinguishing elite lawyers from non-elite lawyers according to the law school they attended, was Christopher Columbus Langdell. Langdell was born in New Boston, New Hampshire, in 1826. In the 1850s, he attended Harvard College and then HLS, where some considered him a "fanatic student," and he worked as the school's librarian.[125] When Langdell was an HLS student, the institution was small. Before 1840, its enrollment never exceeded one hundred students.[126] After graduating, Langdell spent nearly two decades in New York where he was a middling lawyer. This distinction did not stop Harvard President Charles William Eliot from appointing Langdell as the Dane Professor at Harvard Law School (a position previously held by Joseph Story) on January 6, 1870. Soon thereafter he became the school's dean.

---

[124] Lawrence Friedman, *A History of American Law*, 464.
[125] Joel Seligman, *The High Citadel: The Influence of Harvard Law School* (Boston, MA: Houghton Mifflin and Company, 1978), 30; Steve Sheppard, "Casebooks, Commentaries, and Curmudgeons," 596.
[126] Richard Abel, *American Lawyers*, 41.

Reflecting the greater drive towards professionalization and his legal classicist-worldview, as the dean of HLS, Langdell instituted sweeping reforms, which ultimately transformed the American legal education system.[127] First, to permanently institutionalize legal education within the university and to ensure that law schools controlled the dissemination of legal knowledge and knowhow, Langdell convinced his fellow lawyers that the ways of the past—reading law and apprenticeship—were pedagogically ineffective.[128] To bolster his claim, he presented law as a science.[129] Postulating that law "consists of certain principles or doctrines," Langdell claimed that legal teachings could be standardized, quantified, and measured akin to lab data.[130] He presented the law professor as an analogue to the "scientist who gathered, sorted, and evaluated his data to produce a legal solution for social malfunctions."[131] Langdell's conception of law reflected his belief in positivism, a mid-nineteenth century school of thought that asserted that knowledge came from the "methods and discoveries of the physical sciences."[132]

To teach law as if it were a science, Langdell developed an approach to legal study known as the "case method" system. Students were to learn legal standards by studying

---

[127] William W. Fisher, III, "Legal Theory and Legal Education, 1920-2000," *The Cambridge History of Law in America, Vol. III,* eds., Michael Grossberg and Christopher Tomlins, (New York, NY: Cambridge University Press, 1976): 34-72, 59; Sutherland, *The Law at Harvard*; William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994). (LaPiana disputes Langdell's importance.)
[128] William Fisher, "Legal Theory and Legal Education, 1920-2000," 59.
[129] The depiction of American law as a science has long roots. For a fuller history of such, see Howard Schweber, "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education," *Law and History Review* 17, no. 3 (Autumn, 1999): 421-466.
[130] Arthur E. Sutherland, *The Law At Harvard: A History of Ideas and Men, 1817-1967* (Cambridge, MA: Harvard University Press, 1967), 162.
[131] Jerold Auerbach, "Enmity and Amity: Law Teachers and Practitioners, 1900-1922," in *Law in American History*, ed., Donald Fleming and Bernard Bailyn (Boston, MA: Little Brown, 1971), 554.
[132] Bernard Schwartz, *Main Currents in American Legal Thought*, 348.

appellate cases.[133] He expected them to identify the particular circumstances that gave rise to respective cases and then determine the given doctrine applied by the court.[134] To determine whether students had achieved this feat, he employed a refined version of the question-and-answer based Socratic method. Professors questioned students in their knowledge of the relevant facts and of courts' rationale; "through repeated inquisitorial exercises, the students were expected to learn how to ferret out the principles underlying decisions."[135] Reflecting Langdell's endorsement of the concept of social Darwinism, despite its disputed usefulness, the Socratic method became a popular pedagogic device because it created "an aura of the survival of the fittest."[136]

To help students deduce rules from judicial decisions, Langdell invented the casebook, a collection of appellate cases that were thematically similar. Langdell's *Selection of Cases on the Law of Contracts* (1871) was the first casebook published.[137] Comprised of English cases dating back to the sixteenth century and cases from various American states, it presented contract law as a single body of rules and purported to address all the theoretical situations concerning contractual disputes.[138]

Langdell's *Selection of Cases* inspired the publication of other casebooks, which served as tools for teaching the standard first year curriculum, which he developed. Under his

---

[133] Arthur Sutherland, *The Law At Harvard: A History of Ideas and Men, 1817-1967* (Cambridge, MA: Harvard University Press, 1967), 174.
[134] LaPiana, *Logic and Experience*, 24-25. Langdell insisted that only appellate decisions merited analysis. Excluded from his pedagogical menu were state judicial decisions, state statutes, and local ordinances, among other things. This understanding of which laws were worthy of study was not his own but, rather, that of Joseph Story. See Seligman, *The High Citadel*, chapter 2.
[135] William Fisher, "Legal Theory and Legal Education," 60.
[136] Robert B. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Union, NJ: The Lawook Exchange, Ltd, 2001), 53.
[137] Lawrence Friedman, *A History of American Law,* 532; H. A. J. Ford, "The Evolution of the American Casebook," *Res Judicata* 7, no. 3 (1955-1957): 256-275.
[138] Bernard Schwartz, *Main Currents in American Legal Thinking*, 352.

reign, first year courses were contracts, real property, torts, criminal law, civil procedure, evidence, and equity.[139] (American law schools continue to employ this first-year curriculum as well as many of Langdell's other reforms.) Reflecting the priorities of HLS, the underlying commonality of these courses was that they served the interest of the wealthy. As one scholar has said, "What determined the curriculum was the legal interest that came with retainers… creditors' rights were studied deeply [yet] debtors' remedies were passed by shallowly."[140] In short, the curriculum emphasized subjects of interest to lawyers for wealthy clients, but not those that would enable lawyers to serve working-class people.

Finally, in 1875, Langdell instituted an admissions policy requiring prospective students either to have a college degree or pass a qualifying examination in order to enroll. A newly created qualifying exam from the year 1900 included the questions: "What were the different kinds of guardian at common law? What are the principal powers of a corporation? How may a corporation be dissolved? What is an executory device? Give examples."[141] Prospective students also needed to display proficiency in Latin or French.[142]

Langdell claimed he instituted an admissions policy to "discourage the attendance of non-ignitable men," yet the specifics of the policy suggest that he had more particular men in mind that he wanted to dissuade from coming to Cambridge. As late as 1891, 80 percent of lawyers began their careers without any formal academic instruction in the field.[143] Most

---

[139] David Clark, "Legal Education and the Legal Profession," *Introduction to Law of the United States* 2nd ed., eds., David Scott Clark and Tuğrul Ansay, (New York, NY: 2002), 15.
[140] Joel Seligman, *The High Citadel*, xvi.
[141] Arthur Sutherland, *The Law at Harvard*, 168-169.
[142] Lawrence Friedman, *A History of American Law*, 531.
[143] Richard Abel, *American Lawyers*, 41.

jurisdictions allowed men to practice without fulfilling any educational prerequisites.[144] Thus, at a time when very few people went to college, let alone attended college and law school, requiring students to have a college degree in order to secure admission made it all but impossible for anyone but the most privileged students to attend. The entrance exam, which necessitated that students already have deep knowledge of the law before attending law school, also suggests it was intended to be exclusionary. Indeed, according to one scholar, HLS' admission policies "effectively eliminated 96 percent of the eligible population from *consideration*."[145]

As law schools became central to the acquisition of legal knowledge, they also came to the attention of the established bar, which then sought to assert their authority in this new forum. Accordingly, in 1900, the ABA formed the Association of American Law Schools (AALS), an organization created to enable the bar to regulate legal educational institutions. Within a few years, the AALS mandated that law schools establish admission standards and increased the minimum period of training to three years.[146] Notably, prior to World War I, Harvard was the lone school to require some level of college education prior to enrollment; by the 1920s, however, the majority of elite law schools adopted similar requirements.[147] As a result, fewer Jews attended elite institutions. Further, although decades passed before the AALS came to monopolize all facets of America's legal education system, the accreditation,

---

[144] "In 1879, twenty three out of thirty eight jurisdictions required no long study whatsoever; and of the fifteen demanding some, only seven insisted on three years." See Richard Abel, *American Lawyers*, 51; William Johnson, *Schooled Lawyers*, 24.
[145] Jerold Auerbach, "From Rags to Robes," 252.
[146] Joseph H. Beale, "The History of Legal Education," in *Law: A Century of Progress 1835-1935*, Volume 1 (New York, NY: NYU Press, 1937), 11.
[147] Robert Stevens, *Law School*, 37.

admissions, and curricular standards that it imposed helped to differentiate elite and non-elite schools, which had significant outcomes for the students of these institutions.

Despite mounting impediments, some Jews did attend elite institutions such as Harvard, the lasting effects of which almost inevitably altered these students' career trajectories. For Jewish law students going to an elite law school could be both thrilling and terrifying. Felix Frankfurter, an immigrant from Vienna who grew up on the Lower East Side (and a future U.S. Supreme Court Justice), matriculated at HLS in 1902. While there, he remembered a fellow Jewish student scolding him for his supposedly lax work habits. Samuel Rosensohn—who later worked for the American Civil Liberties Union and was, alongside Frankfurter, involved in the Scopes Trial—supposedly reminded Frankfurter that his behavior reflected on the communities from which he came.[148] "[Rosensohn] thought I wasn't attending to business and would disgrace, in the first place, him, and my college—he was also a City College man—and myself. He was terribly worried. He would lecture to me," Frankfurter recalled.[149]

Elite institutions also introduced Jewish students to Patrician America. According to a biographer, at Harvard, Frankfurter "developed a set of social habits, including a taste for good food, wines, and clothing."[150] For students such as Frankfurter, Christian America was somewhat European. "I just luxuriated in what is called 'culture.' I listened to music… I went to the Germanic museum, and I read a lot of German literature in the library attached to

[148] "Scopes and Lawyers to Plan Defense Here," *New York Times*, June 6, 1925, 8; Edward Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion*, (Cambridge, MA: Basic Books, 1997), 102-103.
[149] Edward Larson, *Summer for the Gods*, 19.
[150] Melvin I. Urofsky, *Felix Frankfurter: Judicial Restrain and Individual Liberties* (Boston, MA: 1991), 2.

it. I went to the Boston Museum of Fine Arts," Frankfurter recalled.[151] Life in Cambridge gave Frankfurter "a conception of American society from which he never departed."[152]

Frankfurter's experiences at Harvard were, in some ways, not unique. Langdell's late nineteenth-century reforms at HLS soon were replicated by schools across the country, which sprang up towards the end of the century. By 1880, there were fifty-one law schools.[153] By 1890, there were sixty-one. By 1910, there were 124.[154] For elite schools, the "Harvard law pattern… became… the Olympian object of mimicry."[155] Elite schools embraced Langdell's understanding of law as science, his pedagogic methods, and, by the 1920s, his admission standards.

Yet not all institutions adopted Langdell's reforms. Within a few decades of the rise of HLS as the standard-bearer of legal education, part-time and night schools, which allowed their students to work during the day, emerged. In 1888, Metropolis Law School, which later became New York University Law School, opened evening law divisions, as did Chicago College of Law, which later became Chicago-Kent. In 1889, Baltimore University, which was later integrated into the University of Maryland, began offering part-time law studies.[156] These schools appeared in densely populated immigrant communities, from which they drew their student bodies. By 1900, 21 part-time schools existed. By 1910, there were forty-one.[157]

Far more so than HLS or other elite institutions, the establishment of part-time and night schools facilitated the emergence of Jewish lawyers in the late nineteenth and early

---

[151] Felix Frankfurter and Harlan B. Phillips, *Felix Frankfurter Reminisces* (New York, NY: Praeger, 1978), 32.
[152] Melvin Urofsky, *Felix Frankfurter*, p. 2.
[153] Lawrence Friedman, *A History of American Law*, 464.
[154] Dorothy E. Finnegan, "Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools, 1890-1940," *Journal of Legal Education* 55, no. 1-2 (2005), 208.
[155] Joel Seligman, *The High Citadel*, xiv.
[156] Robert Stevens, *Law School*, 74.
[157] Dorothy Finnegan, "Raising and Leveling the Bar," 210.

twentieth century. As the dean of John Marshall Law School Edward T. Lee noted in 1918 about the predominantly Jewish and Irish students at Chicago's night schools, "the ancient and the modern chosen people" comprised many of these institutions student bodies.[158] Jewish students in the Windy City enrolled in schools such as DePaul University College of Law, Chicago-Kent College of Law, John Marshall School of Law, and the School of Law at Loyola University Chicago.[159] In New York, before 1939, nearly half of the city's Jewish lawyers graduated either from NYULS or BLS. Further, Jewish students attended these institutions at greater rates than non-Jewish students. Before 1939, while 31 percent of New York City's bar members trained at night schools and/or in part-time institutions, over 43 percent of Jewish lawyers did so.

Differences in the experience of attending part-time programs versus attending elite institutions were great. The student-to-teacher ratio at part-time programs on average were "three times higher" than those at elite schools.[160] Likewise, students surely did not acquire the social contacts afforded to Jewish students at elite institutions. Moreover, their reputability was damaged when, soon after being created, the AALS implemented law school accreditation processes and disqualified part-time and night institutions from eligibility for accreditation.[161]

Regardless of these differences, part-time and night law school's lack of admission requirements, location, and affordability made them appealing to immigrant students, most of

---

[158] Edward T. Lee quoted in Joseph F. Kett, *The Pursuit of Knowledge Under Difficulties: From Self-Improvement to Adult Education in America, 1750-1990* (Stanford, CA: Stanford University Press, 1994), 263.
[159] John Heinz, *Urban Lawyers*, 288.
[160] Richard Abel, *American Lawyers*, 53-54.
[161] For NYULS' petition to AALS against its accreditation standards and a history of the school, see Clarence D. Ashley, *The Maintenance of Regular Courses of Instruction in Law at Night, Parallel to Courses in the Day, Does Not Tend Inevitably to Lower Educational Standards: A Protest* (New York, NY: 1914).

whom came from working-class families. Indeed, as of 1939, "over 75% of the practicing Jewish lawyers [in New York City] graduated from the law schools where tuition [was] relatively low and where part-time courses are offered."[162] Unlike Harvard, part-time and night schools did not have admission requirements, which was important for many Jewish students who could not afford to pay for both college and law school. Indeed, in the century's first decades, Jewish students skipped college and enrolled directly in law school more frequently than non-Jews.[163]

Part-time and night schools were also more inclusive learning spaces. Unlike elite institutions, many of them accepted women as students.[164] In New York, NYULS began admitting women in 1890.[165] Within thirty years, "303 women had graduated… and another 157 were enrolled."[166] Likewise, in Chicago, John Marshall Law School offered classes specifically for women in "domestic relations, commercial law, and parliamentary law."[167]

The fact that part-time and night institutions admitted women helps explain why Jewish women, more so than non-Jewish women, attended law school during the Progressive Era. Many of these women were the wives of lawyers. Vera Hillquit, wife of Morris Hillquit, attended NYULS. Bella Bernstein Waldman, the wife of Louis Waldman, was a lawyer (as

---

[162] Melvin Fagen, "The Status of Jewish Lawyers in New York City," *Jewish Social Studies* 1, no. 1 (January 1939), 83.
[163] Richard Abel, *American Lawyers*, 44, 50-51.
[164] Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* (Cambridge: Harvard University Press, 1998), 170.
[165] The start of the century witnessed a slow increase in the number of women law students, for one, because most schools precluded them from admission. In 1909, the total number of women law students nationally was 205; in 1920 they numbered 1171. Although "women constituted between 5.5 and 6.2 percent of entrants in New York City during the years 1925 and 1928… [they] then declined steadily to 3.4 percent in 1934." Nevertheless, women's enrollment in law school in the twentieth century did not follow a straight trajectory. Rather, it fluctuated according to external events like war and economic upheaval. Nationally, "women remained between 1 and 3 percent of the profession and less than 5 percent of enrollment in ABA-approved law schools until the 1970s." See Richard Abel, *American Lawyers*, 91.
[166] Virginia Drachman, *Sisters in Law*, 121.
[167] William Wleklinski, "A Centennial History of John Marshall Law School, 1899-1999," (Chicago, IL: 1999), 14.

were both of their sons). Louis Elizabeth Hourwich, the second wife of Isaac Hourwich, was a member of the Illinois bar.[168] A 1918-1919 study of 106 institutions of higher education found that of the total number of Jewish women enrolled in these schools, approximately 14 percent of them studied law (which was around the same percentage as Jewish males). By contrast, only 1.7 percent of non-Jewish females studied law.[169] Another study done in 1939, which examined the New York County lawyers' directory, found that "a slightly larger percentage of Jewish female lawyers" than women lawyers in the profession generally.[170] In 1920, women still comprised less than 1 percent of the country's lawyers, so these statistics obscure just how few women lawyers, Jewish or otherwise, existed at the time.[171] Nevertheless, Jewish women's early twentieth century engagement with the American legal profession paved the way for later generations.[172]

In addition to being inclusive, part-time and night schools were more affordable than their elite counterparts. Until the late twentieth century, little financial aid was available, so even small differences in tuition mattered.[173] In 1902, the University of Pennsylvania Law School demanded the highest tuition of any American law school at the annual rate of $160. Harvard, Yale, Boston University, Columbia University, and University of Chicago law schools cost $150 annually. Eighteen schools, including New York Law School, NYULS, BLS, and the Kent School of Law of New York City charged $100 per year.[174]

---

[168] "Mrs. Isaac A. Hourwich," *New York Times*, February 28, 1947, 23.
[169] "Professional Tendencies among Jewish Students in Colleges, Universities, and Professional Schools," 385.
[170] Melvin Fagen, "The Status of Jewish Lawyers in New York City," 77.
[171] Joyce Antler, *The Journey Home: How Jewish Women Shaped Modern America* (New York: The Free Press, 1997), 182.
[172] By 1985, "the proportions of Jewish women out of all Jewish lawyers… [exceeded] the general percentage of women in the law profession." Moshe Hartman and Harriet Hartman, *Gender Equality and American Jews* (Albany: State University of New York Press, 1996), 42.
[173] Richard Abel, *American Lawyers*, 59.
[174] "Annual Tuition Fees in Law Schools," *American Law School Review* 1, no. 9 (1902-1906), 311-312.

Part-time and night schools were also appealing for Jewish students because they were close to home. A nearby location meant that Jewish students could study while living with their parents and/or husbands and wives. The need to "supplement the family income or prevent burdening the family with educational expenses" often necessitated that Jews work and attend school simultaneously.[175] Morris Hillquit, a labor lawyer and prominent member of the Socialist Party, taught English to immigrants while studying. Louis Waldman, another important early twentieth-century labor lawyer, held a job as an engineer and assemblyman as he completed night classes.[176] Morris Ernst, the co-founder and general counsel of the ACLU from 1929-1954, sold shirts and then furniture during the day and studied law at night.[177] Indeed, before 1939, Jews pursued work-study programs more often than non-Jewish law students.[178]

Both the rise of elite institutions and non-elite institutions facilitated the emergence of Jewish lawyers en masse. Elite institutions contributed to this phenomenon by replacing the apprenticeship system, which relied on the good will of personal connections for legal knowledge, with a formal and institutional method of learning law. For most people, elite schools were inaccessible, but for a lucky few, matriculating at them redirected their lives' trajectories. More crucially for the emergence of Jewish lawyers en masse was the appearance of part-time and night schools. These schools, which were affordable, inclusive,

---

[175] Fagen, "The Status of Jewish Lawyers in New York City," 81.
[176] Waldman, *Labor Lawyer*, 35. Waldman's later decision to enroll in law school occurred in the aftermath of hearing Morris Hillquit speak in the basement of Cooper Union immediately following the Triangle Shirtwaist Fire. It was this event that first introduced him to political activities. "Hillquit's personality and his plea for the victims of the fire aroused my enthusiasm and sent me off on a pursuit of knowledge which has continued ever since." Waldman, *Labor Lawyer*, 39-40.
[177] Alden Whitman, "Morris Ernst, 'Ulysses' Case Lawyer, Dies," *New York Times*, May 23, 1976, 40.
[178] Fagen, "The Status of Jewish Lawyers in New York City," 77.

and near the places that Jews tended to live, educated generations of Jewish lawyers who collectively would go on to transform the American legal system.

The Hierarchy of Legal Practice

The hierarchy of legal education translated into a hierarchy of legal practice. Where individuals attended law school correlated with what kinds of law they practiced, their clients, and even how much money they made. As was the case with their educational patterns, Jewish lawyers' employment habits—the very basic ways they practiced law—set them apart from their non-Jewish counterparts.

As lawyers came to represent corporations in transactional matters, large law firms emerged. Between 1870 and 1895, firms with five or more partners and associates became powerful legal actors.[179] Elihu Root was a senior partner at the three-man firm Root & Clarke in New York. James O. Broadhead, the ABA's first president, was a senior partner at Broadhead, Slayback & Haeusseler in St. Louis.[180] Attending elite institutions offered some Jewish students chances to work at elite firms, a prospect that was otherwise unthinkable. Frankfurter, for example, secured a job at the New York firm Hornblower, Byrne, Miller & Potter. "I'd heard that they had never taken a Jew and wouldn't take a Jew. I decided that that was the office I wanted to get into, not for any reason of truculence, but I was very early infused with, I'd inculcated in me, a very profoundly wise attitude toward the whole fact that I was a Jew, the essence of which is that you should be a biped and walk on two legs that man has," he explained about his position at the elite firm.

---

[179] Wayne Hobson, "Symbol of the New Profession," 5. Still, not all large firms focused on corporate law. See Wayne Hobson, "Symbol of the New Profession," 6.
[180] Wayne Hobson, "Symbols of the New Profession," 8.

Despite Frankfurter's success, Jews joined elite non-Jewish firms on exceedingly rare occasions. Large firms ensured internal homogeneity by using the "Cravath system" to hire new lawyers. The system was named after Paul Cravath, a partner at Cravath, Swaine, and Moore, a corporate New York-based law firm.[181] The system involved hiring only the very top students from very top law schools and relied heavily on individuals' personal associations, wealth, and social status as signifiers of their employability. They employed individuals with "appropriate social, religious, and ethnic credentials."[182] The Cravath system thus served as a continued barrier to entry for non-WASP lawyers. Jews who did not attend elite schools did not secure positions in elite firms and even for Jewish students who did attended elite schools, finding work at large firms proved incredibly difficult.

Instead, most Jewish students who graduated from elite institutions—a majority of whom were either immigrants of Central-European descent or the children and grandchildren of immigrants of Central-European descent—worked for small private Jewish firms. They also frequently sought public office. For example, Max B. May, the grandson of Rabbi Isaac Mayer Wise and HLS graduate, worked as a lawyer and was eventually elected as a county court judge in Cincinnati, Ohio.[183] His brother-in-law, Edwin S. Mack of Milwaukee, Wisconsin, was a corporate lawyer who, along with George P. Miller and Arthur Fairchild, formed a firm in 1906. (Their clients included Oscar Mayer and West Bend Aluminum.)[184] Another relative by marriage, Julian Mack, also graduated from HLS. Mack's career

---

[181] Benjamin H. Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (New York, NY: Oxford University Press, 2015), 24.
[182] Jerold Auerbach, *Unequal Justice*, 21.
[183] "Ex-Judge Max B. May of Cincinnati Dead," *New York Times*, October 4, 1929, 23.
[184] At the end of the twentieth century, Miller, Mack, and Fairchild evolved into the contemporary firm Foley and Lardner, a Milwaukee-based, international firm with over one thousand attorneys and, in the last decade of the twentieth century, Miller, Mack & Fairchild evolved into Foley & Lardner, an international, Milwaukee-based firm, which still exists. See Ellen D. Lengill, *Foley & Lardner: Attorneys at Law, 1842-1992* (Madison, WI: State Historical Society of Wisconsin, 1992).

included working as a law professor at Northwestern University and the University of Chicago; serving as a judge for the United States Court of Appeals for the Seventh, Sixth, and Second Circuits, and helping to create America's first juvenile delinquency court in Chicago, Illinois, (which sat across the street from Jane Addams' Hull House).

By contrast, most Jewish students who went to part-time and night schools worked as solo-practitioners or with their siblings or other Jewish lawyers in small practices. Most of these individuals were Eastern European immigrants or the children of Eastern European immigrants. Often, these partnerships formed and dissolved within a few years. Louis Boudin worked with his partners Sidney Cohn and Hyman Glickstein in New York.[185] The three were labor lawyers. Likewise, when Jacob Hillquit (then Jacob Hillkowitz) graduated from NYULS, he joined forces with his older brother, Morris, to form the firm Hillkowitz & Hillkowitz, which soon thereafter became Hillquit and Hillquit. Like Morris, Jacob was also a Riga-born immigrant who attended NYULS as a night student and was also a staunch socialist.[186] Both brothers were general practitioners; they worked on varied issues including wrongful termination cases and wills and estate issues.[187] Between 1902 and 1907, J. Sidney Bernstein, who served on the New York Supreme Court, was an associate at Hillquit & Hillquit. He too was a NYULS graduate.[188] (During his partnership with Hillquit, Bernstein also represented labor unions. Once he left the firm, however, he became a specialist in corporate law.) Frederick F. Umhey, who eventually became the executive secretary of the

---

[185] "Sidney Cohn, 83, Aid to Union Organizers," *New York Times*, August 27, 1991; "Hyman Glickstein, 91, Dies; Lawyer and Political Leader," *New York Times*, February 17, 1998; in addition, Julia Cohn Algase worked at the firm. See "Julia Cohn Algase, 73, Is Dead; Stage and Labor Lawyer," *New York Times*, April 12, 1975, 25.

[186] "Jacob Hillquit, 70, Lawyer Here, Dies," *New York Times*, February 26, 1939, 39. Jacob also ran for various political positions.

[187] For example, he represented Morris Siselman in a wrongful termination suit in which Siselman was dismissed because he left work early due to illness. See *Morris Siselman v. Harris Cohen*, 25 Misc. 529 (1898).

[188] Justice Bernstein Dies in Home at 66," *New York Times*, December 10, 1943, 27.

International Ladies Garment Workers' Union, began working in Hillquit's office as a teenager and stayed until 1933. From 1907-1919, Hillquit was also partners with his brother-in-law, Alexander Levene. He too was an Eastern European Jewish immigrant.[189]

Even more commonly, Jews who attended part-time and night schools became solo practitioners, meaning that they had "their own clients, paid [t]he[i]r own operating expenses, and [did] not share in the revenue of other lawyers or of a law firm."[190] For example, Charles Recht, a 1910 NYULS graduate who represented conscientious objectors during World War I as the general counsel for the New York Bureau of Legal Advice, began his career working out of the front room of his family's tenement apartment in Manhattan's Yorkvillle.[191] When the family moved to a brownstone on Seventy-Ninth Street, between First and Second Avenues, the first thing they hung was a glass sign with gold letters that read, "Charles Recht, Counselor-At-Law."[192] Before 1939 in New York, two-thirds of Jewish lawyers were single practitioners, which meant that they were much more likely to work alone than their non-Jewish counterparts. A 1938 survey revealed that 61.1 of Jewish lawyers in New York City practiced as solo practitioners and an additional 6.8 percent were solo practitioners with employees; "only 15.1 percent were partners; 14 percent associates; and 3 percent [were] employed by corporations."[193] (This pattern persisted for more than half the century: a 1960 survey of 207 white male lawyers between the ages of thirty and fifty-five years in Detroit, Michigan found that 69 percent of firm lawyers were Protestant while the same percentage of

---

[189] "Alexander Levene, Law Partner of Morris Hillquit, Dead at 82," *New York Times*, February 2, 1967, 35.
[190] Melvin Fagen, "The Status of Jewish Lawyers in New York City," *Jewish Social Studies*, 100.
[191] Unpublished autobiography, box 1, folder 15, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.
[192] Unpublished autobiography, box 1, folder 15, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.
[193] Richard Abel, *American Lawyers*, 86.

solo practitioners were Catholics and Jews.)[194] Being a solo practitioner had a variety of implications for an individual's legal career. At the most basic level, it meant that it was very difficult, if not impossible, to take on large, complex cases; given the time and monetary resources needed to invest in cases that require litigation that can last months if not years, solo practitioners were limited to cases that could be resolved quickly. This reality, then, limited the class of clients that Jewish lawyers could feasibly represent.

Where Jews went to school and their types of practice also fed into differences in Jewish lawyers' incomes and clientele. By and large, Jewish lawyers made less money than their non-Jewish counterparts. A 1937 survey showed that "the income of Jewish lawyers in New York City was significantly lower in 1937 than the income of the entire New York City bar had been four years earlier, in the depths of the Depression."[195] How much a given Jewish lawyer earned depended largely on their clients. That same survey showed that the income of Jewish lawyers fluctuated according to clients, ranging "from $7,604 for the fifty-one who mainly served banks to $1,281 for the thirty-one mainly engaged in criminal defense."[196] Banks and Jewish businesses were, for the most part, represented by Jewish lawyers who attended elite institutions, most of whom were Jews of Central European descent. Brandeis, for example, represented Filene's Sons Co., a bargain basement apparel store in Boston, Massachusetts. By contrast, Jewish lawyers who attended part-time and night schools, most of whom were Jews of Eastern European descent, represented an otherwise underserved population: immigrants, radicals, minority group members, unions, and other non-elite peoples. As the rest of this dissertation shows, much to the dismay of the

[194] Jack Ladinsky, "Careers of Lawyers, Law Practice, and Legal Institutions," *American Sociological Review* 28, no. 1 (February 1963), 48.
[195] Richard Abel, *American Lawyers*, 86.
[196] Richard Abel, *American Lawyers*, 86.

established legal profession and despite little promise of financial remuneration, Jewish lawyers went to court to challenge laws and norms that discriminated against non-wealthy, non-white, non-Protestant, non-male individuals.

Finally, turn-of-the-century Jewish lawyers faced greater rates of unemployment and under-employment than their non-Jewish counterparts. They practiced law part-time more frequently than did non-Jews. Although statistics from the period are not available, a 1897 article written by Max B. May and published in the monthly magazine *The American Jewess*, which urged the Jewish women of America to "seek some other profession to that of law" because it "does not offer such a career," suggests that widespread unemployment was a problem that Jewish lawyers faced since the end of the nineteenth century. Explaining his request further, May pleaded, "Until the legal profession becomes less overcrowded, until it offers greater opportunities to men," Jewish women should refrain from legal practice.[197] Likewise, a study of New York City lawyers in 1939 showed that while of the profession as a whole, 10 percent of lawyers had another job, between 17 and 18 percent of Jewish lawyers had secondary vocations.[198]

Conclusion: Sociological Shifts

Beginning in the final decade of the nineteenth century, Jews became lawyers at a rate that far exceeded their representation in the general population. Changes to the American legal system both facilitated their emergence and then shaped how they engaged with the legal system. Faced with social, institutional, and professional discrimination, many Jewish

[197] Max B. May, "Women and the Law," *The American Jewess* 5, no. 4 (July 1897): 176-177.
[198] Melvin Fagen, "The Status of Jewish Lawyers in New York City," 79.

lawyers did not feel compelled to conform to the model of the ideal lawyer as envisioned by the profession's elites. Instead, they employed their legal knowhow to challenge aspects of the legal system that they understood as flawed. They did this by filling a gap in the marketplace of legal representation: they went to court on behalf of immigrants, radicals, the impoverished, minorities, and others who otherwise had difficulty securing legal help. As Congress and states passed more and more laws and as courts became forums for overseeing the adjudication increasing numbers of issues that affected American's everyday lives, Jewish lawyers diversified the people who comprised the American bar, and they expanded the population of people served by the law. No longer would the American legal system be solely the domain of the white Anglo-Saxon Protestant male lawyer and no longer would American courts serve the interests of wealthy elite white America alone.

[Chapter 2] Jewish Immigration and Naturalization Services

Between 1880 and 1924, some twenty to twenty-five million people became American immigrants.[1] Approximately two million of these were Eastern European Jews. Not coincidentally, between 1882 and 1891, the U.S. Congress passed a series of laws, which incrementally extended the federal government's authority over America's immigration policy, an issue governed by the states for most of the nineteenth century. Fundamentally, U.S. immigration laws represented Americans' interrelated anxieties about sickness, health, class, race, sexual purity, morality, intelligence, and culture. Functionally, the basic purpose of these laws was to distinguish between desirable and undesirable aliens in order to deny admission to the latter.

During the years of mass immigration, U.S. immigration officials rejected and returned relatively few aliens—a total of less than 2 percent annually—to their places of origin.[2] Between 1899 and 1922 of the tens of millions of aliens who came to America to become immigrants, only 321,874 people were denied admission.[3] Of those, only 23,672 were Jews. In short, prior to the implementation of rigid quotas in 1924, most Jews who tried to become American immigrants succeeded.

This outcome was not inevitable. The approximately twenty-four thousand people permanently refused by immigration officials constituted a small fraction of the number of

---

[1] Hasia Diner, *A New Promised Land: A History of Jews in America* (New York, NY: Oxford University Press, 2000), 44.

[2] Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (New York, NY: Oxford University Press, 2010), 212; Lloyd P. Gartner, "Jewish Migrants en Route from Europe to North America: Traditions and Realities," *Jewish History* 1, no. 2 (Fall 1986), 59; Annie Polland and Daniel Soyer, *Emerging Metropolis: New York Jews in the Age of Immigration, 1840-1920* (New York, NY: NYU Press, 2015), 6.

[3] In addition, during that same period, 2,911 Jews were returned to Europe *after* having lived in the country, because they were found to have violated admission standards within the first three-to-five years of settling. See *American Jewish Year Book, 1923-1924*, Vol. 25 (Philadelphia, PA: Jewish Publication Society of America, 1924), 346; Ellis Island records before 1897 were burned in a fire and therefore it is impossible to know how many Jews were excluded before the noted period.

Jewish aliens initially rejected by immigration officers.[4] In total, between 10 and 20 percent of aliens were marked for exclusion, slated for return to their places of origin, before they eventually secured admission.[5] The fact that many more aliens were initially excluded than actually deported raises the question: how did aliens secure admission into the United States after having been deemed ineligible for entry?

For many immigrants, securing the right of entry required legal intervention, which took a variety of forms, but invariably involved challenging the country's admission standards and/or immigration officers' biased implementation of federal law.[6] Sometimes this intervention took the form of aliens appealing their exclusions to a special panel in whichever immigrant-processing center they had landed; other times, this intervention necessitated petitioning the Secretary of the Treasury or the Secretary of Labor and Commerce, the officials who sat at the head of the country's immigration regime.

---

[4] This figure is still substantial: It was equivalent to many Jewish communities in the United States and elsewhere. Further, the number of debarred Jews between 1899 and 1922 alone exceeds by some ten thousand the 13,294 Jews living in Buenos Aires in 1909. It is more than five times the 4,200 Jews who resided in Atlanta in 1910, and it surpasses the twenty thousand Jews of Milwaukee, Wisconsin in 1917-1918. See Ira Rosenwaike, "The Jewish Population of Argentina: Census and Estimates, 1887-1947," *Jewish Social Studies* 22, no. 4 (October 1960), 198; *American Jewish Year Book, 1924-1925*, vol. 27 (Philadelphia, PA: Jewish Publication Society of America, 1925), 386.

[5] Historians have offered varying approximations of what percent of aliens were initially excluded. See Sean D. Cashman, *American in the Age of the Titans: The Progressive Era and World War I* (New York, NY: NYU Press, 1988), 158; Michael J. Churgin, "Immigration Internal Decisionmaking; A View from History" *Texas Law Review* 78, no. 7 (December 2000), 1635, note 12; Vincent J. Cannato, *American Passage: The History of Ellis Island* (New York, NY: Harper Collins, 2009), 7.

[6] The prominence of Jews in the field of immigration law and the need for some Jews to engage in legal confrontations with the state in order to secure admission suggests that immigration was difficult and complex for large numbers of people in ways that American Jewish historians have not appreciated. Most American Jewish historians have understood American immigration laws to be benign, inclusive, and relatively straightforward. Although they characterize immigrants' physical journeys as arduous, and although they present assimilation and acculturation as stressful, American Jewish historians often depict the legal process of immigration as if it were a clerical formality. Yet, immigration was legally fraught. The nebulous language of the country's laws and the biased outlook of most of the officials who enforced them often resulted in arbitrary and inconsistent exclusions. Moreover, federal officers who inspected aliens as they arrived at immigrant processing centers such as Ellis Island had unchecked discretionary authority, as granted by federal law, which meant that most Jews faced the potential of exclusion.

Often but not always, in ways small and large, lawyers played a significant role in securing the admission of excluded aliens. By appealing exclusion orders when admission processes went awry, guiding individuals through the maze-like bureaucracy of the U.S. immigration system, and initiating court cases to dispute the constitutionality of the given reason why an individual was excluded, lawyers helped people who were initially excluded secure admission into America. By ensuring the admission of one individual, they also eased the entry process for subsequent newcomers.[7] In addition, lawyers disrupted efforts to make the process of immigration more burdensome and executed public relations campaigns, which depicted immigrants and "the immigrant experience" more broadly as quintessentially American. While, in the 1940s and 1950s, the historian Oscar Handlin popularized the idea that America was a "nation of immigrants," late nineteenth- and early twentieth-century lawyers articulated this idea in legal terms decades earlier.[8]

Today, the fact that lawyers intervene in immigration cases is somewhat of a foregone conclusion. At the start of the twentieth-century, however the role of lawyers in the field of immigration was unclear. It was only in 1891 that the federal government replaced state authorities as the central authority in immigration policy and thus, as a field of practice,

---

[7] Historians disagree about the effectiveness of legal representation on Ellis Island. "It was the presence of lawyers and their real or imagined ability to take immigrant admission cases to the courts," Dorothee Schneider writes "that had the most profound effect on the negotiations between immigrants and immigration inspectors at the border." See Dorothee Schneider, *Crossing Borders: Migration and Citizenship in the Twentieth Century United States* (Cambridge, MS: Harvard University Press, 2011), 74. By contrast, Louis Anthes writes that, "Hiring a lawyer on Ellis Island was typically not decisive." His assessment, however, is based on a limited number of examples. See Louis Anthes, *Lawyers and Immigrants, 1870-1940: Cultural History* (El Paso, TX: LFB Scholarly Pub. 2003), 68.

[8] On Oscar Handlin see Hans Leaman, "Remembering Egypt: Evangelicals, Conservatism, and Immigration in America," in *History, Memory, and Migration: Perception of the Past and the Politics of Incorporation* ed., Irial Glynn and J. Olaf Kieist (New York, NY: Palgrave Macmillion, 2012), chapter 6, note 3.

immigration law in its modern iteration barely existed.[9] Lawyers who practiced immigration law around the turn of the century were thus pioneers.

For various reasons, many of these late nineteenth- and early twentieth-century pioneers were Jewish. Some Jewish lawyers represented immigrants as private practitioners; excluded aliens' family members living in the United States sometimes hired lawyers to help their relatives navigate exclusion appeal processes.[10] New York lawyer Henry Gottlieb, for example, represented immigrants as a partner at the firm McKinley & Gottlieb.[11] Other Jewish lawyers worked for Jewish organizations such as the Hebrew Sheltering and Immigrant Aid Society (HIAS) and the National Jewish Immigration Council (NJIC), both of which were dedicated to ensuring the safe passage of Jews into the United States. For example, Max J. Kohler served as HIAS' unofficial lead counsel, overseeing the appeals of excluded Jews. Lower East Side attorney Charles Dushkind represented aliens on behalf of the Liberty Immigration Society. Simon Wolf supervised appeals for NJIC.[12] Finally, some Jewish lawyers worked as immigration advocates on behalf of non-Jewish organizations. The Socialist Party activist Charles Recht, for example, worked for the Austrian Society of New York, a Catholic organization founded in 1898 by former Austrians for purposes similar to that of HIAS.[13]

---

[9] Gerald L. Neuman, "The Lost Century of American Immigration Law, 1776-1875," *Columbia Law Review* 93, no. 8 (December 1993): 1833-1901; Lucy E. Salyer, *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill, NC: University of North Carolina Press, 1995), 2-6.
[10] Louis Anthes, "The Island of Duty: The Practice of Immigration Law on Ellis Island," *New York University School of Law Review of Law and Social Change* 24 (1998): 563-600; Louis Anthes, *Lawyers and Immigrants*.
[11] Gottlieb died from a self-inflicted bullet to the head. See "Lawyer Ends His Life," *New York Daily Tribune*, February 19, 1907, 5.
[12] Letter, Abram Elkus to Simon Wolf, March 27, 1911, box 1, folder 2, National Jewish Immigration Council Papers, 1910-1919, I-85, AJHS, Center for Jewish History, New York, NY.
[13] Unpublished manuscript, box 1, folder 1, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY. On the Austrian Society of New York see Thomas F. Meehan, "Emigrant Aid Societies," in Charles G. Herbermann, Edward Pace, Conde B. Pallen, Thomas Shahan, John J.

Why Jewish lawyers practiced immigration law can be explained, in part, by the particularities of late nineteenth- and early twentieth-century American Jewry. First, Jewish lawyers' engagement with immigration law was the result of their collective and personal histories. As noted in Chapter 1, many of the country's newest lawyers, of which Jews were the plurality if not outright majority, were either foreign born or had at least one foreign-born parent. As immigrants or the children of immigrants, Jewish lawyers were empathetic to non-citizen newcomers. Second, turn-of-the-century American Jews conceived of themselves as part of a global Jewish community, which, until 1948, had no independent sovereign authority. This self-conception and geopolitical reality resulted in a historical preference for open immigration policies, a preference that manifested itself in Jews' political and professional activities. Finally, the fact that so many Jews lived in New York explains Jewish lawyers' outsized role in the forging of immigration lawyering. Turn-of-the-century New York City was home to the country's largest Jewish community; by the start of World War I, the city housed nearly 3.5 million Jews; further, between 1892 and 1924, 71.4 percent of all American immigrants entered America through Ellis Island, an island located in the Upper New York Bay, near the southern tip of Manhattan.[14] Geographic proximity pulled Jewish lawyers into the field of immigrant advocacy.

Why turn of the century Jewish lawyers practiced immigration law with such fervency can also be explained by the xenophobic climate of late nineteenth- and early twentieth-century America: Between 1880 and 1924, post-Civil War tumult, economic

---

Wynne, eds., *The Catholic Encyclopedia: An International Work of Reference on the Constitution, Doctrine, Discipline, and History of the Catholic Church* (New York, NY: Robert Appleton Company, 1909), 404.

[14] Statistics based on Annual Reports of the Commissioner General of Immigration. U.S. Commissioner-General of Immigration, *Reports of the Department of Treasury, 1892-1904*, *Reports of the Department of Commerce and Labor, 1913-1914*, quoted from Anne-Emanuelle Birn, "Six Seconds Per Eyelid," 289.

depressions, urbanization, fears about "modernity," and the advent of scientific racism triggered widespread nativism. The passage of the Chinese Exclusion Act in 1882 and its renewal in 1892 and 1902 made the possibility of a legal prohibition on Jewish immigration imaginable. Far from welcoming them, many U.S. officials viewed Jewish aliens unfavorably. In 1891, U.S. Treasury Secretary Charles Foster informed Simon Wolf, a Jewish immigrant from Bavaria, graduate of Ohio Law College, and prominent statesman, that, "Unquestionably a great and sudden influx of expatriated and destitute aliens of any race would be a grave misfortune to any country, and American Hebrews act both patriotically and humanely when they advise Jewish refugees against coming hither."[15] In 1894, lawyers Prescott F. Hall and Charles Warren founded the Immigration Restriction League (IRL). Its members lobbied Congress to pass annual immigration quotas, implement literacy tests for would-be immigrants, and heighten naturalization requirements.[16] Likewise, political and economic upheaval in Eastern Europe and the implementation of immigration restrictions in Great Britain heightened American Jews' sense of urgency to act on behalf of their Jewish brethren.[17] Specific developments such as the 1887 law in Russia, which banned Jewish children from attending public schools and affected the literacy rates of Jewish immigrants, made challenging specific requirements, such as the literacy test, of the utmost

[15] Letter, Charles Foster to Simon Wolf, August 1, 1891, box 1, folder 3, Simon Wolf Papers, P-25, AJHS, Center for Jewish History, New York, NY.
[16] Deirdre Moloney, *National Insecurities: Immigrants and U.S. Deportation Policy Since 1882* (Chapel Hill, NC: University of North Carolina Press, 2012), 123-124.
[17] Great Britain's "Aliens Act of 1905 was the consequence of agitation around Jewish immigration into Britain as well as a broader hostility towards other nationalities including Europeans." See Helena Wray, "The Aliens Act 1905 and the Immigration Dilemma," *Journal of Law and Society* 33, no. 2 (June 2006), 308. Britain's laws restricting Jewish immigrants appeared in South Africa during this period as well. See Reinhard Zimmermann, "The Contributions of Jewish Lawyers to the Administration of Justice in South Africa," *Israel Law Review* 29, no. 1-2 (Winter-Spring 1995), 254-255.

importance.[18] Both national and global events made Jewish lawyers especially aware of the importance of their services.

Identifying precisely how many Jews worked as immigration lawyers is complicated, if not impossible. Until the latter half of the twentieth century, few attorneys who represented immigrants expressly identified as "immigration lawyers" and organizations such as the American Immigration Lawyers Association did not yet exist. Therefore trying to count Jewish immigration lawyers through self-identification is anachronistic.[19] Likewise, just as it is virtually impossible to count the number of Jewish immigration lawyers, it is impossible to calculate the number of non-Jewish immigration attorneys, and therefore trying to deduce what percentage of the whole were Jewish is impossible.[20]

Whatever the exact numbers, evidence suggests that Jewish lawyers were of particular significance to the advent of immigration lawyering. First, Jewish lawyers were involved in securing the admission of a significant number of people who were initially marked for exclusion. A study of 424 appeals of aliens excluded between the summer of 1893 and 1897 found that attorney Henry Gottlieb oversaw eighty-five trials—more than any other attorney from that period—of which he won approximately two-thirds.[21] Members of the National Council of Jewish Women (NCJW), a charitable organization founded in 1893, prevented the deportation of at least 1,327 women between 1908 and 1911.[22] Finally, by

---

[18] Memo, "Special Meeting on Problem of Illiteracy," 1913, box 1, folder 3, National Jewish Immigration Council Papers, 1910-1919, I-85, AJHS, Center for Jewish History, New York, NY.
[19] The American Immigration Lawyers Association came into existence in the 1940s.
[20] Alternatively, an arbitrary definition of "immigration lawyer" would include anyone who worked on at least one exclusion case. (Most Jewish lawyers who worked as immigrant advocates also engaged in various other types of legal work.) Employing this standard, I have identified at least seventy Jewish immigration lawyers who practiced between 1880 and 1924.
[21] Louis Anthes, "The Island of Duty," 590.
[22] Linda G. Kuzmack, *Woman's Cause: The Jewish Woman's Movement in England and the United States, 1881-1933* (Columbus, OH: Ohio State University Press, 1990), 69-74.

1916, between 100,000 and 125,000 Jewish aliens had secured admission through HIAS and Wolf's appeals to executive branch officials.[23] The total number of individuals aided by private practitioners is unknown as is the total number aided by Jewish lawyers who worked for non-Jewish organizations. Nevertheless, given that Jewish lawyers petitioned the government to secure the admission of at minimum 100,000 aliens, it is reasonable to think that they were important to the advent of immigration lawyering.

Another piece of evidence that suggests that Jewish lawyers played an outsized role in the advent of immigration lawyering is that a number of scholars have identified Jewish lawyers and Jewish immigrant organizations as the "most active" in immigrant advocacy. In his study of immigrant appeals on Ellis Island between 1893 and 1897, historian Louis Anthes identified Gottlieb as the attorney with the highest number of cases.[24] Likewise, several historians have identified HIAS as the foremost immigrant advocacy organization engaged in legal battles. Anne-Emmanuelle Birn, for example, describes HIAS as "the most active" of the immigrant societies, which challenged exclusion orders stemming from supposed medical defects.[25] Likewise, legal scholar Michael Churgin writes that HIAS "appears to have been among the most active organizations and regularly helped immigrants process appeals from exclusion decisions of boards of inquiry."[26] Finally, historian Lucy Salyer writes that, "the most active and vocal defenders of non-Chinese immigrants came from the Jewish immigrant aid and philanthropic organizations," such as HIAS, which were

---

[23] Leon Sanders, "Simon Wolf and the Immigrant," *Jewish Immigration Bulletin* 6, no. 12 (December 1916), 8-9, box 2, folder 1, Simon Wolf Papers, P-25, AJHS, Center for Jewish History, New York, NY. See also Esther Panitz, *Simon Wolf: Private Conscience and Public Image* (Cranbury, NJ: Associated University Press, 1987), 176; Lee and Yung, *Angel Island*, 225; Lucy Salyer, *Laws Harsh as Tigers*, 158.
[24] Louis Anthes, "The Island of Duty," 590.
[25] Anne-Emanuelle Birn, "Six Seconds Per Eyelid: The Medical Inspection of Immigrants at Ellis Island, 1892-1914," *Dynamis,* 17 (1997), 308.
[26] Michael J. Churgin, "Lobbying by Jewish Organizations Concerning Immigration: A Historical Study," *University of Detroit Mercy Law Review*, 83 (2005-2006): 947-953.

led by Jewish lawyers such as Simon Wolf and Louis Marshall.[27] "Representatives from the group," Salyer notes, "never missed an opportunity to testify before various congressional committees investigating immigration procedures or changes in the immigration laws."[28]

In addition to contemporary scholars, various late nineteenth- and early twentieth-century officials who oversaw the implementation of U.S. immigration law noted the outsized influence of Jewish lawyers in securing the admission of excluded aliens. As a frustrated commissioner of immigration noted in 1909, "the Hebrews are appearing in court in great numbers."[29] In December 1910, Wolf recalled that Assistant Secretary of Commerce and Labor Benjamin W. Cable told him, "We will have to have an extra Secretary of Commerce and Labor just to attend to cases of Jewish immigrants."[30] Wolf made so many appearances at the Bureau of Immigration, the first federal office charged with overseeing immigration in the United States,[31] that Secretary of Commerce and Labor Charles Nagel, the individual in charge of the federal immigration regime from 1909-1913, commented, "If we ever miss him, we think the world is going to stop. I frequently inquire about eleven o'clock, 'Has Wolf been here?'"[32]

Finally, it is reasonable to think that Jewish lawyers had an exceptional role in the advent of the practice of immigration lawyering because few of their peers were willing to do

---

[27] Lucy Salyer, *Laws Harsh as Tigers*, 158.
[28] Lucy Salyer, *Laws Harsh as Tigers*, 158.
[29] Letter, Williams to Nagel, July 16, 1909, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C..
[30] Letter, Simon Wolf to Max Kohler, December 16, 1910, box 10, folder 2, Max J. Kohler Papers, P-7, AJHS, Center for Jewish History, New York, NY.
[31] In 1903, the Bureau of Immigration became part of the Department of Commerce and Labor; in 1906, it became the Bureau of Immigration and Naturalization; in 1914, it was moved to the Department of Labor and divided into the Bureau of Immigration and the Bureau of Naturalization. See Darrell H. Smith and H. Guy Herring, *The Bureau of Immigration: Its History, Activities, and Organization* (New York, NY: AMS Press, 1974).
[32] Charles Nagel quoted by Michael Churgin, "Lobbying by Jewish Organizations Concerning Immigration: A Historical Study," 948.

this work. Turn-of-the-century immigration lawyering was anything but a politically neutral activity. Immigration, then as now, was a controversial issue. In a time when the majority of Americans viewed immigrants as economically burdensome and racially inferior, lawyers who represented aliens were exceptions in the profession. To practice immigration law meant that you viewed immigrants sympathetically, if not favorably. To practice immigration law also meant that you were willing to challenge the state about its decisions to exclude foreign-born people. To practice immigration law meant that you were willing to work in a field that lacked prestige and did not promise much financial reward.[33] In short, although it is impossible to quantitatively count the number of turn of the century Jewish immigration lawyers and/or measure their significance, it stands to reason that they played an important if not defining role in the advent of immigration law.[34]

The following chapter illuminates how Jewish lawyers engaged with the American immigration regime. It begins by examining Max Kohler's work on Chinese Exclusion Act cases and then explores different approaches that Jewish lawyers took in ensuring the admission of excluded aliens after the passage of the first comprehensive federal immigration law in 1891. It illustrates how, in the process of securing aliens' admission, Jewish lawyers posed challenges to federal officials' interpretation and implementation of the country's immigration laws and how, by intervening on behalf of aliens, Jewish lawyers helped pioneer the practice of immigration law.

---

[33] As one modern observer writes, immigration lawyers "receive little respect within the legal profession." See Leslie C. Levin, "Guardians at the Gate: The Backgrounds, Career Path, and Professional Development of Private US Immigration Lawyers," *Law & Social Inquiry* 2 (Spring 2009), 400.

[34] Recent studies about immigration lawyers also hint at the fact that Jews were important to the early practice of immigration lawyering. See Leslie C. Levin, "Specialty Bars as a Site of Professionalism: The Immigration Bar Example," *University of St. Thomas Law Journal* 8, no. 2 (Winter 2011), 199.

Chinese Exclusion Act Cases

Chinese immigrants, most of whom were men, began arriving en masse in America in the mid-nineteenth century. By 1870, there were approximately 63,000 Chinese laborers in the United States.[35] (Many of these individuals were integral to the construction of the transcontinental railroad.) As the Chinese immigrant population grew, so-called Yellow Peril, a fear that Chinese laborers would somehow overtake the nation, spread among Americans of European-descent and, in response, Congress passed a series of laws that systematically restricted Chinese immigration. In 1875, Congress passed the Page Act, the first federal immigration statute, which outlawed women entering the country for "lewd and immoral purposes" as well as any forced laborers.[36] Next, in 1882, Congress passed the Chinese Exclusion Act, which banned the admission of skilled and unskilled Chinese laborers for the next ten years, permitted the deportation of Chinese identified as illegally present, and outlawed Chinese naturalization.[37] This law, which Congress renewed in 1892 and 1902, empowered federal authorities—immigration officials, prosecutors, and judges—to oversee thousands of deportations. Nearly 4,800 Chinese were deported under the laws between 1902 and 1907 alone.[38] It also normalized targeting specific perceived racial groups for exclusion.[39]

On their face, the Chinese exclusion laws had little direct effect on Jewish immigration. Indirectly, however, they were significant because, before the passage of the

---

[35] See Daniel Rodgers, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882* (New York, NY: Hill and Wang, 2004), 12-16.
[36] Kerry Abrams, "Polygamy, Prostitution, And the Federalization of Immigration Law," *Columbia Law Review* 105, no. 3 (April 2005), 643.
[37] Lucy Salyer, *Laws Harsh As Tigers*, 17. Tien-Lu Li, *Congressional Policy of Chinese Immigration; Or, Legislation Relation to Chinese Immigration to the United States* (Nashville, TN: Publishing House of the Methodist Episcopal Church, 1916), 38. See also Daniel Rodgers, *Guarding the Golden Door*, chapter 1.
[38] Dorothee Schneider, *Crossing Borders*, 129.
[39] Lucy Salyer, *Laws Harsh As Tigers*, 7.

1891 general immigration law, they revealed some of the discriminatory aspects of the American immigration system to late nineteenth-century Jewish lawyers. Further, cases precipitated by these laws created important precedent, which Jewish lawyers later drew on in cases involving non-Chinese aliens.

One lawyer who became well versed in the Chinese exclusion laws was Max Kohler. Kohler was not an immigrant, but he was certainly accustomed to being a newcomer. The son of Kaufmann Kohler and the grandson of David Einhorn, two prominent American Reform rabbis, Max Kohler was born May 22, 1871, in Detroit, Michigan, and from that moment until he reached adulthood, Kohler and his family moved frequently.[40] Six months after his birth, the family relocated to Chicago, where the senior Kohler became a rabbi at Sinai Congregation. Seven years after that, the family moved to New York, where the elder Kohler succeeded Einhorn, his father-in-law, as the chief rabbi of Temple Beth El.[41] In 1890, Max Kohler earned a Bachelor of Science from CCNY and a year later he completed a Master's of Arts in political science. In 1893, Kohler earned a Bachelor of Laws and was admitted to the bar.[42]

Kohler began his career working on cases stemming from the Chinese exclusion laws. Over the course of his career, Kohler implemented laws that excluded Chinese laborers, defended Chinese from the exclusion laws, and then became the chief legal counsel for HIAS, the leading immigrant advocacy organization in early twentieth-century America. His

---

[40] On David Einhorn, see Jonathan Sarna, *American Judaism: A History* (New Haven, CT: Yale University Press, 2004), 98-101. On Kaufman Kohler, see Sarna, *America Judaism*, 147-151.
[41] In 1903, Kaufmann Kohler left for Cincinnati, Ohio, where he replaced Isaac M. Wise, as the president of Hebrew Union College. See Max J. Kohler, "Biographical Sketch of Kaufmann Kohler," in *Studies in Jewish Literature* (Berlin, Germany: Georg Reimer Publisher, 1913), 1-10.
[42] Irving Lehman, "Max J. Kohler," *American Jewish Year Book* 37 (1935): 20-25.

work on behalf of Chinese laborers prepared him for his future work on behalf of Jewish aliens.

Wallace MacFarlane, a well-connected United States district attorney appointed by President Cleveland, gave Kohler his first job out of law school. MacFarlane graduated from Harvard College in 1879 and then studied at Columbia Law School. He was admitted to the New York bar in 1881.[43] Beginning in December of 1894, Kohler worked as MacFarlane's junior assistant and soon thereafter became an assistant U.S. district attorney for the Southern District of New York (SDNY), one of the country's oldest federal courts.[44] Kohler worked as a district court prosecutor from late 1894 through 1898.[45] During these years, Kohler oversaw cases involving issues ranging from the government's right to restrict private businesses from killing Alaskan seals to whether sea captains were guilty of aiding Cuba during the Spanish-American War to questions of libel by the press.[46] But what Kohler remembered from his time working in the U.S. district attorney's office was that he gained "considerable experience" executing the country's immigration laws, "particularly our Chinese Exclusion Laws."[47]

---

[43] "Wallace MacFarlane," *New York Times*, March 10, 1894.
[44] Theodore Roosevelt was among MacFarlane's clients. See "To Prosecute Canal Frauds," *New York Times*, January 25, 1899 and "An Assistant United States Attorney," *New York Times*, December 8, 1895.
[45] Through the final decades of the nineteenth century, federal district courts, including that of the southern district, primarily heard admiralty cases. See H. Paul Burak, *History of the United States District Court for the Southern District of New York* (New York, NY: Federal Bar Association, 1962), 4.
[46] "Legal Intelligence," *New York Daily Tribune,* February 24, 1897, 10. "The district court in New York received 165 habeas corpus petitions from immigrants between 1891 and 1906; it found in favor of the immigrant only in 16 cases." Lucy Salyer, *Laws Harsh As Tigers*, 102; "The Seal Fisheries Case," *New York Times*, February 5, 1896; "Trial of J.D. Hart and Others," *New York Times*, June 30, 1896; "The Dana Libel Case," *New York Times*, April 7, 1895; Kohler also represented the state in a case against Samuel Untermyer in a dispute revolving around the assessment of an import duty owed to the state. See "Trouble Over an Importation," *New York Times*, April 26, 1896.
[47] Max J. Kohler, *Immigration and Aliens in the United States: Studies of American Immigration Laws and the Legal Status of Aliens in the United States* (New York, NY: Bloch Publishing Company, 1936), preface.

Because courts were primed to enforce laws that excluded Chinese defendants, as a prosecutor, Kohler's main job was to argue in favor of deporting the people he was prosecuting, which, given the anti-Chinese political climate, most courts were inclined to do anyway. For example, in February 1897, Kohler prosecuted Li Foon under the 1884 amendment to the Chinese Exclusion Act. Li Foon was the thirteen-year-old child of a Chinese merchant and a legal U.S. resident. He had entered the country in Malone, New York, which was a common site of illegal entry for Chinese aliens on the East Coast at the turn of the century.[48] The Chinese Exclusion Act of 1882 stipulated that so long as Chinese people living in the United States acquired a special certificate before departing from the country, they could come and go freely. The law also said that Chinese peoples exempt from the act— short-term travelers, merchants, students, and teachers—needed "Section 6" certificates. These certificates were issued by the Chinese government. An 1884 amendment to the law made "the certificate the sole evidence of right of entry."[49] Li Foon had arrived without a certificate of residence as required by the Act of 1884.[50] It was for this reason the immigration inspector ordered him deported, despite his parents' status as legal immigrants.

To prevent Li Foon's deportation, his lawyer, William C. Beecher, petitioned Judge Emile H. Lacombe for a writ of *habeas corpus*. Beecher was the son of famed Congregationalist preacher Henry Ward Beecher, the nephew of writer Harriet Beecher

---

[48] "To Stop Chinese Influx," *New York Times*, April 30, 1903; "'In Ways That Are Dark and Tricks That Are Vain': The Case of Sum Jim Illustrates the Subtle Methods by Which the Chinamen Tries to Elude the Laws," *New York Times*, September 12, 1909.
[49] Lucy Salyer, *Laws Harsh As Tigers*, 19-20; Li, *Congressional Policy of Chinese Immigration*, 48.
[50] Section 12 asserted that, "Any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country whence he came." See *In re Li Foon*, 80 F. 881 (C.C.S.D.N.Y) (1897).

Stowe, and an ardent opponent of the Chinese exclusion laws.[51] Lawyers who represented Chinese defendants charged with illegal entry under the Chinese exclusion laws relied on these writs because, by asking the court to require that their clients appear in court, they delayed (and ideally ultimately prevented) their clients from being sent to their presumed place of origin. Courts sometimes granted these writs because, at the turn of the century, administrative officials and judicial figures were engaged in a power struggle over which branch of government ought to oversee immigration law. Judges felt that they should have the final word in immigration matters; burgeoning bureaucracies felt likewise.[52] Granting writs symbolized an assertion of power by judicial figures.

In his defense of Li Foon, Beecher explained that the boy's father was a legal U.S. resident and therefore Li Foon, a minor, did not need a certificate for admission. Further, Beecher claimed, the decision of the deputy collector in Malone, who had granted Li Foon entry, was *res judicata*, a matter already judged and thus ineligible for reconsideration. Judge Lacombe disagreed with both claims.[53] Regarding the supposed finality of the collector's decision, Lacombe pointed to the Act of 1894, which stipulated that the "question of aliens' right to enter is subject re-examination by the courts." Asserting the court's authority over the executive branch, Lacombe explained, "The courts will adjudicate upon the question of [the defendant's] right to enter, when that question comes before them, unhampered by any

---

[51] Henry Ward Beecher was also a public defender of Jews' civil rights. See Henry Ward Beecher, "Jew and Gentile," *The Menorah* 38, no. 3 (March 1905) (Reprinted from sermon delivered June 24, 1877); George Marsden, *Fundamentalism in American Culture* 2nd ed. (New York, NY: Oxford University Press, 2006), 22-27.
[52] At least in West Coast courts, these cases were often successful. See Lucy Salyer, *Laws Harsh as Tigers*, 35, 107.
[53] Emile H. Lacombe was a judge on the U.S. Circuit Court for the Second Circuit from 1888-1911 and a sat on the U.S. Court of Appeals for the Second Circuit from 1891-1916. He was appointed to the SDNY when Congress realized the court's caseload was too overwhelming. See John D. Winter and Richard Maidman, "Retelling the History of the United States District Court for the Southern District of New York," *NY Litigator* 17, no. 1 (Summer 2012), 11.

decision of the executive officer."[54] In addition to dismissing Beecher's assertion that the issue was already settled, Lacombe decided that the immigration commissioner was right to deport Li Foon. Li Foon did not possess the requisite certificate and therefore he could not enter. Lacombe dismissed Beecher's petition and confirmed the commissioner's decision.

