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Antisemitism, Near, and a Threshold for Ignominy

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Winer: Antisemitism, Near, and a Threshold for Ignominy
**ANTISEMITISM, NEAR, AND A THRESHOLD
FOR IGNOMINY**

Anthony Winer[†]

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In recent years, the tension between the values of the First Amendment Free Speech doctrine and the desire to protect minority communities against the destructive effects of hateful speech has been investigated extensively. A recent example is the compelling discussion provided by Professor Nadine Strossen in her 2018 book,¹ *Hate Speech: Why We Should Resist It with Free Speech, Not Censorship*. Her book was one of the focal points of a 2019 conference on free speech at Mitchell Hamline School of Law.² Another focal point was the Supreme Court's landmark 1931 decision, *Near v. Minnesota*.³ In this decision, the Supreme

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¹ Professor Strossen is on the faculty at the New York Law School and was the first woman national President of the American Civil Liberties Union.

² The conference was held on April 16, 2019, and featured Nekima Levy Armstrong as well as Professor Strossen. The campus title for the conference was "Freedom of Speech in an Era of Social Responsibility: The *Near* Injunction at Ninety."

³ 283 U.S. 697 (1931).

Court established the now-familiar rule against prior restraints, thereby invalidating an infamous injunction issued against a Minneapolis newspaper ninety years before the date of the conference.

The *Near* decision is mostly known for the rule against prior restraints. But in ways unremarked upon at the time of its issuance as well as today, it also provides an early example of the tension between free speech values and the potential harms of hate speech. This is because most of the very newspaper articles that were the subject of the injunction were notably antisemitic. In protecting the newspaper against the state court's injunction, the U.S. Supreme Court was also protecting the rights of the publishers to engage in the propagation of antisemitic discourse, some of it genuinely hateful.

This Article now appears in the context of the closing months of the presidential administration of Donald Trump and the early months of that of Joe Biden. During the months before and after the conference, President Trump and other politicians of both parties have engaged in antisemitic discourse. And those same months also saw some of the worst antisemitic violence in the United States in recent memory; one of the attacks probably being the worst in U.S. history.⁴

The era of the *Near* decision, shortly before the outbreak of World War II, was a time when the full extent of the destruction possible as an outgrowth of antisemitic rhetoric was still being established. Our own era has involved recent escalation of antisemitism in the United States during and since the Trump administration. This could well further escalate after particular followers of that administration now become frustrated as they find themselves in opposition. The lessons of the *Near* era may provide guidance for courts today.

This Article addresses the discourse of courts and judges when considering U.S. antisemitism, and in so doing, posits the existence of an "Ignominy Threshold."⁵ During the 1920s and 1930s, U.S. society was advancing more and more closely to the Ignominy Threshold but had not crossed it by the time *Near* was decided in 1931. Accordingly, the Supreme Court exercised restraint through its minimal acknowledgment of the antisemitism underlying the *Near* facts. The horrors of World War II and the Holocaust pulled the United States back from the brink of this Threshold. And so, the Supreme Court's virtual silence on antisemitism in *Near* caused no great harm. But it may well be that the challenges of the coming months, in light of recent events, could bring us close again. In that event, the restraint exhibited by the Justices in *Near*, should analogous situations arise again, would be ill-advised.

⁴ See *infra* at note 15.

⁵ See *infra* Section 2(c).

I. RECENT EVENTS AND THE IGNOMINY THRESHOLD

In recent years antisemitism, in both discursive and violent forms, has been unusually prominent in the public life of the United States and of Minnesota.⁶ It was observable in the run-up to the 2016 presidential election, continued through the earlier years of the Trump presidency, and then erupted in a series of violent attacks in late 2018 and late 2019.

A. *Recent Antisemitic Discourse and Violence*

In an incident before her election to Congress, Minnesota Representative Ilhan Omar tweeted in 2012 that “Israel has hypnotized the world.”⁷ Omar later defended the statement, maintaining that “drawing attention to the apartheid Israeli regime is far from hating Jews.”⁸ But while it is possible to criticize Israeli policy without expressing antisemitism, the mode of this statement was objectionable. Stereotypical tropes of Jews “hypnotizing” gentiles, and the “world-wide” negative effects of Jewish influence, are consonant with antisemitic campaigns over many generations built on deep-seated anti-Jewish hatred.⁹

In 2015, then-candidate Donald Trump told a room full of Jewish Republicans that “you’re not going to support me because I don’t want your money,” adding that if “you want to control your politicians, that’s fine.”¹⁰

⁶ *Audit of Antisemitic Incidents 2019*, ANTI-DEFAMATION LEAGUE (2019), <https://www.adl.org/audit2019> [https://perma.cc/C6ZB-QDTB]. See also Stephen Montemayor, *Twin Cities Jewish Community Shaken by Rising Anti-Semitism*, STAR TRIB. (Feb. 25, 2017), <https://www.startribune.com/twin-cities-jewish-community-shaken-by-rising-anti-semitism/414789814/> [https://perma.cc/85VY-BT8Q].

⁷ Esme Murphy, *All About The Benjamins: Ilhan Omar’s Tweet Criticized By Republicans, Dems As Anti-Semitic*, CBS MINN. (Feb. 11, 2019), <https://minnesota.cbslocal.com/2019/02/11/ilhan-omar-twitter-anti-semitism-aipac-its-all-about-the-benjamins/> [https://perma.cc/2L7U-XQDZ].

⁸ *Id.*

⁹ The “hypnotizing” or “hallucinatory” effect of a perceived Jewish threat was especially prominent in Nazi rhetoric. See, e.g., ROBERT S. WISTRICH, *A LETHAL OBSESSION: ANTI-SEMITISM FROM ANTIQUITY TO THE GLOBAL JIHAD* 244 (Random House 2010). “The whole apparatus of an increasingly totalitarian German state was now devoted to creating a hallucinatory demonic image of the Jews in order to justify their isolation, segregation, defamation, persecution, and eventual expulsion.” See also *id.* at 90. “In the lower depths of Western culture, the kinship of the Jew with Satan was deeply embedded long before the modern era.” Also, the “mysterious Jew practicing black magic and deliberately spreading poison [was among the] stock clichés of popular literature and folk tales” in the Middle Ages. Wistrich also more generally refers to the “fantasies of the Jew as Antichrist [and] agent of Satan.” *Id.* at 104.

¹⁰ Isaac Stanley-Becker, *Trump and the GOP Are Accused of Anti-Semitism Double Standard After Piling on Rep. Ilhan Omar*, WASH. POST (Feb. 12, 2019), <https://www.washingtonpost.com/nation/2019/02/12/trump-gop-are-accused-anti-semitism-double-standard-after-piling-ilhan-omar/> [https://perma.cc/HH7H-UUFS].