In 1898, Kohler faced Beecher again when he prosecuted Charles H. Leung. In this case and another that Kohler oversaw shortly after, he relied on some of the most expressly racist immigration laws in order to prevail. In 1892 and 1893, Congress passed the Geary Act and the McCreary Act, respectively.[55] Among other things, the Geary Act extended the Chinese Exclusion Act ten additional years and articulated specific requirements for individuals who claimed to have misplaced their Section 6 certificates.[56] This law imposed an affirmative duty on Chinese residents to prove their right to remain in the country. It said that unless an individual could prove that they were involved in an accident, had been sick, or show some "other unavoidable cause" that prevented him or her from obtaining a certificate of residency, to remain in the country, that person needed to show "by at least one credible white witness" that he or she was already a U.S. resident prior to the passage of the law. Those who were unable to produce a white witness would be deported. The McCreary Amendment, passed by Congress the following year, demanded that "*two* credible witnesses other than Chinese" testify on behalf of the individual in question. It also refused bail to those ordered deported, required photographs on residency certificates, and narrowed the

---

[54] *In re Li Foon*, 80 F. 881 (S. D. N. Y. 1897).
[55] *In re Leung*, 86 Fed. 393 (1898); "Decisions in Chinese Cases," *New York Times*, April 9, 1898, 12; "Colleagues For Justice: One Hundred Years of United States Court of Appeals for the Second Circuit," *St. John's Law Review* 65, no. 3 (1991): 938-963.
[56] Geary Act, 27 Stat. 25 (1892).

definition of merchant, now excluding those engaged in mining, fishing, laundry, and peddling, thereby further restricting Chinese eligible for entry.

Kohler used these laws to prosecute Leung, who had come to the U.S. from China in 1883. Intending to visit China, Leung obtained a certificate of residency stating that he was a missionary in 1896. Missionaries, like students, teachers, and travelers, were granted special immigration privileges. After securing a certificate, Leung then went to China but, four months later, when he returned, the customs collector in Malone invalidated the certificate. The Chinese inspector for the Port of New York, John T. Scharf—a lawyer, historian and veteran of the Confederate Army—then identified Leung's presence as illegal.[57] Leung was next brought to U.S. Commissioner John A. Shields. Although Leung produced two white witnesses who testified on his behalf, Shields affirmed Leung's deportation because, in Shields' view, Leung was a laundryman, which, under the McCreary Act, made him a laborer, not a missionary or a merchant.[58] The court agreed with Shield's assessment. Leung, Judge Shipman maintained, "was an active, voluntary, unpaid teacher in a Sunday school, and he actively conversed with his countrymen upon religious subjects, but his business and his chief occupation was that of a laundryman." Shipman affirmed Leung's deportation orders. [59]

In early 1897, Kohler also oversaw the deportation of Li Sing, a Chinese man living in Newark, New Jersey. Sing had visited China in June of 1893. Before leaving he obtained the needed certificate from the Chinese consulate, which identified Sing as a "wholesale grocer," thereby entitling him to reenter the United States. When Sing returned from China in

[57] Scharf served as inspector from 1893 to October 1897. See "Col. J. T. Scharf Dead," *New York Times*, March 1, 1898; "Case of J. Thomas Scharf," *New York* Times, October 19, 1897.
[58] "John A. Shields Stricken," *New York Times*, June 30, 1914, 1.
[59] *In re Leung*, 86 Fed. 393 (S. D. N. Y. 1898).

late June of 1896, the American consular in Hong Kong approved Sing's certificate for reentry upon return. Likewise, when Sing arrived in the United States on August 28 the customs collector in Malone granted Sing admission. About five months later, however, on January 6, 1897, the Chinese Inspector for the Port of New York wrote to Commissioner Shields, reporting that Sing had entered the country illegally and that Sing was a laborer, not a merchant. Shields therefore brought Sing in for a hearing.

At Sing's hearing, despite Kohler's objection, Shields permitted Sing to offer the testimony of a Chinese witness, but nonetheless ordered that Sing be deported. Sing then appealed. In court, Beecher argued that because Malone customs officials had permitted Sing to reenter the country, changing that decision now was invalid. Beecher also insisted that Sing *was* in fact a merchant. Regardless of Beecher's protests, ultimately, Shields concluded that Sing was indeed a laborer and ordered his deportation. [60]

Kohler likely had little autonomy deciding what cases he prosecuted as a junior assistant in the district attorney's office. Two years after leaving his post, he wrote that he had been "compelled by circumstances" to represent the state against Chinese defendants.[61] Still, two pieces of evidence suggest that Kohler was not as conflicted about these cases as he remembered. First, on September 9, 1896, an immigration inspector arrested seven Chinese men in New York's Grand Central Station. Two of the seven men claimed to be American citizens and the others told the commissioner before whom they were arraigned that they were unsure why they had been arrested. When the men requested release pending bail, Kohler went on record saying he believed the immigration commissioner would be wrong to

[60] The Circuit Court affirmed the lower court's ruling in April of 1898. The case then went to the Supreme Court, but Kohler did not appear there. See *Li Sing v U.S.*, 180 U.S. 486 (1901).
[61] Max J. Kohler, "Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?" *New York Times*, November 24, 1901.

grant their request. Legally, Kohler was wrong and eventually the men were released after depositing a payment as insurance that they would return to the court when summoned. Nevertheless, Kohler's instinctive remark that the men should be denied the option of posting bail and thus denied their physical freedom was hardly a display of compassion or concern.[62] Kohler's assertion that a Chinese defendant was not entitled to bail revealed at the very least a lack of empathy for individuals arrested for supposedly violating the exclusion acts.

Likewise, in September of 1899, Kohler published an article in the *Albany Law Journal* entitled, "Admissibility of Evidence Illegally Obtained," in which he criticized a recent federal ruling in favor of the Chinese defendant.[63] In *U.S. v. Wong Quong Wong*, custom's officials seized one of Mr. Wong's letters and, on the basis of that letter, an immigration commissioner decided to deport him. Wong appealed the ruling and U.S. District Court Judge Hoyt H. Wheeler reversed the deportation order, reasoning that the evidence used to support the decision to deport Mr. Wong was illegally obtained. The customs officials taking of Wong's letter violated the Fourth and Fifth Amendments, which protected individuals from "unreasonable searches and seizures," and relieved people of the requirement of testifying against themselves in criminal trials, respectively. This seizure was especially problematic because Wong was most likely an American. Even if Wong was not a citizen, "aliens, while here, are entitled to the benefit of these guarantees, which are not confined to citizens, as affecting liberties and property," Wheeler noted. Although Wheeler's ruling found in favor of Wong and expanded the rights of those being criminally prosecuted,

---

[62] "Seven Chinese Prisoners," *New York Times*, September 10, 1896, 9.
[63] *U.S. v. Wong Quong Wong*, 94 F. 832 (Dist. Ct. 1899). James L. Martin represented the government in this case and Fuller C. Smith represented the defendants. The case was heard alongside *US. v Wong Chin Shuen*, 94 F. 832 (Dist. Ct. 1899), the case of Wong Quong Wong's brother.

Kohler disagreed with the decision to the extent that he published an article criticizing it.[64] "It seems that Judge Wheeler has gone beyond the authority of the precedents he relies on," he contended. Kohler's article primarily focused on the uncertainty the decision produced in the realm of criminal cases. Nevertheless, while not commenting on the Chinese exclusion laws specifically, Kohler had little reservation about using Wong's predicament as a vehicle to express his views about a tangential topic, views that, if accepted, would result in Wong's deportation.

In 1898, Wallace Macfarlane left the district attorney's office.[65] For the next year, Kohler served as a Special United States District Attorney and then he too left. Between 1899 and 1900, he traveled abroad and he completed an essay, which compared laws in various countries and respective criminal appeals processes.[66] (The research he completed in the course of writing this essay likely inspired his commentary on *Quong.*) In 1900, Kohler opened a private practice with Benno Lewinson, who, for many years, served as legal counsel to Temple Beth-El, where both Kohler's father and grandfather were pulpit rabbis, and with Jacob Schattman. Lewinson, the oldest of the three, was born in Germany in 1854. He came to America in 1866, earned a B.A. from City College in 1873; a Master of Science in 1875; and a Bachelor of Laws from Columbia College Law School in 1877, where he was a classmate of famed constitutional and civil rights lawyer Louis Marshall.[67] Schattman, the

---

[64] *Quong Wong* offered the first articulation of judicial protection and prevention of illegal searches and seizures. See "Immigration Raids: Search and Seizure," *Clearinghouse Review* 18, no. 9 (January 1985), 1047.
[65] "W. Macfarlane, Noted Lawyer, Dies," *New York Times*, January 20, 1928.
[66] The research he completed in the course of writing this essay likely inspired his commentary on *Quong.* Max J. Kohler, "Methods of Review in Criminal Cases in the United States," *The Necessity for Criminal Appeal as Illustrated by the Maybrick Case and the Jurisprudence of Various* Countries*,* ed. Joseph H. Levy, (London: P.S. King and Son, 1899), 501-538.
[67] Lewinson litigated corporate, contract, and trademark cases. He was admitted to the New York bar in 1877, helped found the New York County Lawyers' Association, and had deep ties to Tammany Hall. See "Benno Lewinson," *The Tammany Times: A Journal of Democracy*, 20, no. 21 (September 24, 1904), 7; "Benno

youngest of the trio, was also a Columbia graduate and a classmate of Max's brother, Edgar J. Kohler, in law school.[68] The three shared an office on Nassau Street in Lower Manhattan.

In what at first appears like a sudden reversal, at Lewison, Kohler & Schattman, Kohler began defending people threatened with deportation under the Chinese exclusion laws. In the last two decades of the nineteenth century, annually, courts adjudicated the cases of a few thousand people of Chinese descent who were accused of entering the country illegally.[69] Kohler said little about his shifting role, simply stating years later, "After my term of office expired, I frequently represented aliens and alleged aliens in our courts, from the United States Supreme Court down."[70] In many ways, his transition to defense work was only logical. Having spent a few years prosecuting individuals with these laws, he was well versed in the Chinese Exclusion Act and had a wealth of knowledge about cases related to it. Further, his new role as an advocate for Chinese immigrants reflected broader trends in

---

Lewinson Dies in 81st Year," *New York Times*, February 17, 1935. In 1913, Jacob Panken and Lewinson served on a Committee for the New York County Lawyers' Association together. In 1927 Lewinson served on a committee to help reelect Jacob Panken to the bench. See "La Follette Ex-Aide Heads Panken Group," *New York Times*, September 20, 1927. At some point after Kohler left the firm, one of Lewinson's daughters, Dr. Ruth Lewinson, became his partner. See "At 90, She Advises Professional Trio," *New York Times*, December 27, 1948; Matthew Silver, *Louis Marshall and the Rise of Jewish Ethnicity in America* (Syracuse, NY: Syracuse University Press, 2013); Benno Lewinson, "The Late Louis Marshall," *New York Times*, September 13, 1929, 23.

[68] *Columbia College in the City of New York Catalogue 1894-1895* (New York, NY: Columbia College, 1897), 158. Edgar was also a lawyer. In 1893, he graduated from City College and in 1896 he graduated from Columbia Law School. For some time, Edgar and Max practiced together under the firm name "Kohler and Kohler." In 1908, the two were in practice together. See Letter, Max Kohler to Nathan Bijur, July 14, 1908, Baron de Hirsch Fund Records; I-80; box 10, AJHS, Center for Jewish History, New York, NY; From 1918-1930, Edgar Kohler served as an assistant corporation counsel for the City of New York. See "Edgar J. Kohler, 66, Attorney 45 Years," *New York Times*, October 11, 1941. He was a public advocate for women's suffrage. See Edgar J. Kohler, "Women's Fight Won Here 90 Years Ago," *New York Times*, April 16, 1911.

[69] Claudia Sadowski-Smith, "Unskilled Labor Migration and the Illegality Spiral: Chinese, European, and Mexican Indocumentados in the United States, 1882-2007," *American Quarterly* 60, no. 3 (September 2008), 78.

[70] Max J. Kohler, *Immigration and Aliens in the United States: Studies of American Immigration Laws and the Legal Status of Aliens in the United States* (New York, NY: Bloch Publishing Company, 1936), preface.

Jewish-Chinese relations in America.[71] As anti-immigrant Americans began to view Chinese and Jews as being similar if not analogous, the immigrant groups became political allies.[72]

Kohler made his public debut as an immigration lawyer in May of 1901 when he and his partner, Lewinson, defended Li Mai, Do Chin Duck, Do Gee Ling, Lung Look, and Wung Sing, all of whom had been arrested in Plattsburgh, Pennsylvania for unlawfully entering the country. The men had been imprisoned for months before securing access to legal counsel, a period during which some of the men who were arrested alongside them died. Some four months after their arrests in February 1901, U.S. Commissioner William S. Woodward deported them. According to Kohler, however, the men were wealthy merchants and, more importantly, they were American citizens.[73]

Witnessing the deportation of people whom he believed were American citizens deeply upset Kohler. He referenced the incident in a two-part editorial that was published in the *New York Times* in late November 1901. The article, "Our Chinese Exclusion Laws:

---

[71] Michael Berkowitz, "Immigration Restriction and the Emergence of American-Jewish Politics in the United States," in A. Fahrmeir, O. Faron, P. Weil, eds., *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (New York: Berghahn, 2005); Rudolf Glanz, "Jews and Chinese in America," *Jewish Social Studies* 16, no. 3 (July 1954): 219-234. (Glanz finds that Jews on the Pacific Coast embraced anti-Chinese rhetoric whereas the rest of the American Jewish population expressed anti-anti-Chinese views.); Scott D. Seligman, "The Night New York's Chinese Went Out for Jews: How A 1903 Chinese Fundraiser for Pogrom Victims United Two Persecuted Peoples," *Chinese Heritage Quarterly* no. 27, (September. 2011). Available online: http://www.chinaheritagequarterly.org/tien-hsia.php?searchterm=027_jews.inc&issue=027 . Last accessed May 1, 2016.

[72] The Chinese Question," *The Jewish Messenger*, March 12, 1886, 2; See also speeches and public talks by Wu Ting Fang, was a popular diplomat who traveled the country as a representative of the Chinese government. Ting-Fang graduated from the University College London. In December 9, 1900, Ting-Fang spoke alongside Felix Adler at a gathering of the Society for Ethical Culture held in Carnegie Hall in New York City. See "Christ and Confucius," *New York Times*, December 10, 1900. See also Wu Ting-Fang as quoted in "The Golden Rule and the Abolition of Racial Prejudice," *The Literary Digest* 22 no. 15, (January1901): 449-450; "To Eliminate Race Prejudice," *Desert Evening News*, March 27, 1901, 8; "Brotherhood, with the Golden Rule as Guide," *New York Times*, March 27, 1901; "A Golden Rule Meeting," *New York Times*, March 23, 1901; "Mr. Wu Friend of the Jews," *New York Times*, July 22, 1901, 1; *The Menorah* (1901): 160-161. On Fang, see Linda Pomerantz-Zhang, *Wu Ting-Fang (1842-1922): Reform and Modernization in Modern Chinese History* (Hong Kong University Press, 1992).

[73] "Five Chinamen Deported," *New York Times*, May 9, 1901; "Deporting Five Chinese," *Boston Evening Transcript*, May 9, 1901, 9; "The Chinese Cases," *The Plattsburgh Sentinel*, February 8, 1901, 1.

Should They Not Be Modified or Repealed?," was meant to prevent the renewal of the Chinese Exclusion Act, which Congress was set to vote on the following May[74]

Explaining why the Chinese exclusion laws should be abolished, Kohler employed themes of democracy, ethics, and economic prudence. He presented his claims as an objective legal expert, but his words were nothing less than radical. Kohler claimed that the exclusion laws violated the Constitution and "our dearest Anglo-Saxon heritage from the centuries past." If the country felt it necessary to restrict foreign labor, it should use "general legislation," not laws excluding specific classes, which contradicted "fundamental principles of democratic government." Kohler also shed light on common issues that arose in the implementation of the exclusion laws, including the logistical hardships of obtaining residency certificates. He condemned the Geary and McCreary Acts' witness requirements, explaining that Chinese merchants had difficulty "[securing] the evidence of credible non-Chinese witnesses," because of language barriers and social discrimination. Likewise, he criticized laws requiring Chinese merchants to hold a "business in their name," a requirement that at certain times meant merely Chinese-owned businesses and at other times meant, according to the U.S. Attorney General, that the Chinese owner's name needed literally to be in the business's name. This requirement that ignored the reality that "nearly all Chinese merchants do business under corporate 'fancy' names," because, as "in the nature of corporations," any number of co-partners own these businesses, making the use of a single name as its corporate title unreasonable. Kohler concluded the first part of his editorial by juxtaposing Jewish- and Chinese- American history. "Careful study," Kohler asserted,

---

[74] Max J. Kohler, "Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?" *New York Times*, November 24, 1901.

showed that "the system devised for the expulsion of the Moors from Spain and of the Jews from Russia in our day… are gentle and humane compared with the barbarities of our existing 'American methods' as applied to the Chinese." Conflating Biblical Jewry's exodus from Egypt and the plight of Chinese laborers' treatment in the United States, he wrote, "Chinese merchants may well believe that something in the nature of 'forty years wandering in the desert' is before them before they can re-enter this 'promised land.'"

The following day, November 25, Kohler continued his plea. First, engaging in a sort of Chinese apologetics, Kohler identified Chinese laborers as "honest, frugal, law-abiding, and amiable."[75] Addressing the capacity of Chinese people to become American, Kohler emphasized their "willing[ness] to assimilate." Deploying an argument that he would later use in his defense of Eastern European Jewish aliens, he claimed that, contrary to common assumptions, Chinese laborers strengthened the economy. By contrast, efforts to stop Chinese immigration were "expensive and wasteful." Kohler also cited recent history to make a legal point that, at the time, was novel. "Our Civil War, it may reasonably be stated, went far to establish the fact that statements in our Declaration of Independence regarding 'all men being created free and equal' were no mere glittering generalities but an essential foundation of our democracy," he explained. He then invoked the Fourteenth Amendment—which expanded citizenship to all people born in the United States, and guarantees citizens' rights to due process and equal protection under the law—as a legal shield for Americans of Chinese descent who were being wrongfully deported. While perhaps an obvious use of the Fourteenth Amendment for modern readers, at the time, Courts rarely used to protect non-

[75] Max J. Kohler, "Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?," *New York Times*, November 25, 1901.

white individuals. In the immediate aftermath of the Civil War, in the first ten years after its passage, the U.S. Supreme Court applied it in only three cases and to only forty-six in the next decade.[76] Later, courts used it primarily to protect industrialists' property rights.[77]

Finally, Kohler, tacitly acknowledging that Congress was likely going to renew the law, made some recommendations about how it could be improved. Congress needed to create procedural safeguards to protect the principles of due process. There needed to be judicial review of deportation cases. If Congress continued to demand that Chinese obtain residency certificates, "reasonable opportunities" ought to be granted for individuals to find lost or damaged certificates. Lastly, he called for the country to naturalize permanent Chinese residents (which, among other things, would give them voting rights).

In addition to constituting a complete reversal—Kohler had, after all, just spent years prosecuting people under these laws—Kohler's article was remarkable because, by publishing it, he publicly positioned himself in opposition not only with the majority of Americans and legal professionals, but with the immigration regime itself. Three days before he published his editorial, approximately three thousand local and state politicians had gathered at the Chinese Exclusion Convention in San Francisco, California. Calling the gathering to order, Mayor James D. Phelan told the delegates, "Only those who are ignorant of its true meaning and significance would hesitate to endorse the position which California has always taken as the steadfast and patriotic opponent of the further immigration of Chinese coolies."[78] Kohler, by contrast, identified the Chinese as a "persecuted" people, the

---

[76] Lawrence Friedman, *A History of American Law* (New York, NY: Touchstone, 1973), 259.
[77] Bernard Schwartz, *Main Currents in American Legal Thought* (Durham, NC: Carolina Academic Press, 1993), 291.
[78] Proceedings and List of Delegates. California Chinese Exclusion Convention. Held at Metropolitan Temple, San Francisco, November 21 and 22, 1901, 25.

victims of systemic discrimination by the Treasury Department (which, at the time, oversaw the implementation of the exclusion laws) and the courts. Not mincing his words, Kohler claimed the laws had constructed "the most un-American, in-human, barbarous, oppressive system of procedure that can be encountered in any civilized land to-day for the treatment of fellow-men."[79]

In 1902, Kohler made his first appearance before the U.S. Supreme Court on behalf of Chinese defendants.[80] In the Old Senate Chambers, which now housed the Supreme Court, Kohler argued three cases, each of which dealt with different aspects of the exclusion laws. The first, *U.S. v. Lee Yen Tai*, addressed a theoretical conflict between a treaty and federal statute. Specifically, the case asked whether the December 8, 1894 treaty between America and China annulled Section 12 of the Chinese Exclusion Act, which made it unlawful for Chinese people to enter the United States without the requisite certificate and permitted the deportation of any Chinese person found without such a certificate.[81]

The case arose when, on October 6, 1900, a man named Lee Yen Tai arrived in the United States from China without a certificate for entry. Two days later, the U.S. Commissioner of the Northern District issued a warrant for Tai's arrest, brought him in for a hearing, determined his presence was illegal, and issued a warrant for his deportation. Tai was then taken into custody. In response Kohler filed a petition for habeas corpus. Kohler asserted that Lee Yen Tai was a merchant, not a laborer as claimed by the commissioner, and that Tai had a $1,000 stake in a capital firm. Further, he claimed, the commissioner lacked

---

[79] Max J. Kohler, "Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?" *New York Times*, November 24, 1901.
[80] *U.S. v Lee Yen Tai*, 185 U.S. 213 (1902).
[81] "Is §12 of 'An Act to Execute Certain Treaty Stipulations Relating to the Chinese, Approved May 6, 1882, as amended by §3 of the mandatory act of July 5, 1884, repealed by the treaty or convention with China of December 8, 1894?" Quoted from *Chin Bak Kan v U.S.*, 186 U.S. 193 (1902).

the jurisdiction to deport Tai because of the 1894 treaty between the United States and China did not mention deportation. The judge agreed and vacated the charges against Tai, admitting him into the country pending bail. On January 14, 1902, the Circuit Court of Appeals for the Second Circuit took up the case only to send it to the U.S. Supreme Court.

The treaty upon which Kohler based his argument was one of a long list of treaties between the United States and China about immigration. Before 1875, treaties between the two sovereign powers granted "certain privileges to citizens of either country residing in the other," including privileges concerning immigration. The Angell Treaty of 1880, which limited the number of permissible Chinese laborers in the United States, was the basis for the 1882 exclusion law. In March of 1894, the United States and China signed another treaty, which was to be effective for the next ten years, extending the 1880 agreement. According to the terms of the treaty, the two countries agreed to prohibit Chinese laborers from coming to America, excepting those individuals who already had a wife, children, or parents in the country and those owned property of $1000 or more.

On March 13 and 14, 1902, Kohler faced an incomplete Supreme Court. Sitting with his opposing counsel was Assistant Attorney General Henry M. Hoyt, Jr.[82] Just a year earlier, Hoyt argued *Ling Sing v. U.S.*, a case for which Kohler had been the original prosecutor; now they stood on opposing sides of the courtroom and of the law.[83] In *Lee Yen Tai*, Kohler again argued that the 1894 treaty never mentioned deportation and therefore that such a procedure was illegal. The Justices disagreed. Delivering the Court's opinion, Justice Harlan explained that Kohler's view that the 1894 treaty somehow trumped the 1882 law was wrong. Given

[82] Justice Horace Gray was absent; Henry Martyn Hoyt, Jr. was the Solicitor General of the United States from 1903-1909.
[83] *Ling Sing v. U.S.*, 180 U.S. 486 (1901).

the 1894 treaty had been co-authored by Chinese and American officials, whose stated objectives were to deter Chinese laborers from entering the country, the Court reasoned that it should be careful to avoid "[adopting] any construction of the treaty that would tend to defeat the object each had in view." Because interpreting the 1894 treaty as eclipsing the 1882 law would defeat the stated goals of said governments, the Court rejected Kohler's claims.[84] Kohler also lost the other two cases that he argued that day, *Chin Bak Kan v. United States* and *Chin Ying v. United States*.[85]

In addition to exclusion cases, Kohler addressed issues of Chinese citizenship and naturalization. In July of 1912, Kohler defended a young man named Hom Young. Young's father, Hom Chung, was born in San Francisco in 1879. In 1883, when he was four years old, Hom Chung returned to China. He married in 1896. He and his wife then gave birth to a baby boy, Hom Young. In 1900, Hom Chung returned to the United States. In the following decade, although Hom Chung did not return to China, on at least one occasion, he sent money with his brother to give to his wife and son. In 1912, Hom Young made his way to Buffalo, New York, where he lived for several months before being arrested and charged being illegally present in violation of the exclusion acts. The U.S. Commissioner ordered Young deported.

In his defense of Young, Kohler relied on constitutional arguments. The 1882 Chinese Exclusion Act explicitly prohibited Chinese naturalization but, in 1898, the U.S. Supreme Court had ruled that, according to the Citizenship Clause of the Fourteenth

---

[84] *U.S. v. Lee Yen Tai*, 185 U.S. 213 (1902). The Court stingingly wrote, "Despite the ingenious argument made to the contrary, we do not perceive any difficult whatever in reaching this conclusion, after carefully scrutinizing the treat and the statute." On the same day Kohler also argued *Chin Bak Kan v. U.S.*, 186 U.S. 193 (1902).

[85] *Chin Bak Kan v. U.S.*, 186 U.S. 193 (1902); *Chin Ying v United States*, 186 U.S. 202 (1902).

Amendment, children born in the United States to parents of Chinese descent, and whose parents were legally and permanently residing in the country and carrying on a business, were American citizens.[86] Further, American citizens' offspring citizenship rights were established in the Naturalization Act of 1790.[87] Accordingly, Kohler argued that, as the son of an American citizen, Young was an American too, which ought to nullify his deportation order. The court disagreed. According to Judge George C. Holt, "The evidence to prove that the defendant is the son of Hom Chung is as unsatisfactory as usual in Chinese cases." Further, employing guilt-by-association reasoning, Holt asserted that because Hom Chung was arrested "with four other Chinamen," he surely entered the country illegally.[88] Offering extra-judicial commentary that was shrouded in xenophobia and racism, Holt concluded, "It does not seem to me that the legal proposition on which the defense is based is beyond controversy. Is it true that, if Hom Young is the son of Hom Chung, he is an American citizen in the full sense of that term?"[89] Despite evidence that Hom Young was Hom Chung's son and despite Hom Chung's undisputed status as an American citizen, the court affirmed the decision to deport Hom Chung.[90]

How Kohler came to represent Chinese clients is unclear. According to historian Lucy Salyer, the Chinese Consolidated Benevolent Association (CCBA), popularly known as the Chinese Six Companies, "kept an attorney on retainer to contest anti-Chinese legislation

---

[86] *U.S. v Wong Kim Ark*, 169 U.S. 649 (1898).
[87] The basis of citizenship rights of those born in the United States is the principle *jus soli*, which means, "right on the soil." Likewise, the principle of *jus sanguinis*, "right of blood," justifies the citizenship rights of the children of citizens.
[88] *U.S. v Hom Young*, 198 Fed. 577 (S. D. N. Y. 1912).
[89] *U.S. v Hom Young*, 198 Fed. 577 (S. D. N. Y. 1912). For a similar case that Kohler argued see *Fong Ping Ngar v. U.S.*, 223 Fed. 523 (C. C. A. 1915).
[90] Kohler represented two young men who also made claims of citizenship but were nonetheless deported in *Yee King et al. v. U. S.*, 179 Fed. 369 (C. C. A. 1910).

and practices."[91] The CCBA of New York was established in 1890 and Kohler filed various amicus briefs on their behalf and it is possible the organization referred work to him.[92] The short distance between Kohler's offices on Nassau Street and New York's Chinatown also made Kohler especially likely to encounter people of Chinese descent in need of legal representation. Finally, the combination of Kohler's expertise in the field and his public declaration of support for Chinese immigrants and Chinese Americans may have given Kohler a professional reputation that generated work for him and given general hostilities towards Chinese laborers and immigrants it is unlikely there were many other lawyers willing to help.

In addition to Kohler, Jewish lawyers such as Benjamin Levinson and Charles C. Recht defended people of Chinese descent charged under the exclusion laws. In the course of their work, they learned the substantive and procedural aspects of immigration law. This knowledge would prove invaluable to their work on behalf of European aliens. They also learned of the discriminatory and racist foundations of the country's immigration system and courts, an awareness that helped to orient Jewish lawyers as they began to challenge the federal government in general immigration cases.

Ellis Island Advocacy

On March 3, 1891, the U.S. Congress passed a comprehensive immigration law, which established the basic contours of the country's immigration system. Congress expanded this law in 1893, 1903, 1906, 1907, 1910, 1913, and 1917, before implementing

---

[91] Lucy Salyer, *Laws Harsh as Tigers*, 40.

[92] Cases in which Kohler filed amicus brief for CCBA include *Tom Hong v U.S.*, 193 U.S. 517 (1904)—a case in which Chinese aliens were ordered deported for lack of proper certification—and *Ah How alias Louis Ah How v United States*, 195 U.S. 65 (1904)—in which a Chinese merchant in San Louis Obispo was deported.

rigid quota systems in 1921 and 1924. Broadly, the 1891 law and its subsequent iterations achieved two things: First, it articulated who was ineligible for entry as an immigrant; this category included "idiots, paupers, or persons likely to become a public charge, persons suffering from a loathsome or dangerous contagious disease," felons, polygamists, those convicted of crimes "involving moral turpitude," and people who secured financial assistance from other people to pay for their tickets.[93] Second, the law created institutional mechanisms to implement these prohibitions. As a result of this legislation, beginning in 1891, to enter the United States, aliens needed to undergo inspections. Immigrant processing centers served as the central forums in which aliens' fitness for entry was assessed. Ellis Island, which was by far the largest and most significant of these centers, opened on January 1, 1892, followed by Angel Island in San Francisco and smaller centers in places such as Baltimore, Boston, Galveston, New Orleans, and Philadelphia.[94]

When aliens failed their inspections, they were "marked for exclusion," that is, barred from entry, by federal immigration officers. These officers served as the foot soldiers for the executive-branch agency in Washington D.C. charged with overseeing immigration policy. In 1891, Congress created the Office of the Superintendent of Immigration within the Treasury Department and endowed it with exclusive authority over U.S. immigration law. In 1895, the Office of the Superintendent of Immigration became the Bureau of Immigration and the person in charge of the Bureau became known as the Commissioner General of Immigration. Congress granted the Commissioner General total authority to execute the

[93] Immigration Act of 1891, chap. 551, 26 Stat. 1084 (1891).
[94] Before Ellis Island was completed, aliens who landed in New York arrived at a place called Castle Garden. See "Landed on Ellis Island: New Immigration Buildings Opened Yesterday," *New York Times*, January 2, 1892.

immigration laws, including the power to deport "unlawful aliens."[95] In 1903, Congress transferred the Bureau of Immigration from the Treasury Department to the Department of Commerce and Labor.

Between 1881 and 1892, approximately 20,000 Jewish immigrants entered America annually; between 1897 and 1903, that number was 37,000; and between 1903 and 1914, that number was 76,000.[96] As more and more Jews immigrated to the United States, an increasing number of them were denied admission, especially after the first decade of the twentieth century. While deportations of European aliens between 1892 and 1907 numbered a few hundred per year, between 1908 and 1920, that number jumped to between two and three thousand.[97] (At the same time, Chinese exclusion cases dropped off; after 1910 Chinese exclusion cases seldom exceeded five hundred per year and between 1918 and 1924, that figure dipped below one hundred.)

On their face, U.S. immigration laws did not discriminate against specific national or racial groups (like the Chinese Exclusion Act did). Nevertheless, time and again, Bureau of Immigration officials applied the immigration laws to the detriment of aliens, sometimes in ways that betrayed their racial bias towards immigrants. For example, the fact that U.S. Public Health Service officers—men primarily of Southern heritage and English lineage—performed aliens' medical exams meant that sometimes aliens failed medical inspections for reasons other than genuine sickness. Inspectors commonly deployed racialized conceptions of medicine and health. Favus and tuberculosis, for example, were associated with Eastern

---

[95] Immigration Act of 1891, chap. 551, 26 Stat. 1084 (1891).
[96] Hasia Diner, *A New Promised Land*, 44.
[97] Geoffrey Heeren, "Illegal Aid: Legal Assistance to Immigrants in the United States," *Cardozo Law Review* 33 (2011), 632.

European Jews.[98] Likewise, the diagnosis of "insanity" more often reflected inspectors' personal understandings of racial, socioeconomic, and gender norms than the presence of a neurological disorder.[99]

In addition to reflecting racial bias, immigration officers often were left to interpret the law's meaning without Congressional guidance. For example, immigration laws expressly forbid admission of people with "loathsome and dangerous diseases," but immigration officers chose to include hernias and treatable conditions such as head lice within that classification. Likewise, although the law banned aliens who were "likely to become a public charge," for a period of time, officers banned those whom they believed "*may* become a public charge." Further, as historian Deidre Moloney explains, the designation was frequently "either used as a surrogate for other concerns or integrated with other issues—such as race—because it was both easier to prove or more acceptable as an exclusion category."[100] In short, there were many instances in which immigration officers' interpretation of immigration law allowed for disagreement.

It was in this context that Jewish lawyers came to represent Jewish (and sometimes non-Jewish) aliens who were excluded. Generally, this representation conformed to one of two (and sometimes both) patterns: First, they helped aliens navigate the exclusion appeals process as laid out in the immigration law. The 1891 law declared that inspectors' decisions were "final" excepting appeals to the Secretary of the Treasury and, after 1903, the Secretary of Labor and Commerce. This meant that until the mid-1930s, the Secretary of the Treasury

---

[98] Anne-Emanuelle Birn, "Six Seconds Per Eyelid," 296, 308; Amy Fairchild, *Science at the Borders Immigrant Medical Inspection and the Shaping of the Modern Industrial Labor Force* (Baltimore, MD: John Hopkins University Press, 2003), 166-168.
[99] Anne-Emanuelle Birn, "Six Seconds Per Eyelid," 302.
[100] Deirdre Moloney, *National Insecurities*, 111.

and later the Secretary of Labor and Commerce sat atop the pyramid-shaped immigration regime. It also meant that, for the most part, appealing aliens' exclusions was a highly circumscribed process, which involved substantial communication and negotiation with Bureau of Immigration officials. Second, Jewish lawyers represented excluded aliens in court; because the executive branch ultimately won the early twentieth-century battle between the federal courts and the executive branch over jurisdictional authority in matters of immigration law, courtroom battles transpired less frequently, especially as time passed. Nevertheless, Jewish lawyers sometimes tried to insure the safe passage of immigrants into the United States by invoking judicial power.

The Right of Special Inquiry

One early case pursued by a Jewish lawyer on Ellis Island occurred shortly after the passage of the 1891 law and it involved the right of aliens to challenge their exclusions. Earlier that year, federal officials had begun to require aliens to undergo medical and legal inspections in order to land in America and those who did not pass were "marked for exclusion," that is, denied admission into the country.[101] Cabin passengers underwent these inspections while still aboard the ships on which they had traveled. Those who could afford more expensive travel tickets, legislators presumed, were less likely to need financial assistance or wind up in a public institution and therefore did not need to undergo as stringent of inspections. By contrast, steerage passengers underwent these inspections once inside

[101] Alien inspections actually began before they even crossed the Atlantic. Because U.S. law required that inadmissible aliens be returned to their place of origin at the expense of the companies who brought them to the United States, steamship captains scrutinized passengers prior to departure, checking to ensure that they would pass muster with U.S. immigration officials. See Pamela S. Nadell, "The Journey to America by Steam: The Jews of Eastern Europe in Transition," *American Jewish History* 71 (1981), 273.

immigrant processing centers such as Ellis Island, which, along with its west coast counterpart, Angel Island, served as the physical entry points for the vast majority of immigrants. As aliens moved from the landing dock into the building, officials watched them as they climbed the stairs to the Grand Hall in order to ensure that they were not crippled. Aliens then encountered medical inspectors who checked them for health defects such as lice and eye disease.[102] Common afflictions likely to render one deportable included favus (a fungal disease often found on the scalp), typhus, trachoma, tuberculosis, and epilepsy.[103]

Next, aliens underwent legal inspections. As a part of this process they answered between twenty and thirty questions intended to reveal whether they were likely to become destitute or whether they had violated labor laws. Women were asked if they were sex workers. Inspectors wanted to know where each alien was born and their marital status. They checked whether aliens had paid for their own boat as was required. They also checked if they had ever held a job and if anyone had arrived with the promise of employment. (Paradoxically, despite being forbidden from arriving with the promise of a job, aliens also needed to show their capacity to work so as to ensure that they would not become dependent on government or charitable funds.)[104]

At some point during these inspections, an officer declared that Hirsch Berjanski was ineligible for admission. Few records of Hirsch Berjanski remain, but he arrived in the United States from Europe at some point during the summer of 1891. After learning that he was excluded, Berjanski protested and demanded to appeal his case. His demand was denied.

---

[102] Anne-Emanuelle Birn, "Six Seconds Per Eyelid," 281-316.
[103] For example, "Not Wanted With His Disease," *New York Times*, May 27, 1893; "More Typhus Cases Found," *New York Times*, February 13, 1892; "New Typhus Fever Cases," *New York Times,* February 16, 1892; Anne-Emanuelle Birn, "Six Seconds Per Eyelid," 285.
[104] See Louis Anthes, "The Island of Duty: The Practice of Immigration Law on Ellis Island."

Soon after, Abraham H. Sarasohn—the son of Kasyrel H. Sarasohn, the founder of the Orthodox Jewish newspaper *Tageblatt*—offered to represent him in court.[105] How Sarasohn learned of Berjanski's case is unclear, but it was likely that Sarasohn was affiliated with the Hebrew Sheltering House Association (HSHA), also known as Hakhnoses Orkim, which his father helped found in 1889. (In 1909 it would join with the Hebrew Immigrant Aid Society to become HIAS.) Among other things, HSHA offered aliens legal services and this was probably how Sarasohn encountered Berjanski.

However they met, Sarasohn represented Berjanski in September in the NY Eastern District courtroom of Charles L. Benedict, a Vermont-born lawyer who had been appointed by President Abraham Lincoln. There, U.S. district attorney Jesse Johnson claimed that Berjanski had no right to appeal his classification as excludable and that Berjanski's only remedy was to appeal to the superintendent of immigration. In making his argument, Johnson referred to Section 8 of the 1891 law, which stipulated that "all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury."

Sarasohn, by contrast, argued that, before appealing to the superintendent, Berjanski, had the right to appeal his classification, or "demand a special inquiry," to a party other than the inspector who initially identified him as excludable. To make this case, he pointed to the law, which stipulated that "aliens shall be excluded from admission… unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong" to an excluded class.

---

[105] "Abraham J. Sarasohn," *New York Times*, March 2, 1933, 14.

Benedict agreed, writing that "the statute expressly confers upon the immigrant the right to such an inquiry, which the statute declares shall be a 'special inquiry.'" He held that the Act of 1891 endowed immigrants with "the right to demand a special inquiry, and at such inquiry [the right] to show affirmatively, if he can, by any competent testimony, that he does not belong to one of the excluded classes."[106]

The Boundaries of Discretionary Authority

Sixteen days after *Berjanski*, Sarasohn represented Adolph Feinknopf, a forty-year old native of Austria who had travelled from Antwerp, Belgium to New York on a Red Star steamship that had arrived in the late summer.[107] On Ellis Island, the immigration inspector, General James R. O'Beirns, declared that Feinknopf was ineligible for admission on account of the fact that he was "likely to become a public charge" or "LPC."

The classification "likely to become a public charge" first appeared in U.S. immigration law as a justification for deportation in 1882.[108] Congress left the term undefined, but the designation was fundamentally a judgment about an alien's personal wealth. Immigration officers more or less understood it to mean someone likely to find him or herself in a jail or hospital or a likely recipient of charitable aid. Because Congress never assigned a specific amount of money to the classification, inspectors necessarily applied their own judgment as to whether an individual was likely to need monetary aid. Legislative

---

[106] *In re Hirsch Berjanski*, 47 Fed. 445 (E. D. N.Y. 1891).
[107] "Immigrants Want to Land," *Brooklyn Daily Eagle*, August 28, 1891, 4.
[108] Immigration Act of 1882, ch. 376, 22 Stat. 214 (1882), section 2. For a short analysis of "public charge" provision of the act, see Louis Anthes, "The Island of Duty: The Practice of Immigration Law on Ellis Island," 570-571.

ambiguity allowed officers to employ the classification in order to exclude aliens for unauthorized reasons.[109]

After being denied admission, Feinknopf requested a "special inquiry," which required inspectors to reevaluate his case. During this process, sworn testimony from Feinknopf and witnesses on Ellis Island revealed that Feinknopf was a cabinetmaker, a trade he had engaged in for over twenty-five years; that he was sufficiently healthy; that he had no family; and that he had $20.50 with him when he arrived —a significant amount in 1891. No evidence revealed in Feinknopf's special inquiry suggested that he was likely to become a public charge. Nevertheless, the inspector who oversaw the hearing affirmed Feinknopf's exclusion.

The absence of a specific reason for determining that Feinknopf was likely to become a public charge, in Sarasohn's estimation, made Feinknopf's exclusion illegal, which is why he filed a writ of habeas corpus on Feinknopf's behalf. Once again facing off in Benedict's courtroom, Sarasohn and Johnson debated "whether an order for the return of an alien immigrant as a person likely to become a public charge, made by an inspection officer, without any evidence whatever tending to show such to be the fact, [was] a valid order… or invalid."

According to Johnson, the exclusion order was valid because, as the 1891 law stipulated, "the determination of the inspection officer, although made without evidence… is conclusive upon the courts, as is valid authority for the detention and return of the immigrant." In short, the 1891 law had empowered immigration inspectors to determine

[109] Deirdre Moloney, *National Insecurities*, 111.

immigration policy as they saw fit without regard to external opinions and/or the need to produce definitive evidence.

Sarasohn, by contrast, argued that although the findings of inspectors were conclusive, when officers lacked evidence that an alien was excludable for a specific reason, deportations constituted "the exercise of arbitrary power." In Feinknopf's case, inspectors offered no evidence as to why he was likely to become a public charge nor did the sworn testimony of several witnesses attesting to Feinknopf's identity and condition reveal any reason to suspect that he would require institutionalization. According to an affidavit produced during the inquiry, he was not a recipient of public aid or a criminal, and he had arrived in the country with over $20. Designating Feinknopf "likely to become a public charge" was therefore unjustified.

Benedict agreed. In his decision, he wrote that "a determination by the inspection officer, made upon inspection alone," was not a sufficient legal justification for exclusion. Granting immigration inspectors complete and total discretionary power was "contrary to the spirit of our laws."[110] Appearances, Benedict explained, could be deceiving. "A person may present every appearance of poverty and yet be possessed of abundant means. He may be maimed and blind and still be abundantly capable of maintaining himself without becoming a public charge," he expounded.

Defining "Likely to Become a Public Charge"

The misuse of "LPC" as a justification for excluding aliens did not end with Feinknopf nor did Jewish lawyers' efforts to challenge its deployment by immigration

[110] *In re Feinknopf*, 47 Fed. 477 (E. D. N. Y. 1891).

officials. Between 1892 and 1910, "likely to become a public charge" was the single most common reason used by federal officials to justify excluding aliens who wanted to become immigrants.[111] Accordingly, Jewish lawyers dedicated a lot of time to trying to expose its misuse by immigration officials. This undertaking was epitomized by the efforts of Kohler and other lawyers affiliated with HIAS in fifteen exclusion cases that arose in the summer of 1909.[112]

In 1909, the Commissioner General of Immigration David J. Keefe, a Detroit-born labor leader and one-time president of the Longshoreman's union, issued the annual U.S. Bureau of Immigration and Naturalization Congressional Report.[113] Current deportation rates were too low, it explained, a reality that revealed flaws in how officers were implementing the country's immigration laws. "The point at which, perhaps, the law is especially inadequate," it explained, "is in the class of excluded aliens termed 'persons likely to become a public charge.' This standard is not high enough." Aliens, it contended, were economically burdensome. They "[lowered] the standard of living, of work, and of wages" and had a "degrading effect."[114] Presuming that rigorous application of immigration restrictions would deter other undesirable aliens from trying to enter the country, the report asserted "rigid

[111] The category was not evenly applied throughout that time; instead, the frequency with which officers used it depended on who was in charge of the Bureau of Immigration. Ronald H. Bayor, *Encountering Ellis Island: How European Immigrants Entered America* (Baltimore: John Hopkins University Press, 2014), 40.
[112] In 1909, other lawyers involved in the organization included John L. Bernstein, Edward Laurerbach, Abram I. Elkus, Isidor Herschfield, Morris Jablow, Leo Lerner, and Benjamin Levinson. See Memo, Leon Sanders to William Williams, June 17, 1909, box 16, folder 1-5, Baron de Hirsch Fund collection, I-80, AJHS, Center for Jewish History, New York, NY.
[113] On Keefe, see "Labor Leader Rewarded," *New York Times*, December 2, 1908; "Asks Keefe's Dismissal," *New York Times*, February 23, 1913.
[114] Annual Report of the Commissioner-General of Immigration for the Fiscal Year Ended June 30, 1909 (Washington, D.C.: Government Printing Office, 1909), 5.

enforcement" was "the most humane" and it was necessary.[115] To decrease the number of undesirable immigrants, inspectors needed to deploy the classification "likely to become a public charge" more liberally.[116]

Keefe had only been in office six months when the report was published. More so than anyone else, the 1909 mandate actually reflected the outlook of Keefe's predecessor, Frank P. Sargent. Sargent had led the Department of Labor's Bureau of Immigration from 1902 to 1908. Like many U.S. immigration officials, Sargent was an outspoken proponent of immigration restrictions who harbored a special dislike of the "very undesirable class [of immigrants] from Southern and Eastern Europe." Of particular concern to him were "new immigrants" who "[congregated] in larger cities mostly along the Atlantic Seaboard where they [constituted] a dangerous and unwholesome element."[117]

Among the recipients of the 1909 report was William Williams, whom President William Taft had reinstalled as the Commissioner of Immigration at the Port of New York.[118] Like Sargent, Williams, an alumnus of Yale University and Harvard Law School and a veteran of the Spanish-American War, championed immigration restriction.[119] In 1904, during his first term in the post, Williams informed *New York Times* readers that, "We may and should take means, however radical or drastic, to keep out all below a certain physical and economic standard of fitness." He also estimated that, during his first term, he had

---

[115] Annual Report of the Commissioner-General of Immigration for the Fiscal Year Ended June 30, 1909 (Washington D.C.: Government Printing Office, 1909), 7.
[116] Annual Report of the Commissioner-General of Immigration for the Fiscal Year Ended June 30, 1909 (Washington D.C.: Government Printing Office, 1909), 4.
[117] Frank P. Sargent, "Problems of Immigration," *Annals of the American Academy of Political and Social Science* 24 (July 1904), 155-157.
[118] "Williams Regains Immigration Office," May 19, 1909, *New York Times*, 2.
[119] See "Four Years of Progress at Ellis Island," *New York Times*, February 12, 1905, 29. William Williams' anti-immigrant views have been well documented. See Naomi W. Cohen, "Commissioner Williams and the Jews," *The American Jewish Archives Journal* 61, no. 2 (2009), 99; Anthes, *Lawyers and Immigrants, 1870-1940*, chapter 2.

excluded at least 200,000 aliens who, while capable of working, would have nonetheless "[been] a detriment."[120] "It will be the policy of this office to *rigidly enforce* the laws governing immigration," he warned steamship companies, which were financially liable for aliens ineligible for landing.[121] For Williams, "rigid enforcement" meant excluding as many aliens as possible.[122]

Immigration restrictionists greeted Williams' return to Ellis Island with joy. "It is refreshing to learn that we finally have a commissioner who enforces the law," New York attorney Edwin W. Cady wrote to Williams.[123] Orville G. Victor, a self-described "American of early Colonial ancestry," also wrote to thank Williams for his "noble work." "Did you ever stop to consider what a truly delightful city New York would be if all the Irish and the Jews were eliminated from there," Victor wondered.[124]

American Jews, by contrast, reacted with less fanfare. Jewish communal leaders knew that Williams' "rigid enforcement" translated into arbitrary legal standards and discrimination. Williams' last stint as commissioner coincided with the Kishinev pogroms and, rather than accommodate those who sought refuge, Williams became evermore aggressive about applying the country's immigration laws in such a way as to restrict the highest number of aliens possible.[125]

---

[120] "Four Years of Progress at Ellis Island," *New York Times*, February 12, 1905, 29.
[121] Letter, William Williams to Anchor Line, July 26, 1902, reel 1, box 2, William Williams Papers, Mss 3346, Manuscript and Archives Division, NYPL, New York, NY.
[122] One of the first changes he made as commissioner was separating the registry department and the Board of Special Inquiry; he believed the latter, under which the deportation department was located, had done a poor job of actually deporting those deemed unfit. See "Sweeping Changes in Immigration Bureau," *New York Times*, July 1, 1902.
[123] Letter, Edwin W. Cady to William Williams, July 10, 1909, reel 1, box 2, William Williams Papers, Mss 3346, Manuscript and Archives Division, NYPL, New York, NY.
[124] Letter, Orville G. Victor to William Williams, July 17, 1909, reel 1, box 2, William Williams Papers, Mss 3346, Manuscript and Archives Division, NYPL. New York, NY.
[125] "Williams Regains Immigration Office," May 19, 1909, *New York Times*, 2.

Williams' reappointment, in part, inspired the formation of HIAS. The organization's headquarters at 229 East Broadway included a five-floor, twelve-room dormitory with room for ninety beds. HIAS consisted of four branches: the Information Bureau, which collected and distributed information about individual immigrants; the Employment Bureau, which aided newly arrived individuals in finding work; the Sheltering Bureau, which temporarily housed immigrants; and the Ellis Island Office, which oversaw the landing of immigrants.

HIAS was not entirely comprised of legal professionals, but lawyers such as Abram Elkus, Morris Jablow, Max Kohler, Benjamin Levinson, Irving Lipsitch, Leon Sanders, and Simon Wolf directed the group's activities.[126] More so than any other organization or individual, HIAS challenged alien exclusions.

In June 1909, HIAS lawyers hatched a plot to publicly expose how immigration officials arbitrarily classified aliens as "LPC," which they believed would force Congress to provide a more precise definition of the designation. Their plan involved identifying individuals who they believed were improperly excluded as "LPC" and using them as vehicles for litigation in federal court. Although seemingly unexceptional, this plan was actually quite radical. U.S. immigration law endowed the executive branch with total authority over immigration and therefore trying to adjudicate immigration cases in federal court represented an effort to disempower the federal executive branch that oversaw immigration. In short, Kohler's strategy was pugnacious and immigration officials viewed it as threatening.

---

[126] "A Day with Judge Leon Sanders," *The Jewish Criterion* 33, no. 9 (October 6, 1911): 1-4; Memo, Leon Sanders to William Williams, June 17, 1909, reel 27, box 16, Baron de Hirsch Fund Papers, I-80, AJHS, Center for Jewish History, New York, NY.

Kohler's effort to address issues of immigration law in traditional Article Three courts, so named because federal courts were established in Article Three of the U.S. Constitution, rather than in an administrative tribunal in an executive agency was not incidental, but central to how he planned to advance immigrants' rights. Appealing a given individual's case to the Bureau of Immigration might secure the admission of that particular alien, but successfully litigating an immigration case in federal court could establish a legal precedent that would ensure that no other aliens would be excluded for the reason litigated. Even if the ruling Kohler obtained would not be binding in other courts, it would constitute an authoritative guide (dicta) in later cases. Finally, even if he lost, he could at least obtain a decision that he could use as a guide in later actions. Like the "cause lawyers" who followed—leftist lawyers who dedicated their careers to social change—Kohler viewed each case as a steppingstone toward his ultimate goal.[127]

The aliens who Kohler intended to use to test the meaning of "LPC" arrived in America on June 23 and 24, 1909. Fifteen Eastern European Jewish men originally from various places in Russia had been identified as "LPC" because they had arrived with little money.[128] They were part of an uptick in exclusion cases under Williams' administration of Ellis Island.[129] One of the fifteen was Abraham Aker, an eighteen-year-old man who had traveled from Russia to Hamburg and then to the United States aboard the S. S. *President*

---

[127] On "cause lawyering" see Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York, NY: Oxford University Press, 1998).
[128] Kohler and Elkus' brief dates their arrival to June 23, 1909 but the Brief of Appeal in the Immigration and Naturalization Service records dates their arrival to June 26, 1909. See *In re Hersch Skuratowski*, July 24,1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C..
[129] Hebrew Sheltering and Immigrant Aid Society, *First Annual Report 1909* (New York, 1910); "Williams Regains Immigration Office," *New York Times*, May 19, 1909, 2.

Grant. Another, Hersch Skuratowski, arrived from Chudnov, Ukraine by way of Rotterdam, Holland on the S. S. *Raglan Castle*.[130]

Beginning in 1893, in part because of *In re Berjanski*, excluded aliens could challenge their impending deportations before a three-person panel called the Board of Special Inquiry (BSI).[131]BSI hearings took place in rooms adjacent to Ellis Island's Grand Hall. Accordingly, on June 28 at 2:30 p.m.—some four days after he had arrived at Ellis Island—Aker presented his case to a BSI panel and tried to explain why he merited admission. During his hearing, inspectors learned that Aker could read and write (unofficial requirements for entry that various legislators tried to formalize throughout the first two decades of the century); that he had paid for his own boat ticket (as required by legislation); that he had been a waiter (which spoke to his capacity to work); and that he had come to visit his uncle, Berl Kleinmann. Indicative of BSI inspectors' concern about potential immigrants' financial solvency, one inspector demanded, "Why do you come here without money?"—to which Aker earnestly answered, "Because I didn't have any more."[132]

Inspectors also questioned Aker's uncle, who had attended the hearing. Excluded aliens' relatives sometimes attended BSI hearings to vouch for their kin, which is why Kleinmann came. Inspectors wanted to know how long Kleinmann had resided in the United States (six years), whether he had a family (yes), and what he did for business (owned a dry goods store). They demanded to know if Kleinmann had "any money in the bank" or "any

---

[130] On July 5, 1909, the *Jewish Daily Forward* printed a letter form Alexander Rudnev, which was co-signed by one hundred other Eastern European Jews being held on Ellis Island, informing readers that they were being detained because hey did not have sufficient funds to enter the country. See Isaac Metzker, *A Bintel Brief: Sixty Years of Letters from the Lower East Side to the Jewish Daily Forward* (New York, NY: Doubleday and Company, 1971), 99.

[131] Act of March 3, 1893, 27 Stat. 569 (1893).

[132] "In the Matter of Aker, Abraham, Russian Hebrew, Board of Special Inquiry," June 28, 1909, Box 52531/011, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C..

property" and asked what he was "prepared to do for [his] nephew." Often, to sway inspectors, relatives promised to feed, shelter, and even employ their relatives. Indeed, Kleinmann assured the board that he would care for Aker and find him a job. Regardless, BSI officials were unconvinced by Kleinmann's promises. Kleinmann, they noted, was not "legally bound" to provide for Aker and therefore they doubted his commitment to his nephew.[133] While no law or regulation required that relatives be "legally bound" to financially support prospective immigrants, inspectors regularly applied such a standard, meaning that only spouses and parents could serve as sponsors.

Procedurally, BSI hearings were unlike civil or criminal trials. First, in BSI hearings, aliens were presumed to be excludable; to prevail, aliens needed to prove that the admission officers' initial assessments were wrong, unlike criminal trials, in which defendants are presumed innocent until proven otherwise. BSI hearings also spurned the evidentiary standards used by courts to ensure due process. Instead, BSI officials used the significantly less demanding "reasonable person" standard. "Any proof in form of [an] affidavit or other written statement proceeding from responsible sources and calculated to convince a reasonable person" could justify exclusion, Williams explained.[134] Presumably, the "reasonable person" Williams imagined was someone like himself—a white man with little empathy for aliens he perceived as unworthy of becoming immigrants—and thus, in addition to being a less burdensome standard of proof, the standard was biased. Finally, unlike courtrooms, in which attorneys often represented clients, BSI hearings banned lawyers, a rule that sometimes led non-English speaking aliens to misinterpret vital questions and lose their

[133] "In the Matter of Aker, Abraham, Russian Hebrew, Board of Special Inquiry," June 28, 1909, box 52531/011, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington, D.C..
[134] Letter, William Williams to Joseph M. Deuel, July 7, 1903, reel 1, box 2, William Williams Papers, Mss 3346, Manuscript and Archives Division, NYPL, New York, NY.

appeals. In short, BSI procedures and the people who administered them ensured that special inquiry hearings were not impartial, which is, in part, why many aliens' appeals failed, including those of Aker and the fourteen other Jewish men who had been excluded alongside him.[135]

As U.S. immigration law stipulated, immigration officials' decisions were "final" excepting appeals to the Secretary of the Treasury and later the Secretary of Labor and Commerce. This is why, when BSI appeals failed, HIAS lawyers sometimes stepped in to offer their assistance. (HIAS and other Jewish organizations, which were concerned with public perception, routinely refused to represent aliens that they viewed as unfit for admission.)[136] Accordingly, the day after Aker's BSI hearing a 25-year-old graduate of the City College of the City University of New York named I. Irving Lipsitch, an HIAS attorney, wrote to Williams to protest the decision.[137] (At twenty-two, while working for the United Hebrew Charities, Lipsitch had secured the admission of thirty Jewish orphans whose parents had died in the Kishinev pogroms, who had been excluded by Ellis Island authorities.)[138]

The next day, June 30, Lipsitch submitted a full brief appealing Aker's case as well as those of the ten other Jewish men who had been excluded from the S. S. *President Grant*.[139]

---

[135] "Non-appealed exclusion hearings… made up the majority of cases." See "Researching Deportation Records," United States Citizenship and Immigration Services. April 24, 2013. Accessed September 15, 2015: http://www.uscis.gov/history-and-genealogy/genealogy/genealogy-notebook/researching-deportation-records.

[136] Both HIAS and NJIC documents repeatedly assert the organizations' refusal to represent immigrants they viewed as "undeserving." HIAS from 1915-1916, reported that, "the only question with me is whether I consider the case worthy of appeal or not. Even if I thought a case might be successful, I would not appeal if I considered it unworthy. I think it is the best policy for the welfare of Jewish immigrants not to appeal certain decisions." Interview of Irving Lipsitch, January 19, 1909 at the office of Baron de Hirsch Fund, New York, Meeting of Ellis Island Committee, as quoted in Marc Lee Raphael, "The Jewish Community and Ellis Island, 1909," in *On the History of Jews in the Diaspora*, (Tel Aviv, Israel: Tel Aviv University Press, 1975), 175.

[137] On Lipsitch, see "Domestic News," *The Reform Advocate* 52, no. 12 (October 28, 1916), 378.

[138] "30 Russian Orphans Are Ordered Deported," *New York Times*, August 27, 1906, 1; "Jewish Orphans to Stay," *New York Times*, August 29, 1906, 4.

[139] The ten other individuals for whom Lipsitch submitted appeals with were: Leib Eppel; Chonon Jachriel; Jankel Fagurick; Mordche Jurczanski; Leib Palonski; Chaim Berman; Kadish Weiss; Mordche Fuhrman; Isak

In his brief, Lipsitch made his case for the group's admission by trying to assuage the immigration officials' presumed concerns. He reminded them that the men were "in good health" and promised to find them jobs outside of New York, in "western cities," a vow that was intended to mollify nativist fears about immigrant "overcrowding" in urban spaces.

In his brief, Lipsitch also referenced a memo that Williams had recently distributed. On June 28, on the heels of receiving Keefe's report, Williams had circulated a notice informing Ellis Island officials that steamship companies were bringing "immigrants whose funds are manifestly inadequate for their proper support." Although he offered "no hard and fast rule" Williams informed his subordinates that, "in most cases it will be unsafe for immigrants to arrive with less than twenty-five dollars." Referring to Williams' June 28 circular, Lipsitch's brief noted that his clients were unaware of the "regulations requiring each of them to have a stipulated sum of money" and should not be excluded because they lacked the requisite funds. In closing, Lipsitch spoke to his clients' potential as Americans, promising that, "If given the opportunity" the men would "become self-supporting and respectable citizens of this country."[140]

The same day, June 30, a letter from an attorney named William Blau arrived on the desk of Bryan Uhl, the Acting Commissioner of Immigration. Blau, a Jewish immigrant from Bohemia, was known to many bureau officials. He had met Williams in 1902 during Williams' first stint as the Commissioner of Immigration.[141] In his letter, Blau informed

---

Shutzman; and Abram Schlumkowitz. See "Brief of Appeal," June 30, 1909, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives.

[140] Brief of Appeal by Irving Lipsitch, June 30, 1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C..

[141] Letter, Marcus Braun to James S. Clarkson, August 4, 1902. Theodore Roosevelt Papers. Library of Congress Manuscript Division. Available online: http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o38660. Theodore Roosevelt Digital Library. Dickinson State College.