The statement was based on antisemitic tropes involving a putative Jewish avarice and preoccupation with money.¹¹

Trump then built on these antisemitic tropes in a campaign advertisement released the following year. The advertisement quotes one of the candidate's speeches over footage of George Soros and the Federal Reserve Chair at the time, Janet Yellen.¹² Both are Jewish and both have strong ties to international finance, one as a billionaire multinational investor and the other as a powerful financial regulator (now as Secretary of the Treasury).¹³ On the soundtrack, Trump warns that "for those who control the levers of power in Washington and for the global special interests, they partner with these people that don't have your good in mind."¹⁴

On August 11 and 12, 2017, the "Unite the Right" rally in Charlottesville, Virginia, advanced strains of antisemitism that dominated the event. Many of the right-wing demonstrators shouted "Jews Will Not

¹¹ See generally *Addressing Anti-Semitic Stereotypes and Prejudice*, ORG. FOR SECURITY & CO-OPERATION IN EUROPE (Dec. 4, 2019), <https://www.osce.org/files/f/documents/9/2/441098.pdf> [https://perma.cc/3ZKP-U7QT] [hereinafter *Addressing Anti-Semitic Stereotypes*] (providing examples of antisemitic stereotypes, like preoccupation with money, control of the media, dual or lack of national loyalty, and blood libel). See also WISTRICH, *supra* note 9, at 107–111. Wistrich traces resentment of Jewish involvement with banking and finance to "the upheavals of the Industrial Revolution, incipient secularization, democratization, and the challenges posed by Jewish emancipation." *Id.* at 107. He finds the work of Karl Marx and other early socialists to be related to this development, quoting Marx: "What is the worldly cult of the Jew? Huckstering. What is his worldly god? Money." *Id.* at 110 (citing KARL MARX, *EARLY WRITINGS* 241 (Rodney Livingstone & Gregor Benton trans., 1941)). Wistrich also emphasizes the perception that Jewish financiers were connected with the Boer War and other aspects of the maintenance of the British empire in the nineteenth century. *Id.* at 118–19. He also finds the trope of Jewish control of banking and finance to be endemic in much propaganda generated by the Soviet Union. *Id.* at 140–41. He notes that Henry Ford, in addition to being a proponent of *The Protocols of the Elders of Zion*, maintained that "Jews controlled high finance." *Id.* at 159. In discussing antisemitism in post-communist Hungary, he affirms that one of the "classical anti-Semitic stereotypes" is that "Jews exercise great influence in commerce, banking, and industry." *Id.* at 186. More currently, Wistrich cites modern polling for the proposition that many Europeans believe "Jews are too powerful, especially in business, finance, and the media." *Id.* at 260. He also cites references by former French President Charles DeGaulle as "echoing some of the best-known clichés of anti-Semitism, especially the myth of excessive Jewish wealth and control of the media." *Id.* at 280.

¹² Dana Milbank, *Anti-Semitism is No Longer an Undertone of Trump's Campaign. It's the Melody*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/opinions/anti-semitism-is-no-longer-an-undertone-of-trumps-campaign-its-the-melody/2016/11/07/b1ad6e22-a50a-11e6-8042-f4d111c862d1_story.html [https://perma.cc/9LR3-ZZHJ].

¹³ *Id.*

¹⁴ *Id.*

Replace Us,”¹⁵ a slogan indicating resistance to a supposed agenda on the part of Jews to replace non-Jews in positions of power and influence. This keys into antisemitic tropes of a world-wide Jewish conspiracy.¹⁶ Such tropes were central to the genocidal antisemitism of the Nazi regime, and indeed many of the right-wing demonstrators at the Charlottesville event were wearing Nazi uniforms and displaying Nazi paraphernalia.¹⁷

On October 23, 2018, House Majority Leader Kevin McCarthy, later House Minority Leader, posted a tweet evoking anti-Jewish hostility.¹⁸ His post accused then-presidential candidate Tom Steyer and two other Democratic billionaires of Jewish descent—George Soros and Michael Bloomberg—of trying to “buy” the 2018 midterm elections.¹⁹ Again, the association of three wealthy Jews with efforts to buy political power keyed into long-held antisemitic tropes.²⁰

Four days later, the Pittsburgh Tree of Life Synagogue was attacked in the most fatal antisemitic attack in U.S. history.²¹ Eleven people were murdered in cold blood while taking part in religious services, and six more were wounded.²² News accounts indicated that the murderer had been armed with an AR-15-style rifle and at least three handguns.²³ The synagogue had been holding services for three separate congregations when the murders occurred.²⁴

¹⁵ Emma Green, *Why the Charlottesville Marchers were Obsessed with Jews*, THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/> [https://perma.cc/X9C2-YUC9].

¹⁶ See, e.g., Tereza Zelenkova, *Conspiracy Theory to Rule Them All*, THE ATLANTIC (Aug. 25, 2020), <https://www.theatlantic.com/politics/archive/2020/08/conspiracy-theory-rule-them-all/615550/> [https://perma.cc/D587-N3EQ] (discussing the conspiracy theory of *The Protocols of the Elders of Zion* and its staying power as a conspiracy theory). See also WISTRICH, *supra* note 9, at 260 (referencing Islamist publications accusing Jews of “seeking world rule”). He quotes the Greek composer Mikas Theodorakis for a statement Wistrich views as representative of European left-wing intellectuals, accusing Jews of “dominating the global capitalist system.” *Id.* at 461. He quotes a Jordanian diplomat at the United Nations in a reference to a Jewish “cabal in London behind closed doors, to decide on fixing the price of gold.” *Id.* at 479.

¹⁷ *Id.*

¹⁸ Devan Cole, *House Majority Leader Deletes Tweet Saying Soros, Bloomberg, Steyer Are Trying to ‘Buy’ Election*, CNN (Oct. 28, 2018), <https://www.cnn.com/2018/10/28/politics/tom-steyer-mccarthy-tweet/index.html> [https://perma.cc/W286-N82L].

¹⁹ *Id.*

²⁰ *Id.*

²¹ Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [https://perma.cc/2T9Y-564J].

²² *Id.*

²³ *Id.*

²⁴ *Id.*

The year 2019 saw an intensification of anti-Jewish discourse in national political exchanges. Representative Ilhan Omar again drew national attention on February 10, when she criticized U.S. leaders for supporting Israel, asserting: “It’s all about the Benjamins, baby.”²⁵ This was a reference to Benjamin Franklin’s image on \$100 bills, suggesting that the pro-Israel lobby American Israel Public Affairs Committee (AIPAC) was buying off U.S. politicians.²⁶

She also retweeted a comment by Glenn Greenwald, a journalist regularly antagonistic to Israel, who declared: “It’s stunning how much time U.S. political leaders spend defending a foreign nation even if it means attacking free speech rights of Americans.”²⁷ Again, while it is possible to criticize U.S. policy toward Israel without being antisemitic, these statements key off of long-held anti-Jewish stereotypes.²⁸ The implicit assertion was that U.S. Jews, as a class, devote primary attention to money and inevitably have divided loyalties. The resulting implication that U.S. Jews cannot be trusted to be genuinely patriotic toward the United States is unjustified and at least seems to evince prejudice against them.

After vociferous and bipartisan complaints, and on the very next day, Representative Omar issued a public apology for her comments regarding the “Benjamins.”²⁹ She confirmed that “antisemitism is real,” and said that she was “grateful for Jewish allies and colleagues” who were “educating [her] on the painful history of anti-Semitic tropes.”³⁰ She declared: “I unequivocally apologize,” and added that her “intention is never to offend my constituents or Jewish Americans as a whole.”³¹

Nevertheless, Representative Omar then continued in this vein a few weeks later, when, as part of a panel discussion on February 27, she proclaimed: “I want to talk about the political influence in this country that says it is okay to push for allegiance to a foreign country.”³²

²⁵ Emily Burack, *Ilhan Omar’s Anti-Semitism Controversy, Explained*, JEWISH TELEGRAPHIC AGENCY (Feb. 14, 2019), <https://www.jta.org/2019/02/14/politics/the-ilhan-omar-anti-semitism-controversy-explained> [https://perma.cc/D3Q2-TLBW].

²⁶ *Id.*

²⁷ *Id.*

²⁸ See generally *Addressing Anti-Semitic Stereotypes*, *supra* note 11 (discussing the antisemitic stereotype of dual or lack of national loyalty).