Williams, Uhl and their boss, Secretary Charles Nagel, that he had been hired to represent Aker and the others from the S. S. *President Grant*. After explaining his clients' circumstances, which included a summation of Lipsitch's efforts for the group, Blau requested a meeting with Uhl on July 6 for "the purpose of presenting such argument in support of said appeals."[142]

Upon receipt of Blau's letter, Uhl wrote to Nagel, informing him of Blau's request and assessing Blau's letter. With a tone of exasperation, Uhl asserted that even though Lipsitch had promised to find employment for the immigrants in question, Lipsitch "had no specific position to which the alien would be sent" and therefore the offer was meaningless. Worse yet, Uhl thought it likely that Aker needed financial assistance to survive. This, in Uhl's mind, was the primary evidence that Aker did not merit admission. Uhl also asserted that although these individuals had family in the U.S., those relatives were "not legally bound to assist them" and were thus irrelevant to the consideration at hand. Finally, Uhl took issue with Lipsitch's reference to Williams' new stipulation that immigrants have at least $25 cash on hand. Uhl did not think Williams' circular was relevant to the decision to deport Aker. He believed Lipsitch, Blau, and HIAS had misinterpreted Williams. Uhl therefore reaffirmed the orders for deportation.[143]

On July 1, Lipsitch filed another set of appeals, this time on behalf of Gershon Farber, Meyer Gelrot, and Hersch Skuratowski, three men who had arrived on the S. S. *Raglan Castle* whom immigration inspectors had identified as ineligible for entry on June 24. They too had protested their exclusions but failed to convince the BSI of their admissibility. After

[142] Letter, Blau to Williams, June 30, 1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C..
[143] Uhl to Nagel, June 30, 1909, box 52517/011-52531/015INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.

receiving this second set of appeals, Uhl sent the Commissioner-General Keefe a memo noting the similarity between Lipsitch's brief for Aker and the men aboard the S.S. *President Grant* and for Skuratowski and the men who had arrived aboard the S.S. *Raglan Castle.* Offering his opinion on the admissibility of the group, he wrote: "The aliens concerned have arrived here utterly destitute (except one who has $2.75) and are per se ineligible for admission. I do not believe they should be qualified after arrival (unless going to relatives who are legally bound to furnish such aid) *especially* by charitable organizations."[144] For Uhl, aliens' eligibility for admission ought to be assessed the moment they disembarked. Securing aid from others, especially from private charities, did not entitle one to land. If anything, requiring such aid only confirmed that the respective immigrant ought to be excluded.

The following day, July 2, Acting Commissioner General F. H. Larned sent the Assistant Secretary Ornsby McHarg a memo about "the number of appeals now before you of practically penniless Hebrews," which Lipsitch had filed. Beyond affirming Uhl's opinion, Larned dismissed Lipsitch's legal claims in their entirety. In his view, the appeals "do not involve any question of law that needs discussion by anyone." The fate of the men was "simply a question of policy and fact." Like Uhl, he thought immigrants' "cases should be decided upon their status when they arrive at the station" and, for those presently concerned, "that status... is one of inadmissibility on the ground that they are likely to become public charges."[145] Accordingly, on July 3, McHarg sent a final exclusion order for Aker and the ten

[144] Uhl to Keefe, July 1, 1909, 52517/011-52531/015INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[145] Larned to Ornsby, July 2, 1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.

other men with him to Williams, who immediately arranged for their departure. They left on the S. S. *Kaiserin Auguste Victoria* on July 3, 1909 at 10:15 a.m.

Later that day, Williams wrote to Keefe to thank him. "I am very grateful to you for telephoning me this morning the decision in thirteen appeal cases. It enabled me to relieve congestion here by early deportation. The Deporting Division did unusually quick work," Williams noted.[146] Whether Williams was trying to simply reduce crowding on Ellis Island or he knew that the men had become the central figures in an effort to challenge his oversight of Ellis Island is unclear. Regardless, by returning Aker and the other aliens to Europe, Williams stopped an effort to challenge the U.S. immigration system but only momentarily.

Four days after Aker's deportation, officials dismissed the July 1 appeals that Lipsitch had authored on behalf of Farber, Gelrot, and Skuratowski.[147] The next day, Williams wrote to Nagel to apprise him of a sizable increase in the number of challenges to BSI rulings. "You may have noticed that within the last few days the number of appeals has increased materially," he began. "While dictating this letter I learn that the Hebrew charities have filed twenty additional ones for tomorrow," he noted. To address this onslaught of appeals, William decided that, while in the majority of cases, he would continue to confirm BSI decisions, in certain circumstances he would offer certain immigrants "the chance to secure funds." What Williams meant by "secure funds" was to obtain a security bond. Sometimes, in exchange for admission into the country, aliens would pay the immigration bureau an unspecified amount of money as a promise to uphold the admission standards required of

---

[146] Williams to Keefe, July 3, 1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives. He noted that as of the time the memo was sent, only eleven of the thirteen had actually been deported. See Letter, Williams to Keefe, July 3, 1909, RG 85, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, , U.S. National Archives, Washington D.C.

[147] William Williams to Larned, July 17, 1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.

them. The payment was supposed to ensure that aliens would not become public charges. Despite this brief respite, Williams showed no signs of wavering. "As time goes on I shall less and less allow aliens to secure funds as above mentioned," he informed Nagel.[148]

Some days later, on July 10, Williams prepared to deport another group of aliens. While doing so, he received a note from HIAS' Samuel Mason. Mason claimed to have received an order from McHarg instructing Williams to halt the deportations of Farber, Gelrot, and Skuratowski, and of Nechemiah Bartz, a fourth Eastern European Jewish man who had also been identified as "likely to become a public charge" whom Williams intended to deport.[149] Given that security bonds had been paid and that Mason had orders from McHarg, Williams obliged and removed Bartz, Farber, Gelrot, and Skuratowski from the S.S. *Volturno*, which the men had already boarded in preparation for their return to Europe.[150]

The next morning, Williams received writs of habeas corpus on behalf of the four aliens. Receiving orders to appear with four alien detainees in court aroused Williams' suspicions. He therefore wrote to Nagel and inquired whether McHarg had actually given Mason permission to instruct Williams to stop the debarments of Farber, Gelrot, Bartz, and Skuratowski, or, as Williams sensed, he had been tricked into keeping the men on Ellis Island.[151] Williams' hunch was correct: He had been tricked into keeping Bartz, Farber, Gelrot, and Skuratowski on Ellis Island.[152] Kohler, who authored the writs, needed to get

---

[148] William Williams to Charles Nagel, July 10, 1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[149] Mark Wischnitzer, *Visas to Freedom: The History of HIAS* (New York, NY: World Publishing Company, 1956), 40.
[150] "Legal Test Over Deported Aliens," *New York Times*, July 12, 1909, 14.
[151] William Williams to Charles Nagel, July 10, 1909, box 52517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[152] On July 14, Williams received a note from Larned explaining that Mason had lied. "The Assistant Secretary did not authorize Mr. Mason to convey any message from him to you and would not," Larned wrote. Larned to

them approved by a judge, a process that took more time than he had before Williams was to deport Skuratowski and the others (which is why Mason was sent to Williams claiming to have instructions from McHarg to do so).

On July 15, Kohler, Williams, and four other lawyers met on the fourth floor of the City Hall Post Office and Courthouse on the south side of City Hall Park in New York in the downtown courtroom of the 37-year-old Judge Learned Hand.[153] On one side were Williams and two assistant U.S. attorneys, Daniel D. Walton, Jr. and Goldthwaite H. Dorr. On the other were Kohler, Blau, and Abram Isaac Elkus, a New York born CCNY and Columbia Law School-educated lawyer.[154] Almost immediately, Walton and Dorr protested the very occurrence of the hearing. They disputed whether the court had the authority to intervene in immigrant exclusion cases. Indeed, that Hand had involved himself in the matter angered Williams. In a private letter to his attorneys, Williams remarked, "I think it is simply inconceivable that a federal judge should... take any action other than to dismiss the writs."[155] As Williams, Kohler, and likely every other legal professional present knew, the 1891 immigration law stipulated that the Bureau of Immigration retained sole jurisdiction over admission decisions, including oversight of appeals. Congress deemed the immigration inspectors' decisions "final," excepting appeals to the Secretary of the Treasury (and later the Secretary of Labor and Commerce), meaning that immigration law sat outside of the

---

Williams, July 14, 1909, box 52517/011-52531/015, NAB INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.

[153] Gerald Gunther, *Learned Hand: The Man and the Judge*, 2nd ed. (New York, NY: Oxford University Press, 2011), 117.

[154] "Diplomat Lawyer, U.S. Envoy to Turkey During First World War, Succumbs in Red Bank," *New York Times*, October 16, 1947, 27.

[155] William Williams to U.S. Attorneys, July 16, 1909, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.

jurisdiction of the judiciary.[156] Just four years earlier, the U.S. Supreme Court had reaffirmed the executive branch's exclusive authority over immigration when it asserted that, for immigrants, due process was available *only* through an appeals process within the executive branch.[157] This decision all but permanently removed immigration matters from the judiciary's jurisdiction. Accordingly, Walton and Dorr hoped to end the current proceedings quickly.[158]

For his part, Kohler told the court that Williams had effectively bullied Ellis Island officers into deporting immigrants without cause and claimed that Ellis Island officers were "afraid to decide the cases on their merits."[159] Walton and Dorr "declared that the charges were ridiculous." After some back and forth, Hand announced that he intended to consider all the facts before deciding whether judicial involvement was appropriate.

Hand had taken the bench of the U. S. District Court for the Southern District of New York—one of the country's oldest and most important federal courts—just two months earlier.[160] Like Williams, he was a Republican who had been appointed by Taft.[161] Despite his reputation as a "fabulous talker," during his first months as a judge, Hand felt an abiding sense of self-doubt.[162] He was conflicted, wanting both to assert judicial authority and to respect executive autonomy. Looking to avoid clashing with the Bureau of Immigration

---

[156] The Act didn't apply to Chinese peoples and therefore they could continue to rely on judicial review for relief. See Lucy Salyer, *Laws Harsh As Tigers*, 70.
[157] *U. S. v Ju Toy*, 198 U.S. 253 (1905). As a result of *Ju Toy*, the years between 1905 and 1924 saw the "rise of administrative discretion in immigration policy." Lucy Salyer, *Laws Harsh as Tigers*, xviiii.
[158] See *Gegiow v Uhl*, 239 U.S. 3 (1915).
[159] "Williams Accused of Terrorizing Men," *New York Times*, July 16, 1909, 14.
[160] The Southern District court's jurisdiction included Ellis Island and Wall Street. See James D. Zirin, *The Mother Court: Tales of Cases that Mattered in America's Greatest Trial Court* (New York, NY: American Bar Association, 2014); H. Paul Burak, *History of the United States District Court for the Southern District of New York* (New York, NY: Federal Bar Association, 1962).
[161] Gerald Gunther, *Learned Hand*, 109.
[162] Felix Frankfurter, "Learned Hand," *Harvard Law Review* 75, no. 1 (November 1961): 1-4; Gerald Gunther, *Learned Hand*, 112.

officials, Hand limited the discussion to "the questions of procedure followed in determining the cases of the four men in question."[163]

Before the proceeding could continue, however, Williams announced that BSI inspectors planned to rehear Bartz, Farber, Gelrot, and Skuratowski's appeals. Surprised, Kohler urged Williams to promise that the alien-detainees would be permitted legal representation during these new BSI hearings. When Kohler asked Williams' lawyer, Walton, to promise that this would be the case, Walton replied, "Certainly. I suppose they are always allowed counsel." Kohler quickly corrected him. "No, they're not. They don't allow them counsel at all," Kohler informed Walton.[164]

The proceedings that Kohler initiated upset bureau officials, first among them Williams. "You have little idea of the excitement over the four habeas corpus cases. The Hebrews are appearing in court in great numbers," an exasperated Williams wrote to Nagel on July 16 in an assessment of the previous day's hearing.[165] In fact, Nagel likely knew of such "excitement." That very day, national press outlets had reported that Leon Kamaiky, editor of the *Jewish News of New York,* and U.S. Congressman William S. Bennet of New York had visited the White House to voice their concerns to the president about Williams' oversight of Ellis Island.[166] As Kohler had hoped, the case had begun to garner attention, but this attention proved fleeting.

When the six counselors appeared before Hand again, Kohler and Elkus suffered two major blows. First, Hand significantly limited the scope of the hearings. Ignoring Williams'

---

[163] "Williams to Explain His Tests in Court," *New York Times*, July 17, 1909, 3.
[164] "Williams Accused of Terrorizing Men," *New York Times*, July 16, 1909, 14.
[165] Excerpted letter from Williams to Nagel, July 16, 1909, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[166] "Protests Made to Taft," *New York Times*, July 16, 1909, 14.

announcement that the BSI would reconsider the men's appeals, Kohler and Elkus had asked Hand for permission to proceed with litigation. They had also requested that Hand allow document production of "all [Williams'] records for the purpose of a general inquiry as to whether he had ever issued any orders" to BSI inspectors about how to make admission decisions. Kohler hoped to paint Williams as a dictatorial figure, someone who regularly imposed his own rules according to his own preferences. Hand denied Kohler and Elkus' request. Still, trying to navigate between the parties, Hand offered an exception, permitting William's June 28 notice to inspectors recommending exclusion of immigrants without $25 to be used as evidence of the possible infringement of immigrants' due process rights.

In what was the second mishap, Blau, Kohler, and Elkus' co-counsel, surprised virtually everyone: Blau announced that Kohler had recruited him for the trial; that he had not participated in writing the petition; and that, unless his co-counselors amend the petition to omit charges of racial bias, he would remove himself from the case.[167] Unbeknownst to Kohler, between receiving notice of the hearings and actually appearing before Hand, Williams had contacted Blau about charges of racial discrimination that Kohler and Elkus had included in their court petition. Williams was especially upset by these charges, which he viewed as outrageous, and he informed Blau of his opinion. Whether or not Blau was aware of the petition's contents is unclear. Whatever the case, it is likely that Blau was eager to acquiesce to Williams because the men shared an affiliation in the Republican Party. Blau was a judicial candidate for the Municipal Court in New York's Second District on the

[167] "Williams to Explain His Tests in Court," *New York Times*, July 17, 1909, 3; "Courts Again Halt Ballot Printing," *New York Times*, October 29, 1909, 3; "Blau Has Hope for Bench," *New York Times*, November 13, 1909, 6.

Republican Party ticket and the election was only months away. Blau needed the party's support and would have likely lost it had he not complied with Williams' desires.

The next day, July 17, Williams again wrote to Nagel, but this time he was in much better spirits. After informing Nagel that "Mr. Blau acted in a very manly way," he recommended that Bartz, Farber, Gelrot, and Skuratowski be granted new BSI hearings. Indicating his concerns about the bureau's reputation, Williams noted, "Any other course might place the immigration authorities in the attitude of wishing to be vindictive."[168] Moreover, he reasoned, because money had been deposited on their behalf, the aliens were no longer likely to become public charges.

Williams had two additional reasons for recommending that the men be granted BSI hearings: The first was a desire to fortify executive authority in immigration matters. Had Kohler succeeded in challenging the immigration regime in federal court, Hand would have had the opportunity to issue an opinion, which would, in turn, affect how Williams could implement the country's laws. Williams wanted to avoid this outcome. Second, Williams recommended new BSI hearings before Hand could proceed because Williams did not know how Hand would rule. Hand was a newly appointed judge without an established record that would indicate how he might decide an immigration case.

Had Williams known Hand's plans, he could have just waited for Hand to dismiss the case. On July 17, Hand declared that he "was adverse to bringing immigration affairs into the court until every avenue of executive authority had been tried."[169] In essence, he told the parties to follow the procedures laid out in federal law. Still, unwilling to surrender the case

---

[168] Williams to Nagel, July 17, 1909, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[169] "Rehearing for Immigrants," *New York Times*, July 18, 1909, 14.

entirely, Hand scheduled a hearing for a week later, just in case the second round of BSI hearings also resulted in the groups' debarment. Two days later, BSI inspectors reheard the appeals of Bartz, Farber, Gelrot, and Skuratowski. The inspectors declared the men admissible, reversing the July 7 exclusion orders.[170] At least as far as public records indicate, after this incident, Bartz, Farber, Gelrot, and Skuratowski disappeared into America and avoided additional interactions with immigration officials.

In the aftermath of his 1909 confrontation with Williams, Kohler continued to battle the country's immigration system. About a month after the admission of Bartz, Farber, Gelrot, and Skuratowski, Kohler and Elkus sent the brief that they had authored in preparation for the trial that never came to pass to Williams.[171] Trying to capitalize on residual press attention generated by the case, the two distributed their brief widely.[172] They mailed a copy to Taft.[173] The brief, *In re Skuratowski*, articulated a lengthy list of proposals intended to make American immigration law more fair and predictable. Among the suggested changes were granting aliens access to lawyers during their BSI hearings, allowing for communication between immigrants and their families immediately upon arrival, and affording immigrants the rights guaranteed by the U.S. Constitution's due process clause. In conclusion, Kohler explained that, although the circumstances that had given rise to the brief

---

[170] McHarg to William Williams, July 20, 1909, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.

[171] Naomi W. Cohen discusses this case briefly in "Commissioner Williams and the Jews," *American Jewish Archives Journal* 61, no. 2 (2009), 106.

[172] Letter, Wolf to Kohler, July 28, 1909, box 10, folder 2, Max Kohler Papers, P-7, AJHS, Center for Jewish History, New York, N.Y.

[173] Elkus to Taft, July 31, 1909, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C. A copy of it was included in the forty-first volume of the reports of the U.S. Immigration Commission (commonly called the Dillingham Commission), a bipartisan committee created by Congress for the purpose of studying the effects of immigration on the country. See Robert F. Zeidel, *Immigrants, Progressives, and Exclusion Politics: The Dillingham Commission, 1900-1917* (DeKalb, IL: Northern Illinois University Press, 2004).

had been resolved, larger issues remained unsettled: "We make these recommendations in order to secure for arriving aliens a legal administration of laws and such due process of law as the immigrant is entitled to."[174]

Bureau of Immigration officials' opinions about the brief ranged from unenthusiastic to incredulous. Williams sent Keefe a letter stating that, after a cursory read, he found "some of its propositions... simply preposterous."[175] Uhl's assessment echoed that of Williams. Asserting that the principal of executive discretion trumped the judicial priority of due process, procedural standardization, and fairness, Uhl offered a point-by-point rebuttal of Kohler and Elkus' suggestions.[176] "Almost all of these recommendations relate to matters of administration involving executive discretion and nothing else," he concluded.[177]

On several occasions after submitting the brief, Kohler and Elkus requested a response from the Bureau of Immigration but, as of September 17, 1909, no one had replied. Officials were perplexed as to how to answer. Keefe wrote to Nagel suggesting that the bureau either send Kohler and Elkus "a complete reply to the [individual] contentions," including "why certain of the suggestions... cannot be adopted," or, alternatively, write a "very general communication... expressing the department's appreciation of the intentions and service in furnishing the suggestions." Simply put, Bureau of Immigration officials wanted to find the quickest way to make Kohler and Elkus go away. Neither bureau officials

---

[174] *In the Matter of Hersch Skuratowski*, (S. D. N. Y. 1909).
[175] William Williams to Commissioner General, August 31, 1919, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[176] Keefe to Nagel, September 17, 1909, box 53517/011-52531/015, INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[177] "Comments For the Commissioner General on Recommendations to the Secretary Made in Letter of Messrs. Kohler and Elkus," July 30, 1909, box 53517/011-52531/015INS Subject and Policy Files 1893-1957, RG 85, U.S. National Archives.

nor Kohler got what they wanted: the country's immigration policies did not improve in Kohler's eyes nor did he or his colleagues stop challenging them, as officials had hoped.

In 1910, Wolf challenged the Department of Commerce's contention that people who received prepaid boat tickets from Jewish organizations were de facto "likely to become a public charge."[178] Two years later, Wolf appealed the case of a man destined for Chicago who was excluded because he "*may* become a public charge," a new interpretation of the meaning of "likely to become a public charge."[179] And, in 1915, Kohler and Elkus, joined by attorneys Morris Jablow and Ralph Barnett, returned to court to litigate the definition of "likely to become a public charge."

In that case, they represented Ali Gegiow and Sabas Zarikoew, two Eastern European aliens who had been identified as "likely to become a public charge," because, according to inspectors, they had arrived with "very little money" ($40 and $25, respectively), and they were headed to Portland, Oregon, a place where they would find it impossible to find work because of supposed job shortages in the region. Despite the fact that Gegiow and Zarikoew had a relatively large amount of money with them, officials had interpreted that an alien's likelihood of becoming a public charge was now not only dependent on how much money they had with them but also on the likelihood that they could find a job in the place in which they intended to live. Ultimately, the case made its way to the U.S. Supreme Court, where the justices ruled on the single question of whether an alien could be excluded because he was "likely to become a public charge" when that assessment was based on perceptions of the labor market in the place where the alien intended to settle. In an opinion delivered by Justice

[178] Letter, Simon Wolf to Max Kohler, February 9, 1910, box 10, folder 2, Max J. Kohler Papers, P-7, AJHS, Center for Jewish History, New York, NY.
[179] Letter, Simon Wolf to Max Kohler, March 9, 1911, box 10, folder 2, Max J. Kohler Papers, P-7, AJHS, Center for Jewish History, New York, NY.

Oliver Wendell Holmes, Jr., the Court answered no, stating, "It would be an amazing claim of power if commissioners decided not to admit aliens" because of the country's job market.[180] Although Kohler did not actually secure a definition of "likely to become a public charge," he did secure an opinion that eliminated one of the reasons immigration officers had used to justify excluding would-be immigrants.

Anti-Contract Labor Laws and Appeals to the Secretary of Labor and Commerce

In addition to testing the meaning of "likely to become a public charge," Jewish lawyers represented aliens excluded because they had supposedly violated labor laws. In 1885, with the intention of protecting the interests of American laborers, Congress passed the Anti-Contract Labor Law, also known as the Foran Act, which prohibited admission of aliens who came with the express promise of employment.[181] In 1912 a twenty-one year old Jewish baker from Romania named Joseph Pact was excluded because of this law.

On May 6, Pacht disembarked from the S. S. *Uranium* with the intention of finding his brother-in-law, Jack Regenstein, a resident of Youngstown, Ohio. Once on Ellis Island, Pacht underwent health and legal inspections after which he learned that he was ineligible for entry. He then appealed his case to the BSI.

At Pacht's BSI hearing inspectors Dooley, Harper, and Browne asked Pacht if he was literate and where he intended to go in America, and they reviewed personal finances. Early in the hearing, Pacht informed the inspectors that his brother-in-law "wrote he would find

[180] *Gegiow v Uhl*, 239 U.S. 3 (1915).
[181] Anti-Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (1885).

work for [him] in a bakery."[182] This was a mistake: according to the BSI inspectors, his brother-in-law's letter constituted an offer of employment, which made him ineligible for admission. Because Pacht had no savings, had supposedly violated the 1885 labor law, and had no relatives "legally bound" to support him, the BSI affirmed Pacht's exclusion.[183]

Once Pacht learned that he would be sent back to Europe, HIAS' Lipsitch took over his case. On May 8 Lipsitch filed a notice of appeal.[184] The following day, he sent Williams a memo explaining Pacht's circumstances and why he thought the BSI ruling was wrong. First, Lipsitch explained that the letter from Pacht's brother-in-law did not have the requisite components necessary to render it an offer of employment. "No 'offer' or 'promise of employment' or 'agreement to perform labor' can be so construed unless the wages and employer are so specified," Lipsitch asserted.[185] Second, Lipsitch wrote that Pacht was not likely to become of a public charge; his brother-in-law had given him $25, which would enable him to get by for some time. Further, because he was single and had no children, he would be "satisfied with small wages in the beginning." Finally, presumably believing that such information would illicit sympathy from officials, Lipsitch explained, "We respectfully submit that this young man has recently deserted the army, and his return to his native country would be fraught with consequences. We urge his admission."

After reading Lipsitch's memo, Williams sent it to Keefe, along with a letter with his assessment of the case. According to Williams, the BSI's had properly denied Pacht's appeal.

---

[182] "Board of Special Inquiry," May 7, 1912, box 53452/471-480, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[183] "Board of Special Inquiry," May 7, 1912, box 53452/471-480, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[184] Notice of Appeal, May 8, 1912, box 53452/471-480, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[185] "In the Matter of Pacht, Josef, S.S. *Uranium*, 5/6/12," May 9, 1912, box 53452/471-480, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C.

Twisting Lipsitch's intentions for including information about Pacht's army service, Williams wrote that he believed Pacht's uncle's letter was "the inducement to desert," which Williams anticipated Keefe would recognize as a violation of the anti-contract labor law.[186] Heeding Williams' recommendation, Keefe wrote to Nagel reiterating what Williams said and adding that if Pacht did not want to be deported to Romania, they could send him elsewhere. "The Bureau recommends that the excluding decision of the board be affirmed," it concluded.[187]

Pacht's fate, it would seem, was sealed. Yet, the bottom of Keefe's memo included the directive "Advise Mr. Wolf." Mr. Wolf was Simon Wolf, a prominent Washington D.C.-based Jewish lawyer who was also an immigrant.[188] In 1911, Wolf became the official counsel for the National Jewish Immigration Council (NJIC), an organization that managed "appeals made to the Government on behalf of immigrants."[189] NJIC members included Elkus, Mason, Kohler, Nathan Bijur—a New York born lawyer and judge—and Jacob Schiff—a wealthy Jewish immigrant banker and philanthropist from Frankfurt, Germany.[190]

---

[186] William Williams to Charles Nagel, May 9, 1912, box 53452/471-480, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[187] Memorandum for the Acting Secretary, May 10, 1912, box 53452/471-480, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C.
[188] Wolf arrived in America in 1848; apprenticed for a judge in Ohio and then opened a firm with Alexander L. Neeley. In 1862, he moved to Washington D.C., where he lived for the remainder of his life (save for 1881-1882, a year during which he served as the American Minister to Egypt). In Washington, he formed a practice with Myer Cohen, his son-in-law. See Jacob R. Marcus, *United States Jewry, 1776-1985* (Detroit, MI: Wayne State University Press, 1991), 322; Panitz, *Simon Wolf: Private Conscience and Public Image*, 22; "Simon Wolf at 84 Years," *New York Times,* October 23, 1921; "Simon Wolf Dies, Lawyer-Diplomat," *New York Times*, June 5, 1923.
[189] Meeting Minutes, box 1, National Jewish Immigration Council Papers, I-85, AJHS, Center for Jewish History, New York, NY.
[190] "Nathan Bijur Dies; A Noted Jurist," *New York Times*, July 9, 1930, 17; Naomi W. Cohen, *Jacob H. Schiff: A Study in American Jewish Leadership* (Hanover, PA: Brandeis University Press, 1999).

As NJIC's general counsel Wolf served as a liaison between excluded Jews and governmental officials.[191]

In 1891, Congress declared immigration inspectors' decisions "final" excepting appeals to the Secretary of the Treasury and, after 1903, the Secretary of Labor and Commerce. Therefore, in many cases, to ensure an alien's admission, a Jewish liaison such as Wolf needed to make personal appeals to government officials. The process was time-consuming, technical, and veiled by the cloak of federal bureaucracy. Favorable outcomes required knowledge that extended beyond a mere familiarity with administrative procedures. Since federal bureaucrats charged with overseeing exclusion appeals often held anti-immigrant views and because they were legally required to presume that alien exclusion decisions were correct, unless presented with compelling evidence to the contrary, aliens and their lawyers needed to express the proper balance of deference and determination in their petitions. The success of would-be immigrants' appeals was anything but assured.

As the primary contact between Jewish organizations' immigrant lawyers and the Secretary of Labor and Commerce, Wolf was in frequent communication with Secretary Charles Nagel. Nagel was not Jewish but, from 1876 to 1889, he was married to Fannie Brandeis, the sister of Louis D. Brandeis. He was unusually sympathetic to Wolf's pleas.[192] It was through Wolf's relationship with Nagel and other immigration officials that many Jewish immigrants rendered ineligible for admission found recourse. In Pacht's case, Wolf was successful. On May 12, 1912, the Department of Commerce and Labor issued the Report of

---

[191] The NJIC was a sort of umbrella organization for Jewish immigration aid groups. Concerned with the appearance (and public perception) of Jewish lawyers who appealed deportation orders for immigrants identified as excludable, the NJIC elected to appoint Simon Wolf as the sole person designated for this task.
[192] Joyce Antler, *The Journey Home: Jewish Women and the American Century* (New York, NY: Schocken Books: 1998), 5; On Nagel's stance toward immigrants, see Michael J. Churgin, "Immigration Internal Decisionmaking; A View from History," 1652-1653.

Execution of Department Decision. It read: "In accordance with Department decision No. 53452/475 of May 13, 1912, the alien Pacht, Josef was duly admitted."

In that Pacht's case followed the legislated process of appeals for immigrants, his case was typical. Lawyers who aided immigrants in the landing process challenged immigration officials' violations of American immigration law on a case-by-case basis. This required constant oversight of steamships' comings and goings, extreme attention to detail (which included tracking each individual Jewish immigrant), and grit. The process included writing and sending numerous petitions to immigration officials of various rank. It required persistence and vigilance. In that his case ultimately relied on Wolf's willingness and capacity to make a personal appeal to the Secretary of Commerce and Labor it was also typical (at least in the context of appealing exclusions). Often, when independent lawyers failed to secure a given alien's admission, they would contact an HIAS official (often Kohler), who would then contact Wolf.[193]

Despite the seeming banality of the routine appeal to bureaucracy by Jewish lawyers, for those who otherwise would have been returned to their places of origin, this work proved invaluable. In its first decade of existence, HIAS "interceded for 28,884 held for special inquiry, and secured the admission of 22,780 on rehearings; 6,104 were deported."[194] In 1913

[193] By relying on his personal relationships with bureau officials to reverse the exclusion of would-be Jewish immigrants, Wolf recreated in the American political context what historians Salo Baron and Yosef Hayim Yerushalmi describe as "vertical alliances"—that is, mutually beneficial, quid-pro-quo relationships between Jews and the political rulers in the places where they lived—by granting political cover to immigration restrictionists. On Baron, Yerushalmi, and "vertical alliances," see Lois Dubin, "Yosef Hayim Yerushalmi, the Royal Alliance, and Jewish Political Theory," *Jewish History* 28, no. 1 (2014): 51-81. On Wolf's political relationships, see Simon Wolf, *The Presidents I Have Known From 1860-1918* (Washington D.C.: Byron S. Adams, 1922), and Esther L. Panitz, *Simon Wolf: Private Conscience and Public Image* (Cranbury, NJ: Associated University Press, 1987); "Sargent on Immigration," *New York Times*, January 2, 1903, 2.
[194] Wischnitzer, *Visas to Freedom*, 89.

alone, HIAS successfully appealed 2,405 aliens' deportations.[195] The NJIC only functioned until 1914. Nonetheless, as he had before the NJIC came into existence, Wolf acted as an emissary for Jewish immigrants for the remainder of his life. According to various estimates, together, HIAS, Wolf, and other Jewish lawyers ensured the admission of between 100,000 and 125,000 individuals.[196]

Conclusion: Jewish Immigration Lawyers Get the Job Done

Whether they followed the procedures laid out in the immigration law, which involved appealing exclusion decisions to the Secretary of the Treasury or the Secretary of Commerce and Labor, or went to court, beginning around the turn of the century, Jewish lawyers aided individuals who faced obstacles in the process of becoming immigrants. They helped excluded aliens challenge their deportations, opposed inspectors' use of arbitrary and discriminatory procedures, and fought to protect aliens' rights. They established and funded immigrant advocacy organizations, challenged federal and state legislation that they saw as unfavorable. They tried to graft a sympathetic and even positive perception of immigrants onto the American legal system by depicting immigrants as economically beneficial, as central to the country's history, and as ideal Americans.

As a result of positioning themselves as an external check on federal immigration officials, Jewish immigration lawyers played an essential role in shaping the evolution of early twentieth-century immigration legislation. By recurrently engaging in legal confrontations with the state, excluded Jews and their lawyers served as a counterpoint to

---

[195] "Synopsis of the Report of the Activities of our Society for the Year 1913," Roll 24, HIAS Legal Briefs, RG 245.2, YIVO, Center for Jewish History, New York, NY.
[196] Leon Sanders, "Simon Wolf and the Immigrant," *The Jewish Immigration Bulletin* 6, no. 12 (December 1916): 3-4, box 2, folder 1, Simon Wolf Papers, P-25, AJHS, Center for Jewish History, New York, NY.

political forces trying to further restrict immigration. While the advent of immigration restrictions and their biased application prompted Jews to take legal action, the successes of Jewish immigrants and their lawyers in overcoming legal restrictions inspired the advent of new restrictions. Biased application of those new restrictions then led to more legal action, and so on. In this way, Jews participated in a legal tug-of-war. The U.S. Congress, Bureau of Immigration officers, and federal courts defined and redefined admission standards as Jewish immigration advocates fought to expand the categories of who would be admitted by lobbying and waging courtroom battles.

In 1921, Congress passed the Emergency Quota Law, which was intended to temporarily limit immigration by establishing a quota system according to immigrants' countries of origin. In essence, each year the number of aliens permitted entry from each country was 3 percent of the total number of aliens from that country living in the United States in 1910. In effect, this law restricted incoming immigration to approximately 350,000 people per year. Three years later, hoping to further restrict immigration, Congress passed the Immigration Act of 1924, also known as the Johnson-Reed Act.[197] This law, which was similarly designed with the intention of preserving the country's cultural and racial homogeneity, limited the number of immigrant annual admissions from any given country to 2 percent of the people from that country who were living in the country in 1890. (The law also put an explicit ban on Arab and Asian immigrants.) The law limited the total number of annual immigrants to approximately 150,000 people.[198] It remained in effect until 1952.

---

[197] Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004), 23.

[198] In 1921, U.S. immigration limited to 350,000 people annually; in 1924, that number dropped to 150,000. In addition to creating rigid quotas, the 1924 also created something called "Border Patrol" and eliminated a statute that permitted uninspected aliens in the country—what we now call "undocumented"—to remain in the

In the aftermath of the passage of the 1924 law, Jewish lawyers continued to champion open and liberal immigration policies, albeit the legal space in which they could operate was much more limited.[199] Despite these restrictions and innumerable setbacks, by serving as immigration advocates, early twentieth-century Jewish lawyers had a lasting impact on American jurisprudence. By representing excluded aliens, early twentieth-century Jewish lawyers became the country's first cohort of immigration lawyers. Individuals such as I. Irving Lipsitch, Max Kohler, Simon Wolf, Abram Isaac Elkus, and others served as champions for people with very limited legal rights and in so doing launched a field of practice that remains relevant through the present day. Moreover, these lawyers helped to establish immigrant aid organizations such as HIAS, which continues to promote the just treatment of refugees and immigrants through legal and legislative initiatives.

---

country, thereby criminalizing unauthorized entry. Congressional debates about the 1924 Act included discussions of racial theories and the "inferiority" of foreign-born people. See Mae Ngai, *Impossible Subjects*, chapter 1.

[199] Libby Garland, *After They Closed the Gates: Jewish Illegal Immigration to the United States, 1921-1965* (Chicago, IL: University of Chicago Press, 2014).

[Chapter 3] Jewish Labor, Jewish Lawyers: American Labor Law before the New Deal

During the final decades of the nineteenth century in the United States, the ideological triumph of wage labor, complexities of industrialization, and years of mass immigration inspired laborers to try to improve the conditions of their work through collective action.[1] They protested by slowing or stopping work and sometimes banded together for the purpose of negotiating with their employers. These actions, which transpired across the country throughout various industries, coalesced into what became known as the American labor movement.

Almost as quickly as it emerged, organized labor collided with American law: During America's Gilded Age, common law courts punished protesting workers and those who tried to form unions by convicting them of conspiracy. The use of the "conspiracy doctrine," which continued through the 1880s, made association or "combination" with other employees for the purpose of securing better wages or improved working conditions illegal.[2]

Beginning in the early twentieth century, as industrial unrest escalated, conspiracy trails became too burdensome a method for counteracting workers' initiatives. Therefore courts, in alliance with anti-union employers, began issuing injunctions, court orders to stop strikes.[3] Injunctions permitted mass arrest of strike participants.

One unintended consequence of these arrests was that they enabled legal representatives sympathetic to labor to present workers' claims in court and other legal

---

[1] John R. Commons, ed., *History of Labor in the United States, Vols. 1-4* (New York, NY: Macmillan, 1918-1935).

[2] Victoria C. Hattam, "Courts and the Question of Class: Judicial Regulation of Labor under the Common Law Doctrine of Criminal Conspiracy," in Christopher L. Tomlin and Andrew J. King, eds., *Labor Law in America: Historical and Critical Essays* (Baltimore, MD: John Hopkins University Press, 1992), 44-70.

[3] In 1895, in a famous case against socialist Eugene V. Debs, the U.S. Supreme Court granted official approval of injunctions as a method of stopping striking workers and this precedent remained in place until Congress passed the Norris-La Guardia Act in 1932. See *In re Debs*, 158 U.S. 564 (1895).

forums. Accordingly, a small group of lawyers associated with radical political movements and deeply committed to the cause of labor led an effort to inscribe workers' rights into American law.[4] They challenged injunctions, asserted workers' rights to protest, boycott, and picket, and defended individuals criminally prosecuted for participating in labor activism. They also fought to establish the legality of unionization and helped institutionalize collective bargaining and arbitration, negotiation processes used to try to reach agreements between employers and employees. Last but not least, they initiated legal actions for the purpose of litigating issues concerning workers' hours, wages, employers' liability, child labor, and safety and health.[5] By advancing workers' rights in legal forums, late nineteenth- and early twentieth-century lawyers who represented the interests of labor birthed a field of law that regulated the relationships between workers, employers, unions, and the government, which today we call labor law.[6] By the 1930s, labor law became a standard area of legal practice. Moreover, remarkably, the rise of public sector labor law in the 1950s saw states adopt the procedures developed by early twentieth-century labor lawyers as matters of state policy.

While not exclusively, Jews were among the leading practitioners of labor law during the late nineteenth and early twentieth centuries.[7] Why that was so can be explained, first, by

---

[4] "Prior to the Great Depression very few attorneys specialized in labor law." Colin Wark and John F. Galliher, *Progressive Lawyers Under Siege: Moral Panic During the McCarthy Years* (New York, NY: Lexington Books, 2015), 34.

[5] John R. Commons, *History of Labor in the United States, 1896-1932* (New York, NY: Macmillan Company, 1935), 661-667.

[6] Few historians acknowledge the existence of labor lawyers prior to the New Deal. For example, Robert Gordon writes: "The New Deal also forced the creation of a labor bar something that previously had scarcely existed." See Robert Gordon, "The American Legal Profession, 1870-2000," in *The Cambridge History of Law in America, Vol. 3*, eds. Michael Greenberg and Christopher Tomlins, 74-126, (New York, NY: Cambridge University Press, 2008).

[7] Richard Greenwald has noted the Jewish ethnic origins of labor law. He writes that the creators' of the Protocols of Peace "common religious, if not ethnic, identity and community" is of "critical importance in

the rise of the American labor movement and Jews' special place in that movement. The American labor movement emerged during an era of industrialization, immigration, and urbanization with the aim of improving workers' lives and Jewish workers in America, most of whom were poor immigrants living in cities, proved especially sympathetic to these goals. In New York City around 1880, a Jewish labor movement, which was politically radical, secular, Yiddish-speaking, and universalist in its outlook, was born. As historian Tony Michels writes, for the next forty years, "No movement won more support or inspired greater enthusiasm among Jews."[8] By 1920 at least a quarter of a million Jews in America belonged to unions.[9] Its primary publication, the socialist daily *Forverts*, had a daily readership of approximately 200,000 people.[10]

Almost uniformly, Jewish immigrants of Eastern-European descent who became employee-side labor lawyers were involved in the labor movement before practicing labor law, serving as strike leaders and Socialist Party organizers. The same "energetic community of radical intellectuals [who] played a crucial role in the rise and development of the Jewish labor movement" birthed the practice of labor law.[11] In 1888, five years before he became an attorney, Morris Hillquit helped form the United Hebrew Trades, a coalition of Jewish labor unions in New York. Likewise, Jacob Panken was a factory worker and labor agitator before representing workers' unions in court. The same was true for Meyer London, Louis Waldman, Charles Solomon, and others. (Often, these individuals worked in factories during

---

understanding the development of modern labor relations." See Richard Greenwald, "'More than a Strike,' Ethnicity, Labor Relations, and the Origins of the Protocol of Peace in the New York Ladies' Garment Industry," *Business and Economic History* 27, no. 2 (Winter 1998): 318-329.

[8] Tony Michels, *A Fire In Their Hearts: Yiddish Socialist in New York* (Cambridge, MA: Harvard University Press, 2006), 3.

[9] Rafael Medoff, *Jewish Americans and Political Participation: A Reference Handbook* (Denver, CO: ABC Clio, 2002), 20.

[10] Tony Michels, *A Fire In Their Hearts*, 3.

[11] Tony Michels, *A Fire in Their Hearts*, 10.

the day and attended law school at night. As historian Will Herberg noted, "Men with diplomas became the aristocracy within the movement.")[12] In short, Jews' support for the labor movement translated into Jewish lawyers' practice of labor law.

Jews' tendency to live in New York or similar centers of industry with large labor movements also helps explain why Jews came to practice labor law.[13] Progressive-Era New York, which was home to the country's largest Jewish population, housed the country's largest garment industry and other important businesses such as cigar making, baking, sugar refining, flour milling, meatpacking, printing, and publishing.[14] Proximity to these industries, whose workers were central to the labor movement, gave Jewish lawyers a pool of clients to represent.

Jews' unique place within the American garment industry, the industry's unique institutional development, and its place within the American labor movement also sheds light on why and how Jewish lawyers became central to the birth of labor law.[15] New York's clothing industry was arguably the most important of any industry for turn-of-the-century Jews: "Nowhere else did Jews predominate both as employers and employees."[16] In 1897, according to at least one factory inspector, Jews comprised approximately 75 percent of the

---

[12] Will Herberg, "The Jewish Labor Movement in the United States," *American Jewish Year Book* 53 (1952), 28.
[13] On New York as a center of the American labor movement, see Melvin Dubofsky, *When Workers Organize: New York City in the Progressive Era* (Amherst, MA: University of Massachusetts Press, 1968), chapter 1.
[14] The cigar industry was, in the century's final two decades, the second largest employer in New York. "Over 14,000 men and women (2.7 percent of the total work force) earned their livelihood in the cigar industry in 1880." See Dorothee Schneider, *Trade Unions and Community: The German Working Class in New York City, 1870-1900* (Champaign, IL: University of Illinois Press, 1994), 50.
[15] For a source list about Jewish involvement in the United States garment industry see Ewa Morakska, *Insecure Prosperity: Small Town Jews in Industrial America, 1890-1940* (Princeton, NJ: Princeton University Press, 1996), 299, note 2.
[16] Tony Michels, *A Fire In Their Hearts*, 9.

city's 65,000 clothing makers.[17] Likewise, by 1890, Jews of Central European-descent owned approximately seventy percent of the city's garment factories.[18] Unlike the steel and iron industries, garment manufacturing developed in such a way that it was comprised of a "highly decentralized crazy quilt of small- and medium-sized firms."[19] Workers at these firms formed various small- and medium-sized branches of respective unions of which there were many; "by 1912, the garment workers had assumed first place in the state-wide union membership and they represented almost one third of the state's total union membership."[20]

The fact that Jews served as both the primary employers and employees in New York's garment industry meant that Jewish lawyers dominated both sides of labor disputes, giving them considerable influence in shaping the processes and outcomes of turn-of-the-century labor disputes. That garment workers were among the country's most devoted labor activists meant that these disputes occurred regularly.[21] Finally, that the garment industry was comprised of many firms meant that there were many local unions, which translated into a need for legal representation and opportunities for those lawyers who were willing to help.

In addition to explaining why so many Jewish lawyers practiced labor law, the fact that Jews comprised both a majority of employers and of employees in the garment industry accounts for the different ways and different types of Jews who represented parties in labor disputes. Unlike other fields of practice in which Jews comprised a significant proportion of

---

[17] According to a New York factory inspector, Jews comprised seventy-five percent of the 66,500 clothing workers in New York factories in 1897. See Jesse Pope, *The Clothing Industry in New* York (Columbia, MS: University of Missouri Press, 1905), 52, note 11.

[18] According to Howard Sachar, "As early as 1890 almost 80 percent of New York's garment industry was located below Fourteenth Street, and more than 90 percent of these factories were owned by German Jews." Howard M. Sachar, *A History of Jews in America* (New York: Vintage Books, 1993), 145-146.

[19] Susan Glenn, *Daughters of the Shtetl: Life and Labor in the Immigrant Generation* (Ithaca, NY: Cornell University Press, 1990), 93.

[20] Melvin Dubofsky, *When Workers Organize*, 4.

[21] By 1914, two-thirds of the country's clothes came from New York. Its workforce exceeded 500,000. See Howard Sachar, *A History of Jews in America*, 145-146.

the practitioners, Jewish lawyers worked on both sides of the legal divide in labor disputes. By and large, the same class differences, disparate social networks, and particular ideological concerns that distinguished different groups of American Jews from each other guided how Jews engaged in the field.[22]

Generally, Central European Jewish lawyers represented manufacturers-employers, with whom they shared a similar socioeconomic station. They thwarted unionization, prevented strikes, and secured injunctions. For example, prior to his appointment to the U.S. Supreme Court, Harvard-educated lawyer Louis D. Brandeis served as counsel to the Boston department store, William Filene's Sons Company, which later became known as Filene's Basement.[23] Sometimes, Central European Jewish lawyers' involvement in employer-side labor law was motivated by fears of antisemitism.[24]

By contrast, Jewish lawyers of Eastern European descent represented Jewish and Italian immigrant laborers, individuals with whom they shared socioeconomic backgrounds

---

[22] Generally, Jewish lawyers of Central European descent came from families who had arrived in America in the mid-to-late nineteenth century and had preexisting and wealthier social networks while Jewish lawyers of Eastern European descent who had arrived after the 1880s were poor and did not have access to social networks to help them find jobs. Still, even these general patterns did not prove foolproof. For example, Abraham and Herman Fromme, a pair of brother attorneys of Central European Jewish descent, represented the United Garment Workers in the late nineteenth century. See *Sinsheimer v. United Garment Workers of America*, 5 Misc. 488 (N.Y. Misc. 1893). The Fromme brothers were born in New York. See "A Record of Graduates of the New York University Law School," *The American University Magazine* 3 (November 1895): 379.

[23] Saul Engelbourg, "Edward A. Filene: Merchant, Civic Leader, and Jew," *American Jewish Historical Quarterly* 66, no. 1 (September 1976): 106-122. This pattern held true outside of the garment industry as well. For example, Chicago-based lawyer Max Pam—an acquaintance of Samuel Untermyer and Louis Brandeis—represented the steel industry in the landmark Supreme Court case *American Steel Foundries v. Tricity Central Trades Council*, 257 U.S. 184 (1921).

[24] Representing in microcosm the anxiety that many American Jews of Central European descent felt on account of the arrival of Eastern European Jewish immigrants, Jews of Central European descent such as Louis Brandeis, Louis Marshall, and Julius Henry Cohen expressed fears about anti-Jewish reprisals for the actions of Jewish labor activists. See Greenwald, "'More than a Strike,' Ethnicity, Labor Relations, and the Origins of the Protocols of Peace," 320-325.

and political leanings.[25] They led unionization efforts and strikes, encouraged picketing, and aided laborers in the aftermath of arrest. The International Ladies' Garment Workers' Union (ILGWU), a union of garment workers established in 1900 that boasted tens of thousands of members, employed Meyer London, an immigrant from Lithuania and prominent member of the Socialist Party, as its chief counsel.[26] He also represented the Hebrew Bakers' Union.[27] Louis Waldman, who was born outside of Kiev and arrived in America in 1909, represented the United Neckwear Makers' Union.[28]

Precisely how many Jewish lawyers practiced labor law at the turn of the century is difficult to know. As was true of immigration advocates, statistics about labor lawyers from this period do not exist and, at the start of the twentieth century, the identification of "labor lawyer" did not yet exist in the lexicon of the legal profession and therefore simply counting labor lawyers from the era is not feasible. Nevertheless, two reasons suggest that Jewish lawyers were foremost among those practicing labor law: The first is that many Jewish lawyers politically and philosophically supported the labor movement and this support manifest itself in their professional careers. The second reason that suggests that Jews played a singular role in the birth of labor law is that few other lawyers wanted the job. Most lawyers abstained from representing workers. For one, being an employee-side labor lawyer was not lucrative because one's clients were cash-poor unions. Second, according to at least one historian, before the New Deal, "to represent a labor radical was to jeopardize one's

[25] On Jewish and Italian garment workers in New York see Susan Glenn, *Daughters of the Shtetl*. On the Jewish labor movement, see Tony Michels, *A Fire In Their Hearts: Yiddish Socialist in New York*.
[26] On Meyer London see Gordon J. Goldberg, *Meyer London: A Biography of the Socialist New York Congressman, 1871-1926* (New York, NY: McFarland, 2013).
[27] "May Arbitrate for Bakers," *New York Times*, January 8, 1901, 3.
[28] See Louis Waldman, *Labor Lawyer* (New York, NY: E. P. Dutton, 1944).

career and occasionally one's life."[29] In short, most of the American bar's unwillingness to represent unions created an opportunity for Jewish lawyers willing to do just that.

This chapter illuminates the radical Jewish origins of union-side labor law by examining the work of American Jewish labor lawyers between 1893 and 1935.[30] Despite Jewish lawyers' representation of both employer and employees, because their work remains unrecognized and because it was remarkable for its time and place, the chapter highlights the work of employee-side lawyers—union representatives and workers' attorneys. By representing laborers' interests in collective bargaining negotiations, injunction hearings, and criminal trials, early twentieth-century Eastern European Jewish lawyers stood in the vanguard of labor's legal battles. Their efforts ultimately laid the foundation for the institutionalization of labor law during the New Deal.

Collective Bargaining

By the late summer of 1910, Meyer London and Julius Henry Cohen were at loggerheads.[31] London, who represented a group of New York City garment workers' unions, and Cohen, counsel to one hundred and some of the city's clothing manufacturers, had spent

---

[29] Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Cambridge, MA: Oxford University Press, 1976), 217-218.

[30] American legal historians have also given little consideration to Jewish labor lawyers as such or labor lawyers generally who worked before the New Deal. Robert Gordon, for example, writes: "The New Deal also forced the creation of a labor bar, something that previously had scarcely existed." See Gordon, "The American Legal Profession, 1870-2000," 106. Likewise, Robert Segal attributes the growth of labor lawyers to the passage of Wagner Act in 1932. See Robert M. Segal, "Labor Union Lawyers: Professional Services of Lawyers to Organized Labor," *Industrial and Labor Relations Review* 5 (1951): 343-364. Still some strong works about labor lawyers exist. See, for example, Daniel R. Ernst, *The Lawyers and the Labor Trust: A History of the American Anti-Boycott Association, 1902-1919* (PhD diss., Princeton University, 1989). This has led to the errant attribution of the origins of New Deal labor legislation to Progressive Era liberals as opposed to the radicals who were the first legal practitioners to voice ardent support of laborers' legal rights. For example, see Ruth O'Brien, "'Business Unionism,' versus 'Responsible Unionism': Common Law Confusion, the American State, and the Formation of Pre-New Deal Labor Policy," *Law and Social Inquiry* 18, no. 2 (Spring 1993): 255-296.

[31] "Julius Cohen, 77, Lawyer 53 Years," *New York Times*, October 7, 1950, 12.

the previous two months negotiating the settlement of what was the latest in a series of mass labor strikes. At 2 p.m. on July 7, 1910, nearly 60,000 garment makers had put down their work and filled the streets to protest the industry's prevailing labor practices.[32] Among other goals, the strikers wanted the manufacturers to agree to employ only union members, that is, to function as a "closed shop." For union members, working in closed shops ensured job security. Manufacturers, on the other hand, shunned closed shops because they thought being required to hire union workers infringed on their capacity to manage their respective businesses.

This was not the first major labor strike among New York's garment makers. The last strike, which involved some 20,000-shirtwaist makers, had just ended six months prior, after having continued for sixteen straight weeks.[33] Nevertheless, after weeks of discussion, resolution of the summer strike appeared remote. Frustrated and angry, in the final week of August, the manufacturers' counsel, Cohen, asked the New York Supreme Court for a court order directing the workers to stop protesting. On August 28, Judge John W. Goff, a staunch Catholic, Irish nationalist, and democrat issued an injunction requiring just that.[34] In a six-page, single-spaced document, Goff asserted that the manufacturers had "large amounts of

---

[32] For the details of this strike, see Richard A. Greenwald, "'More than a Strike,' Ethnicity, Labor Relations, and the Origins of the Protocol of Peace in the New York Ladies' Garment Industry," 318-329 and *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York* (Philadelphia, PA: Temple University Press, 2005); Gordon J. Goldberg, *Meyer London: A Biography of the Socialist New York Congressman, 1871-1926* (Jefferson, NC: McFarland & Company, Inc., 2013), chapter 2; Melvin Dubofsky, *When Workers Organize*, chapter 3. Likewise, in the context of American Jewish history, scholars have paid scant attention to Jewish labor lawyers, an omission that reflects, in part, the field's general treatment of the Jewish labor movement, which, until recently, was often dismissed as fleeting and therefore unimportant. Tony Michel's *A Fire in Their Hearts: Yiddish Socialists in New York* is an exception.

[33] Susan Glenn, *Daughters of the Shtetl*, 167.

[34] *Schwarcz v. ILGWU*, 68 Misc. 532, 124 N.Y. S. 968 (1910). This was the first time, according to some contemporary reporters, that a sitting judge had outlawed what was known as "peaceful picketing," that is, picketing that excluded violence or direct harm to the employer. See "Goff Will Enjoin The Cloak Strikers," *New York Times*, August 28, 1910, 1, 3; "Wilson Won't Meet Cohalan With Irish," *New York Times*, March 5, 1919, 2; "Left Convent in Father's Last Days," *New York Times*, November 16, 1924, 1, 29.

money invested in their businesses." Should the strike be permitted to continue, the manufacturers would suffer "irreparable" damages so great they "[could not] be estimated." Revealing his perception of the importance of employers and the insignificance of employees, he wrote that union members, conversely, had "no financial responsibility" and risked little by striking. Next, Goff explained why operating as a closed shop was against public policy: "The primary purpose of this strike is not to better the condition of the workmen, but it is to deprive other men of the opportunity to exercise their right to work," he asserted. Such deprivation was illegal because it affronted "the interests of society, [which] favor the utmost freedom in the citizen to pursue his lawful trade or calling." Declaring that the strikers' actions constituted "a common-law, civil conspiracy," Goff issued a sweeping court order banning all forms of protest.[35]

Goff's injunction incensed protestors. At a September 1 gathering in Union Square, activist-attorney Jacob Panken, one of London's fellow Socialist Party luminaries, told some 5,000 listeners, "An appeal from Judge Goff to the Supreme Court is like appealing from one of the bosses to the manufacturers' association… Give me 70,000 men in every city in the country and the red flag of Socialism will float from every City Hall in the United States!"[36] Panken contended that the courts, like factory bosses, served the desires of capitalists. Similarly outraged, some strikers refused to obey Goff's order; police arrested them, in some

[35] Goff's injunction did more than simply reduce the size of the strike; the court order had repercussions for workers who faced arrest and the fines associated with as much. By September, well over one thousand strikers had been arrested for alleged disorderly conduct. According to the *New York Times*, the police commissioner was overseeing "hundreds of additional arrests daily," which was causing an overflow in the city's jails; those arrested were "jammed together like sardines." Moreover, thousands of workers forwent their wages in order to participate in the strike; as a result many faced eviction. See "1,100 Cloak Strikers Now Face Eviction," *New York Times*, September 2, 1910, 5. According to the *New York Times*, "the injunction [restrained] permanently, for the first time in the history of labor disputes in this State, what is known as 'peaceful' picketing." See "Goff Will Enjoin the Cloak Strikers," *New York Times*, August 28, 1910, 1, 3.

[36] "Justice Goff Hooted," *New York Times*, September 2, 1910, 5.

cases, only after subjecting them to beatings.[37]

By September 2, public pressure, workers' growing fatigue, and, most significantly, the intervention of well-known Progressive-Era lawyers Louis Marshall and Louis Brandeis convinced London, Cohen, and a handful of other principal decision makers to endorse an agreement that the parties had been in the process of negotiating. They labeled this agreement the "Protocol of Peace."[38] Between late-1910 and 1914, the Protocol constituted the primary mechanism for resolving employer-employee conflicts in New York's garment industry.[39]

When London and Cohen signed the Protocol, they effectively institutionalized "collective bargaining," a negotiation process in which managers and employees' representatives discussed employment terms such as wages, benefits, hours, and workplace conditions within the largest industry in the country's most vital center of labor activism.[40] As other scholars have shown, this alone marked a major turning point in the development of American industrial democracy. Participation in collective bargaining was spotty before the

---

[37] "Demand Closed Shop Despite Injunction," *New York Times*, August 30, 1910, 8; "Police Disperse Parading Strikers," *New York Times*, September 1, 1910, 5.

[38] On March 25, 1911, some eight months after the launch of the cloak makers strike, a fire broke out in the Triangle Shirtwaist Company; because the manufacturers had chained the stairway closed, garment makers were unable to escape. This too compelled the manufacturers to agree to the Protocol of Peace. See Richard Greenwald, *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York*.

[39] For labor historians, the creation of the Protocol is a familiar story. Scholars have typically depicted the rise and fall of this legal instrument as a central moment in the development of industrial democracy, a system in which employers and employees share decision-making powers in the workplace. See Richard Greenwald, *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York*, introduction. Less explored yet crucial to the creation of garment-industry negotiations, however, was the overlapping ethnic and legal context from which the Protocol and agreements like it emerged. Will Herberg, "The Jewish Labor Movement in the United States," *American Jewish Year Book* 53 (1952): 3-74 is an exception to this omission.

[40] Mrs. Sidney Webb is commonly attributed with having coined the term "collective bargaining" in 1891. A 1901 report published by the Congressional Industrial Commission—a twenty-person committee charged with investigating questions pertaining to immigration, business, labor, agriculture and manufacturing—reported, "Whether the phrase 'collective bargaining' will ever become established in common use in the United States is perhaps doubtful." United States Industrial Commission, "Definitions," *Reports of the Industrial Commission on Labor* Organizations, vol. 17, 57th Congress, 1st sess., House Doc. 186, chapter 2, 77.

start of the twentieth century.[41] For the most part, during the nineteenth century, American judges declared that unionization was illegal, thereby eliminating the possibility of collective negotiation.[42] Still, sometimes, informal employer-employee negotiation occurred and by the second decade of the twentieth century, after a series of labor strikes, collective bargaining became increasingly common. Nevertheless, before 1935, negotiation depended on employers' willingness to engage their employees; manufacturers' ability to withdraw from negotiations with unions reified the imbalance of power between the parties, precisely what union representation and collective bargaining was intended to correct.

Jewish lawyers and labor activists endorsed the practice of employer-employee negotiation not only as valid but as central to improving workers' lives. Before collective bargaining became a legally legislated right for union members, Jewish lawyers tried to improve workers' circumstances by facilitating its use. As Paul Abelson, who spent his entire career as a labor lawyer (mostly on the side of management) wrote in a letter to the editor of the *New York Times* in 1901, "The right to join a union can never be questioned."[43] Likewise, as Morris Hillquit told New York City bar members in 1923, "It may be asserted without exaggeration that the subject [of collective bargaining] is one of the most important if not the most important field of modern jurisprudence."[44]

Although intermittently used in various labor-employer disputes in New York and

---

[41] By the late 1890s, informal collective bargaining processes existed in the United States in industries related to production of materials such as steel, iron, and tin. George E. Barnett, "National and District Systems of Collective Bargaining in the United States," *Quarterly Journal of Economics* 26, no. 3 (May, 1912), 425.
[42] Workers' rights to collectively bargain in the United States did not exist as an affirmative right until 1935, the year in which Congress passed the National Labor Review Act. This law, also known as the Wagner Act, articulated the rules and procedures of employer-employee negotiations.
[43] Paul Abelson, "Merits of the Steel Strike," *New York Times*, July 19, 1901, box 2, folder 3, Paul Abelson Papers, MS 4, AJA, Cincinnati, OH.
[44] Morris Hillquit, "Collective Bargaining Between Employers and Workers," Address to the Bar of the City of New York, for Special Committee on Lectures and Conferences on Legal Topics in *Lectures on Legal Topics, 1923-1924* (New York, NY: Association of the Bar of the City of New York, 1928), 109-121, 121.

elsewhere, the institutionalization of collective bargaining was most clearly achieved in the city's garment industry through the implementation of the Protocol beginning in 1910. The Protocol was a contract between local unions—including the Cloak Operators Union No. 1, the Cloak and Suit Tailors, No. 9, the Amalgamated Garment Cutters Association, No. 10, which belonged were members of the International Ladies Garment Workers' Union (IGLWU)—and the members of the Cloak, Suit, and Skirt Manufacturers' Protective Association (Association).[45] It included nineteen stipulations concerning laborers' working conditions. Signing the agreement, manufacturers promised to stop charging their employees for the electricity used by shop machinery and to cease requiring employees to complete work at home; manufacturers agreed to treat the state's ten legal holidays as paid vacation days. They also promised to "establish a regular weekly pay-day" and vowed to compensate their workers "within a reasonable time."[46] The agreement also called for minimum wages for different categories of workers and limited the workweek to fifty hours per six-day period.

The Protocol also established three institutional entities intended to structure how future disputes would be resolved. The first was a Board of Sanitary Control, a seven-member panel whose task was to articulate and ensure sanitary standards in the garment shops. Whether the small shops of the Lower East Side or newer, larger factories, garment-manufacturing firms were unsanitary and often dangerous, which is why union

---

[45] "Protocol of Peace," September 2, 1910, rare document on file, Louis Marshall Papers, MS-359, AJA, Cincinnati, OH. Available online: http://americanjewisharchives.org/exhibits/aje/details.php?id=694. Last accessed July 10, 2016. For a discussion of the implications of the Protocol on the garment industry in New York, see Bois Emmet, "Trade Agreements in the Women's Clothing Industry in New York City," *Monthly Review of the U.S. Bureau of Labor Statistics* 5, no. 6 (December 1917): 19-39 and Richard Greenwald, *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York.*

[46] "Protocol of Peace," September 2, 1910, rare document on file, Louis Marshall Papers, MS-359, AJA, Cincinnati, OH.

representatives demanded that the Protocol include a mechanism to address workers' physical environments.[47] The second was a Board of Grievances, which was intended to be a forum in which to discuss conflicts between employers and employees.[48] Issues that went unresolved by the grievances board went to the third mechanism created by the Protocol, the Board of Arbitration.[49] This was the final forum for negotiation where lawyers for each party would plead their cases to a panel of arbiters.