²⁹ Sheryl Gay Stolberg, *Ilhan Omar Apologizes for Statements Condemned as Anti-Semitic*, N.Y. TIMES (Feb. 11, 2019), <https://www.nytimes.com/2019/02/11/us/politics/ilhan-omar-anti-semitism.html> [https://perma.cc/9ELS-V5BU].

³⁰ *Id.*

³¹ *Id.* Representative Omar then continued, however: “At the same time, I reaffirm the problematic role of lobbyists in our politics, whether it be AIPAC, the NRA, or the fossil fuel industry. It’s gone on too long and we must be willing to address it.” *Id.*

³² Zach Beauchamp, *The Ilhan Omar Anti-Semitism Controversy, Explained*, VOX (Mar. 6, 2019), <https://www.vox.com/policy-and-politics/2019/3/6/18251639/ilhan-omar-israel-anti-semitism-jews> [https://perma.cc/49HB-MSKC].

During the period being described, some political actors, activists, and commentators complained that it was unfair to brand some speakers as antisemitic while not also calling out the racism or ethnocentrism of others. Such complaints took at least two forms. Some complained that non-Muslim males could make antisemitic comments and not be branded in the way Representative Omar seemed to be.³³ And others asserted that other kinds of racism and ethnocentrism, such as anti-Muslim agitation, were no less deserving of rebuke.³⁴ While it is true that other persons in these positions have made offensive statements,³⁵ it is not always true that they have gone unremarked; they are frequently called out and rejected to the same extent Representative Omar had been. The statement cited above by Kevin McCarthy would be one example of a prominent non-Muslim male making an antisemitic statement. So would the various statements made by President Trump, both before and after election, also described above. Consonant with those descriptions, these statements attracted notable negative attention when made.

Another incident occurred during the first week of March 2019. During a special “GOP Takes the Rotunda” promotional day, a poster was displayed in the West Virginia Capitol that viciously linked Ilhan Omar to the 9/11 hijackers, without nearly as much fanfare as Omar’s antisemitic comments.³⁶ It was not immediately clear who put up the poster, but lawmakers got into a heated dispute over the display, leaving a doorkeeper allegedly injured and a lawmaker resigning.³⁷ A few Democratic lawmakers condemned the poster and allegedly got into a feud with Anne Lieberman, the House’s sergeant-at-arms, “after she allegedly made an anti-Muslim remark.”³⁸ Lieberman denied the remark but resigned shortly following the

³³ See Cody Nelson, *Minnesota Congresswoman Ignites Debate on Israel and Anti-Semitism*, NPR (Mar. 7, 2019), <https://www.npr.org/2019/03/07/700901834/minnesota-congresswoman-ignites-debate-on-israel-and-anti-semitism> [https://perma.cc/EFD7-N33] (noting that some people believed that Representative Omar’s identity as a Muslim woman was made her a target of criticism).

³⁴ See Sheryl Gay Stolberg, *House’s Anti-Semitism Resolution Exposes Generational Fight Over Ilhan Omar*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/politics/ilhan-omar-israel.html> [https://perma.cc/3XCD-HJ2].

³⁵ See, e.g., *id.* (noting that Representative Jim Jordan was accused of antisemitism when his tweet used a dollar sign for the “S” in Tom Steyer’s name); see also Cole, *supra* note 18.

³⁶ Dareh Gregorian, *GOP’s Anti-Muslim Display Likening Rep. Omar to a Terrorist Rocks W. Virginia Capitol*, NBC NEWS (Mar. 1, 2019), <https://www.nbcnews.com/politics/politics-news/gop-s-anti-muslim-display-likening-rep-omar-terrorist-rocks-n978371> [https://perma.cc/EXF4-SYEX].

³⁷ *Id.*

³⁸ *Id.*

allegation.³⁹ Democratic lawmaker Mike Caputo allegedly injured a doorkeeper during a heated argument, local news media reported.⁴⁰

These incidents confirm that people of various racial and ethnic backgrounds can engage in antisemitism, and that there are various kinds of racial prejudice expressed in U.S. society. They also confirm that many of these expressions are, in fact, exposed by the media and others in the public sphere. None of these instances mean that antisemitism is any less real or intense when it is expressed.

On March 7, 2019, the U.S. House of Representatives passed a resolution both condemning antisemitism and “anti-Muslim discrimination and bigotry against all minorities.”⁴¹ The resolution was initially intended to address antisemitic discourse and events, such as the Charlottesville incident and public comments asserting that U.S. Jews have divided loyalties. The additional language regarding anti-Muslim discrimination and bigotry against all minorities was included during negotiations to meet the objections of those who felt that condemning antisemitism without condemning analogous behavior was imposing a double standard.⁴²

In a reportedly long and rambling speech before the Israeli American Council in Hollywood, Florida, President Trump again caught national attention with remarks redolent of antisemitism.⁴³ The remarks were often in the nature of backhanded compliments, praising stereotypical Jewish business acumen by uttering grudgingly appreciative insults.⁴⁴ He declared: “A lot of you are in the real estate business, because I know you very well. You’re brutal killers, not nice people at all.”⁴⁵ He also continued, “Some of you don’t like me. Some of you I don’t like at all, actually. And

³⁹ *Id.*

⁴⁰ Kathleen Joyce, *Poster Connecting Rep. Ilhan Omar to 9/11 Terror Attacks Ignites Outrage at West Virginia Capitol*, FOX NEWS (Mar. 2, 2019), <https://www.foxnews.com/politics/poster-connecting-rep-ilhan-omar-to-9-11-terror-attacks-ignites-outrage-at-west-virginia-capitol> [https://perma.cc/RK2Z-32QW]. The report continued: “Democrat Mike Pushkin called the poster ‘racist’ and ‘wrong.’ He said no Republicans condemned the display. ‘I’m really disappointed that not a single Republican elected official in this building could join me in saying it’s wrong,’ he told The Washington Post.” *Id.*

⁴¹ H.R. Res. 183, 116th Cong. (2019).

⁴² Clare Foran, Ashley Killough & Sunley Serfaty, *House Passes Resolution Condemning Anti-Semitism and Anti-Muslim Discrimination*, CNN (Mar. 7, 2019), <https://www.cnn.com/2019/03/07/politics/house-democrats-resolution-vote-ilhan-omar> [https://perma.cc/8BRR-LDJR].

⁴³ Bess Levin, *Trump Goes Full Anti-Semite in Room Full of Jewish People*, VANITY FAIR (Dec. 9, 2019), <https://www.vanityfair.com/news/2019/12/donald-trump-anti-semitic-remarks> [https://perma.cc/64C6-PRAL].