The Board of Arbitration convened only six times during the Protocol's existence, which lasted from late 1910 to 1914, and each meeting occurred within the context of different stages of crisis, characterized by mass strikes and a very rocky relationship between labor and management. Nevertheless, the following August 1913 arbitration proceeding between the New York Cloak and Skirt Makers' Union and the Cloak, Suit, and Skirt Manufacturers' Protective Association—the last of these negotiations—illuminates precisely how union-side labor lawyers tried to advance workers' interests within a legal framework.[50] It reveals the issues most contested by labor, how labor lawyers sought to justify their positions, and the reactions of management-side attorneys. The substance of the debate it illuminates constitutes an example of collective bargaining, one of the main building blocks of twentieth-century American labor law.[51] Finally, it shows how anti-union attorneys relied on normative legal opinions, which outlawed picketing and various expressions of speech in

---

[47] Susan Glenn, *Daughters of the Shtetl*, 136.
[48] "Protocol of Peace," September 2, 1910, rare document on file, Louis Marshall Papers, MS-359, AJA, Cincinnati, OH.
[49] The original Board of Arbitration was comprised of Louis Brandeis, Hamilton Holt, and Morris Hillquit. When Hillquit resigned in 1912, Dr. Walter Weyl replaced him.
[50] For a full discussion of this arbitration in the context of rank-and-file versus union leadership divides, see Richard Greenwald, *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York*, chapter 3.
[51] Historians and legal scholars have assessed the Protocol's strengths and weaknesses. See Richard Greenwald, *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York.*

order to avoid addressing union demands.

On the morning of August 3, 1913, inside the Association of the Bar of New York City on Forty-fourth Street, a handful of men gathered with the intention of resolving ongoing conflicts between the city's garment makers and their employers. Not coincidentally, the individuals involved in this negotiation were those who had helped craft the Protocol of Peace three years earlier. Walter E. Weyl, Hamilton Holt, and chairman Louis D. Brandeis—all lawyers—served as the session's arbiters.[52] Meyer London represented the unions.[53] Julius Henry Cohen represented the manufacturers.[54] Dr. Isaac Hourwich was there as the Chief Clerk of the Joint Board of the Cloakmakers' Union, a position to which he had been appointed the previous January. In this role, Hourwich was to mediate in-shop disputes and work in conjunction with the manufacturers' chief clerk, Dr. Paul Abelson, who was also present.

Over four consecutive August days, the men met and debated topics ranging from workers' wages to the cost of living to the appropriate compensation for different types of buttonhole makers. The tone of the proceedings was adversarial and sometimes hostile. By meeting's end the future of the Protocol would be in jeopardy and within months Hourwich

---

[52] Arbitration Proceedings between the Cloak and Skirt Markers' Union of New York and the Cloak, Suit, and Skirt Manufacturers' Protective Association, August 3-6, 1913, folder 30, Isaac A. Hourwich Papers, RG 587, YIVO, Center for Jewish History, New York, NY. (This arbitration proceeding is subsequently identified as "August 1913 arbitration.")

[53] Hourwich and London were both Lithuanian-born immigrants. Hourwich had been imprisoned in Siberia for alleged revolutionary activities before studying law in Minsk. Hourwich was admitted to bar in the Circuit Court of Minsk in 1887. See Deposition of Isaac A. Hourwich, April-June 1915, box 53854/39-H, INS Subject and Policy Files, 1893-1957, RG 85, U.S. National Archives, Washington D.C. London was also an immigrant. Born in 1871, he came to America at the age of twenty. He graduated from law school in 1898 and the following year, he and Hourwich formed a partnership. See Partnership agreement, April 5, 1899, Reel 8, Frame 599, Isaac A. Hourwich Papers, RG 587, YIVO, Center for Jewish History, New York, NY.

[54] Cohen was a close friend of Samuel S. Koenig, another prominent early twentieth-century Jewish lawyer in New York. Koenig grew up on the Lower East Side and attended law school at night, graduating in 1896. See "Koenig May Upset the East Side Vote," *New York Times*, October 4, 1908, 4. Cohen was also very wealthy. In 1910, the *New York Times* reported he was building a $35,000 home in White Plains, NY. See "The Manifold Attractions of Westchester Country," *New York Times*, April 24, 1910, 38.

and London would lose their jobs.[55] Of course, no one knew this when the proceedings began.

As the arbitration transcript makes clear, from the outset, Cohen was frustrated by having to engage in these negotiations at all. The fact that the meeting was being held, in Cohen's view, was a mistake and not required under the terms of the Protocol. In Cohen's view, the Board was like a court of final appeal, a last resort only necessary once all other avenues had been tried, and thus the Board need not meet regularly. By contrast, London and Hourwich believed that the Board of Grievances had proved itself incapable of implementing any decisions it came to and therefore the Board of Arbitration needed to meet more frequently, so that issues could be resolved more quickly. Despite's Cohen's desire to focus on the issue of whether the men should even be meeting, after considerable time and without offering a resolution, Brandeis decided to "suspend the consideration of this matter… and proceed to the other matters."[56]

After Cohen's effort to stop the proceedings, Hourwich introduced seven pressing matters, all of which, in one way or another, concerned workers' wages. Hourwich and London wanted to do whatever necessary to facilitate manufacturers increasing workers' salaries. They wanted employers to pay garment workers minimum wages. They thought that buttonhole makers, considered a skilled worker among garment makers, deserved pay increases. They hoped to establish "Joint Price Committees" at each manufacturing firm so as to ensure fair payment for individual garment makers. They aimed to ensure job safety by having employers promise not to fire employees without cause. And they intended to verify

[55] By May of 1915 the Protocol was formally terminated.
[56] August 1913 arbitration, 35.

that manufacturers were properly upholding the Protocol's principal of a "preferential shop," that is, operating as a shop in which employers favor union members over non-union members when hiring and firing.[57] After all, in Hourwich and London's minds, agreeing to operate as a "preferential shop" instead of a closed shop constituted a concession made by the unions in the signing of the Protocol.

Manufacturer-attorney Cohen's initial response to Hourwich's stated goals was to once again dispute the appropriateness of the proceedings. When this argument failed to dissuade the Board from ending the meeting, Cohen claimed that Hourwich and London had failed to follow proper procedures, which required that the two parties discuss these issue "in conference" prior to appearing before the Board. London vehemently disagreed that he had failed to act according to the rules or that additional procedures existed, which he had not followed.[58]

When Cohen's claim again failed to curtail the proceedings, he next explained why any discussion of money was "untimely." First, Cohen pointed to the possibility of new tariff rates as justification for manufacturers' supposed inability even to discuss wage increases.[59] That summer, Congress had been debating the Revenue Act of 1913, which, when President Wilson signed it into law the following October, re-introduced the federal income tax.[60] Of more concern to Cohen and his clients was how the law would affect the tariff rates on imported goods. American garment manufacturers were bracing themselves for impending tariff reductions, which, they believed, would hurt domestic manufacturers by introducing new, less-expensive goods to the marketplace. As the Cloak, Suit, & Skirt Manufacturers'

[57] August 1913 arbitration, 37.
[58] August 1913 arbitration, 58.
[59] August 1913 arbitration, 68.
[60] Revenue Act of 1913, ch. 16, 38 Stat. 114V

Protective Association wrote to Senator Furnifold M. Simmons, the North Carolinian Democratic sponsor of the bill in the Senate, "We protest against the [tariff] rate of 35 percent named in the bill now pending in the House. We are convinced that, under this rate, competition on the part of the American manufacturer of cloaks and suits for the American market is rendered well-nigh impossible."[61] In addition to pointing to possible tariff changes, Cohen reasoned that discussion of wage increases should be tabled because the Protocol was relatively new and manufacturers needed time to adjust to the changes it wrought. The "additional and monumental burdens of the Protocol," which the manufacturers had "digested" just a few years earlier, made pay increases unthinkable.[62] "We cannot possibly add burdens to this industry at this time," he pleaded.[63]

In addition to opposing discussing wage increases, Cohen challenged Hourwich and London's proposal that the industry create a Joint Price Committee, the purpose of which was to create a fair system for paying workers for the garments they made by informing them in advance how much they would earn for making each garment. As justification for opposing this proposal, Cohen claimed the workers themselves were at fault for variations in the payments that they received. "There are certain psychological factors in the cloak industry to be overcome," he asserted.[64] Cohen identified internal friction within the unions as prohibiting the creation of price commissions. Although union members may have agreed

---

[61] Letter from the Cloak, Suit, & Skirt Manufacturers' Protective Association to Senator F. M. Simmons, May 3, 1913, *Brief and Statements Filed with the Committee on Finance United States Senate H. R. 3321 on Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for Other Purposes*, Vol. III (Washington D.C., Government Printing Office, 1918), 1279. Ironically, that the 1913 tariff debate followed on the heels of the creation of the Protocol of Peace proved useful strategically for the manufacturers insofar as they used each of these concurrent developments as justification for opposing the implementation of the other. In their letter to Simmons, manufacturers identified the Protocol as a significant reason why Congress should not lower tariff rates.

[62] August 1913 arbitration, 86.

[63] August 1913 arbitration, 73-74.

[64] August 1913 arbitration, 79.

on the need for uniform pricing standards in the abstract, "because the Jewish worker in the cloakmakers' union is an individualist in temperament and a Socialist in theory," creation of a Joint Price Committee was impossible.[65] Cohen also cited practical reasons as to why such a mechanism was unworkable. He foresaw the committee engaging in weeks-long "haggling," time during which workers would sit idle; in the interim, competitors would produce the same style of garment and would be first to market, effectively penalizing manufacturers who participated in the Joint Price Committee. This reality would ensure that manufacturers who engaged in negotiations over individual garment prices would be disadvantaged for doing so and eventually run them out of business.[66]

Before breaking for lunch, Brandeis posed a number of questions. He asked, "What proportion of the total labor costs is represented by the week wages, which we have under consideration?" and "What is the average time, number of months or weeks of employment in each season… in which pressers and cutters who are generally on week wages, employed?"[67] When Brandeis questioned Cohen about Hourwich's point concerning how much money a family of four needed per week to survive, Cohen deflected by negating the premise of the problem; he insisted that the question was irrelevant because, in his estimation, single men now constituted the majority of industry employees. (Historians have determined his assertion to be wrong; Melvin Dubofsky, for example, writes that "wages in New York City for the mass of workers fell beneath the suggest minima."[68]) Cohen also assured the Board of Arbitration that weekly salary figures ought not be considered in the a discussion of wages because, he claimed, most garment workers had second jobs and

[65] August 1913 arbitration, 80.
[66] August 1913 arbitration, 82.
[67] August 1913 arbitration, 88-89.
[68] Melvin Dubofsky, *When Workers Strike*, 12; Susan Glenn, *Daughters of the Shtetl*, 113, 117-122.

therefore did not need more money from their garment employers.[69]

Thus ended the first three hours of the proceedings. When the men reconvened that afternoon, London immediately attacked Cohen's assertions. "May it please the Board: I just want to take a few minutes in explaining away some of the things which Mr. Cohen said," he began.[70] First, London dismissed Cohen's claim that they should avoid discussing wage increases because of potential changes to the country's tariffs.[71] Change was a constant and now was as convenient a time as any, London reasoned. He also asserted that, contrary to Cohen's claim, workers such as pressers and cutters were *not* employed elsewhere during the slack season, because no other industry required these skills. Therefore, there was no justification for avoiding discussion of pay raises.

London then proceeded to the central issue of concern: wages. On this topic, Hourwich and London employed a two-pronged strategy. First, London appealed to the Board's emotions by explaining the real-world effects of low wages. "What is an increase of wages? It is a question of bread and butter. It is a question of a pair of shoes for a child. It is a question of rent," London implored.[72] "Has the presser a stomach or not? Is he hungry or not? Does he want more bread or does he not?"[73] Second, Hourwich appealed to the Board's rationality by presenting facts and figures. Employing his background as a government statistician and his education—Hourwich earned his PhD in economics from Columbia University—he asserted in statistical terms why union workers merited increased wages. He explained that because garment making was a seasonal job—meaning people found

[69] August 1913 arbitration, 103.
[70] August 1913 arbitration, 106.
[71] August 1913 arbitration, 106.
[72] August 1913 arbitration, 107.
[73] August 1913 arbitration, 108.

employment off and on throughout the year—union members spent approximately one hundred week days per year unemployed, leaving the workers financially insecure. Hourwich also noted that more than half of the industry's cutters—people who cut fabric patterns needed to create a garment—earned less than $800-900 per year, which put them below the poverty line.[74] He discussed the rising cost of living, the price of eggs, surging rent rates, and the changing landscape of New York real estate, all of which reduced workers' buying power and all of which translated into the need for wage increases.

Debate between the parties lasted for days. They discussed the appropriate minimum wage for different types of garment makers. They argued over whether union members deserved an additional day off when a state holiday fell on Shabbat.[75] They considered whether itinerant buttonhole makers, who traveled from factory to factory, ought to earn more money than single-shop based buttonhole makers. Without exception, what Hourwich and London viewed as basic necessities, Cohen viewed as unwarranted compensation. This dynamic, in which Hourwich and London offered suggestions and Cohen dismissed them as impossible or refused to discuss them at all, persisted for the entire length of the meeting. Debate of these topics continued for the remainder of the afternoon and for the next three days.

On August 6, the group met for the final time that week and Brandeis announced the Board's decisions. The sum total of issues resolved was zero. Brandeis offered a series of explanations for why the Board had failed to decide anything definitively. First, addressing Hourwich and London's primary concern, wage increases, Brandeis explained, "We could

[74] August 1913 arbitration, 208.
[75] August 1913 arbitration, B-170.

not, in justice to either side or to ourselves, make a finding as to whether or not the present wages, week wages, were adequate, and the proposed increases were proper… We are extremely sorry, of course." Reflecting Brandeis' desire to understand the social impact of a given decision and his veneration of quantitative information—a preference famously expressed in his 1906 "Brandeis Brief"—he explained that the Board felt incapable of making a decision concerning workers' wages because it did not know "what the men were really earning."[76] Likewise, on issues related to the buttonhole makers, "very much the same considerations" applied. Regarding Hourwich and London's desire to create a Joint Price Committee, Brandeis declined to "express any definite conclusion." In sum, in one way or another, Brandeis and the other arbitrators skirted making any final decisions. Brandeis thus concluded the four-day session by assuring all present that they would reconvene in the near future to rehash the very same issues.[77]

Indeed, the group assembled again in early October. However, instead of continuing their discussion of the issues raised in August, they addressed what Cohen identified as a "serious and critical situation" concerning "the very root of the relationship between the parties to the Protocol."[78] The week before Cohen had sent Hourwich and London a complaint informing them that Cohen and the Manufacturers intended to impeach Hourwich.[79] According to Cohen, Hourwich had violated the stipulations of the Protocol. First, Cohen believed that Hourwich had botched his job as chief clerk by failing to stop

---

[76] On the "Brandeis Brief" see Melvin Urofsky, *Louis D. Brandeis: A Life* (New York, NY: Pantheon, 2009), 219-222.
[77] August 1913 arbitration, unnumbered page.
[78] Arbitration Proceedings between the Cloak and Skirt Markers' Union of New York and the Cloak, Suit, and Skirt Manufacturers' Protective Association, October 3-4, 1913, folder 30-31, Isaac A. Hourwich Papers, RG 587, YIVO, Center for Jewish History, New York, NY. (This proceeding is subsequently identified as "October 1913 arbitration.")
[79] October 1913 arbitration, 4.

workers from striking in local shops. In one case, twenty-three workers had walked off the job at the firm Jaffe & Katz because of the poor lighting in their workspaces. Cohen claimed that Hourwich had failed to order them to return to work, which he was obliged to do, because the union had not called for a strike. When Hourwich convinced the men to return, some twelve to twenty-four hours later, the men found that management had replaced them with other union workers. In response, Hourwich complained to the Board of Grievances; the discharged workers protested by picketing, despite Hourwich's advice not to do so. By failing to prevent these developments, Cohen claimed that Hourwich had encouraged picketing, that is, "keeping employers from getting the men necessary to fill [the strikers'] places."[80] At the time, courts declared preventing the firms from filling open jobs illegal, as Cohen and Hourwich both knew. Thus, by making the accusation he did, Cohen was essentially accusing Hourwich of encouraging criminal activity if not suggesting that Hourwich had himself engaged in illegal acts.

Worse yet, Cohen charged that Hourwich had emboldened strikers through a series of articles that he published in Yiddish in the Joint Board's weekly paper, *Neue Post* (*New Post*), in which Hourwich criticized various aspects of the Protocol. In one of these articles, Hourwich identified the men who had replaced the individuals who had left their posts at Jaffee & Katz as "scabs," a classification that prompted Cohen to identify Hourwich's actions as treasonous.[81] In Cohen's view, neither Hourwich nor anyone else personally

[80] October 1913 arbitration, 133. The second case, which involved cutters at the skirt manufacturers Levay & Friedberg, was similar to the first.

[81] In response to this complaint, Hourwich hired a lawyer named Louis Boudin. Like Hourwich, Boudin was a Jewish socialist labor lawyer. Boudin helped Hourwich prepare a statement, which Hourwich read to the Board. Boudin was not present at these hearings, a fact that Hourwich attributes to the Jewish holidays. See October 1913 arbitration, 6.

involved with the implementation of the Protocol could publicly disparage it.[82]

Hourwich defended himself. "I have the right to criticize the Protocol; I have the right to criticize the Board of Arbitration, and the Association, and certainly I have a right to call a man a scab if I believe he is a scab," he insisted.[83] Articulating a defense grounded in a broad interpretation of the First Amendment, he asserted, "We reserve the right of a free press, and you will not be our censors, so long as I am connected with this labor organization."[84] Cohen vehemently disagreed, declaring the Association's unwillingness to "do business" with someone who publicly criticized an agreement that he was bound to implement. Scoffing at the idea that Hourwich's actions could be justified by free speech claims, Cohen insisted, "There is no such right of free speech that has ever been recognized in any democracy, and least of all, in a trade democracy."[85] The dispute between Cohen and Hourwich concerning Hourwich's right to express his dissatisfaction with the Protcol and calling strikebreakers "scabs" reflected a broader ongoing dispute about the limits of free expression, at the forefront of which radical Jewish lawyers could also be found.

On December 16, 1913, the Association wrote union leaders asking that they select new legal counsel. "We prefer not to be obliged to deal with one who has both insulted us and assumed an attitude of dictatorship in the industry," they announced.[86] As the *New York Times* reported, "The manufacturers have sent word to the union that Hourwich must quit."[87]

---

[82] October 1913 arbitration, 108.
[83] October 1913 arbitration, 18-19.
[84] October 1913 arbitration, 20.
[85] October 1913 arbitration, 108. Brandeis very clearly sided with Cohen in this debate.
[86] Quoted in Julius H. Cohen, *Law and Order in the Industry: Five Years' Experience* (New York, NY: Macmillian Company, 1916), 112.
[87] "Cloak Trade Peace Now In Real Peril," *New York Times*, January 5, 1914, 7.

By contrast, union members rejected this plan.[88] In mid-December of 1913, they voted on a referendum concerning retaining Hourwich as the chief clerk. More than 6,000 of the 8,500 votes favored just that.[89]

Despite the union's clear endorsement of Hourwich, the Cloak, Suit and Skirt Manufacturers' Protective Association announced that it would not participate in collective bargaining with Hourwich as chief clerk. At a meeting held January 18, 1914, Cohen effectively ousted him—and his co-counsel, London.[90] As Brandeis explained, "The manufacturers have declared that it is their firm intention to terminate the protocol forthwith because of their conviction that its purpose cannot be carried out so long as the Union is represented by Dr. Hourwich." Indicative of the Associations' power to control the terms of negotiation, Brandeis, continued, "Beyond all question, a crisis for the protocol has arisen in which Dr. Hourwich alone can supply the relief."[91] With that, the group agreed to meet on January 26. Before they could reconvene, Hourwich resigned. By June, Morris Hillquit had been retained as the ILGWU's chief counsel; by May of 1915, the Protocol had been terminated.

The events leading to Hourwich's ousting and ultimately to the termination of the Protocol of Peace came to be known as the "Hourwich Affair." The designation assigned

---

[88] "Union Men Rally to Aid Hourwich," *New York Times*, January 9, 1914, 9.
[89] "Cloak Trade Peace Now In Real Peril," *New York Times*, January 5, 1914, 7.
[90] Julius Henry Cohen authored a quasi-autobiographical account of his experiences as a employee-side labor lawyer, published in 1916. See Cohen, *Law and Order in the Industry*; "Cloak Trade Peace Now In Real Peril," *New York Times*, January 5, 1914, 7.
[90] "Federal Probe in Garment Dispute," *New York Tribune*, January 14, 1914, 2; "Declare a Truce in Hourwich Fight," *New York Times*, January 19, 1914, 3.
[91] Meeting of the Board of Arbitration Selected by the Representatives of the Cloak & Skirt Makers' Union of New York and the Cloak, Suit, and Skirt Manufacturers' Protective Association with the representatives of said unions and said protective associations as well as the representatives of the International Ladies Garment Workers Union, January 18, 1914, Building of the Association of the Bar of the City of New York, NYC; folder 46, Isaac A. Hourwich Papers, RG 587, YIVO, Center for Jewish History, New York, NY.

blame for the demise of what manufacturers and their representatives hoped would be a panacea to industrial strife to Hourwich personally. Yet, if the story of the Protocol of Peace is about failure, blame does not rest on Hourwich's shoulders alone. Rather, as was made clear by the manufacturers' association's capacity to oust Hourwich, parties to the Protocol did not have equal footing in their relationship. The imbalance of power between Cohen and London and Hourwich reflected an imbalance of power between manufacturers and workers and rendered fair negotiations between them impossible.

Nevertheless, although the Protocol fell by the wayside in 1915, nationally, teams of employers and workers replicated the Protocol's basic structure and used it for decades to come. "Collective bargaining," historian Will Herberg wrote, "proved most stable and enduring and achieved the greatest measure of security in the unions that grew out of the old-line Jewish labor movement."[92] Indeed, the story of the Protocol is the story of how a group of Jewish labor lawyers institutionalized an employer-employee negotiation process in the most important industry in the most important center of labor activism in the country. For union lawyers who led the charge to implement collective bargaining in various industrial contexts, collective bargaining represented a tool by which they intended not only to secure greater financial stability for their clients, but also to improve their quality of life. Before 1935, when workers' prerogatives to be represented by a union in negotiations with employers became a legislated right, the Protocol and agreements like it represented some of

[92] Will Herberg, "The Jewish Labor Movement in the United States," 68. Likewise, historian Richard Greenwald has discussed the centrality of the Protocol to the creation of the Factory Investigation Committee, a New York state legislative committee created in the aftermath of the Triangle Shirtwaist Factory Fire, intended to improve working conditions in the city's garment factories. See Richard Greenwald, *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York*.

the country's earliest and broadest experiments with employer-employee negotiation.[93]

Supporting Strikes and Fighting Injunctions

On January 14, 1913, in what the *New York Times* called "one of the most remarkable demonstrations of its kind ever seen in this city," the Jewish socialist attorney Jacob Panken led tens of thousands of garment workers from the Lower East Side's Rutgers Square, which sat at the intersection of Canal Street and East Broadway, to Union Square, just above Fourteenth Street. The march was a part of the ongoing strikes initiated during the reign of the Protocol. "'I want all of you 50,000 workers assembled here to swear under God's blue sky… that none of you will return to work until the union has been recognized. Do you all so swear?'" Panken asked rhetorically.[94] He then instructed the strikers to lift their hands to the sky. Equating workers' desires for the fulfillment of their unions' demands with Jews' yearnings for Jerusalem during the Babylonian exile, Panken roared, "Let your hands, which you have just raised, become paralyzed if you touch a needle or a machine under non-union conditions! Let your tongues with [which] you uttered 'yes' be cut out if you ask your bosses for work under non-union conditions! Let your legs which brought you here, be shriveled if you work again without recognition of the union!"[95]

Nearly three years later, Panken, who was now the lead attorney for the United Brotherhood of Tailors, testified before the Congressional Commission on Industrial Relations, a group tasked by President Taft with assessing the status of American industrial

---

[93] Richard Greenwald, *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York*, 23; Herberg, "The Jewish Labor Movement in the United States," 67-68.
[94] "Big Strike Parade a Model of Order," *New York Times*, January 14, 1913, 7.
[95] "Big Strike Parade a Model of Order," *New York Times*, January 14, 1913, 7; Psalm 137: 5-6.

workplaces.[96] Addressing Panken, Commissioner John Brown Lennon inquired, "You indicated… that the unions here in the men's garment trade were in favor of collective bargaining and agreements with the employers' association; but you desire to retain the right, if that agreement is broken by the employers, to strike. I understood you to say that?"[97] Drawing breath, Panken confirmed the commissioner's assertion: "Yes; that is the position I take and I think that is the position of the union."

Legally, to "strike" at the start of the twentieth century meant a number of different activities. Traditionally, courts defined a strike as "the act of a body of workmen employed by the same master, in stopping work altogether at a prearranged time, and refusing to continue until higher wages, or shorter time, or some other concession is granted to them by the employer."[98] So-called secondary boycotts involved withholding patronage from a business and/or urging others to withhold patronage.[99] Sometimes courts also defined boycotting as striking. Likewise, strikes sometimes meant picketing; that is, dissuading others from working or supporting a business by marching outside or nearby. Picketing (and therefore strikes) also included participating in chanting, holding signs, and distributing handbills that discourage patronage of particular stores and enterprises. Early twentieth-century courts regularly declared leading, participating in, encouraging, and sometimes merely observing these activities illegal.

---

[96] The Commission was made up of nine individuals including Frank Walsh, a labor lawyer, James O'Connell, John Brown, and John R. Commons. See U.S. House of Representatives, *Commission on Industrial Relations, 1912-1915, Final Report of the Commission on Industrial Relations*, 64th Congress, 1st Session, Washington D.C.: Government Printing Office, 1916.

[97] Jacob Panken quoted in U.S. House of Representatives, *Commission on Industrial Relations, 1912-1915, Final Report of the Commission on Industrial Relations*, 64th Congress, 1st Session, Washington D.C.: Government Printing Office, 1916.

[98] As cited in Thomas S. Cogley, *The Law of Strikes, Lockouts, and Labor Organization* (Baltimore, MD: Press of Sapp Bros, 1894), 2. (Cogley was a student of Thomas M. Cooley at the University of Michigan and dedicated this book to him.)

[99] See Harry W. Laidler, *Boycotts and the Labor Struggle* (New York, NY: Jane Lane Company, 1913), 27.

In practice, strikes were messy. They were chaotic and disruptive and dangerous. They demanded physical strength, oftentimes requiring participants to march alongside throngs of people, chanting, singing, and holding signs, one's feet trudging along downtown's uneven, rectangular, quarried stone thoroughfares. Strikes were often violent. Business owners hired professional strikebreakers—commonly college students—with whom workers often physically clashed.[100] Incidents of police brutality were typical. Workers were arrested.[101] Even if one escaped prosecution, avoided violence, and sidestepped police encounters, protesting was difficult. Striking was tiring, lasting days, weeks, and sometimes even months. Striking could be demoralizing.

Nevertheless, Panken supported workers' right to perform all of these activities, because he saw striking as a means to ensure workers' rights and improve workers' lives. His vision was not shallow nor idealistic; the changes he believed possible included improved working conditions, higher wages, and the creation of job security. In both his aims and means, Panken was joined by fellow labor lawyers who also understood the right to strike as key to counteracting employers' otherwise unchecked power over employees' work circumstances. Striking gave labor a way to assert authority. Legally, for employee-side lawyers, the right to strike was synonymous with the First Amendment right of free speech (a right which, as discussed in a later chapter, the judiciary did not agree existed yet). In support of such right, Jewish union lawyers encouraged strikes, personally led protests, and championed workers' rights to engage in as much. They also tried to protect the right to picket, that is, the effort to prevent others from working in the business against which they

---

[100] Stephen Harlan Norwood, *Strikebreaking & Intimidation: Mercenaries and Masculinity in Twentieth-Century America* (Chapel Hill, NC: University of North Carolina Press, 2002), 16.

[101] For example, during the first month of the 1909 shirtwaist makers general strike, police arrested over seven hundred women. See Susan Glenn, *Daughters of the Shtetl*, 169.

are striking by physically intimidating them by marching outside the employer's place of business. Finally, they fought court-ordered injunctions, issued by judges to prevent strikes, and defended individuals prosecuted for supposed criminal activities performed in the context of union protests.[102]

Doing this work made early twentieth-century labor lawyers exceptional because, for the first three decades of the twentieth century, judges did not share their assessment of striking, boycotting, or picketing. Instead, judges routinely asserted the illegality of these activities.[103] Generally, when they explained why a strike was illegal, they offered one or more of the following reasons: first was the belief that labor strikes were meant to financially harm businesses, which most judges understood as destruction of property, an obviously illegal act. Second was the presumption that strikes necessarily involved coercion of employers by employees in the form of economic duress, that is, a situation in which one party has no other choice but to agree to the given terms of a contract. This type of coercion constituted grounds to void an agreement between parties and therefore justified prohibiting striking. Finally, judges reasoned that strikes constituted an infraction by the employee of his contract with his employer and were therefore unlawful.[104]

---

[102] Employee-side labor lawyers encountered injunctions routinely in their work. Meyer London was doing this work as early as 1899. "London had the distinction of fighting the first injunction sworn out by employers against strikes in the women's clothing industry in the fall of 1899." See Harry Rogoff, *An East Side Epic: The Life and Work of Meyer London* (New York, NY: Vanguard Press, 1930), 30.

[103] This assessment was based, in part, on nineteenth-century English interpretations of labor activities; American courts' earliest judicial decisions concerning labor law, naturally, reflected the standards of English courts. See Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York, NY: Cambridge University Press, 1993); Victoria C. Hattam, "Courts and the Question of Class: Judicial Regulation of Labor under the Common Law Doctrine of Criminal Conspiracy," in *Labor Law in America: Historical and Critical Essays*, eds., Tomlins and King, (Baltimore, MD: John Hopkins University Press, 1992): 44-70.

[104] Late nineteenth-century courts routinely privileged the "right to contract" in labor cases involving unions. In the most authoritative nineteenth-century work on labor law and the judiciary, Thomas Cogley explained, "As a general rule… employes have the right… to quit their employment provided that they do peacefully, and, in doing so, do not violate their contracts with their employers. But that, if in quitting their employment, they either singly or in combination resort to violence to the person or property of either employer or co-employes or

Armed with this reasoning, Progressive Era judges expressed consensus about how to adjudicate labor disputes: laborers, they held, could strike for legitimate purposes but could not strike for illegitimate ends. Legitimate ends included improved working conditions, higher wages, and fewer hours.[105] Illegitimate ends included protesting for a closed shop, either by making demands from employers by discouraging other people from working for a given employer and preventing customers from entering a particular business. Judges identified these latter activities as "secondary boycotts" or as "pickets" and declared such actions criminal.[106]

To stop strikes, employers' lawyers filed for injunctions, court orders that stopped someone from performing a particular act that infringed on someone else's legal rights or, alternatively, compelled someone to do a particular act.[107] American judges began issuing injunctions to stop labor protests by railroad industry employees in the 1870s.[108] Quickly thereafter they began issuing them in the context of other industrial uprisings. Theoretically,

---

persons seeking employment, or by threats, intimidation in any form, molestation, obstruction, or interferences, to compel an employer to increase their wages, to alter his mode of carrying on business, to discharge employes, to employ those he does not want to employ, or to compel against their will employes to quit their employment, or to prevent those seeking work from accepting employment, to join a club or association they do not wish to join, then their acts are illegal, and they become liable criminally." See Thomas Cogley, *The Law of Strikes, Lockouts, and Labor Organization*, 246-247.

[105] Daniel Ernst, "Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900," 29.

[106] Ernst also writes that turn-of-the-century judges developed a variation of this philosophy by shifting their focus to consumer markets and deployed claims about public policy as justification for drawing similar anti-labor decisions. This latter philosophy was "more tolerant of labor combinations. More importantly, it invited workers and their advocates to argue in courts and legislatures that trade unions performed significant public functions by promoting industrial stability and maintaining demand for consumer goods." See Daniel Ernst, "Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900," 37.

[107] For a useful explanation of injunctions in the context of the men's needle trade in New York, see P. F. Brissenden and C. O. Swayzee, "The Use of the Labor Injunction in the New York Needle Trades II," *Political Science Quarterly* 45, no. 1 (March 1930): 87-111.

[108] The year 1877 included a forty-five day railroad workers strike in Martinsburg, West Virginia. The occasion marked the first time in which a federal court issued an injunction against striking workers. See Michael A. Bellesiles, *1877: America's Year of Living Violently* (New York, NY: New Press, 2010); William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991), 65-67. See also Clarence E. Bonnett, "The Origin of the Labor Injunction: A Study of the Evolution of the Law of Conspiracy and Its Application to the Injunction Process in Light of the Conflict Between Combinations of Employers and Employees," *Southern California Law Review* 5 (1931-32): 105-125.

injunctions were reserved for extraordinary circumstance but, by the start of the twentieth century, the injunction had become the go-to mechanism for silencing labor strife in New York City.[109] Their use only increased in the decades before the New Deal.[110] Judges issued more than 2,100 injunctions prohibiting strike activities in the 1920s, a decade in which "the proportion of strikes met by injunctions to total number of strikes reached an extraordinary 25 percent."[111]

It was in this anti-labor, anti-union, anti-strike context that labor lawyers, led by a group of Jewish socialists, went to court to assert workers' rights. The following cases illustrate some of the types of cases handled by labor lawyers; some of the questions they brought to court; and how Progressive Era judges responded to them. By and large, the cases present a mixed record of Jewish labor lawyers' efforts to advance workers' right to strike and stop injunctions, a picture that reflects the historical record rather than history itself. As sociologists, legal scholars, and other historians have shown, by and large, labor lawyers failed to stop injunctions against striking workers. However, because newspapers reported

---

[109] Judicial use of injunctions was so common that pro-labor advocates tried to pass legislation limiting judges' capacity to issue them. Samuel Prince, a Jewish immigrant from England and assemblyman from New York City's Sixteenth district, sponsored a bill in 1904 that would have done just that. Prince spent his youth as a member of the cigar makers' union. See "Labor Leader's Bill to Muzzle Injunctions," *Brooklyn Daily Eagle*, March 9, 1904, 22.

[110] The number of cases involving injunctions in New York and nationally is unclear. According to Felix Frankfurter and Nathan Greene, "The official decisions of the inferior courts of New York report only fifteen labor litigation for the quinquennium 1923-1927, but the New York Law Journal, the reporting organ for courts of first instance in New York City, lists for that city alone, during the same period, forty-eight additional opinions in injunction proceedings. The further number of injunctions granted or continued without opinion and left undisclosed by the entries "So ordered" or "Order Continued," remains unascertained." They also write that a federal study found that 968 injunctions were issued in federal cases between January 1, 1903 and January 1, 1927. See Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York, NY: Macmillian, 1930), 51-52. According to William Nelson, "Between 1920 ad 1927, there were thirty-seven reported labor injunction cases in New York, in which twenty-eight of which preliminary injunctions were granted; between 1923 and 1927 there were an additional forty-eight unreported cases in New York City alone, in thirty-five of which preliminary relief was granted." See William Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill, NC: University of North Carolina Press, 2001), 72.

[111] William Forbath, *Law and the Shaping of the American Labor Movement*, 59.

more frequently about cases in which labor lawyers succeeded and because labor lawyers' successes were often appealed to higher courts, which retained written records, the following section presents Jewish lawyers as more successful than they actually were.

Regardless of their success rate, Jewish union-side lawyers remained undeterred and continued to try to advance workers' rights in court. In so doing, they offered representation to a group of people otherwise severely underserved by professional legal practitioners. Collectively, their work served as a countervailing argument in favor of workers' rights. They were voices of dissent in legal institutions deeply unsympathetic to their claims.

One early victory for those advocating workers' right to strike occurred in 1893 in the context of a five-week labor dispute between the United Garment Workers (UGW), the most important union in the men's clothing industry before 1914, and the Clothing Manufacturers' Association (CMA).[112] A dispute over cutters' wages, work hours, and shop conditions had resulted in a lockout, meaning that CMA managers had prevented employees from performing their work, thus denying them their wages. Manufacturers initiated lockouts in order to strong-arm laborers into forgoing their demands. In response to the lockout, the UGW mailed circulars to CMA clients, demanding that they—the clients—boycott businesses owned by CMA members. The circulars warned that, should a business fail to comply with this demand, the UGW would inform other trade unions and compel those other unions to sever ties with any uncooperative businesses.

Upon discovering this news, CMA lawyers Edgar M. Johnson and John Vernon Bouvier, Jr., of Hoadly, Lauterbach & Johnson, filed for an injunction to stop the union from sending the circulars. Johnson and Bouvier claimed that the UGW had "conspired to injure

[112] "Clothing Cutters Well Satisfied," *New York Times*, April 22, 1893, 3.

the plaintiff's property by illegal acts," and that "it [was] impossible to estimate the damages that will result therefrom."[113] New York natives and New York University Law School graduates Henry Fromme and Abraham L. Fromme, Jewish brothers who together ran the firm Fromme & Fromme, represented the UGW.[114]

After hearing arguments on April 5, Supreme Court Judge Barrett refused to grant the injunction restricting the union's capacity to mail its fliers. In what was an unusual order, Barrett asserted parity between the union and the manufacturers' association, identifying them both as "combinations." This legal equivalency meant that neither could be found liable for coercion. Moreover, he denied that the union had injured or inhibited the manufacturers' property rights. "'To me it certainly seems that the firms that you represent, after conspiring together to prevent these men from finding employment, have come into a court of equity to ask that the other side be enjoined from using the only weapon that they have at hand,'" he announced.[115] Barrett's refusal to grant the injunction stunned the parties and the press. Union members greeted the news with cheers.[116] The next day the *New York Times* reported, "This was the first actual victory of great importance ever won in the courts by any labor organization."[117] The paper, likewise, had identified the first of what would be a number of Jewish labor lawyers' achievements on behalf of workers over the next three decades.

Unsurprisingly, CMA members appealed and in November, New York State Supreme Court Judge George L. Ingraham reversed the ruling. Ingraham thought that the circulars did

---

[113] *Sinsheimer v. United Garment Workers of America*, 5 Misc. 448 (N.Y. Misc. 1893).
[114] The Fromme brothers were born in New York. See "A Record of Graduates of the New York University Law School," *The American University Magazine* 3 (November 1895): 379; Abraham Fromme died October 2, 1898.
[115] "In Favor of Cutters," *New York Times*, April 6, 1893, 8.
[116] "In Favor of Cutters," *New York Times*, April 6, 1893, 8.
[117] "In Favor of Cutters," *New York Times*, April 6, 1893, 8.

constitute "an unlawful injury" to the association's property and therefore granted the injunction.[118] The case next moved to the New York Court of Appeals and on April 13, 1894, Judge P. J. Van Brunt issued a decision in favor of the UGW.[119] Like Barrett, Brunt identified both the union and the manufacturers' association as "combinations."[120] Having asserted the parity between the two parties, Brunt then announced that both organizations had the same legal rights. Likewise, Brunt agreed with Barrett's assessment—that the UGW mailings did not constitute property damage. "There is no proof of any acts of violence upon the part of the defendants, or of any injury to property, or of any threats or intimidation. At best, the circulars were but one of the instruments used by the defendants in their contest with the association of which the plaintiffs were members," he wrote in his reversal of the Court of Special Terms' injunction.[121]

Despite minor successes, more often than not, courts granted injunctions to manufacturers, business owners, etc. In some cases, merely for offering legal aid to workers, Jewish labor lawyers faced court repudiation for serving as union representatives. In April of 1911, for example, New York Supreme Court Justice M. Warley Platzek issued a permanent

---

[118] *Sinsheimer v. United Garment Workers of America*, 5 Misc. 448 (N.Y. Misc. 1893).
[119] *Sinsheimer v. United Garment Workers of America*, 77 Hun. 215 (1894).
[120] Notably, the manufacturers' association retained new counsel between the initial judgment and the appeal. Their new lawyer was William N. Cohen, a New York born Jew of Bavarian descent who was trained by Siegmund Spingarn, who was then a partner in the firm Morrison, Lauterbach & Spingarn. See "William N. Cohen," *The Successful American* 3, no. 1 (January 1901): 15; Siegmund Spingarn, a Jewish immigrant, graduated from Harvard Law School and began practicing law in 1866. See Association of the Bar of the City of New York, *The 'Memorial Book' and Mortuary Rolls of the Association of the Bar of New York City 1883* (New York: 1883), 67-68.
[121] In addition to constituting a win in the immediate sense, *Sinsheimer* had a legal afterlife. Just a few years later, in 1901, Hyman Cohen et al., represented by Frank Bartlett, and the UGW, represented by the firm Levy & Unger, met in the courtroom of Justice James A. Blanchard. On behalf of Cohen, Bartlett sought an injunction against the UGW for mailing similar circulars in the context of another labor dispute. Invoking *Sinsheimer*, Judge Blanchard held that he would not issue an injunction during the period before trial "where that relief would be the same as that ultimately granted if the plaintiffs succeed a trial, and the plaintiffs right to relief sought is involved doubt." See *Cohen v. United Garment Workers of America*, 72 N.Y. Supp. 341 (Sup. Ct. 1901).

injunction against the Custom Tailors' Union. Jacob Panken represented the union. The court order explained that the union had conspired in restraint of trade and in its effort to force members of the New York Manufacturing Tailors' Association to operate as closed shops. Justice McCall had issued a temporary injunction the previous October, but in April, the manufacturers' association treasurer, Mark Arnheim, requested that it be made permanent. Moreover, Panken was charged for supposedly encouraging violence by volunteering to represent strikers who faced arrest.[122]

In 1914, Congress passed the Clayton Antitrust Act, which was intended to further limit monopolies and prevent business practices that impeded economic competition. Unlike its predecessor, the Sherman Antitrust Act, the new law included a section devoted to safeguarding union activities.[123] At least as far as Congress was concerned, both unions and union strikes were now legal.[124] Nevertheless, state and federal judges continued to impede union activities. The "right to strike" remained precarious, which meant that labor lawyers continued to need to go to court in order to assert said right.

In December of 1914, Morris Rothenberg, a one-time partner of Jacob Panken, represented the United Shoe Workers of America, Cutters' Local No. 72, and a handful of

---

[122] "Tailors' Union Enjoined," *New York Times*, April 27, 1911, 8.

[123] Section 6 reads in part: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws should be construed to forbid the existence and operation of labor…organizations… or forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." See Sherman Antitrust Act of 1914, 26 Stat. 209 §6.

[124] Louis Boudin disputes that Congress intended to protect union activities through its formulations in the Clayton Act. See Louis Boudin, "Organized Labor and the Clayton Act: Part I," 275-276. One result of Section 6 of the Clayton Antitrust law was that labor law issues increasingly fell under the jurisdiction of federal courts. This was significant because, theoretically, federal court rulings applied to larger geographic territory. For further discussion in the shifting jurisdiction over labor cases, see Felix Frankfurter and Greene, *The Labor Injunction*, 10-17; see also Louis B. Boudin, "Organized Labor and the Clayton Act: Part I," *Virginia Law Review* 29, no. 3 (December 1942): 273-315.

other unions in an action initiated by the Shoe Manufacturers' Association of New York, a group of eighteen shoemakers. Rothenberg was born in Estonia, came to America in 1893, and graduated from NYU Law School in 1905.[125] Almet R. Latson represented the association, which, collectively, employed about 5,000 people. [126] According to Latson and the association, striking union members conspired to prevent non-striking laborers from working in association factories and therefore Latson requested an injunction to stop them. In advance of the hearing, both parties submitted "voluminous papers" for the purpose of proving or disproving the unions' participation in illegal activities, including supposedly threatening violence against non-union workers. In his ruling, Justice Benedict wrote that whether or not to grant the injunction rested on whether the "complainant's civil rights [were] being invaded." Despite failing to define what he meant by civil rights, Benedict concluded that, indeed, "this action [did] affect the civil rights and interests of all the members" of the association. Although he found the injunction requested by the association members too broad, he nevertheless agreed that, "the papers submitted sufficiently [established]" that the unions had engaged in "unlawful acts," which justified the court's order to stop the protests.[127] Despite the Congressional sanction of labor unions' right to strike, courts continued to impede union protests.

Similarly, in 1920, Milton M. Gewertz, an immigrant from Bialystok, represented the Children's Shoe Workers' Union in a hearing initiated by Isadore Kallet, attorney for the Grand Shoe Company, a shoe manufacturer in Williamsburg, Brooklyn. Kallet had requested

---

[125] Like Panken, Rothenberg graduated from New York University Law School and became a member of the New York State bar in 1905. He became very involved in the American Zionist movement. See "M. Rothenberg, 65, Magistrate, Dead," *New York Times*, September 18, 1950, 23.
[126] *Garside v. Hollywood*, 88 Misc. 311 (N.Y. Misc. 1914); "Seek Aid of Law to Hit Toilers," *The New York Call*, December 2, 1915, 5.
[127] *Garside v. Hollywood*, 83 Misc. 311 (N.Y. Misc. 1914)

a temporary injunction against the union, claiming that the workers had engaged in a conspiracy by picketing the manufacturers' shop. Throughout the nineteenth century and into the twentieth, employers, in alliance with state prosecutors, charged workers under the doctrine of conspiracy, which outlawed forming "combinations" for the purpose of securing higher wages or improved work conditions; the shoemakers had declared a strike because the company had refused to grant wage increases. In his June 6, 1920, ruling, Justice Lewis L. Fawcett granted Kallet's request. Citing the fact that criminal cases were currently pending in the Court of Special Sessions, he based his decision to grant the order on the assumption that union strikers had in fact engaged in violence as sufficient justification.[128] The mere possibility that union members engaged in violence was sufficient to justify granting the requested order.

Other judges required even less than a pending criminal case to justify enjoining strikes. In the same year as *Grand Shoe Company*, Justice Newburger granted an injunction to Charles Eno and his client, Jaeckel and Company, a furrier manufacturer.[129] Meyer London represented Morris Kaufman, president of the furriers' union, which had launched a strike in May of 1920 for the purpose of making Jaeckel agree to an employment contract that promised all sorts of improvements. These included promising only to require forty-hour workweeks; not to fire employees without cause; limiting the number of overtime hours to two-per-day; and granting time off on state-recognized legal holidays.

Newberger granted the injunction. In the order, issued on October 12, 1920, he asserted that the union's attempt to secure a favorable contract with the aforementioned

---

[128] *Grand Shoe Co. v. Children's Shoe Workers' Union*, 187 N. Y. Supp. 886 (1920).
[129] "Hugo Jaeckel, 91, of Fur Firms Dies," *New York Times*, March 9, 1939, 22.

provisions exceeded what he thought was legally acceptable. Striking "tended to injure plaintiffs in their business and cause great loss… Picketing, while lawful, if peaceably conducted, will, however, not be permitted when its purpose is to effect an interference with another's business."[130] London challenged Newberger's injunction, but the appellate division upheld it.

On rare occasions, labor lawyers encountered judges who proved sympathetic to labor's cause. In 1915, for example, Panken and Rothberg successfully fought a permanent injunction requested by Kerwin I. Litwin against the Ladies' Waist and Dressmakers' Union. A temporary injunction had been granted against the union. The strike had begun on Sept 14, 1914 and by February police had made over forty arrests. According to *The Call*, "some strikers were arrested as many as five or six times." The paper also reported that Litwin and his brother were also arrested and charged with assault.[131]

Turning the table on the manufacturers, in 1921, Morris Hillquit and his co-counsel requested an injunction against the Cloak, Suit, and Skirt Manufacturer's Protective Association.[132] In October of that year, the Association unilaterally cancelled its contract with the ILGWU and tried to reinstitute a piecework system and the forty-eight hour workweek. In response, on November 14, 1921, nearly 55,000 garment workers went on strike. Twelve days later, on November 26, Hillquit filed an injunction against the

---

[130] *Jaeckel v. Kaufman et al*, 187 N.Y. Supp. 889 (1921).
[131] "Labor Union Doings in the Greater City," *New York Call*, February 14, 1915, 4.
[132] On this being the first time an enployee's association has successfully obtained an injunction against an employer, see *Schlesinger v. Quinto* 192 N.Y. Sup. 564 (1922); James Oneal, *A History of the Amalgamated Ladies' Garment Cutters' Union Local 10* (New York: Ashland Press, Inc., 1927), 284-285; P. F. Brissenden and C. O. Swayzee, "The Use of the Labor Injunction in the New York Needle Trades I," *Political Science Quarterly* 44, no. 4 (December 1949): 548-568; "Garment Workers Win in Legal Battle," *New York Times,* January 12, 1922. In May, Steuer appealed Wager's decision, but lost. See *Schlesinger v. Quinto* 201 A.D. 487 (1922).

Association for conspiring to breach its contract with the union.[133]

At the heart of this case sat a contract dispute. The case's central question was whether a modification to a contract made on June 3, 1921, was meant to supplant the original contract (made May 29, 1919) or supplement it. While the manufacturers claimed the modification was meant to replace the original agreement, the union claimed it was meant to be an *addition* to the first contract. The resolution of this issue determined whether the original contract was still valid in October of 1921 when the manufacturers unilaterally decided to return to the piecework system and forty-eight hour workweek.

On November 30, having determined that the June modification was meant to supplement rather than supplant the original contract, Justice Charles L. Guy granted a temporary injunction against the Association, forbidding it from implementing the piece-work system or instituting a forty-eight hour workweek. Further, the injunction prohibited Association members "and every officer, director, manager, agent, and employee… from combining or conspiring with the other members or with any other person" for the purpose of voiding the contract between the Association and the ILGWU.[134] In essence, the court tried to literally keep the peace by saving the existing agreement between the parties by prohibiting members of either side from engaging in what it perceived as disruptive behavior.

---

[133] On May 29, 1919, the Association and the ILGWU entered a contract, which had resulted, for the first time, from collective bargaining. The contract contained provisions that the union had fought for: a weekly payment system rather than the "piecework" system, which paid individuals according to their output and a reduction of work hours from forty-eight to forty. The contract was to operate until June 1, 1922. On June 2, 1921, after the agreement had been in place for over a year, a dispute arose that resulted in the signing of another agreement, in which both parties agreed to resolve disputes with the aid of a government-appointed board. In October of 1921, after months of back and forth between the union and the manufacturers over the decision reached by the appointed board, the association resolved to renege on its agreement, claiming "it has become necessary to substitute in the industry the piecework system for the work-week system, to establish an increase of the number of working hours in the week and to fix a reduction of the wages of the workers in those branches of the industry where, by the nature of the services rendered, it is required that they be retained on the work-week system."

[134] "Garment Strikers Enjoin Employers," *New York Times*, November 30, 1921, 10.

In a joint statement issued immediately after Judge Guy's decision, Hillquit and ILGWU President Benjamin Schlesinger noted the historical significance of the decision. "In hundreds of cases in the past working men have been restrained by the courts from calling or conducting strikes in violation of their agreements," they explained. "This is, we believe, the first case of importance in which the workers seek to invoke the law against the employers."[135]

Unsurprisingly, members of the manufacturers' association were taken aback by the decision. The association's lawyer, Max D. Steuer, infamous for his representation of the owners of the Triangle Waist Company in the lawsuit that followed the 1911 Triangle Shirtwaist Factory fire, immediately asked Justice Guy to vacate the injunction.[136] Guy declined to do so.[137]

Despite Guy's ruling, another court soon involved itself in the dispute. On December 15, 1921, without notifying ILGWU representatives, Steuer filed for an injunction on the Association's behalf, which, on January 7, 1921, Justice Alonzo Hinckley granted. This injunction, issued against the ILGWU as well as the Joint Board of the Cloakmakers' Union, restrained the two unions from picketing factories that belonged to the Association, from hosting meetings or encouraging strikes, and from paying strike wages and benefits. According to the *New York Times*, the injunction constituted "one of the most drastic and

---

[135] "Garment Strikers Enjoin Employers," *New York Times*, November 30, 1921, 10. This, too, was a sentiment that Hillquit had been expressing for years. "The fictitious 'equality of all citizens before the law' furthermore favors the possessing classes as against the class of non-possessors in matters of modern legal procedure at least as much as in matters of substantial law." See Morris Hillquit, *Socialism in Theory and in Practice* (New York, NY: MacMillan Company, 1912), 83.

[136] On Max Steuer, see David Von Drehle, *Triangle: The Fire That Changed America* (New York, NY: Atlanta Monthly Press, 2003), chapter 9.

[137] "Refuses to Vacate Garment Injunction," *New York Times*, December 1, 1921, 8.

sweeping injunctions ever issued by a State court in a labor dispute."[138] For unclear reasons, Hinckley's injunction never went into effect because of a paperwork error.[139]

The manufacturer's efforts were for naught because on the next day, January 11, 1922, Supreme Court Justice Robert F. Wagner made the temporary injunction against the Association, which had been originally granted by Justice Guy, permanent. In Wagner's opinion, the June 1921 contract modification was intended as an addition to the May contract.[140] Indicative of his personal awareness of the novelty of his decision, Justice Wagner further explained, "Precedent is not our only guide in deciding these disputes, for many are worn out by the time and made useless by the more enlightened and human conception of social justice."[141] In Hillquit's view, the case marked "an important moral victory for organized labor as a whole." Nevertheless, he was reserved about the outcome of the case, because he disliked injunctions on principle, because "injunctions against employers [could] never be as drastic and deadly as those against workers."[142]

Wagner was a unique judge. In January of 1922, Morris Rothenberg represented Zachary L. Friedman, the president of the Bonnas, Singer & Hand Embroiderers' Union, Local 66, in a counteraction against Woolf Segenfeld and his partners, the owners of a garment firm, Neutral Embroidery Works, who were represented by Harry A. Gordon.[143] Rothenberg and Gordon's appearance in the New York State Supreme Court was prompted by Gordon's effort to obtain a continuance of an injunction issued in anticipation of pending

---

[138] "Workers Enjoined in Garment Strike," *New York Times*, January 8, 1922, 18.
[139] "Delay Injunction in Garment Strike," New York Times, January 10, 1922, 13.
[140] *Schlesinger v. Quinto*, 117 Misc. 735 (1922).
[141] "Garment Workers Win in Legal Battle," *New York Times,* January 12, 1922, 1,12.
[142] "Garment Workers Win in Legal Battle," *New York Times,* January 12, 1922, 1,12.
[143] *Segenfeld et al. v. Friedman et al*, 117 Misc. Rep. 731 (N.Y. Misc. 1922); "The Right to Picket Emphatically Asserted," *Labor and Law* 4 (February 1922): 45-46.

litigation. Gordon claimed that picketing union members of Local 66 were violent and had interfered with non-union workers who had tried to work at Segenfeld's firm. The situation, according to the manufacturer and his lawyer, merited an injunction against the striking workers. In a rare decision, which reflected Justice Wagner's progressive politics, Wagner denied Gordon's injunction request, claiming that Gordon showed no evidence of the striking laborers' efforts to stop others from working.[144]

More commonly, courts granted injunctions to stop picketing. In 1926, for example, Rothenberg represented ILGWU picketers when the Appellate Division of the New York Supreme Court enjoined the ILGWU from picketing two dress shops owned by Maurice Rentner. William Klein, a longtime manufacturers' attorney, represented Rentner.[145] In a decision written by Justice Harry Bijur, son of the well-known Jewish lawyer Nathan Bijur, the court made permanent the temporary injunction that well-known Judge Joseph M. Proskauer, a founding member of the firm Proskauer Rose, had issued a few months earlier. Bijur asserted that the union could have only up to six representatives in front of the Seventh Avenue building that housed Rentner's shops as well as an additional four at each of the building's two side entrances. This was the maximum, because picketers' "mere presence in large numbers interfere with the employees of the plaintiff when going to and returning from their work to an extent which constitutes an unjust invasion of plaintiff's rights in the legitimate carrying on of his lawful business."[146]

---

[144] Wagner's decision was somewhat historical. In his decision, echoing the language of free speech emphasized by socialist activists, he asserted that, "The right to freedom of speech and freedom of action belongs, not only to the individual, but to individuals combined for a lawful purpose. That several insist on exercising their rights simultaneously does not of itself transmute their act to a wrong or illegality." *Segenfeld et al. v. Friedman et al*, 117 Misc. Rep. 731 (1922).
[145] *Rentner v. Sigman*, 126 Misc. 781 (N.Y. Misc. 1926).
[146] "High Court Enjoins Garment Pickets," *New York Times*, April 22, 1926, 27.

Similarly, in 1927, Morris Hillquit represented the Retail Grocery and Dairy Clerks Union of New York in a dispute with L. Daitch & Co, the corporate owners of several grocery stores, which employed non-union members. To urge the storeowners to employ union workers and to encourage store employees to unionize, Retail Grocery and Dairy Clerks Union members marched outside of the L. Daitch & Co's stores and discouraged potential customers from entering the groceries. According to the court's description of the protests, "So-called picket[er]s chanted statements in Jewish jargon attracting crowds who would listen to the representative of the union and thus be deterred from entering plaintiff's place of business." Some unspecified violence occurred, which Hillquit acknowledged was "unlawful." He nevertheless asked the court that union workers be permitted to "walk up and down in front of a place of business during business hours displaying signs designed with intent to dissuade customers from entering the store and thus compelling the proprietor to operate a union establishment." The court rejected this request and issued a permanent injunction against union picketing.[147]

Criminal Defense

On January 2, 1910, amidst a strike, laborers, labor leaders, and the police commissioner and several officers gathered in Carnegie Hall to protest the mass arrest of picketers by police. A poster hanging from a wall read, "Peaceful Picketing is the Right of Every Worker." On stage stood 350 women donning paper sashes with the word "Arrested" printed across the front. Twenty other women wore similar garments, which read

[147] *L. Daitch & Co., Inc., Plaintiff, v. Retail Grocery and Dairy Clerks' Union of Greater New York*, 129 Misc. 343 (1927).

"Workhouse." In a speech highlighting police brutality, Morris Hillquit identified the women who had been arrested and sent to prison as "martyrs."[148]

As underscored by events that winter evening at Carnegie Hall, strikes commonly led to arrests, arrests led to court appearances, and court appearances required lawyers. Accordingly, in addition to participating in the institutionalization of collective bargaining and supporting workers' right to strike, union-side lawyers offered their services in criminal cases in which workers faced prosecution by the state.[149] Furthermore, because strikes involved police surveillance, which oftentimes became violent, labor lawyers also acted as voices of protest against police brutality.

On December 4, 1914, for example, Jacob Panken represented Paul Duchacek, who had been picketing in front of the shop of Henry Bendel at West Fifty-seventh Street. Police arrested him because in addition to picketing, he was wearing a white sash announcing as much. After his arrest, he was taken first to the Fifty-seventh Street Court and then transferred to the Harlem Court.[150]

Similarly, on February 20, 1915, Panken represented sixteen strikers who were arrested the day before during a strike against Herman Bergdorf and Edwin Goodman, tailors who later founded the luxury department store Bergdorf Goodman, whose shop sat at 616

---

[148] "The Rich Out to Aid Girl Waistmakers," *New York Times*, January 3, 1910, 1, 2.

[149] Criminal defense work constituted one of labor lawyers' mainstays. This is because, throughout the twentieth century, different criminal laws proved to be the most used mechanism to thwart union activity. As one legal scholar has written, "labor rights were denied by the blatantly discriminatory enforcement of everyday criminal laws, something particularly notable in the widespread use of vagrancy and other public-order crimes to punish strikers and harass union organizers." See Ahmed A. White, "The Crime of Staging an Effective Strike and the Enduring Role of Criminal Law in Modern Labor Relations," *WorkingUSA: The Journal of Labor & Society* 11 (2008): 22-44. Records of lawyers' participation in cases involving the arrest of strikers are sparse. The New York City Municipal archives maintains one of the largest collections of criminal justice administrative records, which include primarily handwritten court dockets, lawyers' involvement in the arraignment and/or proceedings are very hard to locate. For one, most cases did not go to trial. Moreover, unless requested by the individual charged, a transcript of lower court trials was not made.

[150] "Picket Arrested," *New York Call*, December 4, 1914, 5.

Fifth Avenue. The strike was prompted by Goodman's firing of two employees, both of whom were members of the Ladies' Tailors and Dress Makers' Union, Local 38. After Bergdorf and Goodman refused to submit the fired employees' cases to the union, seventy union members walked out in protest and picketed the shop for nearly two weeks. On February 19, they got into a fight with strikebreakers outside of nearby St. Patrick's Cathedral and police arrested some sixteen people.[151] The men were taken before Justice Simms of the Fourth District Court, also known as the Yorkville Court, on Fifty-seventh Street between Lexington and Third Avenues in Manhattan. In his defense of the strikers, Panken accused the arresting police officers of a conspiracy; prior to this incident, the strikers had filed a formal complaint against a group of officers associated with the Fifty-first Street Station, and Panken contended that the current cases were the result of retaliation. Justice Simms did not agree. He fined six of the men $5, six of the men $10, and charged two others with assault.[152] Across the country and in New York in particular, labor protestors encountered violence in the form of police officers and strikebreakers. This was not unusual. What was unique was that they could draw on a contingency of lawyers willing to come to their aid and defend them.

Similarly, Louis Fridiger, an American-born Jew of Central European descent, represented transit union members charged with a variety of crimes during the course of a strike. On the fourth of September of 1920, the *Brooklyn Daily Eagle* reported that over fifty-five arrests had occurred within the first five days of what became a two-week strike by

---

[151] "Men Fought in Street," *The Troy Times,* February 19, 1915, afternoon edition, 18; According to the New York Times, only fourteen men were arrested. See "Fight in Fifth Av. In Tailors' Strike," *New York Times*, February 20, 1915, 8.

[152] "Fight in Fifth Av. In Tailors' Strike," *New York Times*, February 20, 1915, 8; "Pleas of Union Men Fail to Liberate Them," *New York Call*, February 25, 1915, 4.

employees of the Brooklyn Rapid Transit (BRT) Company, a privately owned public transit system in New York (which the city took over in 1953.) Moreover, police had beaten fifteen of the strikers.[153] Despite as much, it was the strikers who were convicted for various crimes. Most were slapped with charges of disorderly conduct, some were fined, and two were sent to a city workhouse. Richard Butler and Joseph Donner were each fined $10. Hayden Payne and Tony Ricucci, accused of threatening strikebreakers outside of the Thirty-third Street and Fourth Avenue subway station, were sent to the workhouse for five and ten days, respectively. Jacob Goldstein and Jacob Markoff, both charged with disorderly conduct, each were held on $200 bail. Leo Fink and Charles Cahn, discovered to be "hurl[ing] milk bottles at an open car in which fifteen passengers were riding" were charged with felonious assault and held on $2,000 bail.

Nevertheless, Louis Fridiger, counsel to the Amalgamated Transit Union, insisted his clients were not to blame. After declaring his "utmost respect" for New York police, he quickly attacked their behavior in the context of this strike. "It is outrageous for the police officers to beat men because they take advantage of the privilege which is rightfully theirs, that is striking when differences between themselves and employers cannot be settled otherwise," he asserted. "Men who are out on strike have a right to picket if they care to do so just so long as they do it in an orderly manner and peacefully. It is the duty of the police officers to arrest the men who create disturbances to annoy others," bu,t he said, beating the offenders is wrong.[154]

Jewish labor lawyers also acted as defense lawyers for unions who faced special

[153] "Lad Left for Dead in Lot; Strikers Clash With Police," *Brooklyn Daily Eagle*, September 2, 1920, 1.
[154] "Two B.R.T. Strikers Sent to Workhouse," *New York Times*, September 4, 1920, 2.

prosecution. In May of 1919, during a citywide housing shortage, the New York legislature created the Joint Legislative Committee on Housing, chaired by Senator Charles C. Lockwood. The Lockwood Committee was tasked with investigating the slowdowns in housing construction, the causes of rent increases, and explanation of related issues. The committee identified instances of landlord profiteering, insurance fraud, and other unlawful real estate practices. Due to assertions that the committee itself was too costly, the Lockwood Committee was eliminated in 1923. Nevertheless, during its brief existence, state prosecutors, led by the committee's chief counsel Samuel Untermyer, a longtime partner of Louis Marshall, zealously attacked the practices of labor unions associated with the housing industry.

In July of 1922, Jonah J. Goldstein, the long-time lawyer of birth control advocates Margaret Sanger and Ethel Bryne, defended thirty-six members of the Plasters' Union, Local 60, whom Untermyer had charged with "conspiracy in restraint of trade."[155] The case arose after the Lockwood Committee concluded that the city's plasterers had intentionally planned to slow building processes by engaging in strikes between July 1920 and July 1922. At trial before Judge Charles H. Brown of the Criminal Branch of the New York Supreme Court in late April and early May of 1923, Untermyer claimed he could prove that "there was a network of union control and domination in building operations throughout the country which made it impossible to proceed with any construction work unless union labor was employed."

Goldstein tried to get the case dismissed by asserting that the thirty-six charged union

[155] "Untermyer Calls Plasters Czars," *New York Times*, April 14, 1923, 15; "Plasters' Union Fines Employees," *New York Times*, April 17, 1923, 3; "Plasterers' Union Freed of Charges," *New York Times,* June 4, 1924, 11.

members had committed no clear act and that even if that they had performed the acts as alleged by Untermyer, their actions did not constitute a crime. Goldstein claimed that Untermyer's charges were legally empty because the men were not engaged in "trade or commerce" as traditionally defined by criminal law or by business law.[156] Judge Brown refused to dismiss the charges and a trial unfolded. Through various witness testimonies, Untermyer tried to demonstrate the financial harm caused by the plasterers' union and Goldstein tried to rebut as much.[157] Ultimately, six of the twelve jurors did not agree with Untermyer and dismissed the charges against the union members.[158]

In May of 1922, Untermyer lodged charges against another union. He prosecuted thirty-six of the thirty-seven members of Local 109 of the Bakery and Confectionery Workers' International Union, commonly known as the "Jewish Bakers' Union."[159] According to the complaint, members of Local 109 had set up a bakery next to that of Max Schlessinger, a non-union baker, who had a store on the East Side. Untermyer contended that the union was running its bakery for the express purpose of harming Schlessinger's business and accused the group of conspiring to injure trade.[160] Accordingly, on June 15, 1922, Untermyer arranged for the arrest of the members of Local 109. Soon thereafter, thirty-six

---

[156] "Untermyer Calls Plasterers Czars," *New York Times*, April 14, 1923, 15.
[157] For descriptions of the witness testimonies, see "Witness Deny Strike Conspiracy," *New York Times*, April 18, 1923, 9; "Says Plasters Barred Fast Work," *New York Times*, April 19, 1923, 12.
[158] "New Move to Indict Plasters Halted," *New York Times*, July 3, 1923, 8; Untermyer remained undeterred. By claiming that the original charges against the union members were too narrow, Untermyer convinced Deputy Attorney General Abraham Freedman to impanel a Grand Jury to reinvestigate the case for the purpose of securing a new indictment. Defending his decision, Untermyer told the press, "It was for the purpose of correcting this informality and for that purpose only that Mr. Freedman was to have introduced additional proof, which I believe would result in a conviction." By this point, it was July 1923 and the Lockwood Committee's power had already diminished to the point that Untermyer could no longer assert enough authority to pursue this case. Ultimately, Goldstein helped convince the court to drop the indictment against the union and no further action was taken in this particular case.
[159] "Says Bakers' Union is Tyrant in Trade," *New York Times*, June 16, 1922, 14; it seems that Untermyer had a particular issue with the Jewish bakers. See "Gompers Defiant of Union Labor Curb," *New York Times*, May 5, 1922, 3.
[160] "Says Bakers' Union is Tyrant in Trade," *New York Times*, June 16, 1922, 14.

men were arraigned in the courtroom of Justice Giegerich in the criminal branch of New York's Supreme Court. In addition to requesting that each man be held on $5,000 bail, Untermyer told the court that, "Despotic organizations such as [the Jewish Bakers' Union] have grown to be a constant threat to the peace and safety of the community," and then asked the court to change the regular charge against the men from a misdemeanor to a felony. "I feel that this crime is more dastardly and more contrary to all human, livable, and decent conditions than any felony that might be charged."[161]

Morris Hillquit and his junior associate Hyman Bushel represented the members of Local 109. They challenged the high bail set for the men, but soon proved willing to negotiate with Untermyer. Knowledge of the judicial bias against picketing likely motivated them.[162] Ultimately, Hillquit encouraged the union to agree to close its shop next door in exchange for recognition from Untermyer that the union had the right to "conduct any strike they may choose provided it is conducted in a lawful manner."[163]

Conclusion

In 1930, Felix Frankfurter and Nathan Greene published *The Labor Injunction*, a compendium of judicial injunctions in labor conflicts in New York and Massachusetts, states they selected because of their centrality to the development of labor law.[164] Frankfurter was twenty years older than Greene. Still, the two men shared a number of similarities.[165] They

---

[161] "Says Bakers' Union is Tyrant in Trade," *New York Times*, June 16, 1922, 14.
[162] For a discussion of the concept of picketing see Cogley, *The Law of Strikes, Lockouts, and Labor Organization*, 290-292; for a discussion of picketing in New York, see "Peaceful Picketing in New York, 1912-1926," *Yale Law Journal* 36, no. 4 (February 1927): 557-564.
[163] "Says Bakers' Union is Tyrant in Trade," *New York Times*, June 16, 1922, 14.
[164] Felix Frankfurter and Greene, *The Labor Injunction*, 5.
[165] "Felix Frankfurter is Dead," *New York Times*, February 23, 1965, 1, 26.

were both graduates of the City College of New York and of Harvard Law School. (At Harvard Frankfurter, who graduated in 1906, was roommate to the Jewish socialist legal scholar and philosopher Morris R. Cohen; Greene, who earned his LL.B. in 1925 and his S.J.D. in 1927, was classmates with the Jewish communist labor lawyer Lee Pressman.)[166] Further, they were both Jewish men reared in New York who came of age surrounded by labor activism. They witnessed firsthand strikes and picketing and boycotts—activities that inspired Jewish lawyers to work to advance workers' rights.[167]

Indicative of the close relationship between Frankfurter and Louis Brandeis, the book's dedication read: "To Mr. Justice Brandeis, for whom law is not a system of artificial reason, but the application of ethical ideals, with reason at the core."[168] Despite its academic tone, Frankfurter and Greene's book unapologetically revealed the practical and intellectual inconsistencies of the judiciary's deployment of injunctions in labor disputes. The book was a critique on the judicial system's treatment of labor and handling of labor disputes.

Readers embraced *The Labor Injunction* and its positive reception inspired political changes. As labor scholar and statistician Paul F. Brissenden wrote a few years after its publication, Frankfurter and Greene's book had "significant practical effects… The speed and course of the legislative current in the stream of events—in so far at least as labor-dispute legislation is concerned—has been so obviously affected."[169] Indeed, the book served

---

[166] On Lee Pressman, see Gilbert J. Gall, *Pursuing Justice: Lee Pressman, the New Deal, and the CIO* (New York: State University of New York, 1990). On Morris R. Cohen see David A. Hollinger, *Morris R. Cohen and the Scientific Idea* (Cambridge, MA: MIT Press, 1975) and Dalia T. Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (New York, NY: Cornell University Press, 2007).
[167] Moreover, in his early career, Frankfurter served as assistant counsel to his lifelong friend Emory Buckner in a case in which they represented the Amalgamated Clothing Workers of America. See "Clothing World in Big Legal Fight," *New York Times*, April 18, 1920, E1.
[168] Very little biographical information about Nathan Greene is available. See "Nathan Greene, Lawyer, Dies; Labor Expert Served New Deal," *New York Times*, October 31, 1964, 29.
[169] Paul F. Brissenden, "The Labor Injunction," *Political Science Quarterly* 48, no. 3 (September 1933), 413.

as the intellectual basis of the Norris-LaGuardia Act, which Congress passed in 1932.[170] The law limited federal courts' capacity to issue injunctions in the case of nonviolent labor disputes; asserted workers' rights to join unions unencumbered by employers; and forbid employers from forcing employees to promise not to join unions.[171]

Frankfurter and Greene's book also encouraged the passage of the National Industrial Recovery Act (NIRA) on June 16, 1933. That law, in many respects, revolutionized labor rights. Broadly, Congress intended NIRA to empower the President to help the country's crippled economy. It accomplished as much by creating a complex fair trade code to regulate American industries. (Simultaneously, Roosevelt created the National Recovery Administration (NRA), which established industry-wide regulations that prescribed hours, wages, and the prices of goods in various industries.)

Many considered NIRA so revolutionary that they questioned its legality. "The National Industrial Relations Act: Is It Constitutional?" Hal H. Smith asked in an *American Bar Association Journal* article in May of 1934.[172] One reason why many viewed the law as revolutionary was because of Section 7(a), a provision that granted workers "the right to organize and bargain collectively… free from the interference, restraint or coercion of employers," a right for which Jewish lawyers had been advocating for decades. In fact, the section was authored was Simon H. Rifkind, a graduate of DeWitt Clinton High School, the City College of New York, and Columbia Law School. In 1927, U.S. Senator Robert F.

---

[170] Clyde W. Summers, "Frankfurter, Labor Law and the Judge's Function," 67 *Yale Law Journal* (1957): 266-303, 267; Harry Arthurs, "Woe Unto You, Judges: Or How Reading Frankfurter and Greene *The Labor Injunction* Ruined Me As a Labour Lawyer and Made Me as an Academic," *Journal of Law and Society* 9, no. 4 (December 2002): 657-666, 662.
[171] Act of March 23, 1932 (Ch. 90, 47 Stat. 70); 29 U. S. C. § 101.
[172] Hal H. Smith, "The National Industrial Recovery Act: Is It Constitutional?," *American Bar Association Journal* 20, no. 5 (May 1934): 273-280.

Wagner hired Rifkind as a legislative assistant and it was in this post that Rifkind helped draft the NIRA.

Indicative of the radicalism of lawyers who supported unions' rights, Wisconsin economist Edwin E. Witte, who went on to author the policies for the Roosevelt administration that undergird the Social Security Act, wrote in an analysis of the law, "no other part of the National Industrial Relations Act has aroused so much controversy as Section 7(a)."[173]

In May of 1935, the U.S. Supreme Court declared that the law was so radical as to be unconstitutional. The case they used as a legal vehicle to decide NIRA's constitutionality is commonly known by the name "Schechter," the last name shared by four Jewish immigrant brothers—Joseph, Martin, Alex, and Aaron—who co-owned two kosher butcher shops in Brooklyn.[174] In July of 1934, the federal government charged the Schechter brothers with violating various NRA and NIRA provisions, including interfering with interstate commerce by conspiring to sell uninspected chicken as well as ignoring the trade code's pricing regulations. In October of that year, a federal court judge in Brooklyn named Marcus B. Campbell handed down an indictment on nineteen counts of guilt—one count of conspiracy and eighteen counts of sales of poultry "unfit for human consumption."[175] The following April, government lawyers found similar success in the Second Circuit Court. (Still, the three judge panel, which included Learned Hand, declared the government had no right to regulate industries through trade codes based on the constitutional claim of those trades affecting

---

[173] Edwin E. Witte, "The Background of the Labor Provisions of the N.I.R.A.," *University of Chicago Law Review* 1, no. 4 (March, 1934): 572-579, 572.
[174] "NRA Indictments Name Poultry Men," *New York Times*, July 27, 1934, 30.
[175] "Court Rules NRA Alters Trust Law," *New York Times*, August 30, 1934, 13; "First Felony Case Won Under NRA," *New York Times*, November 2, 1934 3.

interstate commerce and dismissed the charges based on that claim.[176]) Within days of the Second Circuit's decision, both the Schechter brother's lawyers and Department of Justice lawyers filed briefs with the U.S. Supreme Court, requesting a review of the case.[177] On May 2, 1935, the court heard the case and twenty-five days later handed down a unanimous decision that declared NIRA unconstitutional.[178]

Seemingly undeterred, in July of 1935, Roosevelt signed the National Labor Relations Act (NLRA), also known as the Wagner Act, which established private sector workers' rights to unionize, encouraged collective bargaining, and permitted limited strikes. Tucked into the law was the language from NIRA's Section 7(a). The law also created a government agency to oversee union elections called the National Labor Review Board (NLRB).[179]

This law, like NIRA, was met with much derision, especially from conservative factions of the American bar. (The National Lawyers' Committee, a wing of the American Liberty League, issued a report that identified the law as "a complete departure from our constitutional and traditional theories of government.")[180] Nevertheless, in 1937, the Supreme Court upheld its constitutionality.[181] The NRLB continues to operate to this day.

As New Deal agencies formed, dissolved, and reformed, as federal legislation generated new labor cases, and as New Deal labor law erupted, Jewish lawyers filled the

---

[176] "Government Asks NIRA Test At Once in Poultry Case," *New York Times*, April 5, 1935, 1, 18.
[177] "Test of NIRA Put in Supreme Court," *New York Times*, April 9, 1925, 10.
[178] "Court is Unanimous," *New York Times*, May 28, 1935, 1, 21; *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[179] National Labor Relations Act, 29 U.S.C. § 151-169.
[180] "58 Lawyers Hold Labor Act Invalid," *New York Times*, September 19, 1935, 1, 10; Jerome Auerbach, *Unequal Justice*, 193.
[181] *National Labor Relations Board v. Jones & Laughin Steel Corp*, 301 U.S. 1 (1937). Many legal scholars attribute the Court's change of heart to Roosevelt's "court-packing plan."

ranks of the American bar's new practice.[182] Jewish lawyers' predominance in the field of labor law, which began during the Progressive Era, persisted throughout the twentieth century.[183] Throughout the 1930s and 1940s, as unions grew, Jewish lawyers took the mantle of representing them. From 1933 to 1948, Lee Pressman served as general counsel for the Congress of Industrial Organizers. Morris Ernst served as the attorney for the American Newspaper Guild. In 1937, Ernst argued that the U.S. Supreme Court should uphold the constitutionality of the Wager Act in the case of the press and the Court agreed with him; the case established the right of media workers to unionize.[184] Maurice Sugar served as the first general counsel to the United Autoworkers' Union from 1939-1947, before being ousted because he was suspected of being a communist. During the 1940s and 1950s, future U.S. Supreme Court Justice Arthur Goldberg represented the United Steel Workers.

In the 1950s, public sector labor law was born. In 1958, 100,000 municipal employees in New York City secured the right to engage in collective bargaining. One year later, Wisconsin became the first state to enact legislation, known as the Municipal Employee Relations Act, which approved of public sector unionization. In 1962, President John F.

---

[182] This reality was ensured, first, by the federal government's willingness to hire young Jewish lawyers who had been informally "barred from employment in most prestigious law firms by long-standing exclusionary politics." Peter Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1993), 126. "It may be true, as Auerbach argues, that Jewish lawyers created political liabilities for the New Deal agencies. But Charles Fahy, a more conservative lawyer with a Catholic-Jewish heritage, hired many Jewish lawyers for the National Labor Relations Board and defended them vigorously against the political attacks of a congressional committee headed by a blatant anti-Semite." See Peter Irons, *The New Deal Lawyers*, 128.

[183] Determining the high percentage of Jewish labor lawyers requires reliance on deductive reasoning. For example, there are reports about the high percentage of labor lawyers who belong to the National Lawyers' Guild. See Robert M. Segal, "Labor Union Lawyers: Professional Services of Lawyers to Organized Labor," *Industrial and Labor Relations Review* 5 (1951): 343-364. (Segal writes: "Whereas nearly every labor attorney is a member of the local bar association and slightly over 70 percent of the labor lawyers belong to a state bar association, only 39 percent of the labor lawyers reporting belong to the American Bar Association. Approximately 20 percent of the labor lawyers were members of the National Lawyers Guild in 1950." Segal, "Labor Union Lawyers," 351; "Although four thousand lawyers, or 2 percent of all the lawyers in the country, belonged to the National Lawyers Guild in 1950, 21 percent of the labor lawyers belonged to the National Lawyers Guild." Segal, "Labor Union Lawyers," 352.)

[184] *Associated Press v. Labor Board*, 301 U.S. 103 (1937).

Kennedy issued Executive Order 10,988, which officially recognized the right of federal employees to negotiate with governmental employer-managers.[185]

Yet before unionization became a legal right, before collective bargaining was broadly embraced, and before the right to strike became synonymous with expressions of free speech, Jewish labor lawyers represented striking workers, fought court-ordered injunctions, and defended union members who faced state prosecution. Despite their limited success, their efforts constituted the foundation of twentieth-century American labor law. Their work was significant because, at the time they pursued as much, their efforts in court constituted labor's greatest hope of asserting workers' rights within a legal framework.[186] Moreover, sometimes labor lawyers actually won, successfully aiding the immediate parties to the case. Even when they lost, by appearing in court and vocalizing pro-union arguments, Jewish labor lawyers served as voices of dissent within the legal system. They advanced arguments that lawmakers were forced to address in later decades. In modified form, the mechanisms, procedures, organizations, and ideas that they generated shaped employer-employee relations for the rest of the twentieth century.

---

[185] As of 2010 unionized public-sector workers far exceeded unionized private-sector workers. In that year, the United States Department of Labor Bureau of Labor Statistics reported that the "nationwide union density in the public sector [sat] at 36.2%... [whereas] only 6.9% of all private sector workers unionized." See William A. Herbert, "Public Sector Labor Law and History: The Politics of Ancient History?," *Hofstra Labor and Employment Journal* 28, no. 339 (2011), 339-365, 339. This statistic, which would have shocked mid-century labor-law practitioners, followed growth of local and state employment sectors in the late 1960s; "compared to the private sector workforce which increased 89% from 1951 to 1980, the state and local government workforce increased 227%." See Martin Malin, Ann Hodges, Joseph Slater, eds., *Public Sector Employment: Cases and Materials* (St. Paul, MN: West Publishers, 2011), chap. 1.

[186] Until 1932, the judiciary was the "dominant influence in labor relations." See Segal, "Labor Union Lawyers: Professional Services of Lawyers to Organized Labor," 344.

[Chapter 4] A Jewish History of the First Amendment

In October of 1893, a twenty-five year old Eastern European Jewish immigrant standing at barely five feet tall was tried for unlawful assembly and inciting a riot in New York City's Court of General Sessions.[1] The court was old: its jurisdiction to oversee criminal trials in New York County dated back to the colonial era. By 1893, it operated in a nondescript three-story rectangular brick building in downtown Manhattan. There, before an unusually large group of courtroom spectators, Assistant District Attorney John F. McIntyre presented his case against the female defendant to an all-male (and likely all white) jury. McIntyre claimed that the woman had delivered an "incendiary" speech at a meeting in New York's Union Square. Although the city had granted permission to the event's organizers to host the gathering of workers, McIntyre nevertheless contended that her speech had violated state law.[2] After being interrogated by McIntyre, the defendant offered an unsolicited explanation of her actions: "My object in going to the Union Square meeting and addressing the people there was to use my right of free speech… I understand that the laws of this country give to every man and woman the right to speak their minds as I did that night. I do not think I violated the Constitution of the state or any of its laws."[3] After two hours of deliberations, the jury returned with a unanimous verdict of "guilty." The presiding judge

[1] "Trial of Emma Goldman," *New York Tribune*, October 5, 1893, 8; "Emma Goldman on Trial," *New York Times*, October 5, 1893, 9; "Emma Goldman Testifies," *New York Times*, October 6, 1893, 8; "Anarchy Her Faith Only," *New York Times*, October 7, 1893, 9.
[2] "Anarchists Kept in Check," *New York Times,* August 20, 1893, 1; "Emma Goldman Arrested," *New York Times*, September 1, 1893, 5; "Emma Goldman in Court, *New York Times*, September 12, 1893, 9.
[3] "Emma Goldman Begins Her Sentence," *New York Times*, October 19, 1893, 8.

then sentenced the woman, a young Emma Goldman, to a year in prison on Blackwell Island in New York's East River.[4]

For contemporary observers, Goldman's imprisonment was predictable.[5] She was a revolutionary who the *New York Times* once characterized as a "little anarchist spitfire." Her status as an Eastern European Jew, atheist, radical, immigrant, woman, and public champion of birth control and worker's rights made her a target of the state.[6] More importantly, the "right to free speech" that Goldman spoke of on the witness stand simply did not exist at the time. Late nineteenth- and early twentieth-century Americans were not legally entitled to broadly conceived expression rights. Nor did most Americans maintain an expectation of "the right to speak their minds." As commonly understood by courts and citizens alike, the First Amendment only promised that the federal government would refrain from "prior-restraint," which meant that the state did not censor expression before it took place. Nevertheless, according to the U.S. Supreme Court, the First Amendment did not prevent state or local authorities from sanctioning speakers who supposedly threatened the public good after the fact.

---

[4] "Emma Goldman Found Guilty," *New York Times*, October 10, 1893, 5; "One Year For Emma Goldman," *New York Times*, October 17, 1893, 9; Before ultimately being deported to Soviet Russia in 1919, she served multiple prison sentences in the United States. On Emma Goldman see Vivian Gornick, *Emma Goldman: Revolution As a Way of Life* (New Haven, CT: Yale University Press, 2011); Howard Zinn, *Emma* (Boston, MA: South End Press, 2002); Paul Avrich and Karen Avrich, *Sasha and Emma: The Anarchist Odyssey of Alexander Berkman and Emma Goldman* (New York, NY: Belknap Press, 2012).

[5] On Americans' views of free speech before World War I see Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (Cambridge, MA: Oxford University Press, 2008).

[6] Issues of free speech, especially as they concerned political speech, were inseparable from immigration policy. See, for example, Broughton Brandenburg, "The Menace of the Red Flag," *The New Broadway Magazine* 20, no. 3 (June 1908): 265-274. The combination of the Haymarket affair in 1886 and President William McKinley's assassination in 1901 resulted in the passage of the 1903 Anarchist Exclusion Act, in which Congress banned various sorts of perceived radicals from entering the country and permitting the deportation of any alien who entered the country within the last three years who held radical beliefs.

By contrast, for modern readers, Goldman's case is likely surprising: Most twenty-first century Americans believe that they are entitled to express all sorts of speech, even speech that most people would find crude or offensive. While indicative of a simplified understanding of the Constitution, the expectation that Americans may legally express themselves in whatever forum and engage in a wide range of demonstrative behaviors reflects modern judicial interpretations of the First Amendment. Today, the U.S. Supreme Court interprets the First Amendment as guaranteeing broad expression rights, especially when such expression concerns political speech precisely of the kind that Goldman voiced.[7] Indeed, had Goldman lived during the twenty-first century, not only would her claim that she was exercising her right of "free speech" likely prove a successful defense to overcome charges of unlawful assembly or inciting a riot, it is doubtful that her Union Square speech would even trigger her arrest.

As suggested by the gulf between Goldman's 1893 conviction and how courts would likely treat her today, Americans' First Amendment rights and their expectations about those rights broadened tremendously since the late nineteenth century. Legally, First Amendment rights came into existence on a literal case-by-case basis. The transformation of these rights was the result not of the passage of legislation, but the outcome of recurrent exercises in judicial review, a process that involved lawyers arguing for their particular interpretation of a

[7] In 1969 the Court struck down an Ohio law, which forbade mere advocacy of violence, determining that general calls for violence are a form of political speech protected by the First Amendment. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). This case was a so-called landmark decision because it expressly overruled *Whitney v. California*, 274 U.S. 357 (1927) and implicitly overruled other cases that concerned sedition. *Brandenburg* articulated what legal scholars termed the "imminent lawless action" test, which the Court intended judges to use to determine what is and what is not protected speech; the test includes three elements—intent, imminence, and likelihood—all of which have their own intellectual legal precedents.

given law before judges.[8] Culturally, the transformation of Americans' assumptions about their First Amendment rights reflected a lengthy crusade to reframe existing expectations about what governmental authorities could and could not regulate. Prior to World War I, most Americans actively opposed claims of "free speech."[9] Today's widely shared presumption that Americans are entitled to First Amendment civil liberties resulted from the persistent efforts of a group of legal activists who promoted the idea that state officials were legally obligated to permit Americans to speak, print, and assemble freely.

Although the legal and cultural transformation of standard interpretations of the First Amendment occurred in tandem, the former relied on the latter; change was slow and included stalemates, failures, and reversals. For late nineteenth- and early twentieth-century speech advocates such as Goldman, the court system posed a particularly thorny problem: more so than any other government institution, none "was more hostile to free speech claims before World War I than the judiciary."[10] Indeed, before 1925, convincing courts to merely entertain First Amendment questions was exceptionally difficult because, in the minds of the vast majority of judges, First Amendment issues rarely arose. Abiding by the 1833 ruling *Barron v. Baltimore*, in which the U.S. Supreme Court asserted that the Bill of Rights applied to the federal government but not to individual state governments, courts refrained from

---

[8] First Amendment rights are not legislated; they are codified in the Bill of Rights, the collective name for the ten amendments, which were added to the U.S. Constitution on December 15, 1791.

[9] See Capozzola, *Uncle Sam Wants You.*

[10] David M. Rabban, *Free Speech in its Forgotten Years, 1870-1920* (Cambridge, MA: Cambridge University Press, 1999), 15. (Rabban locates the origins of free speech norms in an earlier period than most scholars and also attributes modern speech norms to radicals.) On the restrictive treatment of speech see Mark Kessler, "Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger," *Law & Society Review* 27, no. 3 (1993), 559-598. (Kessler argues that Supreme Court decisions between 1919 and 1927 presented two contradictory perspectives on speech: one promoted "free" speech and the second advocated broad and deep speech restrictions. The latter of these views included a "cultural construction of difference," which depicted Jewish and other immigrant defendants as dangerous, foreign, and traitorous. See Kessler, "Legal Discourse and Political Intolerance," 578.

addressing First Amendment questions for the next seventy plus years.[11] Consequently, throughout the remainder of the nineteenth century and through the first two decades of the twentieth century, state and local governments passed all sorts of laws that restricted the freedom of expression, assembly, and press, and criminally prosecuted people charged for violating them.

In 1925, however, after a series of high-profile cases resulting from censorship laws enacted by President Woodrow Wilson during WWI, the U.S. Supreme Court handed down a decision that represented a major about-face: On June 8, in a ruling concerning a young Jewish communist named Benjamin Gitlow, the Court declared that the Due Process Clause of the Fourteenth Amendment extended the reach of some Constitutional guarantees found in the First Amendment to individuals in the states. This meant, theoretically, that states and cities could no longer punish citizens who expressed offensive ideas. In the aftermath of *Gitlow*, over the remainder of the twentieth century, courts broadened American's speech rights. By midcentury, as the United States strategically positioned itself as the standard-bearer of free expression across the globe, Americans came to understand their First Amendment civil liberties as inextricably tied to their rights as citizens.[12] Today, a past in which publicly promoting workers' rights, publishing Gustav Flaubert's *November*, or

---

[11] *Barron v. Baltimore*, 32 U.S. 243 (1833). (This case concerned the application of the Fifth Amendment. The Court held that the Bill of Rights applied strictly the federal government.) The Court slowly moved away from the *Barron v. Baltimore* decision beginning in 1925 with the holding in *Gitlow v. New York*, 268 U.S. 652 (1925). Before World War I most courts ignored free speech arguments. See David Rabban, "The First Amendment in its Forgotten Years," *Yale Law Journal* 90, no. 3 (January 1981): 524-595.

[12] Anticipating modern disparities between Russian and American internet governance policies, the United States and the Soviet Union expressed opposing positions during the drafting of Article 19 of the Universal Declaration of Human Rights, which ensures individuals' fundamental right to the freedom of opinion and expression, at the 1948 International Conference on the Freedom of Information. See John B. Whitton, "The United Nations Conference on Freedom of Information and the Movement Against International Propaganda," *The American Journal of International Law* 43, no. 1 (January 1949): 73-87.

distributing information about birth control resulted in criminal proceedings seems not only outrageous but also oddly quaint.

The rather exceptional transformation of the First Amendment during the twentieth century begs the question: how did this happen?[13] This chapter answers that question by exploring the endeavors of a group of early twentieth-century Jewish lawyers who self-consciously tried to broaden the standard meaning of the First Amendment in the first decades of the twentieth century. Motivated by a unique set of concerns, Jewish lawyers defended individuals, organizations, and businesses charged with criminal violations by proffering First Amendment defenses. Sometimes Jewish lawyers' representation of respective clients resulted from surprise arrests and police raids. Other times Jewish lawyers oversaw "test cases," legal actions intended to set judicial precedent. Anticipating a tactic used by midcentury civil rights activists, some Jewish lawyers instructed their clients to try to get arrested, so as to create an opportunity for themselves to present their arguments in court. Regardless of how they came to these cases, in the quarter century before *Gitlow*, with little reason to believe that they would prevail, Jewish lawyers went from court to court peddling

[13] The First Amendment has been the subject of a tremendous amount of scholarship. American historians point to First Amendment cases as exemplary of government censorship and repression during World War I. Legal scholars have analyzed precedent-setting cases and traced evolving interpretations of the Constitutional rights it promises. Their discussions of the First Amendment focus on the so-called five freedoms: religious liberty and free speech, press, assembly, and petition. Scholars often discuss (and teach) these rights separately (which, given the extensive case law each has spurred, is understandable). According to most of this scholarship, transformations to America's speech rights began around World War I and are attributable to legal thinkers such as Theodore Schroeder and Zechariah Chafee, Jr., who were among the first to articulate liberal and/or libertarian expression standards, and judges such as Learned Hand and Oliver Wendell Holmes, Jr., who then moved those ideas from the margins to the mainstream of judicial thought. David Rabban, however, argues that this periodization is flawed and reflects Chafee's intentional minimization of pre-1917 speech-related case law. See David Rabban, *Free Speech In Its Forgotten Years*.

the radical supposition that, as Goldman put it, "every man and woman ha[d] the right to speak their minds."[14]

Especially before 1925 (and often after that year), early twentieth-century Jewish lawyers' efforts to defend their clients using First Amendment defenses failed to transform how the judiciary interpreted the law. Sometimes they successfully represented their clients to the extent that they convinced judges to dismiss given charges or they secured less punitive sentences for their clients. When Jewish lawyers prevailed in these cases, they prevented the state from fining, imprisoning, or deporting their clients; for these individuals, most of whom were impoverished Jewish laborers and often immigrants, this was a significant feat.[15] Still, these cases seldom produced rulings that influenced subsequent cases or came to the attention of the appellate courts.

Despite as much, early twentieth-century Jewish lawyers endeavors were significant for a number of reasons. First, the process of transforming the meaning of the First Amendment occurred by fits and starts, and for lawyers who wanted to broaden the meaning of the First Amendment, even cases that they lost were strategically important.[16] In order to get themselves into courtrooms where they then could make their respective claims about where and when First Amendment protections ought to apply, lawyers needed to determine

---

[14] In this way, Jewish lawyers personified what legal scholars have called "cause lawyers," attorneys who deployed their professional expertise in order to move society "toward a particular vision of the Good." Austin Sarat and Stuart A. Scheingold, eds., *Cause Lawyers and Social Movements* (Stanford, CA: Stanford University Press, 2006), 9.

[15] Despite the judiciary's general hostility to First Amendment claims and to the particular group of lawyers who made them, judges sometimes dismissed given charges either because they felt sympathy or because they wanted to deny a lawyer the opportunity to make a First Amendment argument in a jury trial; Many Jewish lawyers' clients were other Jews, often immigrants, who found themselves charged with crimes as a result of their involvement in radical political movements and/or the production or dissemination of culture goods such as books, plays, and films.

[16] For additional benefits of "failed" cases see Ben Deporter, "The Upside of Losing," *Columbia Law Review* 113, no. 3 (April 2013): 817-862.

what circumstances courts would accept as a legitimate basis for questioning First Amendment norms. To do this, they employed a process of elimination, which was carried out on a case-by-case basis. When lawyers lost a case, they ruled out possible circumstances that *may* have triggered judicial reconsideration of First Amendment rights, and moved slowly toward determining which situations *did* trigger such a process. Therefore, even lost cases were useful.

Second, by presenting First Amendment arguments, regardless of whether they won or lost the case, early twentieth-century Jewish lawyers intellectually framed the development of First Amendment case law for the next one hundred years.[17] At the start of the twentieth century, standard conceptualizations of the First Amendment were nascent. Its intellectual parsing and application to a broad set of rights, which transpired in later decades, had not yet occurred. Early twentieth-century lawyers' use of the First Amendment as a defense, therefore, was relatively crude and more or less consisted of appeals to the federal Constitution's promise of "free speech," often with little consideration of the amendment's other clauses. Nevertheless, even when Jewish lawyers failed to convince judges of the soundness of their interpretations of the First Amendment, by presenting the bench with their understanding of the law, they identified the particular circumstances in which, in their view, individuals *ought* to be protected by the First Amendment. In so doing, Jewish lawyers determined when and where the First Amendment should protect individuals' rights. Modern

[17] Today, legal practitioners classify "First Amendment" cases by pairing the circumstances in a case with a given clause of the First Amendment. For example, cases about publishing obscene materials are almost always examined through the lens of the "free speech" clause; cases involving media publications were almost always analyzed under the "free press" clause. At the start of the century, however, what circumstances concerned which clause questions was not self-evident because a standard conceptualization of the First Amendment did not yet exist. (As a result, prior to 1925, lawyers who made First Amendment claims most often did so without intellectually parsing the differences between its clauses. When they argued cases protecting journalistic practices, for example, they may have employed a "free speech" defense or a "free press" defense. When they defended union members' right to assembly, they likely invoked workers' rights to free expression.)

conceptions of the First Amendment reflect early twentieth-century Jewish lawyers' framing of these issues.[18]

In the decades before *Gitlow*, Jewish lawyers insured that their ideas would endure by establishing, funding, and staffing organizations that institutionalized their mission to expand Americans' civil liberties, another lasting significance of early twentieth-century Jewish lawyers' work. These organizations, which included the New York Bureau for Legal Aid (NYBLA), the National Civil Liberties Bureau (NCLB), and the American Civil Liberties Union (ACLU), helped individuals in need of representation and served as training grounds for younger lawyers who carried on the crusade to broaden the meaning of the First Amendment. Indeed, some of these organizations (such as the ACLU) continue to perform this work in the present day.

Finally, Jewish lawyers' early work to transform the judiciary's interpretation of the First Amendment was important because, even as they lost their cases in court, they made inroads in the court of public opinion.[19] Part and parcel with their work inside the courtroom, Jewish lawyers disseminated their particular understanding of the First Amendment to the general public. Whether in newspapers, meeting halls, or street protests, often standing alongside their clients, they articulated the idea that all Americas were entitled to express themselves without restraint. They wrote their political representatives, gave speeches, and staged protests for the explicit purpose of changing ordinary Americans perceptions about

[18] In later decades, courts recognized the circumstances first identified by Jewish lawyers as forums for speech—labor protests, rent strikes, political rallies—as instances, which triggered "free speech" questions. At the start of the twentieth century, however, the circumstances that merited consideration of the First Amendment were unknown.

[19] David Rabban, alternatively, argues that, "The IWW free speech fights generated substantially more popular discussion of free speech than any other event, or series of event," prior to World War I. He counts twenrty-six free speech cases led by the IWW between 1906 and 1917. See David Rabban, "The IWW Free Speech Fights and Popular Conceptions of Free Expression before World War I,' *Virginia Law Review* 80, no. 5 (August 1994): 1055-1158, 1058 and 1068.

their personal First Amendment rights. In this way, they helped to transform Americans' expectations about their personal First Amendment rights. In fact, the undertakings of Jewish lawyers who championed broader interpretation of the First Amendment proved fundamental to transforming American legal culture.

Jewish lawyers were not alone in their efforts to broaden the standard interpretation of the First Amendment in the first quarter of the twentieth century.[20] Yet, collectively, they were indispensable if not central to this process. As Roger Baldwin, the public face and most well-known founding member of the ACLU remarked in 1973, "I can't remember a time from when I first began when there was not always a very strong Jewish presence in the movements that I was connected with."[21]

Several historical circumstances illuminate why and how Jewish lawyers came to be so important in the history of the transformation of Americans' First Amendment rights. First, Jews played outsized roles in movements targeted for censorship by the government.[22] They comprised significant memberships of the suffrage, birth control, and peace movements; they

---

[20] It is arguably impossible to quantify how many Jewish lawyers (or lawyers generally) presented First Amendment arguments in courts; many of these arguments were made in local magistrate courts, night courts, and other venues where the records no longer exist. Second, identifying someone as a "First Amendment lawyer" during the Progressive Era is anachronistic. First Amendment case law barely existed; according to Google N-gram Viewer, which tracks the popularity of words and phrases, "First Amendment lawyer" only came of use in the 1970s.

[21] Rodger Baldwin, a founder of the ACLU, was not Jewish. His father's lawyer was Louis D. Brandeis. Transcript, Rodger Baldwin, Oral History Interview, November 1973, by Mitchell Krauss, 16, NYPL. Online: http://digitalcollections.nypl.org/items/7eab5330-02dd-0131-16a2-58d385a7b928#/?uuid=796b65f0-02dd-0131-2373-58d385a7b928. (November 3, 2015)

[22] Most Jews who were charged with crimes and associated with these movements hired Jewish lawyers to defend them. Several scholars have studied the social and ethnic stratification of the American bar. See Richard L. Abel, *American Lawyers* (New York, NY: Oxford University Press, 1989); Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York, NY: Oxford University Press, 1976); 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); Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham, NC: Duke University Press, 1995); Marcia Graham Synnot, "Anti-Semitism and American Universities: Did Quotas Follow the Jews?," in David Gerber, ed., *Anti-Semitism in American History* (Chicago, IL: University of Illinois Press, 1986), 233-271, 258-259.

also disproportionately subscribed to Marxism, atheism, pacifism, anarchism, and were staunchly pro-labor.[23] Jewish businesses that specialized in cultural production were also targets of state censorship.[24] These businesses included publishing houses, theatres, and entities related to making and distributing films. Likewise, Jews were central to the production of pornography in early twentieth-century New York City.[25] Like political activists, Jewish cultural producers—novelists, playwrights, actors, cartoonists, musicians, lyricists, etc., and their publishers, promoters, and distributors—clashed with the state, because much of what they disseminated transgressed American conventions of respectability. Finally, Jews constituted the largest non-Christian minority in the United States.

In addition to constituting significant components of the political movements and business entities targeted by the state, early twentieth-century Jewish lawyers comprised a large portion of the New York bar. Between 1900 and 1910, 26 percent of newly admitted bar members in New York City were Jewish; between 1911 and 1917, 36 percent; between

---

[23] See Tony Michels, *Jewish Radicals: A Documentary History* (New York, NY: NYU Press, 2012), introduction. On Jewish involvement with the American birth control, peace, and suffrage movements see Melissa Klapper, *Ballots, Babies, and Banners of Peace: American Jewish Women's Activism, 1890-1940* (New York, NY: NYU Press, 2013). On the rise of non-believers, see James Turner, *Without God, Without Creed: The Origins of Unbelief in America* (Baltimore, MD: John Hopkins University Press, 1985). On the birth of Christian fundamentalism see George Marsden, *Fundamentalism in American Culture* 2nd ed. (New York, NY: Oxford University Press, 2006). On the First Amendment and the labor movement see Geoffrey D. Berman, "A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s," *Virginia Law Review* 80, no. 1 (February 1994): 291-322.

[24] Alfred A. Knopf, Sr., for example, founded Alfred A. Knopf, Inc., in New York City in 1915. Horace B. Liveright was both a publisher and a theater producer. Jews were central to the production of pornography in early-twentieth century New York City. On Jews and the theatre see Andrea Most, *Making Americans: Jews and the Broadway Musical* (Cambridge, MA: Harvard University Press, 2004) and Stephen Whitfield, *In Search of American Jewish Culture* (Hanover, MA: Brandeis University Press, 1999); on Jews and Hollywood see Neil Gabler, *An Empire of Their Own: How the Jews Invented Hollywood* (New York, NY: Anchor Press, 1989).

[25] Jay A. Gertzman, *Bookleggers and Smuthounds: The Trade in Erotica, 1920-1940* (Philadelphia, PA: University of Pennsylvania Press, 2001).

1918 and 1923, 40 percent; between 1924 and 1929, 56 percent; and between 1930 and 1934, 80 percent.[26]

Because individuals who faced legal battles hired lawyers from within their own social and political circles, two groups of late nineteenth- and early twentieth-century Jewish lawyers came to propel the slow and uneven legal processes that eventually upended standard interpretations of the First Amendment. The first was comprised of radical Jewish lawyers—socialists, leftists, communists (after 1919), and their sympathizers.[27] Despite differences between leftist causes, Jewish lawyers who represented members of these movements united around the mission of expanding the meaning of the First Amendment because, as political outsiders who recurrently engaged in forms of expression perceived as threatening, improper, or dangerous, they were the targets of government repression.[28] These lawyers mostly lived in New York City and/or urban environments and were immigrants or the children of immigrants. Further, they were affiliated, personally and/or politically, with radical causes. For the most part, they attended particular educational institutions: DeWitt Clinton High School on Fifty-ninth Street and Tenth Avenue in Manhattan, and New York University Law School in (the Bohemian) Greenwich Village.[29] The second group was a relatively wealthy

---

[26] Lawrence Friedman, *American Law in the 20th Century* (New Haven, CT: Yale University Press, 2004), 33.
[27] Tony Michels, *A Fire in Their Hearts: Yiddish Socialists in New York* (Cambridge, MA: Harvard University Press, 2006); Tony Michels, *Jewish Radicals: A Documentary History* (New York: NYU Press, 2012).
[28] My argument contradicts that of Peter Irons, who writes that, "A diligent examination of the available records… discloses no evidence that Communist Party membership or sympathy affected in any way their work as lawyers or that they acted differently from their colleagues who were Democrats or even conservatives. As far as this book is concerned, my conclusion is that the communist issue is a non-issue." Peter H. Irons, *The New Deal Lawyers* (New Haven, CT: Princeton University Press, 1993), xii. John Abt's autobiography also contradicts Irons' contention. See John J. Abt, *Advocate and Activist: Memoirs of an American Communist Lawyer* (Urbana, IL: University of Illinois Press, 1994).
[29] DeWitt attracted academically inclined, politically engaged students; NYU Law School, which boasted a night program, attracted the city's immigrant students who were often poor and needed to work during the day. See Michael C. Johanek and John Puckett, *Leonard Covello and the Making of Benjamin Franklin High School: Education as if Citizenship Mattered* (Philadelphia, PA: Temple University Press, 2007), 86-87.

and politically moderate Jewish lawyers of Central European descent, most of whom also resided in New York. They represented publishing houses and writers whose publications anti-vice committees and state and federal courts deemed obscene. In an era in which social antisemitism was pervasive (and arguably on the rise), they challenged prevailing standards about what was acceptable to write and print in order to secure social capital among certain elite non-Jews.[30] Likewise, as non-Christians, they asserted that laws demanding that businesses remain closed on Sundays and requiring that students read the King James bible in school, for example, breeched the Constitution's promise of a separation between church and state.[31]

Challenging legislation and judicial rulings that silenced political speech and censored art and cultural productions, early twentieth-century Jewish lawyers advocated for a broad interpretation of First Amendment freedoms. Collectively, they asserted individuals' rights to express their political views: they argued for workers' rights to assemble, claimed individuals should be allowed to engage in symbolic acts of expression such as flying red flags, and insisted on the legality of distributing anti-war messages and information about birth control. Further, the rulings that resulted from these cases defined and redefined the legal standard of obscenity, libel, and hate speech.[32] While non-Jewish First Amendment

---

[30] Josh Lambert, *Unclean Lips: Jews, Obscenity, and American Culture* (New York, NY: NYU Press, 2013).
[31] Significantly, the legal concepts of civil liberties and civil rights were conceived of and thus used interchangeably until the early years of the Cold War. See Christopher W. Schmidt, "The Civil Rights-Civil Liberties Divide," *Stanford Journal of Civil Rights and Civil Liberties* 12, no. 1 (2016): 2-40.
[32] Encompassed within judicial reinterpretations of individual clauses are distinct streams of cases, each of which pertain to specific circumstances. For example, among the streams of cases that flow from the First Amendment's free speech clause are those concerning sedition and imminent danger, false speech, symbolic speech, obscenity, commercial speech, and campaign finance and political speech. Each of these streams represents distinct circumstances in which the principle of free speech has been a point of contention between citizens and state censors and includes any number of important U.S. Supreme Court decisions as well as lower court rulings. For example, among the important cases that have articulated the federal standard for symbolic

champions joined Jewish lawyers in their advancement of First Amendment liberties, Jewish lawyers' motives for supporting this cause distinguished them from their non-Jewish counterparts; Jewish lawyers' advancement of broad conceptions of the First Amendment reflected their sense of social alienation, political radicalism and/or generally leftist worldview, and the fact that they represented the single largest non-Christian minority in the United States. Although their arguments were initially dismissed, their interpretations of the Constitution ultimately became the legal standards recognized by the American judiciary and internalized by most Americans.

To show as much, the following chapter examines early twentieth-century First Amendment cases in the years before *Gitlow*. It is organized thematically, according to how contemporary courts and legal scholars conceptualize variant streams of First Amendment case law, and chronologically. The first case is from 1901 and the final case is from 1925, when the U.S. Supreme Court first declared that the First Amendment of the U.S. Constitution applied to state governments. In addition to revealing the different issues that Jewish lawyers identified as First Amendment cases, these cases offer a window into the social history of Jewish life that often remains unseen or at the very least unrecognized and reveals the frequency in which American Jews clashed—sometimes violently—with the state. It shows how confrontational early twentieth-century American Jewish life was for many Jews and how they faced such hostility.

---

speech are *Stromberg v. California*, 283 U.S. 359 (1931), *Cohen v. California*, 403 U.S. 15 (1971), and *Texas v. Johnson* 491 U.S. 397 (1989).

Free Press

One key stream of free expression cases litigated by Jewish lawyers at the start of the twentieth century concerned the First Amendment's promise of a press unencumbered by state censors. The idea of a free press, in many ways, was fundamental to America's self-conception. Founding Father Benjamin Franklin began his career as a journalist and saw the printing press as a key tool to propagate his ideas to his compatriots. Nearly four-dozen newspapers were in circulation during the era of the American Revolution. Nevertheless, during the country's earliest decades, a completely uninhibited press proved more of an ideal than a reality.[33] Libel cases waged by political officials, in which they claimed that their rivals had misrepresented them in the press, limited what the press printed. At the close of the nineteenth century relatively little case law existed which concerned the freedom of the press.[34] For most of the nineteenth century, the judiciary refrained from addressing the issue.

At the end of the nineteenth century, on account of technological innovations, increased literacy rates, the country's increasingly urban population, and the appearance of tens of millions of immigrants who consumed publications in a myriad of languages, the print and publication business changed dramatically. By the mid-nineteenth century, New York City boasted the country's largest publishing houses. Moving away from the sensationalist and crude "yellow journalism" printed in Joseph Pulitzer's *New York World* and William Randolph Hearst's *New York Journal*, newspapers increasingly featured human-

[33] Courts defined the crime of "seditious libel" as any publication that attacked or threatened the government and its officials and the repercussions of these lawsuits had the effect of silencing dissent. See Norman L. Rosenberg, "The Law of Political Libel and Freedom of Press in Nineteenth Century America: An Interpretation," *The American Journal of Legal History* 17, no. 4 (October 1973): 336-352. Because of the rise of a two-party system and emergence of mass politics, libel suits declined significantly between the years 1824 and the 1870s.

[34] "No court overturned a state regulation of the press on Constitutional grounds until 1931 (and the Supreme Court threw out the first federal statute in 1965)." See Thomas C. Leonard, "The Beaten Path to the History of a Free Press," *Reviews in American History* 20, no. 2 (June 1992): 247-251.

centered stories and "news as information—the presentation of facts in a reasoned way."[35] And, in 1891, Congress passed the International Copyright Act, which bolstered domestic sales and production of books by promising to ensure that authors and publishers would receive royalties for works sold abroad. The printed word took on a new significance at the turn of the century; so too did the First Amendment's promise of a free press.

As the production and consumption of text and later images underwent tremendous growth, the judiciary's interpretation of the First Amendment remained stagnant.[36] At the start of the twentieth century, the American judiciary still understood the Constitutional prohibition on government regulation of the press in the tradition of the *Blackstone Commentaries*, which defined this First Amendment right as the freedom from prior restraints or pre-publication censorship. "The liberty of the press… consist[ed] in laying no *previous* restraints on publications," but did not preclude the government from punishing individuals who published offensive materials after the fact. While "every freeman" had the "undoubted right" to publicly express himself, "what is improper, mischievous, or illegal, he must take the consequences of his own temerity."[37] In 1907, Justice Oliver W. Holmes, Jr., endorsed Blackstone's definition in *Patterson v. Colorado*, writing that the primary purpose of the First Amendment was to "prevent all such *previous restraints* upon publications as had been practiced by other governments," not stop later convictions for such speech.[38]

---

[35] Christopher B. Daly, *Covering America: A Narrative History of a Nation's Journalism* (Boston, MA: University of Massachusetts Press, 2012), 138.
[36] Carl F. Kaestle, *Literacy in the United States: Readers and Reading Since 1880* (New Haven, CT: Yale University Press, 1993).
[37] William Blackstone, *Commentaries* 4, 150-153 (1769).
[38] *Patterson v. Colorado*, 205 U.S. 454 (1907); "The majority of Americans and of Supreme Court justices in the first decades of the twentieth century believed that some speech and publications could be so dangerous as to deserve suppression and the jailing and censure of offending speakers and authors." Thomas C. Mackey, "'They Are Positively Dangerous Men': The Lost Court Documents of Benjamin Gitlow and James Larkin

Like Holmes, most judges employed *Blackstone* in cases involving the press. They viewed arrests that resulted from the publication of works perceived as threatening as protecting the so-called public good. Until 1919 and frequently even after that year, state and federal courts employed something called the "bad tendency test" to determine the legality of given speech. To find a given speaker guilty, this test required only that jurors and judges *suspect* that the primary purpose of the speech in question was to incite illegal activity.[39] Legal thinkers derived this standard from their understanding of the purpose of the First Amendment; they reasoned that because the First Amendment was intended to promote the public welfare, all speech that did not promote as much was not protected. Implicit in this presumption about the First Amendment's ultimate aim was that judges would serve as the arbiters of what fostered public good. According to this understanding of the First Amendment, neither the intent of the speaker nor the actual effect of the speech mattered.

The trial of Johann Most, a German-born anarchist, and the defense of prominent Socialist Party member and lawyer Morris Hillquit illuminate the dominance of the judiciary's use of the bad tendency test. It also highlights an example of a Jewish lawyer advancing a First Amendment defense in court.[40] Hillquit's representation of Most came about as a result of an incident involving Most's weekly publication, *Die Freiheit* (*Freedom*). On the evening of September 4, 1901, Most drank too much beer and found himself without

---

Before the New York City Magistrates Court, 1919," *New York University Law Review* 69 (May 1994), 421-436, 423-424.

[39] This test began to fall out of fashion after *Schenck v. U.S.,* 249 U.S. 47 (1919), which yielded the "clear and present danger" test.

[40] On Morris Hillquit see Norma Fain Pratt, *Morris Hillquit: A Political History of an American Jewish Socialist* (Westport, CT: Greenwood Press, 1979); Richard W. Fox, "The Paradox of 'Progressive' Socialism: The Case of Morris Hillquit, 1901-1914," *American Quarterly* 26, no. 2 (May 1974): 127-140. Most was a mentor to Emma Goldman. See "Anarchy Her Only Faith," October 7, 1893, *New York Times*, 9. Morris Hillquit can be seen as a precursor to figures such as Floyd Abrams, who litigated cases such as *New York Times v. U.S.,* 403 U.S. 713 (1971), *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), and *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

copy for the paper, the text of which was due to his printer the following day. To fill the empty space, Most decided to reprint one of his favorite essays. On the morning of September 5, Most sent the master copy of that week's *Freiheit*, which featured on its front page "Murder Against Murder," an essay by the revolutionary Karl Heinzen. Heinzen had authored the essay in the early 1850s in response to failed efforts to unify Germany in 1848. Heinzen's essay advocated using violence for political ends. It concluded with the directive: "We say murder the murderers. Save humanity through blood and iron, poison and dynamite." The following day, in Buffalo, New York, the Detroit-born anarchist Leon Czolgosz shot President William McKinley with a .32 caliber revolver. Despite the fact that Most had no direct ties with Czolgosz nor had Czolgosz encountered Most's paper, on September 13, Most was arrested in a bar and charged with "disturbing the peace" under New York Penal Code Section 675, a misdemeanor offense.[41] McKinley died the next day.

When Most first appeared in court he told the presiding judge that he wanted to defend himself. Most, a known champion of broad speech rights, likely intended to use his trial to advance his views on the First Amendment, but the judge insisted that he retain an attorney.[42] "We will have no spectacular work hero… you will appear with a counselor," Justice Holbrook asserted.[43] Soon thereafter, two of Most's associates asked Hillquit to take Most's case. At the time, Hillquit was the older partner in the firm Hillquit & Hillquit (formerly known as Hillkowitz & Hillkowitz).[44] The firm's second Hillquit was Jacob,

---

[41] "Johann Most Arraigned," *New York Times*, September 14, 1901, 3.
[42] "Herr Most on Liberty," *New York Times*, May 18, 1901, 9.
[43] "Silenced Herr Most," *The Spokesman-Review*, September 21, 1901, 1; "Most Silenced," *Los Angeles Times*, September 21, 1901, 4.
[44] Nina Pratt, *Morris Hillquit*, 27. Pratt writes, "The legal office took on an air of bourgeois respectability—indistinguishable from any non-socialist's successful practice." This is not the case if one looks at Hillquit's client list. Between 1902 and 1907, J. Sidney Bernstein, who served on the New York Supreme Court, was an

Morris' younger brother.[45] Like Morris, Jacob was also a Riga-born immigrant who also attended New York University Law School as a night student and was also a staunch socialist. Both brothers were general practitioners; they worked on varied issues including wrongful termination cases and wills and estate issues.[46]

Morris Hillquit, more so than anything else, was passionate about issues of free expression and labor.[47] His dedication to a free press, in part, reflected the "socialist newspaper culture" that pervaded New York's Eastern European Jewish community.[48] More than merely a source of news and information, the Yiddish Press was a much-beloved social, cultural, and political institution that disseminated a Jewish immigrant ethos and bound its readers to each other.

As an avowed socialist, Hillquit disagreed with Most's call for political change by way of deadly violence. Nonetheless, he believed that Most had the right to express his views in print. Thus, when Most's associates approached him to represent Most, Hillquit agreed to take the case. His decision to serve as Most's attorney and the technical points of Hillquit's

---

associate at Hillquit & Hillquit. He too was a NYULS graduate. See "Justice Bernstein Dies in Home at 66," *New York Times*, December 10, 1943, 27. Frederick F. Umhey, who eventually became the executive secretary of the International Ladies Garment Workers' Union, began working in Hillquit's office as a teenager and stayed until 1933. From 1907-1919, Hillquit was partners with his brother-in-law, Alexander Levene. He too was an Eastern European Jewish immigrant. See "Justice Bernstein Dies in Home at 66," *New York Times*, December 10, 1943, 27. During his partnership with Hillquit, Bernstein also represented labor unions. Once he left the firm, however, he became a specialist in corporate law. See "Alexander Levene, Law Partner of Morris Hillquit, Dead at 82," *New York Times*, February 2, 1967, 35.

[45] "Jacob Hillquit, 70, Lawyer Here, Dies," *New York Times*, February 26, 1939, 39. Jacob also ran tirelessly for various political positions. In a 1912 election for Justice of the New York Supreme Court for the First Judicial District, Jacob Hillquit earned 16,181 votes. See Edgar L. Murlin, *The New York Red Book* (Albany, NY: JB Lyon Company, 1913), 670.

[46] For example, he represented Morris Siselman in a wrongful termination suit in which Siselman was dismissed because he left work early due to illness. See *Morris Siselman v. Harris Cohen*, 25 Misc. 529 (Sup. Ct. 1898).

[47] Hillquit was an acquaintance of Max J. Kohler. See Max Kohler to Association of the Bar of the City of New York, March 19, 1915, Microfilm 46, reel 2, frame 663, Morris Hillquit Papers, Mss H, Wisconsin Historical Society, Madison, WI.

[48] Tony Michels, *A Fire In Their Hearts*, 106.

defense rested on Hillquit's broad interpretation of the New York State Constitution's First Amendment.

Hillquit and Most's first appearance together was in the Court of Special Sessions, where they encountered Justices Hindale, Holbrook, and Wyatt.[49] Hillquit presented Most's case, first, by emphasizing the immateriality between Most's publication and Czolgosz's actions. He explained that Most had written and delivered the text of the paper to the printer before McKinley was shot, but Czolgosz had not seen nor heard about Most's paper. Therefore, any connection between the two events was purely coincidental and the charge of "disturbing the peace" was erroneous. Second, Hillquit argued that the controversial article was not even Most's own writing; therefore, Most was not responsible for its content. Finally, he argued that the law used to charge Most was so vague that it was meaningless and therefore inapplicable.

The Court of Special Sessions disagreed and on October 14, 1901, found Most guilty. Justice Hinsdale explained the conviction by reading from the penal code: "A person who willfully and wrongfully committed any act that seriously disturbed or endangered the public peace for which no other punishment was expressly prescribed is guilty of a misdemeanor."[50] Publishing an inflammatory article, the court believed, unquestionably "disturbed or endangered the public peace." Indicative of the conservative politics of the panel, after Hinsdale read the decision, Hillquit filed a motion for reasonable doubt, to which Justice Hinsdale coolly responded, "Why, we have no doubt… The motion is denied." If only to repeat himself, he continued, "We do not believe the arm of the law is too short to reach

[49] "Johann Most's Bond Reduced," *New York Times*, September 17, 1893, 14; *People v. Most*, 36 Misc. 139 (1901).
[50] *People v. Most*, 171 N.Y. 423 (C. C. N. Y. 1902).

those offenders against the life of the nation or too paralyzed to deal with them."[51] He then sentenced Most to a year in prison.

Hillquit appealed and he and Most next appeared in the Appellate Division of the Supreme Court, where they encountered a five-justice panel.[52] With little else to add to the conclusions reached by the Court of Special Sessions, the justices affirmed the lower court's opinion on April 16, 1902. Speaking for the court, Justice Chester B. McLaughlin asserted, "That the promulgation of such unnatural and outrageous doctrines in this state of civilization 'seriously endangers' the public peace, is a question which to us does not seem to admit of debate."[53] The idea that Most's publication, which few even read, *might* incite a riot or "endanger the public peace" was reason enough for the judges to uphold Most's conviction.

Once again, Hillquit appealed the decision and on May 26, 1902, he took Most's case to the Court of Appeals of New York, the state's highest court. There, Hillquit again argued that, despite its potential to do so, in actuality, Most's publication "did not openly outrage the public decency" and therefore his conviction should be overturned. He also offered a First Amendment defense of Most. Quoting the New York State Constitution, Hillquit told the court, "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Hillquit claimed that Most's conviction violated the state's guarantee of freedom of the press.[54] Why Hillquit deployed a First Amendment argument for the first time when he appeared in front of the court of appeals is unclear.

---

[51] *People v. Most*, 36 Misc. 139 (N. Y. 1901); "Most is Sent to Prison," *Chicago Daily Tribute,* October 15, 1901, 1; "Johann Most's Fight," *Brooklyn Daily Eagle*, October 17, 1901, 2.
[52] *People v. Most*, 171 N.Y. 23 (C. C. N. Y. 1902).
[53] *People v. Most*, 171 N.Y. 23 160 (C. C. N. Y. 1902).
[54] N.Y. Const. art. I, §8.

Perhaps the claim only occurred to him after the two previous trials. Whatever the reason, his use of it at all was novel. Claiming that Most has a First Amendment right to print whatever he pleased was an unconventional claim and unaccepted legal supposition.

Hillquit's arguments failed to convince the Court of Appeals. Justice Parker Vann insisted that regardless of who wrote the essay in question, by publishing it, Most "endorsed the sentiments expressed" therein. Concerning Hillquit's constitutional claim, Justice Vann offered the standard Blackstone understanding of free press, explaining, "While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution... [and] the punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability."[55] When Most's trial ended, police took him to a New York County penitentiary on Blackwell's Island in the East River, the same prison to which Goldman was sent three years later.[56]

Peaceful Assembly

As Hillquit promoted a broad understanding of the First Amendment's promise of the freedom of the press, other Jewish lawyers advanced progressive ideas about the right of the people to peaceably assemble. Between the end of the Civil War and 1937, courts interpreted the right of assembly narrowly.[57] In 1897, the U.S. Supreme Court heard a case that originated in Massachusetts, which revolved around the constitutionality of a Boston

[55] *People v. Most*, 171 N.Y. 423 (C. C. N. Y. 1902).
[56] The case has a fascinating legacy related to the application of the Bill of Rights to the states. See Marc Lendler, *Gitlow v. New York: Every Idea an Incitement* (Lawrence, KS: University Press of Kansas, 2012).
[57] In 1937 the Court found that Oregon's criminal syndicalism statute violated the Due Process Clause of the Fourteenth Amendment, which included the First Amendment freedom of speech and right to assemble peacefully. See *De Jonge v. Oregon*, 299 U.S. 353 (1937).

ordinance that forbade people from speaking on public grounds without first obtaining a permit from the mayor. Writing for a unanimous Court, Justice Edward D. White affirmed the Massachusetts' court ruling, agreeing that the government could prohibit public assembly.[58] Until 1937, the U.S. Supreme Court asserted that the right of free assembly applied only to individual people "to petition the government for a redress of grievances," not to groups of individuals who sought to gather for purposes of free association with each other.[59] Although state constitutions also promised individuals' rights to assemble freely, by and large, throughout the Progressive Era, state courts restricted the practice.[60] Courts stopped gatherings perceived as threatening by identifying them as instances of "unlawful assembly."[61] In fact, in 1891, years before he printed Heinzen's essay, Johann Most was charged and convicted of unlawful assembly under the New York Penal Code.[62]

Deriving their understanding of such from English common law, regardless of the location of the gathering, courts generally defined "unlawful assembly" as "a group formed together to accomplish an unlawful act in a violent manner, or one which forms together for a

---

[58] *Commonwealth of Massachusetts v. Davis*, 162 Mass. 510 (1895); *Davis v. Massachusetts*, 167 U.S. 43 (1897). This view stood until 1939, when the Court ruled in *Hague v. C.I.O.* that Jersey City Mayor Frank Hague's deployment of a city ordinance to ban the C.I.O's distribution of literature violated the Freedom of Assembly Clause of the First Amendment. Three Jewish lawyers and ACLU representatives Morris Ernst, Lee Pressman, Benjamin Kaplan, and Spaulding Frazer argued this case on behalf the C.I.O. See *Hague v. CIO*, 307 U.S. 496 (1939).