⁴⁴ *Id.*

⁴⁵ *Id.*

you're going to be my biggest supporters because you're going to be out of business in about 15 minutes if [a Democrat gets elected President]."⁴⁶

On December 10, 2019, there was an antisemitic shooting at a small Kosher grocery store in the Greenville section of Jersey City.⁴⁷ Six people were killed, including both assailants, three civilians, and a police officer.⁴⁸ One other civilian and one other police officer were wounded.⁴⁹ The assailants were members of a violent antisemitic hate group.⁵⁰

On December 28, 2019, an attacker wielding a large knife entered the home of Rabbi Josef Neumann in Monsey, New York.⁵¹ Of the few dozen people who gathered for a meal and religiously oriented fellowship, five were wounded by the attacker.⁵² One of the five was Rabbi Neumann, who later died from his wounds.⁵³

On January 6, 2021, insurrectionists invaded the U.S. capitol in an attempt to halt the counting of the electoral college votes from the 2020 presidential election.⁵⁴ The invading crowd included those expressing antisemitism in their placards, clothing, and other behaviors.⁵⁵ These are observations from an Associated Press news story:

"[P]hotographs captured a man in the crowd wearing a shirt emblazoned with 'Camp Auschwitz,' a reference to the Nazi concentration camp."⁵⁶

* * *

"Two white nationalists known for racist and anti-Semitic rhetoric livestreamed to their online followers after breaking into the Capitol during the deadly insurrection. And video circulated on social media showed a man harassing an Israeli journalist who was trying to do a live report outside the building."⁵⁷

* * *

⁴⁶ *Id.*

⁴⁷ Michael Gold & Ali Watkins, *Suspect in Jersey City Linked to Black Hebrew Israelite Group*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/nyregion/jersey-city-shooting.html> [<https://perma.cc/A6AY-U982>].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Azi Paybarah, *Rabbi Dies Three Months After Hanukkah Night Attack*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/nyregion/rabbi-monsey-attack.html> [<https://perma.cc/E2D2-XQM8>].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Elana Schor, *Anti-Semitism Seen in Capitol Insurrection Raises Alarms*, U.S. NEWS & WORLD REPORT (Jan. 13, 2021), <https://www.usnews.com/news/politics/articles/2021-01-13/anti-semitism-seen-in-capitol-insurrection-raises-alarms> [<https://perma.cc/84XY-QDEQ>].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

“[T]he Miller Center for Community Protection and Resilience at Rutgers University-New Brunswick and the Network Contagion Research Institute released a report that identified at least half a dozen neo-Nazi or white supremacist groups involved in the insurrection.”⁵⁸

* * *

All of these events of recent years demonstrate a sustained resurgence of antisemitism, both in notable political discourse and among fringe groups and violent actors of various backgrounds. The level and frequency of antisemitic attacks is greater than during immediately preceding periods and is a subject for significant concern.

B. Aspects of U.S. Antisemitism

This series of antisemitic statements and violence was particularly alarming because it was also unusual. While antisemitism has always existed in the United States, it has generally not reached the levels of legally mandated discrimination and sustained violence that it has engendered in other countries, or that other minority populations have experienced in the United States. Indeed, the history of antisemitism in the United States can be viewed in a bifurcated manner. To the extent antisemitism has been evident in American society, it has been less observable in the governmental sphere than in the private sphere.

In the private sphere, it is fair to say that antisemitism has been constant and significant. A primary historian of American antisemitism, Leonard Dinnerstein, confirms that antisemitism has been a feature of social consciousness during every period of U.S. history. In his 1994 book, *Antisemitism in America*, he maintains, for example, that in the early post-colonial period, “the traditional and almost universal values of American society . . . emphasized the shortcomings of Jews.”⁵⁹ In the period from the Civil War to 1900, Dinnerstein determines that the United States became “a full-fledged antisemitic society,” evincing bigotry that “reflected the biases of practically every stratum of society.”⁶⁰

During the first two decades of the twentieth century, “racial components of antisemitic thought . . . became obvious,”⁶¹ while between the two World Wars, “antagonism toward Jews increased alarmingly,” fortified by “[p]seudo-[s]cientific racist thinking”⁶² With the inauguration of the New Deal, “the deepening economic crisis contributed

⁵⁸ *Id.*

⁵⁹ LEONARD DINNERSTEIN, *ANTI-SEMITISM IN AMERICA* 17 (1994).

⁶⁰ *Id.* at 35.

⁶¹ *Id.* at 58.

⁶² *Id.* at 79.

to an explosion of unprecedented antisemitic fervor.”⁶³ The World War II years saw the virulent antisemitism of Henry Ford, Charles Lindbergh, Father Charles Coughlin, and others,⁶⁴ while in the two decades after the war antisemitism in the United States began to decline.⁶⁵

Regarding the governmental sphere, state and federal authorities in the United States have very rarely enacted significant and specifically antisemitic discrimination into legal texts. In contrast to consistently antisemitic attitudes throughout American society through most of U.S. history,⁶⁶ the governmental sphere has tended not to advance specific and affirmative discriminations against Jews.⁶⁷

Commentators, including those identified with the Jewish community, noted this situation in their responses to the Pittsburgh Tree of Life Synagogue shooting. A writer for *Haaretz*, a prominent Israeli news organization, noted after the attack that “lethal attacks on U.S. Jews in their homeland have been very rare, with Saturday’s mass shooting in Pittsburgh more than doubling the total number of fatalities.”⁶⁸ The writer went on to observe that “the attacks have more often than not been nonphysical and that, as an example, ‘the number of Jewish victims’ of the KKK, although a ‘virulently antisemitic organization,’ can be ‘counted on a single hand.’”⁶⁹

Some of the comments in a post-Pittsburgh series of articles in *The Atlantic* also made similar observations. One writer noted that “American Jews ha[ve] never experienced the same level of virulent, state-sanctioned aggression as European Jews have,” even though “anti-Semitism has never been absent in this country.”⁷⁰ Another article in *The Atlantic* from the same week listed the previous thirteen most prominent violent attacks against Jews

⁶³ *Id.* at 105.

⁶⁴ *Id.* at 129–33.

⁶⁵ *Id.* at 150.

⁶⁶ See Jack Wertheimer, *Antisemitism in the United States: A Historical Perspective*, in *ANTISEMITISM IN AMERICA TODAY* 35–39 (Jerome A. Chanes ed., 1995) (describing particular antisemitic incidents from the colonial period, through the Founding and early independence, to the enforcement of restrictive residential covenants between the two World Wars).

⁶⁷ Marc D. Stern, *Antisemitism and the Law: Constitutional Issues and Antisemitism*, in *ANTISEMITISM IN AMERICA TODAY* 386 (Jerome R. Chanes ed., 1995) (“With a few notable exceptions, American law had not institutionalized antisemitism in any way that has had an appreciable impact on Jews.”).

⁶⁸ David B. Green, *From Lynchings to Mass Shootings: The History of Deadly Attacks on Jews in America*, *HAARETZ MAG.* (Oct. 29, 2018), <https://www.haaretz.com/us-news/.premium.MAGAZINE-from-lynchings-to-mass-shootings-the-history-of-deadly-attacks-on-jews-in-america-1.6601089> [https://perma.cc/E5M8-4LAS].

⁶⁹ *Id.*

⁷⁰ Julian E. Zelizer, *Trump Needs to Demilitarize His Rhetoric*, *THE ATLANTIC* (Oct. 29, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/americas-long-history-anti-semitism/574234/> [https://perma.cc/97WX-QQ9B].

in U.S. history.⁷¹ But it also noted that the Tree of Life attack, where eleven people were murdered, “is believed to be the deadliest attack against the American Jewish community in U.S. history.”⁷² This author allowed that “[f]atal attacks against American Jews have been far less common” than “other forms of discrimination.”⁷³

In a more general sense, Leonard Dinnerstein has commented on the modern American situation in essentially positive terms: “American Jews have never been more prosperous, more secure, and more ‘at home in America’ than they are today. Not only has antisemitism . . . diminished almost to the point of insignificance, but Jews have been increasingly accepted into the American mainstream.”⁷⁴ In the same set of comments, he noted that the predations of earlier eras included open discussions of the “Jewish problem,” political agitation against Jews by antisemitic demagogues, limited educational and employment opportunities, and residential and resort segregation.⁷⁵ His observations referenced in significant part the virulent antisemitism of Father Charles Coughlin and other antisemitic activists of the 1930s and years following.⁷⁶ However, Dinnerstein’s observation that these were no longer serious issues also serves to illustrate the comparative lack of widespread lethal violence, and the lack of affirmative legally-enforced discrimination, against Jews that have characterized the American Jewish experience.⁷⁷

⁷¹ Isabel Fattal, *A Brief History of Anti-Semitic Violence in America*, THE ATLANTIC (Oct. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/10/brief-history-anti-semitic-violence-america/574228/> [<https://perma.cc/H44G-ZC5W>].