[59] Advancing the proposition that state courts held the power to determine the breadth and depth of First Amendment protections and specifically assembly rights, Justice Morrison Waite wrote in an 1876 case that, although the right of people to assemble predated the creation of the United States and although the federal Constitution did not invent such a right, "for their protection and enjoyment [of such]… the people must look to the States." See *U.S. v. Cruikshank*, 92 U.S. 542 (1876).

[60] This right depended on regional politics. During the antebellum period, most southern state courts and legislatures, fearful of the potential outcome of large gatherings of blacks, recurrently found ways to prevent as much by limiting this right. Contrastingly, in the North, when abolitionists and women suffragists congregated, they successfully invoked their rights to do so by pointing to state constitutions' articulations of freedom of assembly. John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven, CT: Yale University Press, 2012), 7, 30-33.

[61] Glen Abernathy, *The Right of Assembly and Association* (Columbia, SC: University of South Carolina Press, 1961), 19.

[62] Years prior to Hillquit's representation of Johann Most, in 1891, Most was charged and convicted of unlawful assembly under the New York Penal Code. *People v. Most*, 128 N.Y. 108 (N. Y. 1891).

lawful purpose but which intends to accomplish that purpose in a violent or unlawful manner."[63] Using this definition, when political elites determined a given gathering endangered the status quo, they identified it as threatening the public welfare and then stopped it by issuing injunctions or by denying certain groups permits to host large public events. In particular, state and federal officials denied the right of free assembly to political organizations believed to be "radical."[64]

Before federal recognition of individuals' rights to assemble or participate in street gatherings, Jewish lawyers advocated for these rights both by way of legal acts (such as requesting permits) and by representing those convicted of "unlawful assembly." One context in which Jewish lawyers presented a defense of the freedom of assembly was in renters' strikes. In the first three decades of the twentieth century, affordable housing was scarce in New York. Rent hikes recurrently prompted mass protests.[65] On December 26, 1907, for example, some thirty thousand Lower East Side families amounting to approximately one-hundred thousand people assembled to protest what they perceived as unreasonable rent increases.[66] Two months earlier, severe economic panic had spread from the New York Stock Exchange through state and local businesses. Unemployment rose rapidly and, as a result, many workers no longer could afford their rent.

On December 28, the Eastside Landlords' Association distributed dispossession notices to several families living in and around the Cherry Street tenements informing them

---

[63] Glen Abernathy, *The Right of Assembly and Association*, 19.
[64] See various examples in Robert J. Goldstein, "The Anarchist Scare of 1908: A Sign of Tensions in the Progressive Era," *American Studies* 15 (Fall 1974): 55-78.
[65] For a discussion of Jews and rent strikes, see Jenna Weissman Joselit, "The Landlord as Czar: Pre-World War I Tenant Activity," in Ronald Lawson and Mark Naison, eds., *The Tenant Movement in New York City, 1904-1984* (New Brunswick, N.J.: Rutgers University Press, 1986).
[66] "New Joan of Arc Leads Rent Strike," *New York Times*, December 27, 1907, 4; "Laugh at Landlords," *Ogdensburg Journal*, December 27, 1907, 1.

of their imminent eviction.[67] The Eastside landlords intended to oust families from their homes and replace them with new without considering the extenuating circumstances. In response, the following day, some fifteen hundred people gathered at the intersection of Canal Street and East Broadway, just south of Seward Park on the Lower East Side, at a juncture then known as Rutgers Square. Rutgers Square sat directly in front of the Forward Building, the institutional home of the *Jewish Daily Forward*, and was a frequent site of protest. The people who assembled there on December 29, intended, first, to stop their neighbors from being evicted and, second, to generate a plan to convince the landlords to reduce the seemingly ever-increasing cost of rent. As they gathered, police broke up the meeting "with their nightsticks" and threatened to arrest those who delivered public speeches at it.[68]

After the crowds dispersed, a handful of those present, including one Samuel Edelstein, a twenty-eight year old activist and the Secretary of the Tenants' Rights Protective Association (a subsidiary organization if the University Settlement), met with Jacob Panken.[69] Panken was an attorney, Socialist Party activist, and frequent counsel of fellow party members. Like Hillquit, he had attended New York University Law School, graduating in 1907. After being threatened by city police, Panken encouraged protestors to re-group. "In a land where free speech is guaranteed, a request to hold a public meeting is refused by the head of police in the words 'Get to hell out of here!' But we'll send him there one day," Panken told the mass of protestors.[70]

---

[67] "Dispossession Notices Served," *Los Angeles Times*, December 29, 1907, I1.
[68] "Tenants Mass Meeting Broken Up By Police," *Brooklyn Daily Eagle*, December 29, 1907, 1.
[69] On Edelstein's rent-related activism see "To Prosecute Evictor," *New York Tribune*, May 5, 1904, 7.
[70] "Rent Strike Grows; Landlords Resist," *New York Times*, December 31, 1907, 2.

Following Panken's instructions, later that evening, a smaller crowd regrouped in Rutgers Square. Edelstein climbed atop a platform stationed under a Socialist Party banner and spoke about the city's burdensome rent rates. About two minutes later, an undercover police officer asked Edelstein if he had a permit to speak. He did not and so the officer arrested him.[71] That night, Edelstein was arraigned in the court of Magistrate Daniel E. Finn. Panken appeared on his behalf.[72]

Panken's representation of Edelstein was an act of civil disobedience. In court, Panken told Magistrate Finn that the event's organizers had requested a permit from the city police's bureau of information, but they had denied as much. He and Edelstein had planned Edelstein's arrest. They wanted to use the incident as a "test case" on the legal right of assembly. Unfortunately for them, for unclear reasons, Finn upended their plans by dismissing the charges against Edelstein. Panken nevertheless declared the incident a legal victory.[73]

Panken was not alone in championing the right of assembly. This understanding of the First Amendment reflected that of the Socialist Party. In March of 1908, the Socialist Party held a "Conference of the Unemployed," an event that included a public demonstration and speeches in Union Square. Henry Smith, the city's park commissioner, denied conference organizers a permit to hold a public meeting in the park, so conference organizers

---

[71] "Tenants Mass Meeting Broken Up By Police," *Brooklyn Daily Eagle*, December 29, 1907, 1.
[72] "Tenants May Meet: Rent Striker Released, Police Can't Interfere When Notice Has Been Given, Says Court," *New York Tribune*, December 30, 1907, 5.
[73] "Police Stop Tenants," *New York Times*, December 29, 1907, 1. On Finn see "'Battery Dan' Finn, Magistrate, Is Dead," *New York Times*, March 24, 1910, 18; "Tenants May Meet: Rent Striker Released, Police Can't Interfere When Notice Has Been Given, Says Court," *New York Tribune*, December 30, 1907, 5. On Jewish lawyers and the development of landlord-tenant laws see Samuel J. Levene, "Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study in the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation," *Journal of Legal Profession* 33 (2008): 1-29.

moved the meeting to the intersection of Fourth Avenue and Broadway, a space beyond the park commissioner's jurisdiction just south of the park. In the meantime, Hillquit requested an injunction from NY Supreme Court Judge James A. O'Gorman to stop the police from preventing event participants from speaking.[74] This was a unique course of action. While employers frequently filed injunctions against labor unions to prevent strikes, enjoining the police was unprecedented.[75] Unsurprisingly, Judge O'Gorman denied Hillquit's request and, according to Hillquit, conference organizers then cancelled the event.

Conference attendees nonetheless gathered and slated speakers proceeded to deliver their speeches. About one hour into the event, Selig Silverstein, a young radical Jewish immigrant and member of the Anarchist Federation of America, detonated a bomb in Union Square. The explosion killed one and seriously injured others. (Silverstein died just over a month later from injuries received when detonating the bomb.) In response, Smith revoked all permits previously granted to conference organizers.[76]

After the bombing, despite personal antipathy for anarchists such as Silverstein, Hillquit reaffirmed his opposition to government suppression of free assembly.[77] He and fellow socialist Robert Hunter told the New York-based current events magazine *Current Literature* that they resented police interference in their political rallies. Hillquit, Hunter, and other socialists recurrently drew attention to disruptions caused by police, which they

---

[74] "Bomb Kills One, Police Escape," *New York Times*, March 29, 1908, 1, 2.
[75] On the history of labor and injunctions see William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991).
[76] "Socialists to Parade," *New York Times*, May 1, 1908, 4.
[77] This foreshadowed Jewish lawyers Morris Earnst, Harry Weinberger, and Joseph Burton's spearheading of the ACLU's defense of the (neo-Nazi) National Socialist Party of America's march through a Chicago suburb as a right to which they were entitled under the First Amendment in 1977, Hillquit too advocated for the speech and assembly rights of people and groups with whom he vehemently disagreed. On *Nationalist Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) see Philippa Strum, *When the Nazis Came to Skokie: Freedom for Speech We Hate* (Lawrence, KS: University of Kansas Press, 1999) and Woody Klein, *Liberties Lost: The Endangered Legacy of the ACLU* (Westport, CT: Praeger Publishers, 2006), 190.

identified as unconstitutional.[78] While publicly condemning violence, Hillquit asserted that Silverstein's actions were provoked by police on account of their unwillingness to permit public speech. All scheduled speeches were intended to provoke "sympathy in our movement. We were to talk for the unemployed, and to tell them how we could go about to find relief," Hillquit explained.[79] Like Edelstein had during the 1907 rent strike, Hunter acknowledged purposefully trying to get arrested at the rally so as to launch a "test case."

Two days after the bombing, the Socialist Party's General Committee issued a resolution statement about the incident.[80] Broadly, it condemned police behavior yet nevertheless stood firm about the party's intentions to continue to assert its First Amendment rights. Deflecting blame for Silvertstein's unanticipated and regrettable actions, the resolution identified the conduct of the Socialist Party as "law-abiding and orderly" and, conversely, the conduct of city police as "arbitrary and unlawful." The park commissioner's refusal to bestow permits for gathers in Union Square, it claimed, constituted "a direct and open violation of the constitutional guarantee of freedom of speech and assembly." In fact, they claimed, rather than prevent chaos, the police generated "lawlessness, violence, and anarchy." While the party "emphatically opposed" violence, it nevertheless intended to

---

[78] "A Review of the World," *Current Literature* 44, no. 5 (May 1908): 461-493. Others, like Kiev-born American Jewish socialist lawyer Nikolas Aleinikoff—who, among other things, served as counsel to the Russian Consulate—compared infringement on assembly and speech in America to that in czarist Russia. "Russian Exile Sees New Regime There," *New York Times*, June 22, 1912, 10. Aleinikoff arrived in America in 1881 with the group Am Olam; he became a New York bar member in 1892, and died in June of 1921. See Nicholas Aleinikoff," *New York Times*, June 24, 1921; "Obituaries," *New York Times*, June 26, 1921. One of his five children, Alexander Aleinikoff, served in the New York City Corporation counsel's office. See "Mrs. Nicholas Aleinikoff," *New York Times*, July 12, 1938.

[79] "Hillquit Says Police Would Not Allow Meeting," *Brooklyn Daily Eagle*, March 29, 1908, 6.

[80] The Socialist Party's resolution authored in the aftermath of anarchist Silverstein's 1908 bombing of Union Square was authored by a committee comprised of Hillquit, Hunter, Algernon Lee, Thomas J. Lewis, Solomon Fieldman, and Joseph Wauhope, and chaired by an attorney named Henry L. Slobodkin; see "Police to Blame, Say the Socialists," *New York Times*, March 30, 1908, 3.

"steadfastly uphold the rights of free speech and public assemblage, undeterred by arbitrary rulings of police despots."

Despite the protests of the Socialist Party and other radical political groups, over the next ten years, judicial interpretation of the rights of individuals to peacefully assemble, especially in public spaces, changed little. Instead, during the early twentieth century, cities and municipalities passed more restrictive regulations, which banned gathering in public spaces such as streets. For the most part, federal and state courts presumed that individuals had no right to meet or gather in public streets and therefore upheld these regulations.[81] Judges often identified street meetings and soapboxing as illegal. Jewish lawyers such as Charles Recht, however, understood these regulations as unconstitutional.

Recht was born in Bohemia in 1887 and came to the United States in 1900. He was raised in a tenement house in Yorkville on Manhattan's Upper East Side and graduated from NYU Law School in 1910.[82] Between 1911 and 1913, he worked for the Austrian Society of New York, and "appeared almost weekly for excluded immigrants at Ellis Island."[83] In 1917, Recht represented Martha Gruening, a freelance writer, suffragist, and pacifist, who was also a lawyer. In March of 1916, *The Masses* featured a poem she wrote, entitled "Prepared," which was a searing attack of American law and the political status quo.[84] Expressing who

---

[81] See Glenn Abernathy, *The Right of Assembly and Association*, 51. (Abernathy points to the 1872 case *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am.R. 664 (1872), as illustrative of state courts' tendency to restrict street gatherings in all but a limited number of circumstances; he also points to *Kerr* as the first decision to somewhat broaden assembly rights in that it did not outright ban all street gatherings.)

[82] Unpublished autobiography, box 1, folder 15, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

[83] Unpublished autobiography, box 1, folder 15, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY. Recht's experience representing Lopez informed his 1919 publication "American Exclusion and Deportation Laws," which explained the country's exclusion laws. See Charles Recht, *American Exclusion and Deportation Laws* (New York, NY: Workers Defense Union, 1919).

[84] Gruening did graduate work at Bryn Mawr. She was a member of the American Committee for the Defense of Trotsky. See "Trotsky Backers Act to Clear Him," *New York Times*, February 1, 1937, 12.

Gruening saw as most harmed by the strictures of American law, it began: "As long as I can hang a Jew and burn a nigger/Or ride the labor agitator on a rail/As long as I can put any man I don't like/In jail, and keep him there/on the flimsiest pretext or none/And shut the mouth of the fool/Who cries for free speech and assembly."[85] Gruening's poem was one manifestation of her radicalism; another was her willingness to be arrested.[86] On June 3, 1917, police apprehended Gruening, along with her friend Rose Spainer, on Broadway and Twenty-third Street for allegedly distributing handbills, which objected to America's involvement in the First World War.[87] Police charged the two women with "disorderly conduct." Gruening contacted Recht for help, and he served as their lawyer and eventually got the case overturned.[88]

Recht's defense of Gruening was part of a larger effort to define public spaces as legitimate forums for free speech. Intended to silence labor protests, many major American cities outlawed soap boxing—delivering quasi-impromptu political speeches to public audiences while standing on temporary platforms—during the first decades of the twentieth century.[89] During World War I, when many leftists used soap boxing to impart anti-war messages, this activity became known as "soap box sedition," a crime for which thousands of people went to jail, were fined, imprisoned, and in some cases deported. Lawyers who

---

[85] Martha Gruening, "Prepared," *The Masses* 8, no. 57 (March 1916): 13.
[86] In 1910, a year following her graduation from Smith College, she was arrested and jailed in Philadelphia, Pennsylvania, where she claimed she had traveled merely to witness firsthand conditions at a local shirtwaist factory. Despite as much, she acknowledged that she donned a badge, which indicated her support of the strike, during the incident. "Bryn Mawr Girl Tells Prison Story," *New York Times*, January 31, 1910, 1. In that case, she had been charged with allegedly inciting a riot. She was indicted for as much on February 10th of that year. "Martha Gruening Indicted," *New York Times*, February 11, 1910, 1. She graduated from New York University Law School in 1914.
[87] "9 More Foes of Draft Laws Jailed," *New York Times*, June 3, 1917, 1.
[88] Recht writes about this case in his unpublished autobiography. See Unpublished autobiography, box 1, folder 15, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.
[89] Eran Ben-Joseph and Terry S. Szold, *Regulating Place: Standards and the Shaping of Urban America* (New York, NY: Routeledge, 2004), 149.

represented individuals charged with disorderly conduct for soapboxing faced an unsympathetic judiciary; state and lower courts usually upheld these charges.

Free Speech (Symbolic Speech and Expressive Conduct)

At the same time that they advanced the right to assemble and deliver speeches in public spheres, Jewish lawyers championed American's right to engage in what would eventually become known as "expressive conduct" or "symbolic speech," that is, non-verbal communicative acts such as wearing armbands, marching, or waving flags, which implicitly conveyed political messages.[90] Opponents of expressive conduct viewed these acts as problematic because of their symbolism rather than their actual effects. For lawmakers and the judges who enforced laws banning certain symbolic displays, the potential threat of figurative demonstratives justified banning them.

In the last years of the nineteenth century and through the first decades of the twentieth, Americans were particularly concerned about the symbolic use of flags, which is, in part, why they passed laws forbidding flag desecration.[91] At the same time, states passed

[90] The term "expressive conduct" was not introduced by the Court until 1968 in *U.S. v. O'Brien*, 391 U.S. 367 (1968), a case that questioned the constitutionality of a federal law declaring the destruction or marring of draft cards a crime. Marvin M. Karpatkin, on behalf of the ACLU, represented defendant David O'Brien, who had been convicted for burning his draft card outside of a courthouse in Boston. In a 7-1 decision, the U.S. Supreme Court declared that the law was not an unconstitutional infringement of O'Brien's freedom of speech. See *U.S. v. O'Brien*, 391 U.S. 367 (1968). The Court applied a four-part test in order to determine the constitutionality of the law; it distinguished this ruling from that in *Stromberg* by distinguishing between laws intended to stop the communication itself (i.e. red-flag statutes) and laws intended to assure "the smooth and proper functioning" of a governmental system.

[91] Questions concerning flags—how much respect should be afforded to the American flag, whether state and federal legislators could ban the display of certain flags—appeared time and again in courts throughout the twentieth century. Anti-flag desecration laws emerged as a result of the lasting allegiance of some white Southerners to the Confederate flag and incidents of U.S. flag defilement in the decades following the Civil War. Cases of vandalism prompted state governments to ban physical desecration of the U.S. flag. Illinois led this initiative, passing an anti-desecration law in 1897. See Marc Leepson, *Flag: An American Biography* (New York: St. Martin's Griffin, 2005), 158. Anti-desecration laws were not universally supported, however, most of those against them held such a position because they thought they were unnecessary, not because they believed

so-called red flag statutes, which were intended to discourage expressions of allegiance to radical political movements. Many Americans understood the act of displaying a red flag as an especially troublesome manifestation of symbolic speech because of the flag's presumed power to excite radicals. As the *New York Times* wrote in 1905, "the placing of a huge red flag where all could see it helped to stir up enthusiasm" among two-thousand socialists at a political rally in Carnegie Hall.[92] In order to minimize such sentiments, states and cities passed laws that criminalized displaying red flags and all related symbols.[93] In 1919, for example, California legislators declared that exhibition of "a red flag, banner, or badge of any flag… in any public place or in any public meeting place or public assembly" constituted a felony.[94]

As anti-flag desecration laws and red-flag statutes became law, Jewish lawyers led a movement to assert Americans' right to express themselves through symbolic speech.[95] For example, Bronx-resident Solomon Fieldman was indicted for displaying a red flag on several

---

in the right to desecrate the flag. See, for example, the decision of Chicago Judge Gibbons, who declared the Illinois flag law unconstitutional in 1899. See "Declares the Flag Law Void," *New York Times*, November 5, 1899, 1; by 1899, nine states, including New York, had passed similar restrictions and by 1932, all the states in the union had banned expressive speech as it related to Old Glory. "American Flag Association Meets," *New York Times*, June 15, 1899, 5; The Supreme Court heard its first case concerning U.S. flag desecration in 1907. The case involved a bottling company, whose owner had printed the American flag on its bottles for advertising purposes. Nebraskan officials convicted the company's owner of a crime for doing so and the Supreme Court upheld his conviction eight-to-one, reasoning that, although the federal government had created the flag, states had the constitutional authority to enact anti-desecration laws under their general powers to ensure public welfare and safety. See *Halter v. Nebraska,* 205 U.S. 34 (1907).

[92] "Socialists Only Have Hisses for Hearts," *New York Times*, October 16, 1905, 2.

[93] For a fascinating history of the case law related to these statutes, see Elmer M. Million, "Red Flags and the Flag," *Rocky Mountain Law Review* 13, no. 1 (December 1940): 47-60.

[94] California Penal Code, § 403a (1919).

[95] Once of the earliest of red flag cases occurred in August of 1906 when New York City police arrested the sixteen year-old radical activist Elizabeth Gurley Flynn, along with her father and three others, at an outside socialist gathering on Broadway and Thirty-Eighth Street in Manhattan. Police took the five to the Tenderloin Police Station and charged them with disorderly conduct. The *New York Times* misspelled Flynn's middle name. See "Red Flag in Broadway Causes Five Arrests," *New York Times*, August 23, 1906, 1.

occasions in 1907.[96] In mid-May, Fieldman was arrested on the corner of Nassau and Spruce Streets in front of New York City Hall for delivering a speech without a permit and for displaying a red flag while doing so. After being arraigned, Fieldman stood in the Tombs Police Court "with a red flag in one hand and an American flag in the other." There, Magistrate Crane told him, "You can't wave that red flag in New York."[97] When Fieldman asked what law forbade as much, the magistrate asserted that, "'The use of the red flag is substantially the same as inciting to riot.'" In response, Fieldman told the judge that the "'first flag raised'" in protest of King George III was red and that the red flag was "a better flag" than that of the United States. This declaration elicited anger from the judge, who then instructed officers to have NYC Police Commissioner Theodore Bingham deny Fieldman the capacity "to speak in New York" ever again.[98]

The police proved eager to carry out this order. Days later, on May 25, Fieldman drove to Wall Street, a cobblestone thoroughfare in Manhattan's financial district, and stopped his car in front of the U.S. Custom House, the cite upon which Federal Hall, the nation's first capitol building, stood. Directly across the way sat financier and banker J. P. Morgan's office. Under John Quncy Adam Ward's bronze statue of George Washington, Fieldman got out of his car and delivered a speech about the merits of socialism.[99] Once again, he was arrested and charged, one again, with speaking without a permit and displaying a red flag.

---

[96] Press reports of these events identify the man incorrectly as "Friedman." He was in fact a Socialist Party activist previously mentioned as a member of the party's general committee.
[97] "Arrested for Waving of Red Flag," *New York Tribune*, May 22, 1907, 4.
[98] "Arrested for Waving of Red Flag," *New York Tribune*, May 22, 1907, 4.
[99] "Braces Capitalist in his Lair," *New York Tribune*, May 25, 1907, 4.

At the hearing following this second arrest, Magistrate Crane gave Fieldman the option to pay a fine or go to jail. Although claiming to be flush with cash, Fieldman opted to serve time in a workhouse on Blackwell's Island; he made this choice at the urging of Socialist Party legal advisor Henry L. Slobodin, a close associate of Hillquit and famed legal thinker Louis B. Boudin, who was employing Fieldman's arrest as a vehicle to establish broader expression rights. Slobodin was a Russian-born lawyer who arrived in the United States in 1893. [100] A committed activist, Friedman spent five days on Blackwell's Island before requesting that Slobodin secure his release. At the hearing to furnish Fieldman's bail, Slobodin and Magistrate Crane got into an argument about socialism. When Crane told Slobodin that socialists would be stopped from displaying red flags at their meetings indefinitely, Slobodin told the judge, "We shall meet years hence and you will see more red flags than you do today!"[101]

About a month later, on October 16, 1907, yet again, Fieldman drove his car down Wall Street with a red flag flying from its rear. And again Fieldman stopped his vehicle and began to speak about socialism. Again, Fieldman was arrested. Arraigned this time at the Church Street Station before Magistrate Moss, Fieldman told the judge that the Constitution permitted him to speak wherever he wished, which is why, Fieldman claimed, he was innocent.

Like Crane, Moss was not receptive to Fieldman's assertion. (Moss had heard similar First Amendment claims in January of that year when Emma Goldman, Alexander Berkman,

---

[100] United States of America, New York City, New York, Fourteenth Census of the United States: 1920, population schedule. Digital Image. Ancestry.com. February 1, 2016. Slobodin also represented prisoners who were mistreated on Blackwell's Island. See "More Prison Testimony," *New York Times*, December 27, 1913, 5.
[101] "No More A Socialist Martyr," *New York Times*, May 30, 1907, 18.

and John Coryell were arraigned in his court, and rejected them then too.[102] Meyer London, their lawyer, secured their release on bail by furnishing the court with a total of $4,000.[103]) Fieldman, once again opted to go to the workhouse rather than pay a fine, which is precisely what he did.[104]

In 1911, the continued persecution of radicals who displayed red flags prompted Morris Hillquit to write New York City Mayor William J. Gaynor, a Tammany-Hall Democrat and trained lawyer. In a letter, Hillquit informed Mayor Gaynor of his opinion concerning Socialists' rights to "hold meetings without police permits and to carry red flags in public parades and processions."[105] Despite the fact that New York City's police officers appeared to believe that public meetings held in city streets required special permits, Hillquit wrote, "this belief is entirely unfounded." Hillquit then took the opportunity to give Gaynor a history lesson, beginning with an explanation of Chapter 806, Section 14 of the Laws of 1867, which discussed the circumstances requiring permits for public meetings, moving on to Section 315 of Charter Act of 1901, which spelled out the duties of police officers, and

---

[102] The three were charged with violating the penal law that forbid utterance of "incendiary statements." See "Anarchists Freed on Bail," *New York Times*, January 8, 1907, 6; "Court Refuses to Drop Case Against Reds," *New York Times*, January 12, 1907, 18. London represented Berkman again in 1908. See "Tilt in Night Court," *New York Tribune*, September 10, 1908, 5.

[103] "Talks Socialism to Brokers," *New York Times*, October 16, 1907, 7; "Socialist Talks in Wall Street," *New York Tribune*, October 16, 1907, 4.

[104] Not all judges imprisoned or fined individuals who engaged in this form of symbolic expression. On October 18, 1907, in a nearby courtroom, Magistrate Wahle dropped charges against Bronx resident Jeremiah C. Frost, who, like Friedman, was arrested for displaying a red flag and speaking without a permit. Explaining his decision Wahle announced, "A member of a recognized political party does not need a permit to hold a street meeting." Wahle then freed Frost from custody. "Court O.K. For the Red Flag," *New York Times*, October 18, 1907, 18. The broader effect of Wahle's decision is unclear. Whomever Wahle may have influenced with his novel opinion or whoever else avoided conviction under the red-flag laws in his courtroom, arrests for red-flag demonstrations continued in New York and elsewhere as red-flag statutes continued to be enforced. See, for example, "Plan May Day Mass Meeting," *New York Times*, May 1, 1908, 16. (The I.W.W. was granted a permit by police to hold a May Day parade "on the stipulation that no red flags would be carried and that the parade would not take place in busy streets, where it would obstruct traffic.)

[105] Morris Hillquit to William J. Gaynor, February 16, 1911, reel 2, frame 505, Morris Hillquit Papers, 5430 MF, Wisconsin Historical Society, Madison, WI.

ending with the Penal Code section 2092, which defined "unlawful assembly," the most recent law that addressed the issue of public-street meetings. Quoting the former at length, Hillquit asserted that street meetings could take place any day of the week save Sunday—when, according to the law, "it may interfere with the peace of Sabbath"—so long as the meeting did not block free passage in the street or on the sidewalks.[106]

Gaynor responded to Hillquit's note and promised to look into the issue of police suppression of people who displayed red flags.[107] While seemingly conciliatory, Gaynor nevertheless warned Hillquit that some socialists "are rather violent in their language," which displeased him.[108] Still, Gaynor accepted Hillquit's plea to halt arrests of socialists displaying red flags. Before becoming mayor, Gaynor had served as a New York Supreme Court Justice for fourteen years and had a known libertarian streak.[109] Speaking about curbing police abuse in his February 21, 1911, speech to the Board of Aldermen, Gaynor included mention of "the considerate treatment of the Socialist red flag."[110] Some New Yorkers took this admonition poorly. One anonymous writer sent a letter to the *New York Times* declaring, "We have not heard that the Socialists have during Mayor Gaynor's term been subject to unlawful duress or oppression by the police. Why should the Mayor deem his utterance necessary and dignify it with a place in his annual message?"[111] Despite (or perhaps because of) public perception that Gaynor supported socialists' rights to display red flags, the mayor clarified his opinion a

---

[106] Morris Hillquit to William J. Gaynor, February 16, 1911, reel 2, frame 505, Morris Hillquit Papers, 5430 MF, Wisconsin Historical Society, Madison, WI.
[107] Gaynor was famous for his written correspondence. See Sam Roberts, "A Century Ago, a Mayor Who Wrote Back," *City Room: Blogging the Five Boroughs* (blog), *New York Times*, January 1, 1913, available online: http://cityroom.blogs.nytimes.com/2013/01/01/the-mayor-of-sarcastic-witty-and-candid-letters/ Last accessed February 5, 2016.
[108] William Gaynor to Morris Hillquit, February 27, 1911, reel 2, no. 506, Morris Hillquit Papers, 5430 MF, Wisconsin Historical Society, Madison, WI.
[109] "William J. Gaynor As His Intimates Knew Him," *New York Times*, September 21, 1913, 82.
[110] "A Word to the Mayor," *New York Times*, March 8, 1911, 10.
[111] "Topics of the Times," *New York Times*, February 24, 1911, 8.

year later in a long interview with the *New York Times*. While Gaynor stated, "I have no fault with any of you [socialists]," he nevertheless expressed dismay about socialists' attachment to a cloth symbol. "Nearly everybody thinks your red flag means that you want the blood of the people, that you want war, and to kill people… why do you not go and make people understand as simple a thing as the meaning of your flag," he inquired.[112]

The Socialist Party did make many people understand something "as simple" as their flag but what those people understood was that the flag was not a benign symbol. As a result, in 1919, during the first Red Scare, along with twenty-three other states, New York passed another Red flag law, declaring display of a red flag a misdemeanor crime; likewise, New York City passed a red flag ordinance outlawing such displays.[113]

Free Speech (Espionage and Sedition)

On October 7, 1917, recalling the events of the day in his diary, James Marshall, the elder son of prominent New York attorney Louis Marshall, wrote about the visit of the famed Yiddish writer Sholem Asch to the Marshall home on Manhattan's Upper East Side. An urgent business had occasioned Asch's visit. Two days earlier, the publishers of the *Jewish Daily Forward*, the most widely read Yiddish paper, had received a letter from federal officials informing them that U.S. Postmaster General Albert S. Burleson intended to revoke the paper's second class mailing privileges. Five months earlier, President Woodrow Wilson had signed the Espionage Act, which, among other things, permitted the Postmaster General to deny publications perceived as "interfering" with the war effort preferential mailing rates.

---

[112] "Mayor's Interview as Dictated," *New York Times*, May 12, 1912, 57.
[113] Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920* (St. Paul, MN: University of Minnesota Press, 1855), 233-234.

Revoking these privileges would cause problems for the *Forward* because, while the paper constituted the country's largest circulating foreign-language publication, its financial solvency relied, in part, on its reduced postage fee. This situation prompted Asch, a close friend of the *Forward*'s manager Baruch C. Vladeck, to visit the Marshall home; Asch came to ask the famed attorney Louis Marshall for help. Noting his father's reaction to Asch's visit, James reported that his father told the Yiddish writer, "'I told you so.'" The elder Marshall nonetheless agreed to serve as the paper's lawyer.[114]

For many scholars the First World War marks a turning point in the history of the First Amendment. This is because immediately after Congress declared war on Germany on April 16, 1917, the president "imposed a systematic program of censorship… on all printed materials… including newspapers, magazines, telegrams, and mail."[115] In addition to inhibiting the free expression of ideas and opinions, Wilson's new laws generated an avalanche of litigation.[116] Many cases generated by these laws were criminal trials; government prosecutors charged people and institutions with espionage and sedition. During

---

[114] Diary entry, October 7, 1917, box 50, folder 6, James Marshall Papers, MS 157, AJA, Cincinnati, OH. For two complete accounts of this incident see Lucy Dawidowicz, "Louis Marshall and the *Jewish Daily Forward*: An Episode in Wartime Censorship, 1917-1918," in *For Max Weinreich in his Seventieth Birthday* (London, England: Mouton and Co., 1964): 31-44; Matthew Silver, *Louis Marshall and the Rise of Jewish Ethnicity in America*, 317-324.

[115] Daly, *Covering America*, 163.

[116] In addition to the Espionage law, in May of 1918, Congress passed the Sedition Act, which declared interfering with American war efforts included use of "disloyal, profane, scurrilous, or abusive language" when discussing the country or its constitution; and advocacy, teaching, and defense of any such activities a felony crime. (Punishment for violation of the act was a $10,000 fine or twenty years imprisonment or both.) Because America's entry into World War I initially garnered little popular support, Wilson's administration was especially eager to silence both opposition and debate about American involvement in the conflict; Wilson and Congress intended that these laws would accomplish just that. Wilson's criminalization of expressions of opposition to World War I more or less worked as a method to suppress protest; defining "interference" broadly, government officials—ranging from executive branch appointees to local and city police to federal judges—prosecuted and/or applied the wartime laws to anyone or anything that appeared to oppose America's involvement in the war. This sweeping suppression of anti-war activists served as a call to arms for those opposed to the war and for proponents of a broad range of political speech—groups that overlapped but were not synonymous.

the war, the Post Office prosecuted thousands of anti-war dissenters and by May of 1918, more than four hundred U.S. publications had had their mailing privileges revoked, especially leftist publications.[117] In part because this era of government censorship targeted foreign language and socialist publications that New York's Jewish immigrants and their children cherished, many of the wartime censorship cases involved Jewish lawyers.[118]

Like Marshall, Morris Hillquit defended publications associated with pacifism, socialism, and radicalism, which the Postmaster General tried to stop from being mailed. Hillquit's earliest involvement with publications affected by the Espionage Act occurred when Burleson denied second-class mailing privileges to *American Socialist*, a weekly published by the American Socialist Party. Burleson's office deemed three issues of the paper "unmailable." In response, the paper's representatives sent Hillquit to meet with Burleson in Washington D.C. Hillquit told Burleson that the paper's content had changed little since the war commenced. Just as before America had entered the conflict, the paper printed "economic theory and historical doctrine which Socialists all over the world have been consistently expressing."[119] How could content that merited First Amendment protections before the war suddenly not merit such protections? Burleson dismissed Hillquit and insisted that the *American Socialist*'s commentary was implicitly critical of the war.

---

[117] Stephen Martin Kohn, *American Political Prisoners: Prosecutions Under the Espionage and Sedition Act* (Westport, CT: Praeger, 1994), 10; John Sayer, "Art and Politics, Dissent and Repression: The Masses Magazine versus the Government, 1917-1918," *The American Journal of Legal History* 32, no. 1 (January 1988): 53. (Sayer's article offers a full account of proceedings involving *The Masses* in 1917-18.) In their representation of individuals, groups, and expressive entities targeted for suppression by the federal government during the years surrounding World War I—an occurrence that only years later became known as the "Red Scare"— Jewish lawyers were outliers. As John Sayer has written regarding the prosecution and conviction of individuals under the wartime laws, "while many trial judges handed out stiff sentences, a few lawyers defended the dissidents and pushed the concept of civil liberties. Most lawyers, however, followed the lead of the Attorney General and often attempted to sanction those who did not." See Sayer, "Art and Politics, Dissent and Repression," 64-65.

[118] Christopher Daly, *Covering America*, 163.

[119] Morris Hillquit, *Loose Leaves From a Busy Life,* 213.

Thus, Burleson claimed, he had no choice but to suspend the paper's mailing privileges. Unlike Marshall's successful defense of the *Jewish Daily Forward*, Hillquit's efforts failed as did his attempt to protect the mailing privileges of targeted publications such as the *Milwaukee Leader*, the *New York Call,* and *Pearson's Magazine*.[120]

In April of 1918, Hillquit appeared in court on behalf of Max Eastman, Floyd Dell, Merrill Rogers, Arthur "Art" Young, Josephine Bell, John Reed, and H. J. Glinterkamp, seven individuals associated with the monthly socialist publication *The Masses*, all of whom had been criminally charged with violation of the espionage law.[121] The publication's editorial offices were located in Greenwich Village, a downtown New York neighborhood nicknamed "America's Left Bank" because of the array of radicals and bohemians found there.[122] The charges against the group were only somewhat surprising; the magazine as a business entity (as opposed to the individuals who worked for it) had been the subject of lawsuits the entire year prior to the group's indictment. In fact, it was this initial lawsuit that enabled the criminal prosecution of Hillquit's clients.

Following the passage of the Espionage Act in June of 1917, *The Masses* was one of the first publications identified by Postmaster Burleson as "unmailable." After failed negotiations between *The Massess*' business manager and Post Office officials in Washington D.C., the magazine requested an injunction in a New York federal district court to essentially halt the Postmaster General's order, which forbade mailing the magazine.

---

[120] Morris Hillquit, *Loose Leaves From a Busy Life,* 214-221.
[121] All published editions of *The Masses* are available online: http://dlib.nyu.edu/themasses/. Last accessed October 23, 2014.
[122] On the Jewish encounter with Greenwich Village see Tony Michels, "The Lower East Side Meets Greenwich Village: Immigrant Jews and the New York Intellectual Scene," in *Choosing Yiddish: New Frontiers of Language and Culture*, eds., Shiri Goren, Hannah Pressman, Lara Rabinovitch (Detroit, MI: Wayne State University Press, 2012), 69-85.

There, on July 24th, Judge Learned Hand, the same man who Max Kohler encountered in his 1909 effort to secure due process rights for immigrants, surprisingly granted the magazine an injunction, which temporarily postponed the Postmaster General's order.[123] Two days later, however, another district court judge temporarily suspended Judge Hand's decision, once again halting *The Masses*' distribution through the mail.

Putting an end to this back and forth between the federal district courts, on November 12, 1917, the Circuit Court of Appeals overturned Judge Hand's decision, reinstituting the postmaster's order not to mail the publication.[124] In his opinion, for the purpose of solidifying the constitutionality of the espionage law and verifying the Postmaster General's authority, Judge Henry Wade Rogers wrote that even when courts doubted whether a respective publication intentionally violated the wartime laws, "the head of a department of the government in a doubtful case will not be overruled."[125] With regards to the espionage and sedition laws, Rodgers asserted, federal courts must respect the discretionary authority of executive agents.

Rogers' ruling had implications beyond this specific case. Indeed, the ruling gave tacit approval to federal officials to pursue criminal cases against individuals associated with suppressed publications. This is how Hillquit came to represent Eastman (*The Masses*' editor), Dell (managing editor), Rogers (the magazine's business manager), Young (cartoon artist), Bell (contributor), John Reed (contributor), and Glinterkamp (cartoon artist).[126] In November of 1917, immediately following Rogers' circuit court decision, U.S. District

---

[123] *Masses Publishing Co. v. Patten*, 244 F. 535 (S. D. N. Y. 1917). John Sayer, "Art and Politics, Dissent and Repression," 47-48.
[124] *Masses Publishing Co. v. Patten*, 244 F. 535 (S. D. N. Y. 1917).
[125] *Masses Publishing Co. v. Patten*, 244 F. 535 (S. D. N. Y. 1917).
[126] Floyd Dell, "The Story of the Trial," *The Liberator* (June 1918): 7-18; "Indicts the Masses and 7 of Its Staff," *New York Times*, November 20, 1917, 4.

Attorney Earl B. Barnes indicted the group of seven for allegedly conspiring to "obstruct recruiting and enlistment" by the country's armed forces. According to Barnes, they violated the wartime act vis-à-vis their individual contributions to the August, September, and October 1917 issues of the magazine. Dell, for example, was charged for his commentary on letters written by conscientious objectors from England. Young's indictment resulted from his cartoon entitled "Having Their Fling," which presented a band being led by the devil alongside an editor, politician, minister, and capitalist, all of whom were depicted as dancing.[127] Bell's indictment was a ramification of the publication of a poem she wrote praising the bravery of Emma Goldman and Alexander Berkman.

The *Masses* criminal trial took place from April 15-24 before Learned Hand's first cousin, Justice Augustus N. Hand. In his defense, Hillquit used a similar line of argument that he had unsuccessfully employed to discourage Burleson from revoking the *American Socialist*'s mailing privileges; he stressed his clients' harmless intent and even tried to show how the magazine complied with the wartime laws. Hillquit asserted that the *Masses* never intended to violate the espionage act. As evidence, he showed that the magazine's tone had shifted toward supporting the war and away from opposition, which indicated that it had tried to comply with the country's new laws. Hillquit also explained that before the Espionage Act's passage, the *Masses*' business manager had travelled to Washington D.C. to seek the advice of George Creel, the head of the U.S. Committee on Public Information, an agency created by President Wilson for the purpose of influencing public opinion. During the trial, Creel admitted on the witness stand that Rogers had visited, but denied that he had approved

[127] John Sayer, "Art and Politics, Dissent and Repression," 56.

of the publication's content.[128] Hillquit also tried to emphasize the absurdity of the proceedings, informing jurors that Wilson himself had discouraged Burleson from pursuing this case. (This was true; Wilson had advised Burleson to drop the case. Burleson, however, refused to back down.)

Perhaps despite himself, Hillquit's defense took the form of a classroom lecture. He schooled jurors on free speech, pacifism, and liberty. In his closing statement, Hillquit harped on the sanctity the Constitution. "We will not surrender our Constitutional rights of opinion and the freedom to express that opinion. Not for one day, not for one hour… No, not even in the time of war, for the Government is founded upon the very principle of freedom of speech," he asserted.[129] Emphasizing that the paper's political speech contributed to the public good, Hillquit concluded by reminding jurors: "Constitutional rights are not a gift." Should they allow the trampling of such rights during wartime, such rights will lose their meaning and "never again have the same potent vivifying force as expressing the democratic soul of a nation."[130]

Two days later, the jury returned without a definitive verdict. Hillquit convinced two of the twelve jurors that the editors, writers, and cartoon artists had not conspired against the government, but the ten others remained unsure.[131] The case was deemed a mistrial and a new trial date was set.[132] In the summer of 1918, however, Hillquit contracted tuberculosis. He was so ill that he had to take a hiatus from legal practice. A new team of lawyers—

---

[128] John Sayer, "Art and Politics, Dissent and Repression," 60.
[129] "Fate of Eastman in Jury's Hands," *New York Times,* April 26, 1918, 20.
[130] Hillquit as quoted in John Sayer, "Art and Politics, Dissent and Repression," 58.
[131] "Masses Defendants Free," *New York Times*, January 11, 1919, 22.
[132] Following the conclusion of the trial, Hillquit said: "It did not seem a trial. It had the appearance of a university for uneducated, unenlightened American citizens in the jury box and outside of it. They were instructed upon the rights of American citizens to think for themselves on all vital questions, including the questions of war and peace and conscription." Hillquit as quoted in John Sayer, "Art and Politics, Dissent and Repression," 76.

Seymour Stedman (a non-Jewish socialist and frequent Hillquit associate), Walter Nelles (a founder of the ACLU), and Charles Recht—replaced Hillquit to represent the seven *Masses* defendants.[133] During this third trial, rather than Justice August Hand, the group returned to the courtroom of Justice Learned Hand. Despite the physical change of environment, the group continued to employ Hillquit's strategy of trying to show the group's intention to comply with the wartime laws. Max Eastman, in fact, testified that his own opinion had shifted during the war towards a more favorable stance.[134] Despite the state's best efforts to secure guilty verdicts, this trial too resulted in a mistrial because the jury was unable to unanimously render a guilty verdict.[135]

In addition to aiding publications targeted by the wartime laws, Jewish lawyers represented individuals charged with espionage and sedition, many of whom were students and many of whom were immigrants. In March of 1917, William Karlin, a Russian-born immigrant, Socialist Party activist, and 1908 graduate of New York University Law School, represented three Stuyvesant High School students. William Jablow, Harry Ultan, and Max Cowiser had traveled from their lower Manhattan school to Brooklyn to distribute handbills advocating pacifism to students at Eastern District High School when they encountered Dr. William T. Vlymen, the school's principal. Vylmen asked them to leave and when they refused, he summoned the police. Officer Carey arrested the young men, charging them with distributing incitement and distribution of literature in front of a public building without a permit. In court, trying to defend themselves, all three "declared… that they had the right to

---

[133] *Masses Publishing Co. v. Patten*, 244 F. 535 (S. D. N. Y. 1917).
[134] John Sayer, "Art and Politics, Dissent and Repression," 72.
[135] Sayer writes that one juror told Charles Recht, "You fellows were just lucky in not having a Jew or a foreigner among the defendants or you wouldn't have gotten off without an acquittal cotes except mine." See John Sayer, "Art and Politics, Dissent and Repression," 74-75.

expound their principles and preach their doctrines wherever they wished." The judge disagreed. Magistrate Naumer fined them $2 each, which Karlin paid.[136]

A few months later, in June, Charles Francis Phillips, Owen Cattell, two Columbia University students, and Eleanor W. Parker, a Barnard student, printed circulars that read "Will You Be Drafted?" with the intention to distribute them around campus. Less than one month earlier, Congress had passed the Selective Service Act of 1917, the country's first draft law that prevented men from avoiding military service by paying their way out, which required all men between the ages of 21 and 30, who were physically present in the United States, to register for military service.[137] Before Phillips, Cattell, and Parker could distribute their flyers, they were arrested and charged for conspiring to discourage men from complying with the law. Morris Hillquit and his associate Winter Russell represented the three.

Hillquit first tried to get the case dismissed because, he claimed, the draft was unconstitutional.[138] During a period when most Americans perceived anti-draft sentiments "as the product of enemies of America, aliens and foreigners who lacked intelligence and breeding to appreciate and contribute to the Anglo-Saxon way of life," Hillquit likely knew that there was little chance a judge would grant this motion.[139] Indeed, rather than reflect any legal reality, Hillquit's assertion represented his own anti-war sentiments.[140]

At trial, Hillquit took a noticeably less radical stance and offered an argument that reflected the actual events of the case. To justify acquittal, Hillquit claimed that because

---

[136] "Arrest School Boys Pacifists," *Brooklyn Daily Eagle*, March 24, 1917, 1.
[137] Selective Service Act of 1917, ch. 15, §4
[138] Hillquit also represented Dr. William J. Robinson, who was charged with spreading anti-war propaganda. See "Robinson Saw Only a German Victory," *New York Times*, March 5, 1918, 4.
[139] Mark Kessler, "Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger," *Law & Society Review* 27, no. 3 (1993), 575.
[140] Indeed, Hillquit's assertion represented his own anti-war sentiments; he was a founding member of the People's Council of America for Democracy and Peace, a pacifist group formed in May 1917, and an outspoken critic of the war.

Phillips, Cattell, and Parker never distributed the anti-draft circulars they had not committed a crime. Trying to solicit jurors' sympathy, Hillquit portrayed the defendants as political idealists. "Happy is the nation that has such young people who know and then preach the gospel of peace," he told the court.[141]

The prosecution offered a different interpretation of events. U.S. Attorney for the Southern District of New York, Harold A. Content, argued that, in fact, the three had completed the conspiracy once they sent the circular to the printers.[142] Ultimately, the court dismissed the charges against Parker; jurors convicted Cattell and Phillips. Underscoring the possible ramifications of expressing political dissent as an immigrant and the intersection between speech and immigration law, the court also slapped Cattell and Phillips with $500 fines and permanently stripped them of their American citizenship. The judge, Julius M. Mayer, also assigned Cattell to six days in prison; Phillips served one.[143]

One month after Hillquit faced U.S. Attorney Harold Content in Phillips, Cattell, and Parker's trial, Harry Weinberger encountered him while representing Berkman and Goldman, who were also charged under the Espionage Act for allegedly conspiring to encourage draft dodging.[144] Born in 1888 in New York City to Hungarian Jewish immigrants, Weinberger

---

[141] "Students Guilty of Fighting Draft," *New York Times*, June 22, 1917, 1; "Two Students Fined $500 and Day in Custody," *The Call,* July 13, 1917; "Objector to Draft Agrees to Register," *The Call*, June 7, 1917; "'Patriotism' Convicted Two Students, Says Writer," *The Call*, June 23, 1917; "Draft Opponent May be Jailed," *The Call*, June 13, 1917; "9 More Foes of Draft Laws Jailed Here," *New York Tribune*, June 3, 1917, 1; "Seven Are Indicted Here," *New York Times*, June 5, 1917, 1-2.

[142] Attorney Content had also prosecuted Emma Goldman and Alexander Berkman for allegedly co-conspiring to encourage men to dodge the draft. See "Columbia Students Face Federal Jury: Socialist Lawyers Defend Them on Charge of Anti-Draft Conspiracy," *New York Times*, June 19, 1917, 2; "Students Guilty of Fighting Draft," *New York Times*, June 22, 1917, 1.

[143] Mayer was regretful of his obligation to strip the two of their citizenship, which was a mandatory sentence. He told them, "Unless your future conduct is against you, nothing could give me more pleasure than to do what I can to aid you in regaining your citizenship." See "Columbia Pacifists Pay Fines," *New York* Times*,* July 13, 1917, 3.

[144] Emma Goldman, *Living My Life: Emma Goldman In Two Volumes* (New York, NY: Dover Publications, 1970), 635-637.

grew up in what he described as "the Irish neighborhood bordering on the East River," and attended DeWitt Clinton High School and then New York University Law School.[145]

Like Hillquit, Weinberger was a radical and advocate for the broad interpretation of First Amendment rights; the April prior to appearing before the Supreme Court on behalf of Goldman and Berkman, Weinberger testified before Congress in hearings before the judiciary committee about the espionage law, which he identified as unconstitutional.[146] "You are allowing a part of the Government to issue rules to limit free speech in a way that the Constitution does not allow. After all we are a Government of and by discussion," he pleaded. As Goldman and Berkman's attorney, Weinberger repeated this claim and it again failed to convince the federal grand jury, which indicted his clients for conspiracy on June 21, 1917.[147] Less than two months later Weinberger appeared before Magistrate Nolan in night court on behalf of George L. Steinhardt, a Socialist Party member, who police arrested for supposedly maligning the U.S. Army.[148]

In late 1917, Charles Recht was called on to represent Nicholas Hourwich, a leader of the Russian Federation, a left-wing Socialist Party faction, who was also charged with sedition. Nicholas Hourwich was the son of socialist lawyer and economist Isaac A.

---

[145] Harry Weinberger, "A Rebel's Interrupted Autobiography: A Personal Document on the Impact of War on One Who Has Made a Lifelong Fight Against It," *The American Journal of Economics and Sociology* 2, no. 1 (October 1942): 111-122; More than any other activity, he remembers reading voraciously as a child and was a self-declared "true agnostic." After graduating from NYULS, which he attended at night while spending his days working as a stenographer, Weinberger was admitted to the New York City bar in 1908; L., "In Memoriam: Harry Weinberger, 1885-1944," *American Journal of Economics and Sociology, Inc.* 3, no. 4 (July 1944): 646.

[146] U.S. Congressional Committee on the Judiciary, *Espionage and Interference with Neutrality Hearings before the Committee on the Judiciary*, 65th Congress, 1st Session, April 9 and 12, 1917 (Washington D.C.: Government Printing Office, 1917). Weinberger was speaking on behalf of the Free Speech League, an organization created in 1902 by Edward Bliss Foote, a doctor committed to providing women with birth control, his son Edward Bond Foote, Goldman, and Theodore Schroeder, a lawyer and prolific writer on the issue of free expression. On the Free Speech League see Rabban, *Free Speech in Its Forgotten Years*.

[147] "Emma Goldman Out On Bail," *New York Times*, June 22, 1917, 14.

[148] "Frame Up in Socialist Case," *The New York Call*, August 2, 1917, 6.

Hourwich, Meyer London's one time law partner and an associate of left-wing radicals such as John Reed, Benjamin Gitlow, James Larkin, and Jay Lovestone.[149] On November 18 police arrested Nicholas Hourwich and three associates in Connecticut and imprisoned them at the Fairfield County Jail.[150] Hourwich was in Bridgeport to speak to the Union of Russian Mechanics, an organization "organized by the Russian Immigrant Aid Committee."[151] As Hourwich neared the end of his speech, a man entered the hall and attacked him, while telling the audience "not to listen to the Jew Revolutionist." Hourwich was held without charges. He was also denied the option to post bail.

For weeks, authorities failed to charge Hourwich with a crime. Eventually, they contended that Hourwich "advised the members of the Russian Mechanics Union to slacken their production in ammunition work and walk out," an act that supposedly violated the Espionage Act.[152] In his defense, Recht framed the case as a question of First Amendment freedoms. Writing to a newspaper editor in Buffalo, New York in an effort to drum up public support for his client, Recht explained, "I am writing you in the hope that whatever may be your views upon the war question, you will agree with the members of this Committee that neither Freedom of Speech nor other constitutional rights ought to be destroyed in time of war."[153]

---

[149] Tony Michels, *A Fire In Their Hearts*, 225. Recht and Isaac A. Hourwich litigated immigration and deportation cases together. See *United States v. Wallis*, 279 Fed. 401 (C. C. A. 1922). (The issue in this case was the birthplace of the deportee, specifically who—the courts or the Department of Labor—was entitled to make a determination and what evidence they could use to do so.) Along with Thomas F. Hardwick, Hourwich and Recht also co-authored the brief on behalf of Russian ambassador Ludwig C. A. K. Martens. See "Officials Examine Papers of Martens," *New York Times*, June 15, 1919, 18.

[150] "The Arrest of Nicholas Hourwich," *The Survey*, December 8, 1917, 296.

[151] "The Arrest of Nicholas Hourwich," *The Survey*, December 8, 1917, 296.

[152] Untitled, box 5, folder 5, New York Bureau of Legal Advice Records, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

[153] Recht's letter explained that on December 7, a grand jury was scheduled to meet in order to determine the legitimacy of the treason charges for which Hourwich was being tried. See Letter to Editor, December 3, 1917,

Recht came to represent Hourwich as a result of his position as the general counsel of the New York Bureau for Legal Aid (NYBLA).[154] Morris Hillquit was Recht's immediate predecessor and Martha Gruening, Recht's former client, was a founding member as was fellow feminist Frances M Witherspoon; Jacob Hillquit helped managed the organization's finances.[155] The NYBLA was created immediately after America's entry into the war and was led by a group of radical lawyers. It was designed to provide legal aid to protestors being prosecuted by the various federal wartime laws—helping people avoid the draft and assert their rights as conscientious objectors, claim their civil liberty to free speech, and avoid deportation for supposedly harboring and teaching radicalism.[156] While the NYBLA was created to help anyone charged with violating the wartime laws, according to at least one officer, most NYBLA clients were Jews.[157]

---

box 4, folder 4, New York Bureau of Legal Advice Records, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

[154] On June 27, 1918, Recht wrote to Judge Learned Hand, requesting that the judge "[refer] indigent defendants in cases arising under the Espionage Sedition and Draft law to me as counsel for the Bureau." See Letter, Charles Recht to Learned Hand, June 27, 1918, box 4, folder 5, New York Bureau of Legal Advice Records, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

[155] Among other responsibilities, Jacob Hillquit oversaw fundraising and acted as a go-between for the NYBLA and the People's Council and Socialist Party. Additionally, he made a monthly contribution of $10. See Memo, New York Bureau of Legal Advice Records, box 2, folder 24, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

[156] According to Jacob Hillquit, the NYBLA was the lone organization "continuously engaged in assisting men with exemption claims, adjusting differences with the Board, securing extensions of time cancellations of illegal registration, etc." Jacob Hillquit letter, box 3, folder 2, New York Bureau of Legal Advice Records, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY; Unpublished autobiography, box 1, folder 18, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY; A year later, the group shortened its name to The New York Bureau of Legal Aid.

[157] Attorney Joy Young told *The New York Tribune*, "This bureau formed shortly after we entered the war. Its object was to permit freedom from conscience and liberty of speech. We did not charge any fee aiding men in the draft with legal advice. Most of the people we aided were Jews of the East Side." See "U.S. Raids Offices Of Organization Aiding Draftees," *New York Tribune*, August 31, 1918, 12.

As the organization's chief legal counsel, Recht presented the NYBLA's objectives in both practical and abstract terms.[158] Writing to a potential donor, he explained that the NYBLA was unique in its "interest in establishing legal points because of their importance in the future," that is, legal precedent.[159] He then noted that the organization was, as of 1919, appealing two important cases to the U.S. Supreme Court. The first concerned the rights of conscientious objectors and the second "an attempt to get the Supreme Court to discriminate between the force or criminal anarchist and the philosophical anarchist."[160] These were his two major concerns: establishing individuals' rights to avoid conscription into a war that they oppose and establishing a legal distinction between criminal and philosophical anarchists. In both aims, Recht advanced First Amendment claims.[161]

Recht's dedication to the broadening of Americans' civil liberties was also exemplified by his commitment to establishing the legal right of individual to protest being drafted. When Congress passed the Selective Service Act, it outlined very narrow

---

[158] According to one scholar, as Recht had imagined, the organization made some strides in the protection of due process. Frances H. Early, *A World Without War: How U.S. Feminists and Pacifists Resisted World War I* (Syracuse, NY: Syracuse University Press, 1997), 87-88.

[159] Letter, Recht to Agnes Inglis, July 2, 1919, box 3, folder 5, New York Bureau of Legal Advice Records, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

[160] Letter, Recht to Agnes Inglis, July 2, 1919, box 3, folder 5, New York Bureau of Legal Advice Records, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

[161] In addition to representing conscientious objectors, Recht also advocated on behalf of individuals who he thought were unfairly charged with political radicalism. Recht failed to convince courts of an existing distinction between what he called "criminal anarchists" and "philosophical anarchists." According to Recht, the former violently opposed all forms of government, a position he found "inconsistent." Contrastingly, the philosophical anarchists were "gentle," and only identified themselves as anarchists "because they [disbelieved] in every form of violence." In fact, he explained, "many of them go to the length of becoming vegetarians, their abhorrence of force extending to the lower animal kingdoms." This was not an academic distinction; the government was excluding immigrations from admission to the country and deporting people already present for their endorsement of this latter belief. See *Lopez v. Howe*, 254 U.S. 612; Unpublished autobiography, box 1, folder 19, Charles Recht Papers, TAM 176, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.

circumstances in which one could qualify as a so-called conscientious objector.[162] Under Recht's leadership, the NYBLA oversaw approximately 5,000 individuals' cases.[163]

Like Recht, Harry Weinberger, who was also an NYBLA lawyer, represented conscientious objectors.[164] On June 1, 1917, the day following the arrests of Phillips, Cattell, and Parker, outside of Madison Square Garden, five immigrants in their twenties—Louis Kramer, Louis Sternberg, Joseph Walden, Morris Becker, and Jennie Deimer—were arrested for distributing anti-draft literature and also charged with conspiracy. Later that month, a jury found Kramer and Becker guilty and the two men were sentenced in the courtroom of Judge Mayer (who Hillquit faced in Phillips, Cattell, and Parker's trial months earlier).[165]

Weinberger appealed Kramer's case until it reached the U.S. Supreme Court. In a decision handed down on January 14, 1918, Chief Justice White ruled that the case was indistinguishable from a group of rulings known as the Selective Draft Law cases in which the Court found that Congress was within its constitutional authority to compel military service.[166]

Weinberger was also involved with another wartime case that, unbeknownst to him at the time, would be remembered by history as a seminal First Amendment case. During the

---

[162] For a comprehensive history of the development of the status of "conscientious objector" and the rise of the administrative state see Jeremy K. Kessler, "The Administrative Origins of Modern Civil Liberties Law," *Columbia Law Review* 114, no. 5 (June 2014): 1083-1166.
[163] A 1916 letter from an NYBLA officer cites having helped some 5,000 individuals with exemptions. See Letter, Witherspoon to Cram, September 25, 1916, box 2, folder 17, New York Bureau of Legal Advice Records, TAM 044, Tamiment Library/Robert F. Wagner Labor Archives, New York, NY.
[164] *Selective Draft Law Cases*, 245 U.S. 366 (1918).
[165] "New Police Arms Awe Socialists," *New York Times*, June 1, 1917, 1-2; "Anarchists Convicted of Obstructing Draft," *New York Times*, June 13, 1917, 1, 11; Weinberger, Hillquit, and Recht are not the only examples of Jewish lawyers defending Jewish radicals charged with violating laws due to anti-draft protests; lawyer Alexander Karlin defended Abraham Tuvin and Julius Codkind for the same. See "Draft Slackers Must Face Trial," *New York Times*, June 7, 1917, 2. Interestingly, Karlin was jailed in 1928 for supposedly "ambulance chasing."
[166] *Selective Draft Law Cases*, 245 U.S. 366 (1918).

summer of 1918, at Goldman's urging, Weinberger volunteered to represent five young Jewish immigrant anarchists—Jacob Abrams, Mollie Steimer, Hyman Lachowsky, Samuel Lipman, and Jacob Schwartz—who police arrested in August of 1918 for writing, creating, and distributing English and Yiddish language leaflets challenging America's intervention in the Russian Civil War, which was being raged between the Bolsheviks (Reds) and the anti-Bolsheviks (Whites).[167] Like so many of Weinberger's previous clients, the government charged his young clients with conspiracy and violation of the Sedition Act of 1918. In an analysis of the trial, famed First Amendment legal theorist Zechariah Chaffee, Jr., identified precisely why the group earned the state's attention: "The position of the defendants could hardly be understood without some acquaintance with the immigrant population of a great city, some knowledge of the ardent thirst of the East Side Jew for the discussion of international affairs."[168]

After losing his case in district court and in the appeals court, Weinberger turned to the Supreme Court. Representing the four youths (Schwartz had died in prison), Weinberger battled the narrow conception of permissible legitimate expression by offering two broad arguments, one pertaining to the content of the leaflets and the other pertaining to his clients' supposed rights to free speech. First, Weinberger explained that the leaflets did not support

---

[167] Richard Polenberg, *Fighting Faiths: The Abrams Case, The Supreme Court*, *and Free Speech* (Ithaca, NY: Cornell University Publishers, 1999), 80. For a complete account of the Abrams case see *Fighting Faiths.* The case *Abrams v. United States* is perhaps most well-known because this case inspired Justice Oliver W. Holmes Jr.'s dissent lamenting the indictment of four Russian Jewish immigrant anarchists, who had been charged with violating the Sedition Act of 1918. In what legal scholars and historians have identified as an intellectual shift, Justice Holmes wrote that, contrary to the standard imposed by the Court, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force." See *Abrams v. United States*, 250 U.S. 616 (1919).