⁷² *Id.*

⁷³ *Id.*

⁷⁴ DINNERSTEIN, *supra* note 59, at 228 (internal quotation marks omitted).

⁷⁵ *Id.*

⁷⁶ *See, e.g., id.* at 112–13.

⁷⁷ Along similar lines, historian Bernard Lewis has identified “three types” of “hostility” against Jews. BERNARD LEWIS, SEMITES AND ANTI-SEMITES, 20–21 (1999). He describes these as:

- a. “Opposition to Israel [and] to the Zionist movement and ideology.”
- b. “[W]hat one might call common, conventional, in a sense even ‘normal’ prejudice, sometimes giving rise to ‘normal’ persecution. Parallels to it might be found in suspicion and resentment which are often directed against neighbors of another tribe, another race, another faith, or from another place, or the attitudes which majorities sometimes adopt toward minorities.”
- c. “Anti-Semitism, or ‘hatred of Jews.’”

Id. This perspective could group much of current American antisemitism into his second category, highlighting the distinction with violent, and often governmentally-enforced hostility, which is the behavior he reserves for the descriptor of “antisemitic.” This Article adopts the more customary, broader view of the term.

There have been some occurrences in U.S. history that have exhibited more extreme antisemitism. The one occurrence that came the closest to an official federal antisemitic act was the attempt by General Ulysses S. Grant to expel Jews from the Tennessee territory in 1862.⁷⁸ That attempt, however, was countermanded immediately by President Lincoln, and was never addressed again.⁷⁹ This federal record is remarkable when compared to the European experience, through which national governments in various centuries have excluded Jews from citizenship and from voting, imposed taxes on Jews or on incidents of Jewish culture, sponsored programs or other oppressive measures to destabilize Jewish communities, prohibited Jews from entering certain geographic areas or certain professions, and the like.⁸⁰ In the United States, state laws during earlier periods barred non-Christians from public office, and on occasion, assisted the enforcement of residential real estate restrictions.⁸¹ While pernicious, these laws were never part of a national effort to legally institutionalize antisemitism.⁸²

Nevertheless, antisemitism has appeared in the actions of private persons and groups, sometimes with violence. The lynching of Leo Frank in Atlanta in 1915 was an especially vicious example.⁸³ Henry Ford's antisemitism was also well known.⁸⁴ His periodical, the *Dearborn Independent*, published a particularly racialized form of antisemitism, and he gave credence to the infamous forgery, *The Protocols of the Elders of Zion*.⁸⁵

C. *The Ignominy Threshold*

According to a leading online dictionary, the quality of being “ignominious” is the quality of being deserving of shame, disgrace, or

⁷⁸ Wertheimer, *supra* note 66, at 39.

⁷⁹ *Id.*

⁸⁰ Stern, *supra* note 67, at 385–86 (noting that other counties have imposed “bans on citizenship and voting, especially onerous Jewish taxes, government-instigated pogroms, exclusions from educational institutions, and the like.”).

⁸¹ Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), <https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/> [https://perma.cc/C4HA-7YDM] (noting that in early America, some states had religious requirements to hold public office, like Massachusetts only allowing Christians to hold office).

⁸² *Id.* at 386 (“Official antisemitism has not taken the form of legislation in the United States for at least one hundred and fifty years These restrictions did not deny all other citizenship rights and benefits to Jews. They surely did not endanger the physical security of Jews.”).

⁸³ See Wertheimer, *supra* note 66, at 41–42.

⁸⁴ See *id.* at 42–43.

⁸⁵ *Id.*

infamy, and synonyms are despicable and dishonorable.⁸⁶ The noun form of the same word is ignominy, and that is the sense in which it used in this Article; the state of being ignominious. When U.S. society has succeeded in not enacting federal laws affirmatively and explicitly disfavoring Jews, and not experiencing fatal violence against Jews, this Article views the society as being below the Ignominy Threshold.

To be sure, U.S. history is replete with instances and practices of antisemitism. These are referenced in various parts of this Article and, insofar as Minnesota is concerned, some of them are described in great detail herein. But these have almost always been private and local in character, there has never been a federal law affirmatively and specifically disfavoring Jews, and widespread systemic violence specifically against Jews has not been a major feature of life for American Jews.

From time to time, American society approaches, however, a threshold where affirmative and specific legal discrimination against Jews seems more possible, and widespread systemic violence against Jews becomes more conceivable. At those times, the Ignominy Threshold is approached. The murder of Leo Frank in 1915 moved substantially toward that Threshold, but mercifully was not followed with similar or analogous crimes. After the attack on the Charlottesville events, the Tree of Life Synagogue murders, and the ensuing violence in New Jersey and upstate New York, an approach to the Ignominy Threshold may well be imminent.

D. Iconic Supreme Court Holdings and the Ignominy Threshold for Antisemitism

The significance of the Ignominy Threshold may be evidenced by considering landmark constitutional Supreme Court cases that have been decided in the context of other traditionally disfavored groups. A small number of iconic Supreme Court cases, while standing for larger principles, are also identified in the common mind with the disfavored groups with which they are associated. However, there is no such iconic constitutional Supreme Court precedent associated specifically with Jews or antisemitism.

The chief examples of such iconic cases would be:

Brown v. Board of Education,⁸⁷ which held that racial segregation of state-owned and operated, primary and secondary schools violated the Equal Protection Clause.⁸⁸ Although the holding would condemn segregation of students in any racial group, the text of the opinion speaks in

⁸⁶ *Ignominious*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ignominious> [<https://perma.cc/38T9-97ZJ>].

⁸⁷ 347 U.S. 483 (1954).

⁸⁸ *Id.*

terms of effects on Black schoolchildren.⁸⁹ In the common imagination, it is also understood as having its primary application to the ways in which racial segregation in primary and secondary schools harmed Black schoolchildren. Accordingly, the opinion is an iconic Supreme Court opinion that is associated in the common mind chiefly with American Blacks.

* * *

United States v. Virginia,⁹⁰ which held that Virginia's ownership and administration of a military academy that excluded women violated the Equal Protection Clause.⁹¹ This case was much in the public eye as it was being litigated and decided. Male stereotypes regarding strength, assertiveness, aggressiveness, and military bearing made the issues dramatic at the time. Those for whom such stereotypes especially resonated found it difficult to sympathize with those attacking the State. But the State did lose the case, and in part because of the fame associated with it, the case is an iconic emblem for non-discrimination against women.

* * *

Obergefell v. Hodges,⁹² which held that state-law prohibitions of marriage between persons of the same sex violated both the Equal Protection Clause and the Fourteenth Amendment Due Process Clause.⁹³ Although most of the general population may not be aware of the name of the case, most politically aware members of the population know how the case was decided. The fact that same-sex couples now have a constitutional right to marry is well known, and it is also well known that the Supreme Court so decided. It is an iconic opinion for the lesbian, gay, bisexual, and transgender community.

* * *

Yick Wo v. Hopkins,⁹⁴ which held that the discriminatory enforcement of city building codes against Chinese businesses violated the Equal Protection Clause.⁹⁵ The chief focus of the case was the declaration that unconstitutional discrimination could be accomplished through the discriminatory actions of state officers, even if the text of the relevant law was not discriminatory.⁹⁶ The holding, therefore, did not turn on the fact that the complaining business owners were Chinese or Chinese American. And probably most people outside the legal community are unaware of the

⁸⁹ For example, the opinion speaks exclusively in terms of comparisons between "Negro and white schools." *Brown v. Board of Education*, 347 U.S. 483, 492 (1954). It also refers to "white and colored children." *Id.* at 494.

⁹⁰ 518 U.S. 515 (1996).

⁹¹ *Id.*

⁹² 576 U.S. 644 (2015).

⁹³ *Id.*

⁹⁴ 118 U.S. 356 (1886).

⁹⁵ *Id.*

⁹⁶ *Id.*

case. But most within the legal community are aware of the general principles regarding de facto and de jure discrimination. And among those working and studying in relevant areas, the case is both known for these principles and for its factual basis in the treatment of Chinese and Chinese-American people. Accordingly, for purposes of this Article, the case can be viewed as an iconic case with respect to Chinese people in the United States and Chinese Americans.

* * *

Other famous or significant Supreme Court cases have addressed the treatment of other specified disfavored groups in ways that are less satisfactory than these. Nevertheless, these other Supreme Court cases have been broadly noted and have become associated with those groups in the mind of those familiar with the relevant issues.

*Korematsu v. United States*⁹⁷ was decided in a way that did not then advance the interests of Japanese nationals in the United States and Japanese Americans. Numerous Supreme Court cases have addressed the rights of Native Americans and their tribes.⁹⁸ Cases like *Korematsu* did not have protective effects, and cases addressing the rights of Native Americans were also not always protective, and often less well known by the general population.⁹⁹ But such cases nevertheless demonstrate that the Supreme Court was presented with the interests of disfavored groups, that the Court considered the arguments of the groups, and that the Court decided the cases in such a way that indicated awareness of discrimination against those groups.

That has never happened with respect to Jews. There is no iconic Supreme Court case, even in the sense of being well known to lawyers or civil-rights professionals, that stands in the collective mind for the consideration of the interests of Jews, let alone for the vindication of their interests.

There are two cases that may come to mind, but both fall short of the criteria being advanced. The first is the so-called “Skokie case,”¹⁰⁰ which upheld the First Amendment Free Speech rights of a group of American Nazis who planned to conduct a peaceful march through a heavily Jewish neighborhood.¹⁰¹ This, however, was a 7th Circuit appellate case, and

⁹⁷ 323 U.S. 214 (1944).

⁹⁸ See generally Angelique EagleWoman (Wambdi A. Was'teWinyan), *Permanent Homelands Through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the McGirt Decision*, 47 MITCHELL HAMLINE L. REV. 641 (2021) (discussing some of the history of U.S. Supreme Court decisions that impact Tribal Nations and Native American communities).

⁹⁹ See generally *id.*

¹⁰⁰ *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

¹⁰¹ *Id.*

although certiorari was denied for the case, the Supreme Court has neither addressed nor substantively decided the specific issues involved.

The second is *Shaare Tefila Congregation v. Cobb*,¹⁰² a case not much discussed within constitutional law circles since it did not concern constitutional law. There, the Court decided that the phrase in the 1866 Civil Rights Act (now 18 U.S.C. § 1982), assuring that all citizens in every state must have the same property rights as “[W]hite citizens” of that state, could be used to protect against discrimination disfavoring Jews.¹⁰³ The case has not attained special prominence, it is not constitutional in scope, and applies only to actions under the 1866 Act.

Even though the *Shaare Tefila Congregation* case is not the kind of iconic Supreme Court constitutional case that the others described above have been, it still helps to illustrate the dynamics of the Ignominy Threshold. The Court decided the case upon the theory that when the 1866 Act was passed, Congress considered the concept of racial discrimination to encompass “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”¹⁰⁴ Accordingly, the Act protects Jews against discrimination in their property rights because their status as Jews can be analogized to the status of racial minorities, whose treatment has indeed passed the Ignominy Threshold.

II. THE *NEAR* DECISION AND ANTISEMITISM

The Supreme Court’s decision in *Near v. Minnesota*¹⁰⁵ is justly regarded as a landmark in First Amendment Free Speech law for having established the rule against prior restraints. However, it is also notable because it presented an early opportunity for the Supreme Court to condemn antisemitism. The Court did not take advantage of that opportunity. Judges and Justices in the United States should pay due regard to the Ignominy Threshold before following the Court’s reticence in *Near*.

A. *The Minnesota Gag Law and Its Enforcement Against Near*

The *Near* decision is intimately dependent on the Minnesota statute at issue in the case. It has come to be called the “Minnesota Gag Law.”¹⁰⁶ As relevant to the *Near* facts, it applied to any “person” engaged in

¹⁰² 481 U.S. 615 (1987).

¹⁰³ *Id.* at 616.

¹⁰⁴ *Id.* at 617 (citations omitted).

¹⁰⁵ 283 U.S. 697 (1931).

¹⁰⁶ See, e.g., FRED W. FRIENDLY, MINNESOTA GAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 24 (1981); John E. Hartmann, *The Minnesota Gag Law and the Fourteenth Amendment*, MINN. HIST. MAG., Dec. 1960, at 161.

the business of publishing “a malicious, scandalous and defamatory newspaper, magazine or other periodical.”¹⁰⁷ Legal condemnation of material that is defamatory might not have occasioned as much concern, but it was the law’s enforcement mechanism that drew attention.

The statute branded such publication a “nuisance,”¹⁰⁸ and allowed a county district court to issue a temporary injunction against such publication pending trial.¹⁰⁹ If at trial the court determined that the defendants had violated the statute, the court could enter judgment “permanently enjoining the defendants . . . from continuing the violation.”¹¹⁰

On November 22, 1927, the Hennepin County Attorney brought an action under this statute against Jay Near for the publication of Near’s periodical, *The Saturday Press*.¹¹¹ Pursuant to the state statute, the state district court issued an order immediately forbidding Near from publishing or circulating any issues of *The Saturday Press*, either those that had already been issued or “any future editions.”¹¹² The order also extended to “any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter.”¹¹³

Near answered the county attorney’s complaint by entering a demurrer that “challenged the constitutionality of the statute.”¹¹⁴ The district court certified the constitutional question to the Minnesota Supreme Court, which upheld the statute.¹¹⁵ The district court proceedings then continued, and ultimately the district court entered judgment that *The Saturday Press* was a public nuisance that would be “hereby abated” through the court’s judgment.¹¹⁶ The judgment thus had the effect of making the district court’s earlier prohibition final. It “perpetually enjoined” Near and *The Saturday Press* “from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper” and also “from further conducting said nuisance under the name and title of *The Saturday Press* or any other name or title.”¹¹⁷

The dual effects of the statute, which both authorized temporary and permanent injunctions and authorized the prohibition of a newspaper as a nuisance to be abated, thus combined to result in the trial court’s

¹⁰⁷ MINN. STAT. §§ 10123-1, 10123-1(b) (1927).

¹⁰⁸ *Id.* § 10123-1.

¹⁰⁹ *Id.* § 10123-2.

¹¹⁰ *Near v. Minnesota*, 283 U.S. 697, 703 (1931).

¹¹¹ *Id.* at 703-04.

¹¹² *Id.* at 704-05.

¹¹³ *Id.* at 705.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 706.

¹¹⁷ *Id.* (internal quotations omitted).

temporary order and its final judgment. These prohibited Near not merely from circulating the issues he had already produced, but also from ever producing other issues of *The Saturday Press* in the future, along with any other publication of any name that would contain similar material.