[168] Zechariah Chaffee, Jr., *Freedom of Speech* (1920), 126.

the Germans; that they were not intended to harm the United States; and that, at the time of publication, the leaflets actually reflected American policy towards the Bolsheviks (which suggested cooperation between the two). Concerning the defendants' speech rights, he told the court that his clients had "the right to question and protest" American military being sent to Russia. "They had the right, not because they are American citizens, because they are not, but because they are here and free speech is guaranteed to all citizens and noncitizens," Weinberger argued.[169]

On November 10, 1919, seven of the nine members of the Supreme Court rejected Weinberger's assertions and affirmed the lower court's ruling. Using the "clear-and-present danger" test articulated in *Schenck* to assess the case, Justice John H. Clarke declared that the defendants had intended to slow wartime production, an act that constituted a threat actionable under the sedition laws.[170] Despite earlier rulings in which Holmes endorsed a seemingly limited viewed of free speech, in this case, Justice Holmes did not join the Court's

---

[169] Richard Polenberg, *Fighting Faiths*, 133.

[170] On March 3, 1919, the Supreme Court handed down its decision in *Schenck v. U.S.*, marking the first time that the Supreme Court took up a First Amendment-based challenge to federal law. Charles Schenk, the general secretary of the Socialist Party, was arrested on December 20, 1917 for mailing some 15,000 circulars to draftees, which encouraged them to oppose the war by signing anti-draft petitions. For this he was charged with having violated the Espionage Act. In court, Schenck offered a First Amendment-based defense of his actions, claiming he was exercising his right to engage in public discussion. No court in which Schenck appeared agreed with his analysis, including the Supreme Court, which upheld Schenck's conviction. Despite as much, *Schenck* proved both legally and historically significant: for the first time, the Court articulated what became known as the Clear and Present Danger doctrine, which seemingly offered a more stringent legal standard to justify the government's silencing of speech than mere "bad tendency." In what became a famous unanimous opinion, authored by Justice Holmes, the Court asserted: "The question in every case is whether the words are used in such circumstances and are of such nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." See *Schenck v. U.S.,* 249 U.S. 47 (1919). Despite this new legal standard, convictions of radicals who offered First Amendment defenses continued. A week after affirming Schenck's conviction, the Court upheld the conviction and affirmed the ten-year prison sentence of Eugene V. Debs. On June 16, 1918, Debs delivered a speech entitled "Socialism is the Answer" to an audience of twelve hundred people in Canton, Ohio, and it was because of the content of this speech that he was indicted under the Espionage Act of 1917; see *Debs v. United States*, 249 U.S. 211 (1919); "Debs Loses Appeal, To Serve Ten Years," *New York Times*, March 11, 1919, 3.

majority opinion.[171] Instead, Holmes, who was joined by Justice Louis D. Brandeis, emphatically asserted that the defendants lacked the requisite intent necessary for conviction: "I do not see how anyone can find the intent required by the statute in any of the defendants' words," Holmes asserted. In what has subsequently become one of the most quoted sections of a frequently quoted dissent, Justice Holmes, espousing judicial pragmatism, wrote: "The best test of truth is the power of the thought to get itself accepted in the competition of the marketplace… That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."[172]

Despite Holmes' dissent, Weinberger's clients were found guilty. Steiner was sentenced to a prison term of fifteen years and fined $5,000; Abrams, Lipman, and Lachowsky faced twenty-year prison terms and $1,000 fines. After serving these sentences, the four were to be deported. Instead, after a great effort, Weinberger secured the release of the four provided that they immediately returned to Russia, which is precisely what they did. Along with Weinberger, Charles Recht, Norman Thomas, Elizabeth Gurley Flynn, and Leonard Abbot attended a "farewell" dinner for the four, although Steiner, Abrams, Lipman, and Lachowsky were not permitted to attend.[173]

---

[171] Historians and legal scholars have noted (and parsed almost endlessly Holmes' seeming change of opinion. See, for example, David S. Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," *Hofstra Law Review* 11, no. 1 (1982): 97-189.

[172] *Abrams v. United States*, 250 U.S. 616 (1919). On Holmes' pragmatism see Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York, NY: Farrar, Straus, and Girous, 2002). On Holmes' change of mind see Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America* (New York, NY: Metropolitan Books, 2013).

[173] Zosa Szajkowski, "Double Jeopardy—The Abrams Case of 1919," *American Jewish Archives* 23, no. 1 (April 1971): 8-32, 28.

Free Speech (Obscenity)

In addition to silencing supposed sedition, early twentieth-century state authorities censored materials that they deemed obscene, that is, offensive to public decency. In response to anxieties born from industrialization, xenophobia (that was triggered by mass immigration), and the rise of Victorian morality, which encouraged sexual repression and strict gender norms, states and federal authorities began adopting anti-obscenity laws in the 1860s.[174] Obscenity laws reflected the work of Anthony Comstock, a Connecticut-born veteran of the Union Army and deeply religious Christian. In 1873, Comstock created the New York Society for the Suppression of Vice (NYSSV), an organization intended to oversee and enforce public morality standards.[175] That same year he also convinced Congress to pass the "Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use Act," which outlawed obscenity and criminalized use of the United States postal service to distribute obscene materials. Its passage inspired twenty-four states to pass similar legislation.[176] These laws primarily outlawed publications concerning birth (including birth control) and pornography (broadly defined). Nowhere were these laws more zealously

---

[174] On the rise of obscenity laws, see Elizabeth B. Hovey, "Stamping Out Smut: The Enforcement of Obscenity Laws, 1872-1915," PhD Dissertation, Columbia University, 1998; Paul S. Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (New York: Scriber, 1968); Andrea Friedman, *Prurient Interests: Gender, Democracy, and Obscenity in New York City, 1909-1945* (New York, NY: Columbia University Press, 2000). On the rise of Victorian morality as an outgrowth of Christian theology see George Marsden, *Fundamentalism and American Culture* (New York, NY: Oxford University Press, 2006);

[175] Comstock had taken the idea from a similar organization founded in England in the late nineteenth century. Among the lawyers who worked for the organization was Henry Ward Beecher, the Chinese immigration advocate. See Beecher served as the attorney for the New York Society for the Prevention of Crime, the Society for the Suppression of Vice, and the Long Island Railroad. See "Col Beecher Dies; Son of Preacher," *New York Times,* September 20, 1928 and "Turning Away the Chinese," *New York Times*, February 19, 1879.

[176] Although state oversight of public decency was not new, the emergence of private organizations such as the NYSSV, in which private citizens were empowered by state authorities to oversee their neighbor's moral norms, represented a major shift in the legal regulation of obscenity. First, it introduced the federal government to the business of regulating societal morals. Second, it permitted private citizens to act as state officials and to prosecute those who they identified as exceeding the subjective bounds of decency. Finally, it resulted in a sudden uptick in legal cases about individuals' decency standards.

applied than in New York; according to one scholar, "over fifty 'obscene books' in a single year were ordered destroyed. In these cases, grand juries routinely brought indictments (more than 90 percent of the time.)"[177]

Jewish lawyers figured prominently in the transformation of obscenity standards in America on account of a confluence of circumstances. First, they were already knowledgeable about speech-related case law and therefore the same people who advocated for broader understandings of the First Amendment in the context of press, sedition, and political expression cases served as First Amendment champions in the context of obscenity cases. Second, they were intimately linked to a Jewish ethnic economy and to Jewish cultural producers. When a book was censored or a play shut down, Jewish lawyers offered their services. Third, many obscenity cases concerned the distribution of information about contraception or of actual contraceptive devices; because Jews were prominent in this movement, it only made sense that Jewish lawyers would represent its members in court.[178]

Perhaps the most famous trial involving charges of obscenity as it related to the distribution of birth control was that of Margaret Sanger, her sister, Ethel Bryne, and Fania Mindell, a Jewish immigrant from Minsk. On October 16, 1916, the three women opened the nation's first birth control clinic on Amboy Street in Brownsville, Brooklyn. Bryne was a nurse by training; Mindell was a record keeper and a translator. (Her services were needed because the clinic was located in a predominantly Yiddish-speaking neighborhood.) Finally,

---

[177] Peter C. Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, *The Federal Courts: An Essential History* (New York, NY: Oxford University Press, 2015), 209.

[178] For example, women's rights crusader and birth control advocate Mary Ware Dennett was an ally of Morris Hillquit, helping direct his mayoral campaign. See Christopher Lasch, "Dennett, Mary Coffin Ware," in *Notable American Women: 1607-1950: A Biographical Dictionary Vol. I*, eds., Edward T. James, Janet Wilson James, Paul S. Boyer (Cambridge, MA: Harvard University Press, 1971), 463-465.

Sanger provided clients—most of whom were poor, married, immigrant women—with information about contraception.

Nine days after the clinic's opening, police arrested the three women. Sanger, Bryne, and Mindell were charged with violating Section 1142 of the Penal Law of the State of New York, which outlawed informing women about or providing them with any form of birth control.[179] They were also charged with violating the Comstock Act, which made it a crime to promote or purvey birth control through the mail or across state lines.[180] Additionally, Bryne and Mindell were charged with selling Sanger's informational pamphlet "What Every Girl Should Know," which offered its readers a frank discussion of puberty, sex, and conception. Sanger was also charged with overseeing a clinic intended to spread information about contraception. After their arraignment, they were sent to jails—Sanger and Mindell to the Raymond Street jail and Bryne to Liberty Avenue station.

In court, Sanger, Bryne, and Mindell were represented by Jonah Goldstein. Goldstein and his family had moved to New York's Lower East Side in 1891. He spent much of his childhood in neighborhood settlement houses, where he encountered east side fixtures such as Lillian Wald, founder of the Henry Street Settlement, and Henry Moskowitz, a civil rights activist and co-founder of the National Association for the Advancement of Colored People (NAACP).[181] Like so many radical Jewish lawyers, Goldstein attended DeWitt Clinton High

---

[179] "A person who sells, lends, gives away, or in any manner exhibits or offers to sell, lend, or give away or advertises, or offers for sale, loan or distribution, any instrument or any article, or any recipe, drug, or medicine for the prevention of contraception, or for causing unlawful abortion, or purporting to be for the prevention of contraception, or for causing unlawful abortion or holds out representations that can be used or applied, or any such description…"

[180] Comstock Act, 17 Stat. 599 (1873).

[181] See "Jonah Goldstein, Ex-Judge, Is Dead," *New York Times*, July 23, 1967, 60; "Biographical Sketch of Jonah J. Goldstein," undated, Jonah G. Goldstein Papers, P-61, box 1, folder 2, AJHS, Center for Jewish History, New York, NY.

School and then NYU Law School.[182] After graduating from law school in 1907, Goldstein and his brother, David, opened a firm together.

Goldstein oversaw the pre-trials hearings, trials, appeals, and, if necessary, final appeals for all three women, each with its own results. The trials were long and complex and the proceedings yielded varied outcomes. Regardless, Goldstein's commitment to free speech persisted throughout the eighteen months he worked on these cases. He defended his clients both because he viewed contraception as important and believed that Sanger and company's arrests violated their First Amendment rights. As he told judge after judge, "Section 1142 violates both the Federal and State Constitutions, as to individual liberty, because of its failure of regulation. It establishes an absolute inhibition of the dissemination of information to all persons," the ill effects of which endangered women's lives.[183]

Goldstein also waged a public campaign about the right to speak publicly about contraception. In February of 1917, he published an article entitled "The Birth Control Clinic Cases" in the first volume of *The Birth Control Review*, a magazine dedicated to advocating for women's right to birth control, which Sanger founded.[184] (Its masthead read: "Dedicated to the Principle of Intelligent and Voluntary Motherhood.")[185]

---

[182] Michael C. Johanek and John Puckett, *Leonard Covello and the Making of Benjamin Franklin High School: Education as if Citizenship Mattered* (Philadelphia, PA: Temple University Press, 2007), 86-87. In the century's first decades, a majority of Jewish lawyers attended schools nearby where they lived, in part because of these institution's low tuitions, the availability of part-time and night programs, and (eventually) elite institutions' discriminatory admissions policies.

[183] *People v. Margaret H. Sanger*, 222 N. Y. 192 (1918).

[184] J. J. Goldstein, "The Birth Control Clinic Cases," *The Birth Control Review* 1, no. 1 (February 1917): 8; Goldstein also served as the treasurer and vice-president of the New York Birth Control League, a group formed in December of 1916 after Sanger's initial arrest for opening the Brownsville Clinic. The group's goals included a legal agenda, which consisted of lobbying for laws that enabled medical professions to prescribe contraceptives. Goldstein linked the importance of contraceptives to eliminating poverty. While preparing for Sanger's appeal, he wrote to the Children's Bureau in Washington D.C., "In trying to defend [Sanger], I find it very necessary to have statistics relating to large families among poor people. Would you be kind enough to see whether there is any such material gathered in your bureau and forward to me anything that you think could be used along this line," he asked Anne Rochester. See Jonah Goldstein to Anne Rochester, Children's Bureau,

Later that same year, in a case involving both birth control and film, Goldstein represented the Message Photo-Play, a production company, against the New York City Commissioner of Licenses, George H. Bell, who was represented by the city's corporate counselors, Lamar Hardy and George P. Nicholson.[186] The case concerned a film entitled *Birth Control*, which Goldstein's clients produced. The film featured a series of vignettes of poor women with large families intermixed with images of Margaret Sanger working as a nurse. In the film, Sanger appears torn between abiding by the Comstock laws and spreading information about birth control; ultimately, her on-screen persona indulges her desire to inform her patients about birth control.

In May of 1917, a New York theater had intended to show the movie, but before that occurred, Commissioner Bell, a bureaucrat whose duty it was to ensure screened films did not offend the "morality, decency, and public welfare," revoked the theater's permit to show the film.[187] According to Commissioner Bell, *Birth Control* was morally problematic. By depicting Sanger's anguish over whether to provide information about contraception, it illegally conveyed information about contraception. Moreover, the subject of contraception was inherently unfit for public consumption. Finally, the movie encouraged women to violate state and federal laws banning use of or distributing of information about birth control.

On June 6, 1917, Justice Nathan Bijur, an associate of well-known Jewish immigration attorney Max Kohler, handed down an opinion in favor of Goldstein's client and

---

March 24, 1917, box 24, Records of the Children's Bureau, 1908-2003, Central Files 1912-1969, U.S. National Archives at College Park, MD.

[185] *The Birth Control Review* 1, no. 1 (February 1917).

[186] *Message Photoplay Co. v. Bell*, 100 Misc. Rep. 267 (1917); Manon Parry, *Broadcasting Birth Control: Mass Media and Family Planning* (New Brunswick, NJ: Rutgers University Press, 2011).

[187] In 1916, the City of New York expanded the commissioner of licenses job to include regulation of motion picture theaters.

granted a motion for an injunction against the city. Bijur reasoned that the danger to the public welfare did exist, but not because they might learn about contraception; rather, the danger was in allowing only one opinion to be forced on the public about birth control.

Next, the case was reheard by the New York Court of Appeals on July 13. There, Goldstein argued that the purpose of the film was to encourage citizens to reconsider their beliefs about birth control and that by banning the film, the state hindered Sanger's exercise of free speech. Justice Laughin rejected Goldstein's claim that the First Amendment ensured Sanger's right to express herself in the film, bluntly writing in his decision: "We are not concerned with the freedom of speech guaranteed by the Constitution."[188] Further explaining the court's view on the matter of censorship, Laughlin wrote, "It has been… authoritatively settled that it is not only competent for the Legislature of the State to require a license for public theatrical and motion picture exhibitions, but also to censor such productions in order that they may be regulated and controlled in the interest of morality, decency, and public safety and welfare." Laughin reversed Bijur's injunction against the commissioner and permitted the city to prevent the film's screening by revoking the theater's license.

Jewish lawyers also represented individuals charged with obscenity in cases unrelated to the birth control movement. Specifically, they represented various individuals prosecuted for producing supposedly obscene books, plays, and photographs. Five years following his defense of Sanger, Goldstein defended Thomas Seltzer, a Russian-American book publisher and left-leaning journalist who at one time worked at *The Masses*. Seltzer was an immigrant from Poltava, Russia. As a young child and teenager he worked in Lower East Side sweatshops. In 1897, encouraged by his sister, he graduated from college after earning a

[188] *Message Photo-Play Co. Inc. v. Bell*, 179 App. Div. 13 (N.Y. App. Div 1917).

scholarship. He then worked as a journalist and editor.[189] In 1920, after several attempts at running publishing houses with various business partners, Seltzer opened Thomas Seltzer, Inc., a publishing house dedicated to publishing great European works in America.[190]

Seltzer selected, translated, and published various works for nearly two years when, on July 11, 1922, John S. Sumner entered his Fiftieth Street warehouse with a permit to confiscate Seltzer's books. Sumner, having replaced Comstock as the public face of the NYSSV, continued Comstock's effort to rid the city of immoral materials. Having obtained a warrant from Magistrate Edward Weil, Sumner confiscated 772 books from Seltzer, including many copies of *A Young Girl's Diary* (1919), a diary written by an anonymous wealthy Austrian teenager; *Casanova's Homecoming* (1918, Germany; 1921, U.S.), a work by Viennese author Arthur Schnitzler, which recounts the sexual conquests of the famed Italian adventurer; and *Women in Love* (1920), a melodramatic novel by D. H. Lawrence about sisters and their respective lovers.[191] Seltzer was charged under Section 1141 of the penal law, which prohibited the publication of obscene literature.

As his lawyer, Goldstein embraced Sumer's challenge to free speech. (How Goldstein and Seltzer met is unclear; it is possible that Arthur G. Hays, Goldstein's lifelong friend and prominent member of the ACLU, asked him to take the case.) The day after Sumner's raid of

---

[189] Thomas Tanselle, "The Thomas Seltzer Imprint," *The Papers of the Biographical Society of America* 58, no. 4 (Fourth Quarter, 1964): 380-448; Alexandra L Levin, "Thomas Seltzer: Publisher, Fighter for Freedom of the Press, and the Man Who 'Made' D. H. Lawrence," *American Jewish Archives* 41, no. 2 (January 1989): 215-234.
[190] Alexandra Levin, "Thomas Seltzer: Publisher, Fighter for Freedom of the Press, and the Man Who 'Made' D. H. Lawrence," 219.
[191] "Seize 772 Books in Vice Crusade Raid," *New York Times*, July 12, 1922, 32.

Seltzer's warehouse, Goldstein spoke to reporters, asserting "I will not try to have the charges dismissed," and declaring the books Sumner took were "classics of the day."[192]

On July 31, 1922, Goldstein stood before New York Magistrate George W. Simpson of the Fifty-Fourth Street Court on Manhattan's West Side. When trial courts heard obscenity charges like those waged against Weinberger and company, they employed the "Hicklin test" to determine defendant's innocence or guilt.[193] The test defined "obscene" as that which tended to "deprave and corrupt those whose minds are open to such immoral influence" without regard for the artistic or literary merit of the work in question.[194] This meant that if, according to the jury and judge, the material in question was offensive, nothing else mattered.

In order to show that the works did not "excite" readers to "lustful and lecherous desires," Goldstein invited various literary scholars to testify about the book's content as well as physicians to attest to the work's capacity to educate young people about sex. And, oddly, the judge permitted him to use this testimony. On September 12, 1922, Judge Simpson dismissed the charges, apparently convinced by the expert testimony of literary critics and university professors who attested to the works' literary value.[195] In response to his victory in

---

[192] "Seltzer to Fight Charges," *New York Times*, July 13, 1922, 29.
[193] The test came from the English case *Regina v. Hicklin* (1868), which defined the statutory meaning of "obscene" in the Obscene Publications Act of 1857 as materials that tended to "deprave and corrupt those whose minds are open to such immoral influence" without regard for the artistic or literary merit of the work.
[194] The application of the Hicklin test by federal judge (and future U.S. Supreme Court Justice) Samuel Blatchford in 1879 officially upheld the constitutionality of the federal Comstock Law. Its use by the U.S. Supreme Court in *Rosen v. U.S.* (1896) cemented the Hicklin test as the official standard for determining obscenity in all federal courts. See Janice R. Wood, *The Struggle for Free Speech in the United States, 1872-1915: Edward Bliss Foote, Edward Bond Foote, and Anti-Comstock Operations* (New York, NY: Taylor and Francis, 2007).
[195] "Seize 772 Books in Vice Crusade Raid," *New York Times*, July 12, 1922, 32; "The Law and the Censor," *New York Times*, September 14, 1922, 21; "Important Censorship Case," *The Publisher's Weekly*, August 5, 1922, 463.

court, Goldstein announced his decision to sue Sumner for the lost profits which resulted from the incident.[196]

A more typical example of Jewish lawyers' experiences fighting obscenity charges was that of Harry Weinberger. In 1923, Weinberger, a theatre aficionado, produced an English-language version of the Sholem Asch play *Got fun Nekomeh* (*God of Vengeance*), which explored the dualities between a man's daily life as a brothel owner and as a religiously observant Jews. The plot included a love affair between the main character's daughter and a woman who worked in his brothel. This was perhaps why, according to the *New York Times*, the play was "a great question of dispute on the east side" among Yiddish-speaking intellectuals. ("Do you know Sholem Asch, reader? If you do not, you have better acquaint yourself with him" the paper instructed readers on May 29, 1910, the year that the play was first produced in America.)[197]

In the fall of 1922, Weinberger's English-language rendition of the play opened in New York's Greenwich Village Theatre, a stone's throw away from *The Masses* former offices. The theatre was home to the Provincetown Players, an experimental theatre company associated with American playwright Eugene O'Neill.[198] In addition to its provocative plot, Weinberger's production allegedly included a kiss between the two lead actresses.[199] By March of 1923, the show was being performed in the Apollo Theater on West Forty-Second Street, in the city's theater district. On March 6, less than a month after the show's opening, Weinberger and the entire cast were arrested and charged with "advertising, presenting, and participating in an obscene, indecent, immoral or impure drama, play, exhibition, show, or

[196] "Book Censorship Beaten in Court," *New York Times*, September 13, 1922, 20.
[197] "Peripatetic Philosophers of this Many-Sided Town," *New York Times,* May 29, 1910, 53.
[198] Harry Weinberger was legal counsel to both the theater and to O'Neill himself.
[199] It is unclear whether this was true.

entertainment which would tend to the corruption of the morals of youth or others," a violation of section 1140a of the New York Penal Code.[200] Weinberger and Samuel Seabury, a descendent of loyalist Episcopal bishop Samuel Seabury, represented the group in court. Probably hoping to improve his chance of success by employing another respectable ally, Weinberger also recruited Joseph Proskauer—a founding member of the prestigious firm Proskauer Rose—as counsel.[201]

While preparing for trial, hoping to garner public outrage, Weinberger wrote to various publications to encourage them to write about the case. Writing to David Karsher of the *New York Call*, a socialist daily, he commented on the obstacles he faced: "This is going to be a hard fight because it is not just mere censorship that I am up against but religious mania interwoven into same."[202] Aiming to win the support of influential community members, Weinberger sent complimentary tickets to the show to various prominent individuals, including U.S. district court Judge Learned Hand. Along with the tickets Weinberger sent a note remarking on "the irony of fate that one of the most serious plays in New York should have censorship applied to it after it has been performed for more than ten years here in New York City and more than one hundred performances in English."[203] (Hand declined Weinberger's invitation.)

As suggested by Weinberger's message to Karsher, the first challenge Weinberger faced was the court's use of the Hicklin test, the prevailing legal standard used to determine

---

[200] New York Penal Laws, chap. 40, §1140a.
[201] Letter, Harry Weinberger to Sholem Asch, March 14, 1923, box 24, folder 2, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.
[202] Letter, Harry Weinberger to David Karsher, March 26, 1923, box 24, folder 20, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.
[203] Letter, Harry Weinberger to Learned Hand, April 4, 1923, box 24, folder 14, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.

whether a given publication or material was obscene. The second issue Weinberger confronted concerned the prosecutor's claim that the play denigrated the Jewish religion. Indeed, Assistant District Attorney James Garrett Wallace had Joseph Silverman, a rabbi at the Reform congregation Temple Emanu-El, testified during the trial. How Silverman came to see the show is unclear. He had spent years ostensibly working against the negative portrayal of Jewishness on stage and some scholars have reported that Silverman apparently notified authorities about the play because he found it offensive.[204] According to Weinberger, however, it was the District Attorney who recruited Silverman to attend the play and then report it to the police.[205]

Opposing a prominent religious figure whose congregants were public figures in New York put Weinberger in a precarious position. To overcome the accusation that he or the cast had denigrated Judaism, Weinberger contacted sympathetic figures such as Rabbi Stephen S. Wise, a progressive rabbi and leader of the Free Synagogue, who assured him, "I do not believe it is fair to call [the play] an 'obscene, indecent, immoral, or impure drama."[206] Weinberger successfully convinced Wise to attend a performance, deliver a sermon about the morality of the play, and release an extended version of that sermon publicly in support of the play.

In court, Weinberger argued that depiction of vice in the play was meant to teach a moral lesson; therefore, rather than deprecate Judaism, the play, he argued, illuminated its value. Likewise, to show that the play was not obscene, Weinberger attempted to present

---

[204] On Rabbi Joseph Silverman see Edna Nahshon, "The Pulpit and the Stage: Rabbi Joseph Silverman and the Actors' Church Alliance," *American Jewish History* 91, no. 1 (March 2003): 5-27.
[205] Letter, Stephen S. Wise to Harry Weinberger, April 6, 1923, box 25, folder 9, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.
[206] Letter, Stephen S. Wise to Harry Weinberger, April 6, 1923, box 25, folder 9, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.

testimony of people who had seen the play and of the actors' script notes. Recognizing that other renditions of the play had been performed in Chicago and New York in years past, the prosecution had asserted that it was not the play itself that was on trial, but Weinberger's production of it specifically; accordingly, Weinberger wanted to use a script that featured actors' notes in it to prove that he had intentionally told the cast *not* to perform the play in such a way that it could be perceived as obscene. He also wanted to include the testimony of various "experts," who would comment on the enduring value of the show.[207]

Judge John F. McIntyre—the same man who had prosecuted Emma Goldman in 1893—refused to permit such "opinion evidence." Because the Hicklin test stipulated that literary and artistic merit did not matter when determining whether a work was obscene, the court did not allow Weinberger to present testimony from people who had seen the play or information about its production. McIntyre denied Weinberger the chance to read, show, or use the actual script in court; instead, relying on a rule known as "present recollection," McIntyre only permitted witness testimony about their memories of the show.

Unsurprisingly given the low threshold of the Hicklin test and given Weinberger's inability to include testimony about the script, on May 23, 1923, ninety minutes following the conclusion of the trial, the jury in the New York Court of General Sessions returned with a verdict of "guilty."[208] (According to Weinberger, the foreman of the jury was Jewish.)[209] Delivering his opinion, McIntyre explained that the decision would have a "wholesome

---

[207] Letter, Harry Weinberger to Baruch C. Vladeck, May 11, 1923, box 25, folder 8, Harry Weinberger Papers MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.
[208] Weinberger and the play's lead actor (and Yiddish theater star) Rudolph Schildkraut were fined $200 each; the other actors got suspended sentences. See "'God of Vengeance,' Players Convicted," *New York Times*, May 24, 1923, 1, 3.
[209] Letter, Stephen S. Wise to Harry Weinberger, April 6, 1923, box 25, folder 9, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.

effect on the theatrical profession" and proclaimed that, "drama must be purified."[210] Referencing the "religious mania" that Weinberger predicted would interfere with the case, McIntyre claimed that his decision was in part based on his respect for Jewish religious texts, which, he surmised, were as holy to Jews as the host was to Roman Catholics.[211]

After losing at trial, Weinberger filed an appeal with the First Department of the Appellate Division, which took issue with the type of evidence permissible in court. While courts had established that "opinion evidence" was irrelevant in cases concerning books and pictures, which supposedly "spoke for themselves," courts had not determined as much regarding plays. Weinberger wanted to use this absence of case law about the use of opinion evidence in cases about plays as a way to overturn the trial court ruling. As he wrote to the secretary of the Americanism Protective League, an anti-censorship organization established in the aftermath of another obscenity case, "I am quite hopeful that the courts will decide that opinion evidence must be allowed in reference to plays and probably in reference to books, magazines, and pictures as well." Continuing, he reiterated his understanding of the case as a vehicle to expand the meaning of the First Amendment: "There is also the question as to the law being so uncertain that it is unconstitutional, both from its ex post facto quality and also that it is a violation of the free speech and free press clause," he explained.[212]

While preparing for the appeal, Weinberger solicited the help of legal minds near and far. Writing to future U.S. Supreme Court Justice Felix Frankfurter, who at the time was serving his third year as a faculty member at Harvard University, Weinberger explained his concern about facing off against Jewish religious figures. "The real trouble," he remarked, "is

---

[210] "'God of Vengeance,' Players Convicted," *New York Times*, May 24, 1923, 1, 3.
[211] "'God of Vengeance,' Players Convicted," *New York Times*, May 24, 1923, 1, 3.
[212] Letter, Harry Weinberger to Sam H. Elliott, June 2, 1924, box 24, folder 2, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library, New Haven, CT.

the Jewish question. In the brief of course I am raising the question of the unconstitutionality of the law and also errors made on the trial, etc., and I am also raising the Jewish question as it is involved."[213] He then asked if Frankfurter might read his brief and offer any suggestions, which Frankfurter agreed to do.[214] In addition, Weinberger also tried to turn public opinion by appearing in public and speaking about free speech. On October 18, 1924, for example, he appeared in a symposium at the Civic Club on West Twelfth Street entitled "What Price Glory," to express his anti-censorship position.[215]

Despite his best efforts, the appeals court did not find in his favor. Therefore, he next took the case to the Court of Appeals. On January 21, 1925, the New York's Court of Appeals reversed the appellate division's decision and ordered a new trial.[216] Writing on behalf of four of six justices, Judge Irving Lehman declared that the lower court had erred not necessarily in its conclusion that Weinberger had violated state obscenity laws, but in its execution of the trial. Because the lower court had "precluded from presenting to the jury evidence which might have afforded a more certain basis for a conclusion and which might have led to a different result," the case needed to be retried.[217] While the Court of Appeals acknowledged that "present recollection" may be suitable testimony in some cases, because the question of obscenity turned on the play's production, and because notes in the actor's script spoke to the question of production, the trial court's exclusion of the script amounted to a procedural error significant enough to necessitate a new trial.

---

[213] Letter, Harry Weinberger to Felix Frankfurter, January 11, 1924, box 24, folder 10, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library.
[214] Letter, Felix Frankfurter to Harry Weinberger, January 12, 1924, box 24, folder 10, Harry Weinberger Papers, MS 553, Manuscripts and Archives, Yale University Library.
[215] "Symposium Held," *The Billboard*, October 25, 1924, 7; "Censorship 'Symposium' Runs Largely to Quantity," *The New York Herald Tribune*, October 16, 1924, 2.
[216] *People v. Weinberger*, 239 N. Y. 307 (1925).
[217] *People v. Weinberger*, 239 N. Y. 307 (1925).

Conclusion: Gitlow and Beyond

As Weinberger was defending himself against obscenity charges, his colleagues were defending a young man named Benjamin Gitlow. In March of 1919, the New York state legislature created the Joint Legislative Committee to Investigate Seditious Activities for the purpose of snuffing out anti-government speech. Popularly known as the Lusk Committee—named in recognition of its chair, State Senator Clayton R. Lusk, a Republican lawyer and commonplace nativist—the nine-member committee targeted perceived radicals throughout New York, many of whom were Jewish immigrants.[218]

Gitlow was among those prosecuted by the Lusk Committee. As a young man Gitlow, the son of Eastern European Jewish immigrants, worked as an organizer in Lower East Side garment shops.[219] In 1909, at eighteen years old, he joined the Socialist Party and in 1917 and 1918, he was elected to the New York State Assembly on the Socialist Party ticket. Between March and July of 1919, while managing a publication *The Revolutionary Age*, Gitlow and his associate, the journalist John Reed, printed and distributed a pamphlet entitled, "The Left Wing Manifesto," on three occasions.[220]

A few months later, New York Attorney General Archibald Stevenson, a member of the Lusk Committee, came across the "Manifesto." Stevenson decided to use the pamphlet and its publishers as a vehicle to quash political radicalism. Between November of 1919 and January of 1920, in collaboration with U.S. Attorney General A. Mitchell Palmer of the U.S.

---

[218] On the Lusk Committee see Julian F. Jaffe, *Crusade Against Radicalism: New York During the Red Sare, 1914-1924* (New York, NY: Kennikat Press, 1972).
[219] For a complete rendition of this case, see Marc Lender's fantastic book, *Gitlow v. New York: Every Idea An Incitement* (Lawrence, KS: University Press of Kansas, 2012).
[220] On August 31, 1919, Gitlow, Reed, and other members of the Left Wing Section abandoned the party and formed the Communist Labor Party. Two days later in Chicago, another faction formed the Community Party of America. Eventually, in May of 1921, these two communist groups combined. See Paul Buhle, *Marxism in the USA: From 1870 to the Present Day* (London, England: Verso, 1987).

State Department, government prosecutors oversaw a series of raids in various radicals' apartments and offices. Gitlow was among the two hundred and fifty people arrested on November 7, 1919, during one such raid.

Based on his involvement with the publication of the "Manifesto," Gitlow was charged under the New York Criminal Anarchy Law of 1902. The law, which was passed in the immediate aftermath of Johann Most's 1902 conviction, made it a felony to advocate, through speech or writing, the overthrow of the government "by force or violence, or by assassination…or by unlawful means."[221] Despite its original purpose, in the years surrounding World War I, state prosecutors deployed the law against non-anarchist leftists, including socialists and communists.

In anticipation of his first post-arrest hearing, Gitlow's attorney, Charles Recht, prepared the twenty-eight year old Gitlow's defense as well as that of James Larkin, an Irish-born American Socialist Party leader. (Days earlier, Recht had served as the lead attorney for a group of twenty-four people arrested during the Lusk Committee's raids of the Russian Soviet Bureau and Rand School.) Gitlow and Larkin's first court hearing turned on the question as to whether publishing the manifesto violated the state's 1902 penal law.

At the last moment, Clarence Darrow replaced Recht as the group's representative in court. Using Recht's legwork, Darrow argued Gitlow and Larkin's case in the Mulberry Street courtroom of New York City Chief Magistrate William McAdoo.[222] McAdoo was surely not surprised to see them there: he had signed off on the warrant for the raids, which resulted in Gitlow's arrest, days earlier. In his November 14, 1919, decision, McAdoo

---

[221] The New York Criminal Anarchy Act, Consol. Laws, c. 40, §160, 161 (1902).
[222] On McAdoo, "Magistrate M'Adoo Dies Suddenly at 76," *New York Times*, June 8, 1030, 1, 22.

considered Gitlow's guilt by offering a close read and analysis of the manifesto. Determining that its calls for revolution violated the law, McAdoo affirmed the charges waged against Gitlow. Comparing anarchy with a destructive natural force that indiscriminately scorched whatever it encountered (and implying that the American political system was highly flammable), McAdoo asserted that the statute under which the state prosecuted Gitlow and Larkin was "intended to put out a fire with a bucket of water." This was also how he justified giving judicial validation to the legality and prudence of the 1902 prophylactic law. Rather than a violation of Gitlow or Larkin's constitutional rights to speech, McAdoo concluded that failure to convict would be nothing short of a "betrayal of a sacred public trust."

Over the next two years, a group of rotating lawyers appealed Gitlow's case, including Charles Whitman, a Republican who had been involved in the litigation following 1911's Triangle Shirtwaist Factory Fire, Walter H. Pollak, who later worked on the Scottsboro Boys' case, and Walter Nelles, who helped argue the third *Masses* trial. This involved conducting three more trials: one in the New York Supreme Court, one in the appeals division, and finally one in the Court of Appeals, the state's highest court.[223] Simultaneously, the state tried and convicted many of Gitlow's political associates: Harry Winitsky, Jim Larkin, Isaac Ferguson, and Charles Ruthenberg. They too lost their cases.[224] Between 1919 and 1924, they went to trial, served prison sentences, and eventually were pardoned or released. Walter Pollak also appealed for a pardon on Gitlow's behalf. Pollak, a

[223] *People v. Gitlow*, 183 N.Y.S. 846 (N.Y. Spec. Term 1920); *People v. Gitlow*, 187 N.Y.S. 783 (N.Y. App. Div. 1921); *People v. Gitlow*, 234 N.Y. 132 (N.Y. 1922). In the final case, in the New York Court of Appeals, Justices Cuthbert Pound and Benjamin Cardozo dissented from the majority's conviction.
[224] See Marc Lendler, *Gitlow v. New York*, chapters 4 and 5.

1910 Harvard Law School graduate, was born in Summit, New Jersey.[225] He represented Gitlow on behalf of the American Civil Liberties Union, an organization dedicated to protecting Americans' civil liberties, which had been created just five years earlier by Roger Baldwin (who was not Jewish), Walter Nelles, Morris Ernst, Crystal Eastman (who was not Jewish), and Arthur G. Hayes, among others. Much like the NYBLA, they created the organization in response to government repression and censorship during World War I. (Before Pollak's requested pardon was decided upon, Gitlow himself squashed the effort because of his determination for his case to serve as a test of the meaning of the First Amendment.)

After the New York Court of Appeals affirmed Gitlow's conviction, the U.S. Supreme Court agreed to review his case. The court considered questions such as: did New York's 1902 criminal anarchy law deprive Gitlow of his freedom of expression under the Due Process Clause of the Fourteenth Amendment? Was the law itself unconstitutional? Did the Fourteenth Amendment extend the reach of the Bill of Rights to individuals in the state? In defense of Gitlow, his legal team argued that New York could not demonstrate that any true harm had occurred; that his manifesto was protected because it did not present a "clear and present danger," the standard set forth by Justice Oliver W. Holmes, Jr., in *Schenck.* Moreover, they argued that New York had violated Gitlow's First Amendment right to free speech. New York, conversely, asserted that the state rightfully possessed the authority to

---

[225] He attended DeWitt Clinton High School and Columbia College before entering Harvard. He married Marion Heilprin on April 4, 1914. His first job was an associate position at the firm Sullivan and Cromwell at 49 Wall Street; in December of 1912, he moved to Simpson and Cardozo (which soon thereafter became Cardozo and Engelhard). See "Walter Heilprin Pollak," *Harvard College Class of* 1907 (Norwood, MA: Plimton Press, 1917), 294. Walter Pollak was the father of famed civil liberties attorney Louis Pollak. See Dennis Hevesi, "Louis Pollak, Judge and Civil Rights Advocate and Federal Judge, Dies at 89," *New York Times*, May 13, 2012, A24.

prevent violence in light of its duty to promote the public good and protect the public from harm. Because Gitlow threatened the public's safety within his words, his conviction was properly adjudicated. They also argued, in essence, that the U.S. Supreme Court had no business intruding in the state's affairs.

In response, a majority (seven) of the justices ruled to uphold Gitlow's conviction.[226] Writing for the majority, Justice Edward T. Sanford affirmed that the New York law did not "hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press." Nevertheless, he also acknowledged that, "the freedom of speech and of the press… are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."[227] In short, the Court acknowledged for the first time that, indeed, free speech and press were among Americans' "fundamental personal rights."

Conversely, dissenting, Justices Holmes, Jr., and Louis D. Brandeis asserted that the law was indeed unconstitutional. Holmes thought it was obvious "that there was no present danger of an attempt to overthrow the government" by the "admittedly small minority" of people who agreed with Gitlow's message. In what became one of the most quoted lines of his dissent, Holmes wrote, "Every idea is an incitement… If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

---

[226] Although he had been out of prison for two years, Gitlow was then sent to the infamous Sing Sing on the east bank of the Hudson. He remained there only until December, when Governor Al Smith pardoned him. See Marc Lendler, *Gitlow v. New York*, 122.

[227] *Gitlow v. New York*, 268 U.S. 652 (1925).

Gitlow's conviction was not overturned, but his case represented a hugely important moment in the history of the First Amendment: it launched a process of "selective incorporation" in which the Court gradually applied "fundamental rights" found in the Bill of Rights to the states through the Fourteenth Amendment. (The name of the constitutional doctrine through which this was achieved is the "incorporation doctrine.") In subsequent decades, later courts identified additional "fundamental" rights. Indeed, by 1964, the Court had identified more than half of the promises found in the Bill of Rights as applicable to the states.[228]

In addition to making a turning point in American law, *Gitlow* represented the culmination of twenty-five years of Jewish lawyers' efforts to broaden standard understandings of the First Amendment. The arguments that Gitlow's lawyers presented in court were claims they had developed and deployed for over two decades. Indeed, these were arguments that later generations of radical Jewish lawyers would continue to deploy (with mixed success) for the remainder of the twentieth century.

In the wake of *Gitlow*, speech restrictions began to loosen in the 1930s, as courts began to incorporate the Supreme Court's ruling that individual were entitled to First Amendment rights. In 1931, the U.S. Supreme Court struck down California's red flag law when it extended rights associated with the Freedom of Speech to "expressive conduct."[229]

---

[228] Paul C. Bartholomew, "The Gitlow Doctrine Down to Date, II," *American Bar Association Journal* 54, no. 8 (August 1968): 785-787.

[229] In *Stromberg v. California*, 283 U.S. 359 (1931) the Court struck down a California statute that banned red flags. The defendant, the nineteen year-old Yetta Stromberg, was a member of the Young Communist League and was working as a camp counselor at a communist summer camp. Her daily responsibilities included overseeing a daily ceremony in which campers raised and saluted then a red flag. In 1929, she was arrested and charged with a felony under the California Red Flag Law of 1919. John Beardsley represented Stromberg, the daughter of two Jewish Russian immigrants. Beardsley had been selected by both the ACLU and International Labor Defense lawyers to argue Stromberg's case. See Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 90.

Likewise, in 1937, in a case brought by radical Jewish lawyers Morris Ernst, Lee Pressman, Benjamin Kaplan, and Spaulding Frazer on behalf of the Committee for Industrial Organization, the Court ruled that New Jersey Mayor Frank Hague's city ordinance banning labor meetings in pubic spaces violated the First Amendment's promise of the freedom of assembly.[230] In 1938, Ernst successfully defended *Life* magazine publisher Roy Larsen, who was charged with violating obscenity laws for his publication of pictures of human childbirth.[231]

In addition to the effects of Gitlow, the 1930s were a decade of change because some Jewish lawyers were appointed to municipal and sometimes even the federal bench, positions in which their personal convictions about the First Amendment could have effect in their respective rulings. In 1933, for example, Morris Ernst and Alexander Lindley represented Herman Miller, who was charged for violating Section 1141 of the Penal Law because of his publication of Gustave Flaubert's *November*. In court, they presented their case before Judge Jonah Goldstein, Sanger's former attorney.[232] Evidence of Goldstein's past as a free speech advocate was evident in court. Refusing to act as guardian of morality, he noted in his decision that his "duty [was] to act as an observer and recorder—not regulator." Accordingly, after "[reading] the book carefully," Goldstein found that "it reflects no violation of Section 1141 of the Penal Law… The obscenity statute was not intended to suppress bona fide literary effort but rather to prohibit the exploitation of smut—dirt in the raw." He dismissed the complaint against Miller.

---

[230] *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).
[231] For a discussion of this case in the context of masculinity, see Matthew Joel Silverman, "Pursuing Celebrity, Ensuing Masculinity: Morris Ernst, Obscenity, and the Search for Recognition," PhD Dissertation, University of Texas-Austin, 2006. Publication no. DA3266888.
[232] Complaint of *Sumner v. Miller*, 279 N. Y. S. 583 (1935). Court opinion found in Jonah J. Goldstein Papers, Court Opinion, May 8, 1935, box 5, folder 2, American Jewish Historical Society, New York, NY.

The flourishing of civil liberties organizations also helped to broaden interpretations of the First Amendment (and establish civil rights by way of case law). By the 1930s, the ACLU had become the premier organization for the advancement of civil liberties in the United States. Between 1929 and 1959, two Jewish lawyers of central European descent shared the title of ACLU general counsel with Arthur G. Hayes. In 1933, he successfully defended the publisher Random House, which was charged with violating obscenity laws for its publication of James Joyce's novel *Ulysses.* Further, on February 20, 1937, radical Jewish lawyers largely affiliated with the Communist Party established the National Lawyers Guild, a professional organization for progressive attorneys, as an alternative to the American Bar Association, (which did not admit black lawyers until 1943).[233] Although the NLG was primarily focused on civil rights, they too litigated First Amendment cases.

Despite the changes of the 1930s, the decade did not see the end of speech restrictions. Speech limitations persisted and, in fact, new restrictions came into existence throughout the twentieth century. And, as they had for the previous two decades, Jewish lawyers continued to battle these limitations. In 1959, in a case argued by famed Jewish First Amendment attorney Charles Rembar, a cousin of Norman Mailer and lead attorney for Grove Press, an alternative publishing house owned by Barney L. Rosset, a federal district judge repealed a ban on D. H. Lawrence's novel, *Lady Chatterley's Lover*, and redefined obscenity as something "utterly without redeeming social importance."[234] In 1966, New York City-born, Yale Law School graduate Herman R. Uviller, the son of attorney Harry Uviller, defended Edward Miskin, who had been charged with violating New York's obscenity laws

---

[233] Anna Fagan Ginger and Eugene Tobin, eds., *The National Lawyers Guild: From Roosevelt to Reagan* (Philadelphia, PA: Temple University Press, 1988).

[234] *Grove Press, Inc. v.* Christenberry, 175 F. Supp. 488 (S. D. N. Y. 1959); Laura Mansnerus, "Charles Rembar, 85, Dies; Lawyer Fought Censorship," *New York Times*, October 26, 2000.

on account of his production of fifty books which depicted homosexual sex. In what was surely a creative interpretation of *Roth*, Uviller unsuccessfully argued that because Mishkin's work did not appeal to the "prurient" interest of the average person—the standard articulated in 1957's *Roth*—his client did not produce obscene material.[235] In 1968, Los Angeles-born, Harvard Law School-educated Melville B. Nimmer successfully represented Paul R. Cohen, who wore a jacket that displayed the phrase "Fuck the Draft" while in a California courthouse and was consequently charged with violating the state's penal code, which forbid "maliciously and willfully disturb[ing] the peace."[236] In 1973, Chicago-born, HLS-educated lawyer Harry M. Plotkin argued (unsuccessfully) that comedian George Carlin's "Filthy Words" broadcast was entitled to First Amendment protections.[237] In 1989, William C. Kunstler and David C. Cole represented Gregory Johnson, a member of the Revolutionary Communist Youth Brigade who had burned a stolen American flag outside the Republican National Convention in Dallas, Texas. Kunstler and Cole successfully argued that flag burning was protected speech. (As a result, the Court overturned the forty-eight laws in as many states that prohibited the desecration of so-called venerated objects such as the American flag.)[238]

Over the course of the twentieth century, what constituted permissible speech completely transformed as a result of judicial reinterpretation of the First Amendment. While

---

[235] *Mishkin v. New York*, 383 U.S. 502 (1966).
[236] *Cohen v. California*, 403 U.S. 15 (1971); on Melville B. Nimmer see Wolfgang Saxon, "Melville B. Nimmer, 62, Dies; Expert on Law of Copyright," *New York Times*, November 27, 1985.
[237] See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). On Harry M. Plotkin see "Lawyer Harry Plotkin Dies," *Washington Post*, January 31, 1998.
[238] See *Texas v. Johnson*, 491 U.S. 397 (1989). Forty-eight of fifty American states banned desecration of the American flag until 1989. The U.S. Supreme Court finally overturned state prohibitions forbidding the desecration of so-called venerated objects such as the American flag in *Texas v. Johnson*. This case framed speech rights as including "expressive conduct" as well as "verbal communication." See Robert Goldstein, *Flag Burning and Free Speech: The Case of* Texas v. Johnson (Lawrence, KS: University Press of Kansas, 2000).

these shifts cannot be attributed solely or sometimes even directly to the work of Jewish lawyers, Jewish lawyers were nonetheless central to these changes. By framing cases involving arrested labor protestors, antiwar cartoonists, and birth control champions as First Amendment cases; by identifying political dissenters as victims of state repression; by classifying imprisoned red-flag wavers as individuals deprived of their Constitutionally promised civil liberties, their work in the first two decades of the twentieth century laid the intellectual foundation for post-*Gitlow* cases. Moreover, through their persistent, loud, and clear-eyed public advocacy of broad speech, press, and assembly rights, Jewish lawyers shifted Americans' expectations about their civil liberties. While Jewish lawyers rarely (if ever) possessed enough power to singlehandedly transform standard interpretations of the First Amendment, their use of Constitutional arguments in court introduced judges, jurors, and even outside observers to the idea that the First Amendment protected individuals' civil liberties from state regulation. But for Jewish lawyers' persistent claims that the First Amendment entitled Americans to express themselves freely, the judiciary's gradual (and ultimately sweeping) reinterpretation of the First Amendment would not have happened.

[Conclusion] Legacies

Today, Jewish lawyers are ubiquitous to the extent that they are a trope in American popular culture. In addition to being a plot point of a 2011 episode of the television sitcom, *Curb Your Enthusiasm*,[1] a 2013 YouTube video entitled "Rappers Love Jewish Lawyers" features twenty-six different rappers rapping about the skillfulness of their respective Jewish attorneys.[2] These comedic representations highlight Jewish lawyers' visibility and their presumed capacity to serve their clients. Yet, Jewish lawyers were not always perceived as consummate professionals. Far from being quintessential authorities, late nineteenth- and early twentieth-century Jewish lawyers were outsiders and underdogs. They stood apart from and often in contradiction with mainstream legal thought and practice.

Jewish lawyers first became a significant minority in the American bar in the final two decades of the nineteenth century when an expanding, increasingly centralized legal system facilitated their mass entry into the legal profession. Jewish lawyers' cultural distinctiveness, immigrant backgrounds, left-leaning politics, and status as a non-Christian minority distinguished them from non-Jewish lawyers. As a result of these differences and persistent anti-Jewish bias in the legal profession, they represented marginalized people and presented new interpretations of what the law was and should be. Consequently, Jewish lawyers

---

[1] In this particular episode the show's protagonist, Larry David, discovered that his divorce attorney, Andrew Berg, is not Jewish, but Swedish, and swiftly fired him. Certain of the superiority of Jewish lawyers' legal acumen, David replaced Berg with Hiram Katz, a Jew whom he mistakenly believed was a more capable advocate. See Larry David, "The Divorce," *Curb Your Enthusiasm*, episode no. 71, directed by David Steinberg, first aired July 10, 2011. This was not the first television show to feature this plot. In a 1971 episode of the television sitcom, *All in the Family*, the show's protagonist, Archie Bunker, needed the assistance of an attorney and therefore called the law firm Rabinowitz, Rabinowitz, and Rabinowitz. When the firm assigned Whitney Fitzroy IV to his case, Bunker refused his services and demanded that a Jewish lawyer represent him, expressing satisfaction only upon the arrival of Sol Rabinowitz, a stereotypical-looking Jewish attorney. See Stanley R. Ross, "Oh, My Aching Back," *All In the Family*, episode no. 3, directed by John Rich, first aired January 26, 1971.

[2] Slackstory, "Rappers Love Jewish Lawyers," filmed August 8, 2013. YouTube video, 3:39. Posted August 8, 2013. Available https://www.youtube.com/watch?v=q5lQRZXx8BE. Last accessed July 7, 2016.

redirected the trajectory of American law.

In the area of immigration, Jewish lawyers helped prevent the exclusion and deportation of approximately 100,000 people. They did this by appearing in Ellis Island and other immigrant processing centers and advocating on behalf of individuals whom they identified as having been unjustly denied admission. By appealing aliens' exclusion orders and helping them navigate the complex bureaucracy of the U.S. immigration system, they ensured that people who otherwise would have been returned to their places of origin were admitted into America. American Jewish lawyers also prevented the exclusion and deportation of an unknown number of others by initiating litigation, the lasting effects of which eased the process of immigration for all subsequent newcomers. Although they did not always win the cases that they brought to court, the collective efforts of individuals such as Max Kohler, I. Irving Lipsitch, and Simon Wolf helped forge the practice of what today is known as immigration law.

At the same time, American Jewish lawyers affiliated with the Socialist Party helped enshrine workers' rights in American law. By challenging injunctions, asserting laborers' rights to protest, boycott, and picket, and defending workers charged with crimes for union-related activities, Jewish lawyers such as Morris Hillquit, Jacob Panken, Isaac Hourwich, and Meyer London laid the foundation for what became state policy through the passage of New Deal legislation. Although before the 1930s courts rejected many of the ideas that these lawyers advanced, during the mid-century they became widely accepted norms.

Finally, in the first quarter of the twentieth century, Jewish lawyers oversaw the broadening of judicial and popular interpretations of the First Amendment. They initiated test cases and defended individuals charged with crimes on account of their publications, verbal

expressions, and involvement with radical political movements and presented judges with the argument that the First Amendment of the U.S. Constitution protected their clients' right to free expression and assembly. As a result, lawyers such as Henry L. Slobodin, Charles Solomon, Charles Recht, William Karlin, and Harry Weinberger spearheaded the effort to broaden judicial interpretations of the First Amendment. Moreover, by framing activities such as soapboxing and displaying red flags as free speech issues, they established how legal experts would think about these activities for the next one hundred years.

In short, Jewish lawyers engaged with the American legal system in distinctive ways. By espousing new notions of equity and equality and fairness, serving underprivileged communities, and employing alternative dispute mechanisms, they diversified the bar's social composition and the communities it served. By bringing new issues to court, Jewish lawyers enlarged and altered the law's substantive content. By displeasing the court, they prodded American law towards the ideals of democracy, equitability, and justice.

Examining the professional pursuits of late nineteenth- and early twentieth-century Jewish lawyers who were common practitioners reveals the everyday circumstances that inspired Jewish lawyers to litigate the cases and pursue the work that they did. In so doing, this dissertation recasts the origins of immigration, labor, and First Amendment law. In addition, this study of Jewish lawyers' work reveals a more general truth about the construction of American law: the social composition of the American bar has direct bearing on its development. Who practices law not only determines how legal questions are answered but also what questions are asked and by whom. In this way, this dissertation provides insight into current debates about the social configuration of the bar and judiciary and the importance of racial, ethnic, religious, and gender diversity in both.

This study of Jewish lawyers also bears on the experience of American Jews. Contrary to the common presumption that Jews in America prospered because of America's laws, exploring the work of late nineteenth- and early twentieth-century Jewish lawyers reveals that American laws often represented obstacles for Jews to overcome. Often, in order for Jews to achieve their goals—whether they wanted to become immigrants, union members, political activists, or publishers—they needed to appear in court and argue for the law to accommodate their desires. The United States' willingness to accommodate the various forms of diversity embodied by Jewish Americans hinged on legal battles.

[Bibliography]

Archival Collections
American Jewish Archives, Cincinnati, OH (AJA)
American Jewish Historical Society, Center for Jewish History, New York, NY (AJHS)
Columbia University Special Collections, New York, NY
New York City Municipal Archives, New York, NY
New York Public Library, Archives and Manuscript Division, New York, NY (NYPL)
United States National Archives, Washington D.C.
Tamiment Library and Robert F. Wagner Labor Archives, New York, NY
Walter P. Reuther Library, Wayne State University, Detroit, MI
Wisconsin Historical Society Library and Archives, Madison, WI
Yale University Library, Archives and Manuscript Division, New Haven, CT
YIVO, Center for Jewish History, New York, NY

Newspapers
Brooklyn Daily Eagle
Boston Evening Transcript
The Call
Jewish Daily Forward
Los Angeles Times
New York Daily Tribune
New York Tribune
New York Times
New York Post
Plattsburgh Sentinel
Publisher's Weekly
The Troy Times

Journals
American Bar Association Journal
American Law School Review
American Jewish Archives
American Jewish Historical Quarterly
American Jewish History
American Jewish Year Book
American Jewess
American Journal of Economics and Sociology
American Journal of International Law
American Journal of Legal History
American Quarterly
American Sociological Review

American Studies
American University Magazine
Annals of the American Academy of Political and Social Science
Australia & New Zealand Journal of Law and Education
Bench and Bar
Birth Control Review
Boston College Law Review
Brooklyn Law Review
Business and Economic History
California Legal History
Cardozo Law Review
Chicana/o Latina/o Law Review
Chinese Heritage Quarterly
Clearing House Review
Columbia Law Review
Contemporary Jewry
Cornell Law Quarterly
Current Literature
Desert Evening News
Dynamis
Florida State University Law Review
Fordham Urban Law Journal
Green Bag
Harvard Law Review
Hofstra Law Review
Illinois Law Review
Industrial and Labor Relations Review
Iowa Law Review
Israel Law Review
Journal of American History
Journal of American Ethnic History
Journal of History of Ideas
Journal of Law and Society
Journal of Legal Education
Journal of Legal Profession
Jewish Criterion
Jewish History
Jewish Immigration Bulletin
Jewish Messenger
Jewish Social Studies
Labor and Law
Law and History Review
Law and Social Inquiry
Law and Society Review
Leo Baeck Yearbook

The Liberator
Literary Digest
New Broadway Magazine
New York University Law Review
New York University School of Law Review of Law and Social Change
NY Litigator
The Menorah
Monthly Review of the U.S. Bureau of Labor Statistics
Ohio State Law Journal
Pacific Historical Review
Political Science Quarterly
Quarterly Journal of Economics
Rocky Mountain Law Review
Southern California Law Review
St. John's Law Review
Stanford Journal of Civil Rights and Civil Liberties
Studies in Jewish Literature
Successful American
The Survey
Tammany Times
Tel Aviv University Studies in Law
Texas Technical Law Review
University of Chicago Law Review
University of Detroit Mercy Law Review
University of St. Thomas Law Journal
Urban Law Journal
Virginia Law Review
WorkingUSA
Yale Law Journal

Court Decisions

U.S. Supreme Court

Abrams v. U.S., 250 U.S. 616 (1919)
Ah How alias Louis Ah How v. U.S., 195 U.S. 65 (1904)
American Steel Foundries v. Tricity Central Trades Council, 257 U.S. 184 (1921)
Associated Press v. Labor Board, 301 U.S. 103 (1937)
Barron v. Baltimore, 32 U.S. 243 (1833)
Bradwell v. Illinois, 83 U.S. 130 (1873)
Brandenburg v. Ohio, 395 U.S. 444 (1969)
Chin Bak Kan v. U.S., 186 U.S. 193 (1902)
Chin Ying v. U.S., 186 U.S. 202 (1902)
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)
Chy Lung v. Freeman, 92 U.S. 275 (1875)
Cohen v. California, 403 U.S. 15 (1971)

Davis v. Massachusetts, 167 U.S. 43 (1897)
De Jonge v. Oregon, 299 U.S. 353 (1937)
Debs v. U.S., 249 U.S. 211 (1919)
In re Debs, 158 U.S. 564 (1895)
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)
Gegiow v. Uhl, 239 U.S. 3 (1915)
Gitlow v. New York, 268 U.S. 652 (1925)
Hague v. CIO, 307 U.S. 496 (1939)
Halter v. Nebraska, 205 U.S. 34 (1907)
Landmark Communications v. Virginia, 435 U.S. 829 (1978)
Ling Sing v. U.S., 180 U.S. 486 (1901)
Lochner v, New York, 198 U.S. 45 (1905)
Luria v. U.S., 213 U.S. 9 (1913)
Mishkin v. New York, 383 U.S. 502 (1966)
Muller v. Oregon, 208 U.S. 412 (1908)
National Labor Review Board v. Jones & Laughin Steel Corp, 301 U.S. 1 (1937)
Nationalist Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)
New York Times v. U.S., 403 U.S. 713 (1971)
Patterson v. Colorado, 205 U.S. 454 (1907)
Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935)
Schenck v. U.S., 249 U.S. 47 (1919)
Selective Draft Law Cases, 245 U.S. 366 (1918)
Stromberg v. California, 283 U.S. 359 (1931)
Texas v. Johnson, 491 U.S. 397 (1989)
Tom Hong v. U.S., 193 U.S. 517 (1904)
U.S. v. Cruikshank, 92 U.S. 542 (1876)
U. S. v Ju Toy, 198 U.S. 253 (1905)
U.S. v. Lee Yen Tai, 185 U.S. 213 (1902)
U.S. v. O'Brien, 391 U.S. 367 (1968),
U.S. v. Wong Kim Ark, 169 U.S. 649 (1898)
Whitney v. California, 274 U.S. 357 (1927)

U.S. Circuit Courts

In re Hirsch Berjanski, 47 Fed. 445 (E. D. N.Y. 1891)
Cohen v. United Garment Workers of America, 72 N.Y. Supp. 341 (Sup. Ct. 1901)
In re Feinknopf, 47 Fed. 477 (E. D. N.Y. 1891)
Fong Ping Ngar v. U.S., 223 Fed. 523 (C. C. A. 1915)
Grove Press, Inc. v. Christenberry, 175 Fed. Supp. 488 (S. D. N. Y. 1959)
In re Li Foon, 80 Fed. 881 (S. D. N. Y. 1897)
Masses Publishing Co. v. Patten, 244 F. 535 (S. D. N. Y. 1917)
U.S. v. Hom Young, 198 Fed. 577 (D. C. 1912)
U.S. v. Wallis, 279 Fed. 401 (C. C. A. 1922)
U.S. v. Wong Quong Wong, 94 Fed. 832 (Dist. Ct. 1899)
Yee King et al. v. U.S., 179 Fed. 369 (C. C. A. 1910)

State Courts
City of Shreveport v. Levy, 26 La. Am. 671 (La. 1875)
Massachusetts v. Davis, 162 Mass. 510 (1895)
Fairbanks v. Kerr, 10 Am.R. 664 (Pa. 1872)
Garside v. Hollywood, 88 Misc. 311 (N. Y. C. Misc. 1914)
Grand Shoe Co. v. Children's Shoe Workers' Union, 187 N. Y. Supp. 886 (Sup. Ct. 1920)
Jaeckel v. Kaufman et al, 187 N.Y. Supp. 889 (Sup. Ct. 1920)
L. Daitch & Co. v. Retail Grocery & Dairy Clerks' Union, 129 Misc. 343 (Sup. Ct.1927)
In re Leung, 86 Fed. 393 (S. D. N. Y. 1898)
Message Photoplay Co. v. Bell, 100 Misc. Rep. 267 (Sup. Ct. 1917)
Morris Siselman v. Harris Cohen et al., 25 Misc. 529 (Sup. Ct. 1898)
People v. Margaret H. Sanger, 222 N. Y. 192 (N.Y. 1918)
Rentner v. Sigman, 216 N. Y. Supp. 79 (Sup. Ct. 1926)
Schwarcz v. ILGWU, 124 N.Y. S. 968 (1910)
Segenfeld et al. v. Friedman et al, 117 Misc. Rep. 731 (N.Y. Misc. 1922)
Sinsheimer v. United Garment Workers of America, 5 Misc. 488 (N.Y. Misc. 1893)
Sinsheimer v. United Garment Workers of America, 77 Hun. 215 (1894)
People v. Gitlow, 183 N.Y.S. 846 (N.Y. Spec. Term 1920)
People v. Gitlow, 187 N.Y.S. 783 (N.Y. App. Div. 1921)
People v. Gitlow, 234 N.Y. 132 (N.Y. 1922).
Siselman v. Harris Cohen, 25 Misc. 529 (Sup. Ct. 1898)
Sumner v. Miller, 279 N. Y. S. 583 (City Ct. 1935)
People v. Most, 128 N.Y. 108 (N. Y. 1891)
People v. Most, 36 Misc. 139 (N. Y. 1901)
People v. Most, 171 N.Y. 423 (C. C. N. Y. 1902)
People v. Weinberger, 239 N. Y. 307 (1925)

Laws
Federal
Act of March 3, 1893, 27 Stat. 569
Act of March 4, 1913, chap. 141, 37 Stat. 736
Act of February 20, 1907, 34 Stat. 989
Act of March 23, 1932, chap. 90, 47 Stat. 70
Anti-Contract Labor Law of 1885, chap. 164, 23 Stat. 332
Chinese Exclusion Act, 22 Stat. 58 (1882)
Comstock Act, 17 Stat. 599 (1873)
Geary Act, 27 Stat. 25 (1892)
Immigration Act of 1882, 22 Stat. 214
Immigration Act of 1891, 26 Stat. 1084
Immigration Act of March 3, 1903, 32 Stat. 1213
Immigration Act of 1907, 34 Stat. 898
National Labor Relations Act, 29 U.S.C. § 151-169.
Revenue Act of 1913, chap. 16, 38 Stat. 114

Selective Service Act of 1917, chap. 15, 40 Stat. 76
Sherman Antitrust Act of 1914, 26 Stat. 209, 15 U.S.C. 1-7

State
California Penal Code, §403a
New York Constitution, art. I, §8
New York Criminal Anarchy Act, Penal Code, chap. 40, §160, 161 (1902)
New York Penal Laws, chap. 40, §1140a.
California Criminal Anarchy Statute, Penal Code, § 403a (1919)

Annual Reports and Catalogues

Commission on Law and Social Action, A Survey of the Employment Experiences of Law School Graduates of Chicago, Columbia, Harvard, and Yale Universities. New York, NY: American Jewish Congress, 1954.