B. The Near Majority Opinion

The Supreme Court majority opinion was authored by Chief Justice Charles Evans Hughes. He began his analysis of the Minnesota statute by noting that it was “unusual,”¹¹⁸ and then determined that it was “important to note precisely the purpose and effect of the statute as the state court has construed it.”¹¹⁹ In this respect, the Court emphasized that “the object of the statute [was] not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical.”¹²⁰ The Court added that the State’s justification for the statute was that “prosecutions to enforce penal statutes for libel do not result in ‘efficient repression or suppression of the evils of scandal.’”¹²¹

The Court concluded its review of the “purpose and effect” of the Minnesota statute with a pointedly expressed conclusion: “This is of the essence of censorship.”¹²² After considering relevant historical material and the proper scope of the issue, the Court then stated its primary precept for the case, extolling “the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”¹²³

The Court was also mindful that some of the material in *The Saturday Press* had been critical of Minneapolis political leaders, including the county attorney, the mayor, and the chief of police.¹²⁴ In that light, the Court added another note to its conclusion on the statute’s purpose and effect. The Court admonished that liberty of the press “was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct.”¹²⁵

The Court’s holding that the Minnesota statute, insofar as it authorized the proceedings against Near and *The Saturday Press*, was

¹¹⁸ *Id.* at 707.

¹¹⁹ *Id.* at 709.

¹²⁰ *Id.* at 711.

¹²¹ *Id.*

¹²² *Id.* at 713.

¹²³ *Id.* at 716.

¹²⁴ *Id.* at 704.

¹²⁵ *Id.* at 717.

unconstitutional,¹²⁶ effectively states what has become known as the rule against prior restraints.¹²⁷ As such, the *Near* holding is one of extreme importance in our First Amendment jurisprudence, and it is duly celebrated as such.¹²⁸

C. *The Near Dissenting Opinion*

Justice Butler authored the dissenting opinion in the *Near* case, and his was also the only opinion issued apart from the Opinion of the Court.¹²⁹ He was joined by Justices Van Devanter, McReynolds, and Sutherland. His main point seems to have been that the state statute in the *Near* case did not operate as a “prior restraint,” properly so called.¹³⁰ He maintained that the statute “does not authorize administrative control in advance” of publication.¹³¹

It is true that before *The Saturday Press* started publishing, the statute did not require approval from any governmental authority, and Justice Butler seems to have considered this important. He viewed the subsequent injunctions not as distinctively prior restraints, but rather as “a remedy to be enforced by a suit in equity” with respect to material that had already been published.¹³² With the prior restraint issue thus minimized, much of his opinion deals with the procedural sufficiency of the various stages of the *Near* litigation.¹³³ In so doing, he emphasized that the defendants conceded that “defendants’ regular business was the publication of malicious, scandalous, and defamatory articles”¹³⁴ He accordingly emphasized the harmful and deleterious nature of the contents of *The Saturday Press*.

It was in emphasis of that idea, that *The Saturday Press* was indeed harmful and deleterious, that Justice Butler chose to reproduce in a lengthy footnote substantial portions from the November 19, 1927, issue of the

¹²⁶ *Id.* at 722-23.

¹²⁷ See 2 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 15.4 (2020) (stating that the *Near* decision held that “‘liberty of the press’ . . . principally meant ‘immunity from previous restraints or censorship.’”).

¹²⁸ See, e.g., FRIENDLY, *supra* note 106, at 179 (“No other nation on earth has a constitutional tradition against prior restraints comparable to those which sprang from Hughes’s sweeping opinion.”).

¹²⁹ *Near*, 283 U.S. at 723 (Butler, J., dissenting).

¹³⁰ *Id.* at 735 (Butler, J., dissenting) (quotation marks added).

¹³¹ *Id.* (Butler, J., dissenting).

¹³² *Id.* (Butler, J., dissenting).

¹³³ See, e.g., *id.* at 724-29 (Butler, J., dissenting) (including supportive references to the evidentiary record, the language of the statute, the initial opinion of the state supreme court, and the district court’s opinion on remand from the state supreme court).

¹³⁴ *Id.* at 724 (Butler, J., dissenting).

paper.¹³⁵ This was the ninth and final issue of the paper before the state district court halted publication and distribution.¹³⁶ As described in the following segment of this Article, those quoted passages are teeming with vigorous and vicious antisemitic language, and no doubt this was one reason Justice Butler reproduced it in the footnote.

Thus, the *Near* majority opinion included no significant direct quotations from the paper, but the dissenting opinion included this language at length. This could be in keeping with the idea, consistent with the majority opinion, that the content of *Near*'s paper was basically irrelevant (within limits).¹³⁷ The majority opinion turns on the question of prior restraints, rather than on whether the character of the speech itself was protected. Justice Butler, on the other hand, attached importance to the harmful and deleterious nature of the paper, and so included his long quotation.

Even though Justice Butler was willing to bring the lurid antisemitism of *Near*'s publication into the pages of the Supreme Court Reporter, he was not willing to expressly condemn the antisemitism as such. Rather, twice (and only twice) in his opinion,¹³⁸ he notes in passing that among the "malicious, scandalous, and defamatory articles" appearing in *The Saturday Press* were those "concerning . . . the Jewish race."¹³⁹ How malicious and defamatory matter involving the Jewish race can be harmful, in what ways and for what reasons, he leaves to the reader to acknowledge.

And in this respect, the distinction between the majority opinion and the dissent is not as dramatic as it might have been. The majority opinion also acknowledges, precisely twice,¹⁴⁰ that *The Saturday Press* contained material derogatory of Jews. Like the dissent, the majority opinion develops no further the possibility that antisemitic content might be specifically objectionable. But unlike the dissent, the silent implication is that it does not matter with respect to the validity of the law. The dissent, on the other hand, seems at least to suggest that it should matter, albeit without saying why.¹⁴¹

¹³⁵ *Id.* (Butler, J., dissenting).

¹³⁶ *Id.* at 703.

¹³⁷ The majority opinion recognized that the rule against prior restraints was not absolute and mentioned as exceptions the release of militarily sensitive information during wartime, as well as the "primary requirements of decency [that] may be enforced against obscene publications." *Id.* at 715-16.

¹³⁸ *Id.* at 724, 729 (Butler, J., dissenting).

¹³⁹ *Id.* (Butler, J., dissenting).

¹⁴⁰ *Id.* at 703 (noting the complaint's reference to malicious, scandalous and defamatory matter in *The Saturday Press* regarding "the Jewish Race"); *id.* at 704 (noting the assertions in *The Saturday Press* that "a Jewish gangster" [referencing Mose Barnett] was responsible for certain crimes).

¹⁴¹ Of course, *Near* was decided seven years before *United States v. Carolene Products*, 304 U.S. 144 (1938), which signaled the beginning of the modern "suspect classification" approach to Equal Protection theory.

D. The November 19 Issue of The Saturday Press

There was antisemitic content in almost all nine issues of *The Saturday Press*.¹⁴² But as suggested in the immediately preceding segment of this Article, the issue containing the most vehemently antisemitic material was the final issue published on November 19, 1927.

The November 19 issue was the first issue published after Jack Guilford, who had started the paper with Jay Near, had been released from the hospital and had again begun to work on the paper.¹⁴³ Guilford had been shot on September 26, 1927, by Minneapolis gangsters.¹⁴⁴ The shooting took place shortly after the first issue of *The Saturday Press* had appeared, and was accordingly one of the key subjects covered in ensuing issues.¹⁴⁵ The purpose of the shooting was no doubt to intimidate Guilford and Near, and discourage them from printing material that would expose the gangsters' criminal activity.¹⁴⁶ The coverage of the shooting, and other related events, throughout the run of *The Saturday Press* indicated how futile the effort had been.