Board of Delegates. *Annual Report of the Union of American Hebrew Congregation*, Vol. 42-44, 1916.

Columbia College in the City of New York Catalogue 1894-1895. New York, NY: Columbia College, 1897.

Hebrew Sheltering and Immigrant Aid Society. *First Annual Report*. New York, NY, 1909.

U.S. Attorney General. *Annual Report of the Attorney General of the United States for The Year 1897.* 55th Congress, Washington D.C., Government Printing Office, 1897.

U.S. Commissioner-General of Immigration. *Annual Report of the Commissioner-General of Immigration for the Fiscal Year Ended June 30, 1909*. Washington D.C., Government Printing Office, 1909.

U.S. Congressional Committee on the Judiciary. *Espionage and Interference with Neutrality: Hearings before the Committee on the Judiciary*. 65th Congress, 1st Session, April 9 and 12, 1917. Washington D.C.: Government Printing Office, 1917.

U.S. House of Representatives. *Commission on Industrial Relations, 1912-1915, Final Report of the Commission on Industrial Relations*. 64th Congress, 1st Session, Washington D.C.: Government Printing Office, 1916.

U.S. Industrial Commission. *Reports of the Industrial Commission on Labor Organizations*, vol. 17. 57th Congress, 1st Session, Washington D.C.: Government Printing Office, 1902.

Published Primary Sources

Ashley, Clarence D. "The Maintenance of Regular Courses of Instruction in Law at Night, Parallel to Courses in the Day, Does Not Tend Inevitably to Lower Educational Standards: A Protest." New York, NY, 1914.

Blackstone, William. *Commentaries on the Laws of England: A Facsimile of the first edition of 1765-1769*, ed, Stanley N. Katz, Chicago, IL: University of Chicago Press, 1979.

Boston, Charles A. "A Code of Legal Ethics." *The Green Bag* 20 (1908): 224-231.

Chaffee, Jr., Zechariah. *Freedom of Speech* (1920)

Cohen, Julius H. *Law and Order in the Industry: Five Years' Experience*. New York, NY: Macmillian Company, 1916.

Coudert, Frederic R. "The Crisis of the Law and Professional Incompetency." *Annual Report of the American Bar Association* 34 (1911): 677-688.

Frankfurter, Felix. "Learned Hand." *Harvard Law Review* 75, no. 1 (Nov. 1961): 1-4.

Frankfurter, Felix and Harlan B. Phillips. *Felix Frankfurter Reminisces*. New York, NY: Praeger, 1978.

Goldman, Emma. *Living My Life: Emma Goldman In Two Volumes*. New York, NY: Dover Publications, 1970.

Goldstein, J. Jonah. "The Birth Control Clinic Cases." *The Birth Control Review* 1, no. 1 (February 1917): 8.

Hillquit, Morris. *Socialism in Theory and in Practice*. New York, NY: MacMillan Company, 1912.

Kohler, Max J. *Immigration and Aliens in the United States: Studies of American Immigration Laws and the Legal Status of Aliens in the United States.* New York, NY, Bloch Publishing, 1936.

---. "Un-American Character of Race Legislation." *Annals of the American Academy of Political and Social Science* 34, 2 (September 1909): 275-293.

---. "Methods of Review in Criminal Cases in the United States." In *The Necessity for Criminal Appeal as Illustrated by the Maybrick Case and the Jurisprudence of Various* Countries*,* 501-538, ed. Joseph H. Levy, London: P.S. King and Son, 1899.

May, Max B. "Women and the Law," *The American Jewess* 5, no. 4 (July 1897): 176-177.

"Problems of Immigration." *Annals of the American Academy of Political and Social Science* 24 (July 1904): 153-157.

Recht, Charles. *American Exclusion and Deportation Laws.* New York, NY: Workers Defense Union, 1919.

Rowe, William V. "Legal Clinics and Better Trained Lawyers—A Necessity." *Illinois Law Review* 11, no. 9 (1917): 591-618.

Sargent, Frank P. "Problems of Immigration." *Annals of the American Academy of Political and Social Science* 24 (July 1094): 155-157.

Stone, Harlan Fiske. *Law and Its Administration*. New York, NY: Columbia University Press, 1915.

Story, Joseph. "Natural Law." In *Encyclopedia Americana: A Popular Dictionary of Arts, Sciences, Literature, History and Biography*. Volume 9, edited by Francis Lieber, Philadelphia, PA: Desilver, Thomas and Company, 1836.

Tiedeman, Christopher. *The Unwritten Constitution of the United States*. 1890.

Waldman, Louis. *Labor Lawyer*. New York, NY: E. P. Dutton, 1944.

Weinberger, Harry. "A Rebel's Interrupted Autobiography: A Personal Document on the Impact of War on One Who Has Made a Lifelong Fight Against It." *The American Journal of Economics and Sociology* 2, no. 1 (October 1942): 111-122.

Whitney, James A. *The Chinese and the Chinese Question.* (1880).

Wolf, Simon. *The Presidents I Have Known From 1860-1918*. Washington D.C.: Byron S. Adams, 1922.

Dissertations and Theses

Ernst, Daniel R. "The Lawyers and the Labor Trust: A History of the American Anti-Boycott Association, 1902-1919." PhD diss., Princeton University, 1989.

Hester, Torrie. "Deportation: Origins of a National and International Power." PhD diss., University of Oregon, 2008.

Hovey, Elizabeth B. "Stamping Out Smut: The Enforcement of Obscenity Laws, 1872-1915." PhD diss., Columbia University, 1998.

Silverman, Matthew Joel. "Pursuing Celebrity, Ensuing Masculinity: Morris Ernst, Obscenity, and the Search for Recognition." PhD diss., University of Texas-Austin, 2006.

Secondary Sources

Abel, Richard L. *American Lawyers*. New York, NY: Oxford University Press, 1989.

Abernathy, Glen. *The Right of Assembly and Association*. Columbia, SC: University of South Carolina Press, 1961.

Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*. New York, NY: Rowman & Littlefield, 1999.

Abramovitch, Ilana and Sean Galvin, eds. *Jews of Brooklyn*. Waltham, MA: Brandeis University Press, 2001.

Abrams, Kerry. "Polygamy, Prostitution, And the Federalization of Immigration Law." *Columbia Law Review* 105, no. 3 (April, 2005): 641-716.

Abt, John J. *Advocate and Activist: Memoirs of an American Communist Lawyer*. Urbana, IL: University of Illinois Press, 1994.

Antler, Joyce. *The Journey Home: How Jewish Women Shaped Modern America*. New York, NY: The Free Press, 1997.

Anthes, Louis. *Lawyers and Immigrants, 1870-1940: A Cultural History*. Levittown, TX: LFB Scholarly Publishing, 2003.

---. "The Island of Duty: The Practice of Immigration Law on Ellis Island." *New York University School of Law Review of Law and Social Change* 24, (1998): 563-600.

"Annual Tuition Fees in Law Schools." *American Law School Review* 1, no. 9 (1902-1906): 311-312.

Auerbach, Jerold S. *Unequal Justice: Jewish Lawyers and Social Change in Modern America.* New York, NY: Oxford University Press, 1976.

---. "From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience." *American Jewish Historical Quarterly* 66, no. 2 (1976): 249-284.

---. *Justice Without Law?: Resolving Disputes Without Lawyers*. New York, NY: Oxford University Press, 1984.

---. *Rabbis and Lawyers: The Journey from Torah to Constitution*. Bloomington, IN: Indiana University Press, 1993.

---. "Enmity and Amity: Law Teachers and Practitioners, 1900-1922." In *Law in American History*, ed., Donald Fleming and Bernard Bailyn. Boston, MA: Little Brown, 1971.

Avrich, Paul and Karen Avrich. *Sasha and Emma: The Anarchist Odyssey of Alexander Berkman and Emma Goldman*. New York, NY: Belknap Press, 2012.

Babson, Steve. *The Color of Law: Ernie Goodman, Detroit, and the Struggle for Labor and Civil Rights*. Detroit, MI: Wayne State University Press, 2010.

Barnett, George E. "National and District Systems of Collective Bargaining in the United States," *The Quarterly Journal of Economics* 26, no. 3 (May, 1912): 425-443.

Barton, Benjamin H. *Glass Half Full: The Decline and Rebirth of the Legal Profession*. New York, NY: Oxford University Press, 2015.

Bayor, Ronald H. *Encountering Ellis Island: How European Immigrants Entered America*. Baltimore, MD: John Hopkins University Press, 2014.

Beale, Joseph H. "The History of Legal Education." In *Law: A Century of Progress 1835-1935*. Vol. 1, 104-116, New York, NY: New York University Press, 1937.

Beecher, Henry Ward. "Jew and Gentile." *The Menorah* 38, no. 3 (March 1887): 193-204.

Bell, Robert R. *The Philadelphia Lawyer: A History, 1735-1945*. Cranbury, NJ: Associated University Press, 1992.

Bellesiles, Michael A. *1877: America's Year of Living Violently*. New York, NY: New Press, 2010.

Ben-Joseph, Eran and Terry S. Szold. *Regulating Place: Standards and the Shaping of Urban America*. New York, NY: Routeledge, 2004.

Benedict, Michael Les. "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism." *Law and History Review* 3, no. 2 (Fall, 1985): 293-331.

Berkowitz, Michael. "Immigration Restriction and the Emergence of American-Jewish Politics in the United States." In Fahrmeir, A, Faron, O and Weil, P, eds., *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period*, 253-270, New York, NY: Berghahn, 2005.

Berman, Geoffrey D. "A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s." *Virginia Law Review* 80 no. 1 (Feb. 1994): 291-322.

Bernstein, Lisa. "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry." *The Journal of Legal Studies* 21, no. 1 (January 1992): 115-157.

Birmingham, Stephen. *Our Crowd: The Great Jewish Families of New York*. New York, NY: Harper and Row, 1967.

Birn, Anne Emanuelle. "Six Seconds Per Eyelid: The Medical Inspection of Immigrants at Ellis Island, 1892-1914." *Dynamis,* 17 (1997): 281-316.

Bloomfield, Maxwell. "John Mercer Langston and the Training of Black Lawyers." In *American Lawyers in A Changing Society, 1776-1876*. Cambridge, MA: Harvard University Press, 1976.

---. "From Deference to Confrontation: The Early Black Lawyers of Galveston, Texas, 1895-1920," in Gerald W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, CT: Greenwood Press, 1984): 150-165.

Bogen, David S. "The Free Speech Metamorphosis of Mr. Justice Holmes." *Hofstra Law Review* 11, no. 1 (1982): 97-189.

Bonnett, Clarence E. "The Origin of the Labor Injunction: A Study of the Evolution of the Law of Conspiracy and Its Application to the Injunction Process in Light of the Conflict Between Combinations of Employers and Employees." *Southern California Law Review* 5 (1931-32): 105-125.

Boorstin, Daniel J. *The Mysterious Science of the Law: An Essay on Blackstone's Commentary.* Chicago, IL: University of Chicago Press, 1941.

Boyer, Paul S. *Purity in Print: The Vice-Society Movement and Book Censorship in America.* New York, NY: Scribner, 1968.

Brandenburg, Broughton. "The Menace of the Red Flag." *The New Broadway Magazine* 20, no. 3 (June 1908): 265-274.

Braudy, Susan. *Family Circle: The Boudins and the Aristocracy of the Left*. New York, NY: Knopf, 2003.

Brissenden, Paul F. "The Labor Injunction." *Political Science Quarterly* 48, no. 3 (September 1933): 413-450.

Brissenden, P. F. and C. O. Swayzee. "The Use of the Labor Injunction in the New York Needle Trades II." *Political Science Quarterly* 44, no. 4 (March 1929): 548-568.

Brockman, Norbert. "The National Bar Association, 1888-1893: The Failure of Early Bar Federation." *American Journal of Legal History* 10 (1966): 122-127.

Broyde, Michael J. *The Pursuit of Justice and Jewish Law: Halakhic Perspectives on the Legal Profession* 2nd ed. New York, NY: Yashar Books, 2007.

Buhle, Paul. *Marxism in the USA: From 1870 to the Present Day*. London, England: Verso, 1987.

Burak, H. P. *History of the United States District Court for the Southern District of New York*. New York, NY: Federal Bar Association of New York, New Jersey, and Connecticut, 1962.

Bustamante, Andres. "Immigration Raids: Search and Seizure." *Chicana/o Latina/o Law Review* 8 (1985): 1043-1050.

Byson, W. H. and E. L. Shepard. "The Virginia Bar, 1870-1900." In *The New High Priests: Lawyers in Post- Civil War America*, ed., Gerald W. Gawalt, 171-185, Westport, CT: Greenwood Press, 1984.

Cannato, Vincent J. *American Passage: The History of Ellis Island*. New York, NY: Harper Collins, 2009.

Capozzola, Christopher. *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen*. Cambridge, MA: Oxford University Press, 2008.

Carrington, Paul D. "The Constitutional Law Scholarship of Thomas McIntyre Cooley." *American Journal of Legal History* 41 (July 1997): 368-399.

Carson, Gerald. *A Good Day at Saratoga*. New York, NY: American Bar Association, 1978.

Cashman, Sean D. *America in the Age of the Titans: The Progressive Era and World War I*. New York, NY: NYU Press, 1988.

Chiswick, Barry R. "The Occupational Attainment and Earnings of American Jewry, 1890 to 1990." *Contemporary Jewry* 20 (1999): 68-98.

Churgin, Michael J. "Lobbying by Jewish Organizations Concerning Immigration: A Historical Study." *University of Detroit Mercy Law Review*, 83 (2005-2006): 947-953.

---. "Immigration Internal Decisionmaking: A View from History." *Texas Law Review* 78, no. 7 (December 2000): 1642-1643.

Cogley, Thomas S. *The Law of Strikes, Lockouts, and Labor Organization*. Baltimore, MD: Press of Sapp Bros, 1894.

Cohen, Naomi W. "Commissioner Williams and the Jews." *American Jewish Archives Journal* 61, no. 2 (2009): 99-126.

---. *Jacob H. Schiff: A Study in American Jewish Leadership*. Hanover, PA: Brandeis University Press, 1999.

"Colleagues for Justice: One Hundred Years of United States Court of Appeals for the Second Circuit." *St. John's Law Review* 65, no. 3 (1991): 938-963.

Commons, John R. *History of Labor in the United States, 1896-1932*. New York, NY: The Macmillan Company, 1935.

Cooper, John. *Pride versus Prejudice: Jewish Doctors and Lawyers in England, 1890-1990*. Portland, OR: Littman Library of Jewish Civilization, 2003.

Corbin, Arthur L. *Simeon Eben Baldwin: Lawyer, Social Scientist, Statesman*. New York, NY: King's Crown Press, 1955.

Cornish, Natalie. *Pioneer Jewish Texans*. College Station, Texas: Texas A&M University Press, 1989.

Daly, Christopher B. *Covering America: A Narrative History of a Nation's Journalism*. Boston, MA: University of Massachusetts Press, 2012.

Dawidowicz, Lucy. "Louis Marshall and the *Jewish Daily Forward*: An Episode in Wartime Censorship, 1917-1918." In *For Max Weinreich in his Seventieth Birthday*, ed. Lucy Dawidowicz, 31-44, London, England: Mouton and Co., 1964.

Dawley, Alan. *Changing the World: American Progressives in War and Revolution*. Princeton, NJ: Princeton University Press, 2003.

"A Day with Judge Leon Sanders." *The Jewish Criterion* 33, no. 9 (October 6, 1911): 1-4

"In Defense of the Immigrant," *American Jewish Year Book 5671*. Philadelphia, PA: The Jewish Publication Society of America (1910): 19-98.

Dell, Floyd. "The Story of the Trial." *The Liberator* (June 1918): 7-18.

Deporter, Ben. "The Upside of Losing." *Columbia Law Review* 113, no. 3 (April 2013): 817-862.

Dershowitz, Alan. *Chutzpah.* New York, NY: Simon & Shuster, 1992.

Diner, Hasia R. *A New Promised Land: A History of Jews in America*. New York, NY: Oxford University Press, 2000.

---. *In the Almost Promised Land: American Jews and Blacks, 1915-1935*. Greenwood, CT: Greenwood Press, 1977.

---. *Lower East Side Memories: A Jewish Place in America*. Princeton, NJ: Princeton University Press, 2000.

Diner, Hasia R., Jeffrey Shandler, and Beth Wenger, eds. *Remembering the Lower East Side: American Jewish Reflections*. Bloomington, IN: Indiana University Press, 2000.

Dinnerstein, Leonard. *Uneasy At Home: Antisemitism and the American Jewish Experience*. New York, NY: Columbia University Press, 1987.

Dollinger, Marc. *Quest for Inclusion: Jews and Liberalism in Modern America*. Princeton, NJ: Princeton University Press, 2000.

"Domestic News." *The Reform Advocate* 52, no. 12 (October 28, 1916): 378.

Drachman, Virginia G. *Sisters in Law: Women Lawyers in Modern American History*. Cambridge, MA: Harvard University Press, 1998.

Draper, Theodore. *American Communism and Soviet Russia: The Formative Period*. New York, NY: Viking Press, 1960.

Drehle, David von. *Triangle: The Fire That Changed America*. New York, NY: Atlanta Monthly Press, 2003.

Dubin, Lois. "Yosef Hayim Yerushalmi, the Royal Alliance, and Jewish Political Theory." *Jewish History* 28, no. 1 (2014): 51-81.

Dubofsky, Melvin. *When Workers Organize: New York City in the Progressive Era*. Amherst, MA: University of Massachusetts Press, 1968.

Early, Frances H. *A World Without War: How U.S. Feminists and Pacifists Resisted World War I.* Syracuse, NY: Syracuse University Press, 1997.

Emmet, Bois. "Trade Agreements in the Women's Clothing Industry in New York City." *Monthly Review of the U.S. Bureau of Labor Statistics* 5, no. 6 (Dec. 1917): 19-39.

Endlemen, Todd. *Leaving the Fold: Conversion and Radical Assimilation in Modern Jewish History*. Princeton, NJ: Princeton University Press, 2015.

Engelbourg, Saul. "Edward A. Filene: Merchant, Civic Leader, and Jew." *American Jewish Historical Quarterly* 66, no. 1 (Sept. 1976): 106-122.

Fagen, Melvin. "The Status of Jewish Lawyers in New York City." *Jewish Social Studies* 1, no. 1 (January 1939): 73-104.

---. "The Jewish Law Student and New York Jobs—Discriminatory Effects in Law Firm Hiring Practices." *Yale Law Journal* 73, no. 4 (March 1964): 625-660.

Fairchild, Amy. *Science at the Borders: Immigrant Medical Inspection and the Shaping of the Modern Industrial Labor Force*. Baltimore, MD: John Hopkins University Press, 2003.

Finnegan, Dorothy E. "Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools, 1890-1940." *Journal of Legal Education* 55, no. 1-2 (2005): 208-233.

Fisher, William W., III, "Legal Theory and Legal Education, 1920-2000." In *The Cambridge History of Law in America*. Vol. 3*,* edited by Michael Grossberg and Christopher Tomlins, 34-72, New York, NY: Cambridge University Press, 1976.

Foner, Eric. *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War*. New York, NY: Oxford University Press, 1995.

Forbath, William. *Law and the Shaping of the American Labor Movement*. Cambridge, MA: Harvard University Press, 1991.

Fox, Richard W. "The Paradox of 'Progressive' Socialism: The Case of Morris Hillquit, 1901-1914." *American Quarterly* 26, no. 2 (May 1974): 127-140.

Frank, John P. *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860*. Cambridge, MA: Harvard University Press, 1964.

Frankfurter, Felix. "Distribution of Judicial Power Between United States and State Courts." *Cornell Law Quarterly* 13 (1927-28): 499-530.

Frankfurter, Felix and James M. Landis. *The Business of the Supreme Court: A Study in the Federal Judicial System*. New York, NY: Macmillan Company, 1928.

Friedman, Andrea. *Prurient Interests: Gender, Democracy, and Obscenity in New York City, 1909-1945*. New York: Columbia University Press, 2000.

Friedman, Lawrence. *American Law in the 20th Century*. New Haven, CT: Yale University Press, 2004.

---. *A History of American Law.* New York, NY: Touchstone, 1973.

Gabler, Neil. *An Empire of Their Own: How the Jews Invented Hollywood.* New York, NY: Anchor Press, 1989.

Galanter, Marc. "A Dissent on Brother Daniel." *Commentary* 36, no. 1 (July 1963), 10-17.

---. "Outside, Inside: Jewish Justices in the Homeless Society." Review of *Two Jewish Justices: Outcasts in the Promised Land* by Robert A. Burt. *Law & Society Inquiry* 14, no. 3 (Summer 1989): 507-526.

---. *Lowering the Bar: Lawyer Jokes and Legal Culture*. Madison, WI: University of Wisconsin Press, 2005.

---. "A Vocation for Law? American Jewish Lawyers and Their Antecedents." *Fordham Urban Law Journal* 26, no. 4 (April 1999): 1125-1148.

Gall, Gilbert J. *Pursuing Justice: Lee Pressman, the New Deal, and the CIO*. New York, NY: State University of New York, 1990.

Garber, David. *Antisemitism in American History.* Chicago, IL: University of Illinois Press, 1986.

Garland, Libby. *After They Closed The Gates: Jewish Illegal Immigration to the United States, 1921-1965*. Chicago, IL: University of Chicago Press, 2014.

Garner, Bryan A. "Does It Please the Court?" *ABA Journal* 99, no. 4 (April 2013): 24-26.

Gartner, Lloyd P. "Jewish Migrants en Route from Europe to North America: Traditions and Realities." *Jewish History* 1, no. 2 (Fall 1986): 49-66.

Gawalt, Gerard W. "The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900." In *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerald W. Gawalt, 97-123, Westport, CT: Greenwood Press, 1984.

Gertzman, Jay A. *Bookleggers and Smuthounds: The Trade in Erotica, 1920-1940.* Philadelphia, PA: University of Pennsylvania Press, 2001.

Ginger, Anna F. *Carol Weiss King: Human Rights Lawyer, 1895-1952*. Boulder, CO: University Press of Colorado, 1993.

Ginger, Anna F. and Eugene Tobin. *The National Lawyers Guild: From Roosevelt to Reagan*. Philadelphia, PA: Temple University Press, 1988.

Glanz, Rudolf. "Jews and Chinese in America." *Jewish Social Studies* 16, no. 3 (July 1954): 219-234.

Glenn, Susan. *Daughters of the Shtetl: Life and Labor in the Immigrant Generation.* Ithaca, NY: Cornell University Press, 1990.

Glennon, Robert J. *The Iconoclast as Reformer: Jerome Frank's Impact on American Law*. New York, NY: Cornell University Press, 1985.

Glick, Joshua. "On The Road: The Supreme Court and the History of Circuit Riding." *Cardozo Law Review* 24 (April 2003): 1753-1844.

Goldberg, Albert I. "Jews in the Legal Profession: A Case of Adjustment to Discrimination." *Jewish Social Studies* 32, no. 2 (April 1970): 148-161.

Goldberg, Gordon J. *Meyer London: A Biography of the Socialist New York Congressman, 1871-1926*. New York: McFarland, 2013.

"The Golden Rule and the Abolition of Racial Prejudice." *The Literary Digest* 22 no. 15, (January 1901): 449-450.

Goldstein, Robert J. *Flag Burning and Free Speech: The Case of* Texas v. Johnson. Lawrence, KS: University Press of Kansas, 2000.

---. "The Anarchist Scare of 1908: A Sign of Tensions in the Progressive Era." *American Studies* 15 (Fall 1974): 55-78.

Goldstein, Eric L. *The Price of Whiteness: Jews, Race, and American Identity*. Princeton, NJ: Princeton University Press, 2008.

Gordon, Robert. "The American Legal Profession, 1870-2000." In *The Cambridge History of Law in America, Vol. 3*, eds., Michael Greenberg and Christopher Tomlins, 74-126, New York: Cambridge University Press, 2008.

Goren, Arthur. *New York Jews and the Quest for Community: The Kehillah Experiment, 1908-1922.* New York, NY: Columbia University Press, 1979.

Gornick, Vivian. *Emma Goldman: Revolution As a Way of Life*. New Haven: Yale University Press, 2011.

Greenwald, Richard A. *The Triangle Fire, the Protocols of Peace, and Industrial Democracy in Progressive Era New York*. Philadelphia, PA: Temple University Press, 2005.

---. "'More than a Strike,' Ethnicity, Labor Relations, and the Origins of the Protocol of Peace in the New York Ladies' Garment Industry." *Business and Economic History* 27, no. 2 (Winter 1998): 318-329.

Greisman, Israel M. "The Jewish Criminal Lawyer's Dilemma." *Fordham Urban Law Journal* 29, no. 6 (August 2002): 2413-2434.

Gunther, Gerald. *Learned Hand: The Man and Judge* 2nd ed. New York, NY: Oxford University Press, 2011.

Halper, Louise A. "Christopher G. Tiedman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age." *Ohio State Law Journal* 51 (1990), 1349-1384.

Hartman, Moshe and Harriet Hartman. *Gender Equality and American Jews.* Albany, NY: State University of New York Press, 1996.

Hartogensis, Benjamin H. "Unequal Religious Rights in Maryland Since 1776." *Publications of the American Jewish Historical Society* 25 (1917): 93-107.

Hattam, Victoria C. "Courts and the Question of Class: Judicial Regulation of Labor under the Common Law Doctrine of Criminal Conspiracy." In *Labor Law in America: Historical and Critical Essays*, eds., Tomlins and King, 44-70, Baltimore, MD: John Hopkins University Press, 1992.

Healy, Thomas. *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*. New York, NY: Metropolitan Books, 2013.

Heeren, Geoffrey. "Illegal Aid: Legal Assistance to Immigrants in the United States." *Cardozo Law Review* 33 (2011): 619-674.

Heinz, John P., Nelson, Robert L., Sandefur, Rebecca L., and Lauman, Edward O. *Urban Lawyers: The New Social Structure of the Bar*. Chicago, IL: University of Chicago Press, 2004.

Herberg, Will. "The Jewish Labor Movement in the United States." *American Jewish Year Book* 53 (1952): 3-74.

Hobson, Wayne K. "Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915." In Gerard W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America.* Westport, CT, 1984.

Hodgkins, Howard L. *Historical Catalogue of the Officers and Graduates of the Columbian 1821-1891.* Washington D.C.: George Washington University Alumni Association*,* 1891.

Hoffer, Peter C, Hoffer, Williamjames H. Hoffer, and N.E.H. Hull. *The Federal Courts: An Essential History*. New York, NY: Oxford University Press, 2015.

Hofstadter, Richard. *Social Darwinism in American Thought, 1860-1915*. Philadelphia, PA: University of Pennsylvania Press, 1944.

Hollinger, David A. *Morris R. Cohen and the Scientific Idea*. Cambridge, MA: MIT Press, 1975.

---. *Science, Jews, and Secular Culture: Studies in Mid-Twentieth-Century American Intellectual History*. Princeton, NJ: Princeton University Press, 1998.

---. *Cosmopolitanism and Solidarity: Studies in Ethnoracial, Religious, and Professional Affiliation in the United States*. Madison, WI: University of Wisconsin Press, 2006.

---."Communalist and Dispersionist Approaches to American Jewish History in an Increasingly Post-Jewish Era." *American Jewish History* 95, no. 1 (March 2009): 1-32.

---. "A Yet More Capacious Expanse for American Jewish History." *American Jewish History* 95, no. 1 (March 2009): 73-78.

Horwitz, Morton J. "The Rise of Legal Formalism." *American Journal of Legal History* 19, no. 4 (October 1975): 251-264.

---. "Jews and Legal Realism." In *Jews and the Law*, eds., Ari Mermelstein, Victoria Saker Woeste, Ethan Zadoff, and Marc Galanter, 309-320, New Orleans, LA: Quid Pro Quo Books, 2014.

Howe, Irving. *World Of Our Fathers: The Journey of the East European Jews to America and the Life They Found and Made*. New York, NY: NYU Press, 2005.

Hühner, Leon. "Jews in the Legal and Medical Professions in America Prior to 1800." *American Jewish Historical Quarterly* no. 22 (1914): 147-165.

Hurst, James Willard. *The Growth of American Law: The Law Makers*. Boston, MA: Little Brown, 1950.

Huskey, Eugene. *Russian Lawyers and the Soviet State: The Origins and Development of the Soviet Bar, 1917-1939.* Princeton, NJ: Princeton University Press, 1986.

Hyman, Paula E. *The Jews of Modern France*. Los Angeles, CA: University of California Press, 1998.

Igra, Anna R. *Wives Without Husbands: Marriage, Desertion, and Welfare in New York, 1900-1935*. Chapel Hill, NC: University of North Carolina Press, 2006.

---. "Marriage as Welfare." *Women's History Review* 15, no. 4 (September, 2006): 601-610.

"In Memoriam: Harry Weinberger, 1885-1944." *American Journal of Economics and Sociology* 3, no. 4 (July 1944): 646.

Inazu, John D. *Liberty's Refuge: The Forgotten Freedom of Assembly*. New Haven, CT: Yale University Press, 2012.

Irons, Peter. *The New Deal Lawyers*. Princeton, NJ: Princeton University Press, 1993.

---. "'Fighting Fair': Zechariah Chafee, Jr., The Department of Justice, and the 'Trial at the Harvard Club.'" *Harvard Law Review* 94 (1980): 1205-1236.

Isserman, Maurice. *Which Side Were You On: The American Communist Party During the Second World War*. Middletown, CT: Wesleyan University Press, 1982.

Ivers, Gregg. *To Build A Wall: American Jews and the Separation of Church and State*. Charlottesville, VA: University of Virginia Press, 1995.

Jacobs, Clyde E. *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon Constitutional Law*. New York. NY: Da Capo Press, 1973.

Jackson, Frederick. *Simeon Eben Baldwin: Lawyer, Social Scientist, Statesman*. New York, NY: King's Crown Press, 1955.

Jaffe, Julian F. *Crusade Against Radicalism: New York During the Red Scare, 1914-1924*. New York, NY: Kennikat Press, 1972.

Jarausch, Konrad. "Jewish Lawyers in Germany, 1848-1938, The Disintegration of a Profession." *Leo Baeck Yearbook* 36 (1991): 171-190.

---. *The Unfree Professions: German Lawyers, Teachers, and Engineers, 1900-1950*. Cambridge, MA: Oxford University Press, 1990.

Johanek, Michael C. and John Puckett. *Leonard Covello and the Making of Benjamin Franklin High School: Education as if Citizenship Mattered*. Philadelphia, PA: Temple University Press, 2007.

Johnson, Christopher. *Maurice Sugar: Law, Labor, and the Left in Detroit, 1912-1950*. Detroit, MI: Wayne State University Press, 1988.

Johnson, William R. *Schooled Lawyers: A Study in the Clash of Professional Cultures*. New York, NY: NYU Press, 1978.

Jones, Alan. "Thomas M. Cooley and 'Laissez Faire Constitutionalism': A Reconsideration." *The Journal of American History* 53, no. 4 (March 1967): 751-771.

Joselit, Jenna W. "The Landlord as Czar: Pre-World War I Tenant Activity." In *The Tenant Movement in New York City, 1904-1984*, eds., Ronald Lawson and Mark Naison, New Brunswick, N.J.: Rutgers University Press, 1986.

Kaestle, Carl F. *Literacy in the United States: Readers and Reading Since 1880*. New Haven, CT: Yale University Press, 1993.

Kalman, Laura. *Abe Fortas: A Biography*. New Haven, CT: Yale University Press, 1990.

Kaplan, Marion. *The Making of the Jewish Middle Class: Women, Family, and Identity in Imperial Germany*. New York, NY: Oxford University Press, 1994.

Karabel, Jerome. *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton*. New York, NY: Houghton Mifflin Harcourt, 2005.

Kessler, Jeremy K. "The Administrative Origins of Modern Civil Liberties Law." *Columbia Law Review* 114, no. 5 (June 2014): 1083-1166.

Kessler, Mark. "Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger." *Law & Society Review* 27, no. 3 (1993): 559-598.

Kett, Joseph F. *The Pursuit of Knowledge Under Difficulties: From Self-Improvement to Adult Education in America, 1750-1990*. Stanford: Stanford University Press, 1994.

Klapper, Melissa. *Ballots, Babies, and Banners of Peace: American Jewish Women's Activism, 1890-1940*. New York: NYU Press, 2013.

Klein, Woody. *Liberties Lost: The Endangered Legacy of the ACLU.* Westport, CT: Praeger, 2006.

Knox, Herman W, ed. *Who's Who in New York: A Biographical Dictionary of Prominent Citizens of New York City and State.* New York, NY: Who's Who Publications, Inc., 1917.

Kohn, Stephen M. *American Political Prisoners: Prosecutions Under the Espionage and Sedition Act.* Westport, CT: Praeger, 1994.

Kohler, Max J. "Biographical Sketch of Kaufmann Kohler." In *Studies in Jewish Literature Issued in Honor of Professor Kaufmann Kohler*. Berlin: Georg Reimer Publisher, 1913.

---. "Judah P. Benjamin: Statesman and Jurist." *American Jewish Historical Quarterly* 12 (1904): 63.

Kovacs, Maria M. *Liberal Professions and Illiberal Politics: Hungary from the Habsburg to the Holocaust*. Washington D.C.: Woodrow Wilson Center Press, 1994.

Kross, Anna M. and Grossman, Howard M. "Magistrates' Courts of the City of New York: History and Organization." *Brooklyn Law Review* 7, no. 2 (Dec. 1937): 133-179.

Kuhne, Gunther. "The Impact of German Jewish Jurists on German Law Until 1933 and Their Immigration Thereafter to the U.S., Israel, and Other Countries." *Tel Aviv University Studies in Law* 15, (2000): 67-77.

Kuzmack, Linda G. *Woman's Cause: The Jewish Woman's Movement in England and the United States, 1881-1933*. Columbus, OH: Ohio State University Press, 1990.

Ladinsky, Jack. "Careers of Lawyers, Law Practice, and Legal Institutions." *American Sociological Review* 28, no. 1 (Feb. 1963): 47-54.

Laidler, Harry W. *Boycotts and the Labor Struggle*. New York: Jane Lane Company, 1913.

Lambert, Josh. *Unclean Lips: Jews, Obscenity, and American Culture*. New York: NYU Press, 2013.

Langum, David J., Sr., *William M. Kunstler: The Most Hated Lawyer in America*. New York, NY: NYU Press, 1999.

LaPiana, William P. *Logic and Experience: The Origin of Modern American Legal Education*. New York: Oxford University Press, 1994.

Larson, Edward. *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion*. New York, NY: Basic Books, 1997.

Lasch, Christopher. "Dennett, Mary Coffin Ware." In *Notable American Women: 1607-1950: A Biographical Dictionary Vol. I*, eds., Edward T. James, Janet Wilson James, and Paul S. Boyer, 463-465, Cambridge, MA: Harvard University Press, 1971.

Lasser, William. *Benjamin V. Cohen: Architect of the New Deal*. New Haven, CT: Yale University Press, 2002.

"Lawyers and Legal Events." *Bench and Bar* 29 (1913): 90.

Leaman, Hans. "Remembering Egypt: Evangelicals, Conservatism, and Immigration in America." In *History, Memory, and Migration: Perception of the Past and the Politics of Incorporation*, eds., Irial Glynn and J. Olaf Kieist, New York, NY: Palgrave Macmillion, 2012.

Leband, David and Deborah Hendry. *Blue Laws: The History, Economics, and Politics of Sunday-Closing Laws.* Lanham, MD: Lexington Books, 1987.

Lee, Erika and Judy Young. *Angel Island: Immigrant Gateway to America*. New York, NY: Oxford University Press, 2010.

Lee, Marc R. "The Jewish Community and Ellis Island, 1909." In *On the History of Jews in the Diaspora*, 172-187, Tev Aviv, Israel: Tel Aviv University Press, 1975.

Leepson, Marc. *Flag: An American Biography*. New York: St. Martin's Griffin, 2005.

Leibman, Arthur. *Jews and the Left*. New York, NY: John Wiley & Sons, 1979.

Lehman, Irving. "Max J. Kohler." *American Jewish Year Book* 37 (1935): 20-25.

Lendler, Marc. *Gitlow v. New York: Every Idea an Incitement*. Lawrence, KS: University Press of Kansas, 2012.

Lengill, Ellen D. *Foley & Lardner: Attorneys at Law, 1842-1992*. Madison, WI: State Historical Society of Wisconsin, 1992.

Leonard, Henry B. "Louis Marshall and Immigration Restriction, 1906-1924." *American Jewish Archives* 24, no. 1 (April 1972): 6-26.

Leonard, Thomas C. "The Beaten Path to the History of a Free Press." *Reviews in American History* 20, no. 2 (June 1992): 247-251.

Levin, Alexandra L. "Thomas Seltzer: Publisher, Fighter for Freedom of the Press, and the Man Who 'Made' D. H. Lawrence." *American Jewish Archives* 41, no. 2 (Jan. 1989): 215-234.

Levin, Leslie C. "Specialty Bars as a Site of Professionalism: The Immigration Bar Example." *University of St. Thomas Law Journal* 8, no. 2 (Winter 2011): 194-224.

---. "Guardians at the Gate: The Backgrounds, Career Path, and Professional Development of Private US Immigration Lawyers." *Law & Social Inquiry* 2 (Spring 2009): 399-436.

Levine, Samuel J. "Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study in the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation." *Journal of Legal Profession* 33 (2008): 1-29.

---. "Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism," *American Journal of Legal History* 47, no. 1 (January 2005): 1-34.

Levinger, Lee J. "Jews in the Liberal Professions in Ohio." *Jewish Social Studies* 2 no. 4, (Oct., 1940): 401-434.

Levinson, Samuel. "Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity." *Cardozo Law Review* 14, (1992-3): 1157-1612.

Lewis, Walker. "The Birth of the American Bar Association." *American Bar Association Journal* (1978): 996-1002.

Li, Tien-Lu Li. *Congressional Policy of Chinese Immigration; Or, Legislation Relation to Chinese Immigration to the United States.* Nashville, TN: Publishing House of the Methodist Episcopal Church: Nashville, 1916.

Lowe, Jennifer M., ed. *The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas*. Washington, D.C.: The Supreme Court Historical Society, 1994.

Macgill, Hugh C. and R. Kent Newmyer. "Legal Education and Legal Thought, 1790-1920." In *Cambridge History of Law in America*, 36-67, eds M. Grossberg and C. Tomlins, Cambridge: Cambridge University Press, 2008.

Maidman, Richard. "Retelling the History of the United States District Court for the Southern District of New York." *NY Litigator* 17, no. 1 (Summer 2012): 9-17.

Mackey, Thomas C. "'They Are Positively Dangerous Men': The Lost Court Documents of Benjamin Gitlow and James Larkin Before the New York City Magistrates Court, 1919." *New York University Law Review* 69 (May 1994): 421-436.

Mansfield, John B. *The History of Tuscarawas County, Ohio: Containing a History of a County.* Chicago, IL: Warner, Beers, and Co., 1884.

Marcus, Jacob Rader. *United States Jewry, 1776-1985*. Vol. 1. Detroit, MI: Wayne State University Press, 1989.

Markel, Howard. *Quarantine! East European Jewish Immigrants and the New York City Epidemics of 1892.* Baltimore, MD: John Hopkins University Press, 1997.

Marsden, George. *Fundamentalism in American Culture*. New York, NY: Oxford University Press, 2006.

Martin, George W. *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870-1970*. Boston, MA: Houghton Mifflin Company, 1970.

Matzko, John A. "'The Best Men of the Bar': The Founding of the American Bar Association." In *The New High Priests: Lawyers in Post-Civil War America*, ed., Gerald W. Gawalt, 75-96, Westport, CT: Greenwood Press, 1984.

McCraw, Thomas K. *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*. New York, NY: Belknap Press, 1986.

McClellan, James. *Joseph Story and the American Constitutional A Study in Political and Legal Thought*. Norman, OK: University of Oklahoma Press, 1971.

McGowan, Carl. *The Organization of Judicial Power in the United States*. Evanston, IL: Northwestern University Press, 1969.

McKee, Delber L. "The Chinese Boycott of 1905-1906 Reconsidered: The Role of Chinese Americans." *Pacific Historical Review* 55, no. 2 (May 1986): 165-191.

Meade, Robert D. *Judah P. Benjamin: Confederate Statesman.* New York, NY: Oxford University Press, 1943.

Medoff, Rafael. *Jewish Americans and Political Participation: A Reference Handbook.* Denver, CO: ABC Clio, 2002.

Mermelstein, Ari, Victoria S. Woeste, Ethan Zadoff, and Marc Galanter, eds. *Jews and the Law.* New Orleans, LA: Quid Pro Quo Books, 2014.

Metzker, Isaac. *A Bintel Brief: Sixty Years of Letters from the Lower East Side to the Jewish Daily Forward.* New York, NY: Doubleday and Company, 1971.

Michels, Tony. *A Fire in Their Hearts: Yiddish Socialists in New York*. Cambridge, MA: Harvard University Press, 2005.

---. "The Lower East Side Meets Greenwich Village: Immigrant Jews and the New York Intellectual Scene." In *Choosing Yiddish: New Frontiers of Language and Culture*, eds., Shiri Goren, Hannah Pressman, and Lara Rabinovitch, 69-85, Detroit, MI: Wayne State University Press, 2012.

---. *Jewish Radicals: A Documentary History*. New York, NY: NYU Press, 2012.

Miles, Albert S., Dagley, David L., and Yau, Christina H. "Blackstone and His American Legacy." *Australia & New Zealand Journal of Law and Education* 5, no. 2 (2000): 46-59.

Miller, Batya. "Enforcement of the Sunday Closing Laws on the Lower East Side, 1882-1903." *American Jewish History* 91, no. 2 (June 2003): 269-286.

Million, Elmer M. "Red Flags and the Flag." *Rocky Mountain Law Review* 13, no. 1 (Dec. 1940): 47-60.

Mills, Barbara. *And Justice for All: The Double Life of Fred Weisgal, Attorney and Musician*. Baltimore, MD: American Literary Press, 2000.

Mitchell, Dalia Tsuk. *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism*. New York, NY: Cornell University Press, 2007.

Moloney, Deirdre M. *National Insecurities: Immigrants and U.S. Deportation Policy Since 1882*. Chapel Hill, NC: University of North Carolina Press, 2012.

Moore, Deborah Dash. *At Home in America: Second Generation New York Jews.* New York, NY: Columbia University Press, 1981.

Morakska, Ewa. *Insecure Prosperity: Small Town Jews in Industrial America, 1890-1940*. Princeton, NJ: Princeton University Press, 1996.

Most, Andrea. *Making Americans: Jews and the Broadway Musical*. Cambridge, MA: Harvard University Press, 2004.

Murlin, Edgar L. *The New York Red Book.* Albany, NY: J. B. Lyon Company, 1913.

Murray, Robert K. *Red Scare: A Study in National Hysteria, 1919-1920.* St. Paul, MN: University of Minnesota Press, 1855.

Nadell, Panela S. "The Journey to America by Steam: The Jews of Eastern Europe in Transition," *American Jewish History* 71 (1981): 269-284.

Nathans, Benjamin. *Beyond the Pale: The Jewish Encounter with Late Imperial Russia*. Los Angeles, CA: University of California Press, 2004.

Nelson, William E. "The Impact of the Antislavery Movement upon the Styles of Judicial Reasoning in Nineteenth Century America." *Harvard Law Review* 87, no. 3 (January 1974): 513-566.

---. *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980*. Chapel Hill: University of North Carolina Press, 2001.

Neuman, Gerald L. "The Lost Century of American Immigration Law, 1776-1875." *Columbia Law Review* 93, no. 8 (December 1993): 1833-1901

Newmyer, R. Kent. "Harvard Law School, New England Legal Culture, and the Antebellum Origins of Jurisprudence." *The Journal of American History* 74, no. 3, (Dec. 1987): 814-835.

Ngai, Mae. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton, NJ: Princeton University Press, 2004.

Nicholson, Philip Y. *Labor's Story in the United States*. Philadelphia, PA: Temple University Press, 2004.

Nigro, Mario and Clare Mauro. "The Jewish Immigrant Experience and the Practice of Law in Montreal, 1830 to 1990." *McGill Law Journal* 44 (1999): 999-1046.

Norwood, Stephen H. *Strikebreaking & Intimidation: Mercenaries and Masculinity in Twentieth-Century America*. Chapel Hill, NC: University of North Carolina Press, 2002.

O'Brien, Ruth. "'Business Unionism,' versus 'Responsible Unionism': Common Law Confusion, the American State, and the Formation of Pre-New Deal Labor Policy." *Law and Social Inquiry* 18, no. 2 (Spring 1993): 255-296.

Oneal, James. *A History of the Amalgamated Ladies' Garment Cutters' Union Local 10*. New York, NY: Ashland Press, Inc., 1927.

"Other Federal Cases." *Administrative Law Bulletin* 9, no. 2 (March 1957): 99-100.

Paludan, Philip S. "Law and the Failure of Reconstruction: The Case of Thomas Cooley." *Journal of the History of Ideas* 33 (1972): 597-614.

Panitz, Esther L. *Simon Wolf: Private Conscience and Public Image*. Cranbury, NJ: Associated University Press, 1987.

Parry, Manon. *Broadcasting Birth Control: Mass Media and Family Planning.* New Brunswick, NJ: Rutgers University Press, 2011.

"Peaceful Picketing in New York, 1912-1926." *Yale Law Journal* 36, no. 4 (February 1927): 557-564.

Pearce, Russell G. "The Jewish Lawyer's Question." *Texas Technical Law Review* 27 (1996), 1259-1270.

Pearson, Drew and Allen, Robert S. *The Nine Old Men*. New York, NY: Doubleday, Doron and Company, Inc., 1936.

Peppers, Todd C. *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*. Stanford, CA: Stanford University Press, 2006.

Pittenger, Mark. *American Socialists and Evolutionary Thought, 1870-1920*. Madison, WI: University of Wisconsin Press, 1993.

Pollenberg, Richard. *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech*. Ithaca, NY: Cornell University Press, 1999.

Polland, Annie and Daniel Soyer. *Emerging Metropolis: New York Jews in the Age of Immigration, 1840-1920*. New York, NY: NYU Press, 2015.

Pomerantz-Zhang, Linda. *Wu Ting-Fang (1842-1922): Reform and Modernization in Modern Chinese History.* Hong Kong University Press, 1992.

Pope, Jesse. *The Clothing Industry in New York*. Columbia, MO: University of Missouri Press, 1905.

Posner, Richard A. *Cardozo: A Study in Reputation*. Chicago, IL: University of Chicago Press, 1993.

Pound, Roscoe. *Organization of the Courts*. Westport, CT: Greenwood Press, 1940.

Powell, Michael J. *From Patrician to Professional Elite: The Transformation of the New York City Bar Association*. New York, NY: Russell Sage Foundation, 1988.

Pratt, Norma F. *Morris Hillquit: A Political History of an American Jewish Socialist.* Westport, CT: Greenwood Press, 1979.

"Professional Tendencies Among Jewish Students in Colleges, Universities, and Professional Schools." In *The American Jewish Year Book.* Philadelphia, PA: Jewish Publication Society of America, 1920.

Prusin, Alexander V. *Nationalizing a Borderland: War, Ethnicity, and Anti-Jewish Violence in East Galicia, 1914-1920*. Tuscaloosa, AL: University of Alabama Press, 2005.

Pulzer, Peter. *Jews and the German State: The Political History of a Minority, 1848-1933*. Cambridge, MA: Blackwell, 1992.

Purcell, Jr, Edward A. *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value*. Lexington, KY: University Press of Kentucky, 1973.

Rabban, David M. "The IWW Free Speech Fights and Popular Conceptions of Free Expression before World War I." *Virginia Law Review* 80, no. 5 (August 1994): 1055-1158.

---. *Free Speech in its Forgotten Years, 1870-1920*. Cambridge, MA: Cambridge University Press, 1999.

---. "The First Amendment in its Forgotten Years." *Yale Law Journal* 90, no. 3 (Jan. 1981): 514-595.

Rahden, Till van. *Jews and Other Germans: Civil Society, Religious Diversity, and Urban Politics in Breslau, 1860-1925.* Translated by Marcus Brainard, Madison, WI: University of Wisconsin Press, 2008.

"A Record of Graduates of the New York University Law School." *American University Magazine* 3 (Nov. 1895): 379.

Reiss, Oscar. *The Jews in Colonial America.* Jefferson, NC: McFarland & Company, 2004.

Rehnquist, William H. "The Changing Role of the Supreme Court." *Florida State University Law Review* 14, no. 1 (Spring 1986): 1-14.

"A Review of the World." *Current Literature* 44, no. 5 (May 1908).

Reynolds, Quentin. *Courtroom: The Story of Samuel S. Leibowitz*. Freeport, CT: Farrar, Straus, Giroux, Inc., 1950.

Reznikoff, Charles, ed., *Louis Marshall: Champion of Liberty. Selected Papers and Addresses*. Philadelphia, PA: Jewish Publication Society of America, 1957.

"The Right to Picket Emphatically Asserted," *Labor and Law* 4 (February 1922): 45-46.

Rischin, Moses. *The Promised City: New York's Jews, 1870-1914*. Cambridge, MA: Harvard University Press, 1977.

Roberts, Sam. "A Century Ago, a Mayor Who Wrote Back." *City Room: Blogging the Five Boroughs*, *New York Times*, January 1, 1913. Available online: http://cityroom.blogs.nytimes.com/2013/01/01/the-mayor-of-sarcastic-witty-and-candid-letters/ Last accessed February 5, 2016.

Rodgers, Daniel. *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882*. New York, NY: Hill and Wang, 2004.

Rogoff, Harry. *An East Side Epic: The Life and Work of Meyer London.* New York, NY: Vanguard Press, 1930.

Rosenberg, Norman L. "The Law of Political Libel and Freedom of Press in Nineteenth Century America: An Interpretation." *American Journal of Legal History* 17, no. 4 (October 1973): 336-352.

Rosenstock, Morton. *Louis Marshall: Defender of Jewish Rights.* Detroit, MI: Wayne State University Press, 1965.

Rosenwaike, Ira. "Eleazer Block—His Family and Career." *American Jewish Archives* 31 (November 1979): 142-149.

---. "The Jewish Population of Argentina: Census and Estimates, 1887-1947." *Jewish Social Studies* 22, no. 4 (October 1960): 195-214.

Rowland, Dunbar. *Courts, Judges, and Lawyers of Mississippi, 1789-1935*. Jackson, MS: Mississippi Historical Society, 1935.

Rubin, Barry. "Ambassador Laurence A. Steinhardt: The Perils of a Jewish Diplomat, 1940 1945." *American Jewish History* 70 no. 3 (March 1981): 331-346.

Sachar, Howard M. *A History of Jews in America*. New York, NY: Vintage Books, 1993.

Sadowski-Smith, Claudia. "Unskilled Labor Migration and the Illegality Spiral: Chinese, European, and Mexican Indocumentados in the United States, 1882-2007." *American Quarterly* 60, no. 3 (September 2008): 779-804.

Salyer, Lucy E. *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law*. Chapel Hill: University of North Carolina Press, 1995.

Sanders, Leon. "Simon Wolf and the Immigrant." *The Jewish Immigration Bulletin* 6, no. 12 (December 1916): 3-4.

Sarat, Austin and Stuart A Scheingold. *Cause Lawyers and Social Movements*. Stanford, CA: Stanford University Press, 2006.

Sarna, Jonathan D. *American Judaism: A History*. New Haven, CT: Yale University Press, 2004.

---. "Two Jewish Lawyers Named Louis." *American Jewish History* 94, nos. 1-2 (March-June 2008): 1=19.

Sayer, John. "Art and Politics, Dissent and Repression: The Masses Magazine versus the Government, 1917-1918." *American Journal of Legal History* 32, no. 1 (Jan. 1988): 42-78.

Segal, Robert M. "Labor Union Lawyers: Professional Services of Lawyers to Organized Labor." *Industrial and Labor Relations Review* 5 (1951): 343-364.

Schmidt, Christopher W. "The Civil Rights-Civil Liberties Divide." *Stanford Journal of Civil Rights and Civil Liberties* 12, no. 1 (February 2016): 2-40.

Schneider, Dorothee. *Crossing Borders: Migration and Citizenship in the Twentieth Century United States*. Cambridge, MS: Harvard University Press, 2011.

---. *Trade Unions and Community: The German Working Class in New York City, 1870-1900*. Illinois: University of Illinois Press, 1994.

Schwartz, Bernard. *Main Currents in American Legal Thought*. Durham, NC: Carolina Academic Press, 1993.

Schweber, Howard. "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education." *Law and History Review* 17, no. 3 (Autumn, 1999): 421-466.

Segal, Robert M. "Labor Union Lawyers: Professional Services of Lawyers to Organized Labor." *Industrial and Labor Relations Review* 5 (1951): 343-364.

Seligman, Joel. *The High Citadel: The Influence of Harvard Law School*. Boston, MA: Houghton Mifflin and Company, 1978.

Seligman, Scott D. "The Night New York's Chinese Went Out for Jews: How A 1903 Chinese Fundraiser for Pogrom Victims United Two Persecuted Peoples." *Chinese Heritage Quarterly* no. 27 (September. 2011). Available online: http://www.chinaheritagequarterly.org/tienhsia.php?searchterm=027_jews.inc&issue=027. Last accessed May 5, 2016.

Selvin, Molly. "The Loeb Firm and the Origins of Entertainment Law Practice in Los Angeles, 1908-1940." *California Legal History* 10, no. 1 (2015): 135-173.

Shamir, Ronen. *Managing Legal Uncertainty: Elite Lawyers in the New Deal*. Durham, NC: Duke University Press, 1995.

Sheppard, Steve. "Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall." *Iowa Law Review* 82 (1996-1997): 547-644.

Silver, David M. *Lincoln's Supreme Court*. Urbana, IL: University of Illinois Press, 1956.

Silver, Matthew M. *Louis Marshall and the Rise of Jewish Ethnicity in America.* Syracuse, NY: Syracuse University Press, 2013.

Sinclair, Daniel B. "Advocacy and Compassion in the Jewish Tradition." *Fordham Urban Law Journal* 31 (November 2003): 99-118.

Slezkine, Yuri. *The Jewish Century*. Princeton, NJ: Princeton University Press, 2006.

Smith, Hal H. "The National Industrial Recovery Act: Is It Constitutional?" *American Bar Association Journal* 20, no. 5 (May 1934): 273-280.

Smith, Darrell H. and Herring, Guy H. *The Bureau of Immigration: Its History, Activities, and Organization*. New York, NY: AMS Press, 1974.

Sorkin, David J. *The Transformation of German Jewry, 1740-1840*. Cambridge, MA: Oxford University Press, 1987.

Spielvogel, Jackson J. *Western Civilization Since 1300.* 8th ed. Boston, MA: Wadsworth Cengage, 2012.

Sterba, Christopher. *Good Americans: Italian and Jewish Immigrants During the First World War*. New York, NY: Oxford University Press, 2001.

Stebenne, David L. *Arthur J. Goldberg: New Deal Liberal*. New York, NY: Oxford University Press, 1996.

Stevens, Robert B. *Law School: Legal Education in America from the 1850s to the 1980s.* Union, New Jersey: The Lawook Exchange, Ltd, 2001.

Strum, Philippa. *When the Nazis Came to Skokie: Freedom for Speech We Hate*. Lawrence, KS: University of Kansas Press, 1999.

"Supreme Court: Its Homes Past and Present," *American Bar Association Journal* 27 (May 1941): 283-289.

Surrency, Erwin. *History of the Federal Courts*. New York, NY: Oceana Publications, Inc., 1987.

Sutherland, Arthur E. *The Law At Harvard: A History of Ideas and Men, 1817-1967.* Cambridge, MA: Harvard University Press, 1967.

Svonkin, Stuart. *Jews Against Prejudice: American Jews and the Fight for Civil Liberties*. New York, NY: Columbia University Press, 1997.

Synott, Marcia G. "Anti-Semitism and American Universities: Did Quota Follow the Jews?" In *Anti-Semitism in American History*, ed., David Gerber, 233-271, Urbana, IL: University of Illinois Press, 1986.

Szajkowski, Zosa. "Double Jeopardy—The Abrams Case of 1919," *American Jewish Archives* 23, no. 1 (April 1971): 8-32.

Tanselle, Thomas. "The Thomas Seltzer Imprint." *The Papers of the Biographical Society of America* 58, no. 4 (1964): 380-448.

Tomlins, Christopher L. *Law, Labor, and Ideology in the Early American Republic*. New York, NY: Cambridge University Press, 1993.

Tsesis, Alexander. "Furthering American Freedom: Civil Rights and the Thirteenth Amendment." *Boston College Law Review* 45 (2004): 307-338.

Turner, James. *Without God, Without Creed: The Origins of Unbelief in America*. Baltimore, MD: John Hopkins University Press, 1985.

Urofsky, Melvin I. *Felix Frankfurter: Judicial Restraint and Individual Liberties*. Boston, MA: Twayne Publishers, 1991.

---. *Louis D. Brandeis: A Life*. New York, NY: Pantheon, 2009.

Vaisse, Justin. *Neoconservatism: The Biography of a Movement.* Cambridge, MA: Harvard University Press, 2010.

Vital, David. *A People Apart: The Jews of Europe, 1789-1939*. New York, NY: Oxford University Press, 1997.

Vought, Hans. "Division and Reunion: Woodrow Wilson, Immigration, and the Myth of American Unity." *Journal of American Ethnic History* 13, no. 3 (Spring 1994): 24-50.

Waldman, Louis. "Employment Discrimination against Jews in the United States—1955." *Jewish Social Studies* 18, no. 3 (July 1956): 208-216.

Wark, Colin and John F. Galliher. *Progressive Lawyers Under Siege: Moral Panic During the McCarthy Years*. New York, NY: Lexington Books, 2015.

Warren, Charles. *The Supreme Court in United States History*. New York, NY: Little Brown and Company, 1935.

Wendell, Mitchell. *Relations Between the Federal and State Courts*. New York, NY: Columbia University Press, 1949.

Wenger, Beth S. *New York Jews and the Great Depression: Uncertain Promise*. New York, NY: Syracuse University Press, 1999.

Wheeler, Russell R. and Harrison, Cynthia. *Creating the Federal Judicial System*.

Washington D.C.: Federal Judicial Center, 1994.

White, Ahmed A. "The Crime of Staging an Effective Strike and the Enduring Role of Criminal Law in Modern Labor Relations." *WorkingUSA* 11 (2008): 22-44.

Whitfield, Stephen. *In Search of American Jewish Culture*. Waltham, MA: Brandeis University Press, 1999.

Whitton, John B. "The United Nations Conference on Freedom of Information and the Movement Against International Propaganda." *The American Journal of International Law* 43, no. 1 (Jan. 1949): 73-87.

Wiebe, Robert. *The Search for Order, 1877-1920*. New York: Hill and Wang, 1966.

Wiecek, William M. "The Reconstruction of Federal Judicial Power, 1863-1875." *The American Journal of Legal History* 13 (1969): 333-359.

---. *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*. New York, NY: Oxford University Press, 1998.

Wleklinski, William, *A Centennial History of John Marshall Law School, 1899-1999*. Chicago, IL: John Marshall Law School, 1999.

"William N. Cohen." *The Successful American* 3, no. 1 (Jan. 1901): 15.

Wischnitzer, Mark. *Visas to Freedom: The History of HIAS*. New York, NY: World Publishing Company, 1956.

Witte, Edwin E. "The Background of the Labor Provisions of the N.I.R.A." *University of Chicago Law Review* 1, no. 4 (March 1934): 572-579.

Wood, Janice R. *The Struggle for Free Speech in the United States, 1872-1915: Edward Bliss Foote, Edward Bond Foote, and Anti-Comstock Operations*. New York, NY: Taylor and Francis, 2007.

Wray, Helena. "The Aliens Act 1905 and the Immigration Dilemma." *Journal of Law and Society* 33, no. 2 (June 2006): 302-322.

Yaffe, James. *So Sue Me: The Story of a Community Court*. New York, NY: Saturday Review Press, 1972.

Zeidel, Robert F. *Immigrants, Progressives, and Exclusion Politics: The Dillingham Commission, 1900-1917*. DeKalb, IL: Northern Illinois University Press, 2004.

Zeitz, Joshua. *White Ethnic New York: Jews, Catholics, and the Shaping of Postwar Politics*. Chapel Hill, NC: University of North Carolina Press, 2002.

Zimmermann, Reinhard. "The Contributions of Jewish Lawyers to the Administration of Justice in South Africa." *Israel Law Review* 29, no. 1-2 (Winter-Spring 1995): 250-288.

Zinn, Howard. *Emma*. Boston, MA: South End Press, 2002.

Zirin, James D. *The Mother Court: Tales of Cases that Mattered in America's Greatest Trial Court*. New York, NY: American Bar Association, 2014.