Guilford and Near were certain that the shooting had been ordered by a gangster by the name of Mose Barnett,¹⁴⁷ who indeed was Jewish. He was part of an organized group of Jewish gangsters and professional criminals who were active in the Twin Cities before, during, and shortly after, the time of Prohibition.¹⁴⁸ Both Guilford and Near were disdainful of Barnett and his criminal syndicate for undertaking their regular criminal activities. But they were more deeply infuriated at Minneapolis Mayor George Leach, Minneapolis Police Chief Frank Brunskill, and (to a somewhat lesser extent) Hennepin County Attorney Floyd Olson.¹⁴⁹

¹⁴² See *infra* section II, D-E, for a discussion of the run of *The Saturday Press* as a whole.

¹⁴³ FRIENDLY, *supra* note 106, at 45.

¹⁴⁴ *Id.* at 38-39.

¹⁴⁵ See *id.* at 39.

¹⁴⁶ This was at least the interpretation of *The Saturday Press* itself. See *id.* at 38 (“The first issue of *The Saturday Press* . . . report[ed] a threat from the underworld to bump off Near and Guilford if they persisted in their exposé of conditions in the city.”).

¹⁴⁷ *Id.* (“Guilford always insisted that ‘Big Mose’ had ordered the shooting.”). Near’s recitations of the crime in later issues of *The Saturday Press* confirm that he was of the same view. See, e.g., *id.* at 39.

¹⁴⁸ For more on “Big Mose Barnett” and his criminal activities in Minneapolis in the 1920s, see ELIZABETH JOHANNCEK, MINNEAPOLIS UNDERWORLD: OVER A CENTURY OF MILL CITY RACKETEERING AND COLLUSION 60, 120-21, 132 (2013). For more on the activities of Jewish gangster groups in the New York City area in the early- to mid-20th century, see generally RICH COHEN, TOUGH JEWS: FATHERS, SONS, AND GANGSTER DREAMS (1999).

¹⁴⁹ See generally JOHANNCEK, *supra* note 148, at 139-40 (describing hostile relations between Guilford, Near, and *The Saturday Press*, on the one hand, and Brunskill, Olson, and Minneapolis authorities on the other, based on asserted official complicity with illegal conduct).

Guilford and Near were convinced that Leach, Brunskill, and other Minneapolis public figures were complicit in allowing the gangsters relatively free rein in pursuing their gambling and other associated illegal activities in the city. It was these activities that *The Saturday Press* largely meant to publicize, and of course, Guilford and Near were outraged that their intended exposure of the criminality had resulted in Guilford's shooting.

It is in that context that the issue of November 19 appeared. The major articles for that issue teemed with violent and hateful rhetoric, excoriating Barnett for having attempted the murder of Guilford. No extreme was spared in attributing the criminal viciousness of the attack to Barnett's Jewishness. One of the more prominent articles in the issue was written by Jay Near and titled "Facts Not Theories."¹⁵⁰ The title seemed to denote an assertion that the activities of Jewish gangsters in Minneapolis, and their connection to the authorities, was a matter of fact rather than speculation. Just a small number of the most virulent passages from this piece were:

There have been too many men in this city and especially those in official life who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis. . . . It is Jew thugs who have 'pulled' practically every robbery in this city. . . . It was a gang of Jew gunmen who boasted that for five hundred dollars they would kill any man in the city. It was Mose Barnett, a Jew, who boasted that he held the chief of police of Minneapolis in his hand

Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call 'Jews' they can easily do so BY THEMSELVES CLEANING HOUSE. I'm not out to cleanse Israel of the filth that clings to Israel's skirts I simply state a fact when I say that ninety per cent of the crimes committed against society in this city are committed by Jew gangsters.

It is Jew, Jew, as long as one cares to comb over the records And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews

¹⁵⁰ See, e.g., *Near v. Minnesota*, 283 U.S. 697, 724 n.1 (1931).

I have adopted the sparrow as my national bird unit Davis' law enforcement league or the K. K. K. hammers the eagle's beak out straight. So if I seem to act crazy as I ankle down the street, bear in mind that I am merely saluting MY national emblem¹⁵¹

One of the pieces authored by Howard Guildford in the November 19 issue, titled "Gil's Chatterbox," addressed his shooting directly. It also contained lurid antisemitic material. Here are some examples:

I headed into the city on September 26th, ran across three Jews in a Chevrolet; stopped a lot of lead and won a bed for myself in St. Barnabas Hospital for six weeks Whereupon I have withdrawn all allegiance to anything with a hook nose that eats herring Mose Barnett . . . headed the local delegation to the new Palestine-for-Jews-only. He went ahead of the boys so he could do a little fixing with the Yiddish chief of police boys will be boys and 'ganefs' will be 'ganefs.'¹⁵²

A third significant piece in the November 19 issue referenced grand jury proceedings, then taking place in Minneapolis, concerning an earlier crime that Near and Guilford were attributing to Barnett. They believed that the grand jury was not pursuing leads toward Barnett as aggressively as it should and seemed to maintain that one or more of the grand jurors had either been bribed or intimidated. The article, called "Grand Juries and Ditto," included remarks like these:

The Yids had your dimensions, apparently [sarcastically addressing a grand juror], and we always go by the judgment of a dog in appraising people. We will call for a special grand jury and a special prosecutor within a short time Up to the present we have been merely tapping on the window. Very soon we shall start smashing glass.¹⁵³

E. The November 19 Issue and Antisemitic Tropes

One of the chief reasons the November 19 issue should be viewed as especially vehement in its antisemitism is that it makes such frequent use of so many antisemitic tropes. The most destructive trope is the association of Mose Barnett with Judaism in such a way that all Jews are tarnished by Barnett's criminality. After all, if a notorious gangster named "Smith," say, comes from a Protestant background, no one feels the need to refer to "that filthy Protestant gangster Smith." Near and Guilford are attacking Barnett's Jewishness no less (and perhaps more) than his criminality.

¹⁵¹ *Id.* (all emphases in original).

¹⁵² *Id.*

¹⁵³ *Id.*

Second, there are numerous images in the November 19 articles analogizing Jews or purportedly Jewish characteristics as animalistic. Note the references to “snake-faced” Jewish gangsters, to Jewish gangsters as “rodents,” and the need to “hammer the eagle’s beak out straight.”¹⁵⁴ Depicting Jews in posters and magazines as mere animals masquerading as humans was a pervasive tactic of the Nazi regime.¹⁵⁵ It is very literally dehumanization.

Third, the November 19 articles treat all Jews as an undifferentiated mass whose members both lack individuality and are in some kind of conspiratorial control of each other. The repetition of the word “Jew,” often in all capitals or with some other emphatic treatment,¹⁵⁶ emphasizes the status of being Jewish over all other aspects of the individual. And the insistence that all other Jews are responsible for the criminality of some of them implies a degree of group control that plays into the trope of a worldwide Jewish conspiracy, also a key feature of Nazi rhetoric.¹⁵⁷ This is also accentuated by the reference to “Israel;”¹⁵⁸ the modern state of Israel did not exist at the time, and the reference is to the inchoate cultural and religious nation of Israel as the body of all Jews around the world.¹⁵⁹

Additionally, the very disclaiming of antisemitism that appears repeatedly in the November 19 articles is itself an aspect of much antisemitic discourse. The actual antisemitism is all the more evident from the reference to Jewish status as defining a “race,” and the repeated use of the Yiddish word “ganef,”¹⁶⁰ meaning a disreputable or dishonest person.

Finally, the November 19 article on the Minneapolis grand jury closes with the sentence: “Very soon we shall start smashing glass.”¹⁶¹ The

¹⁵⁴ *Facts, Not Theories*, SATURDAY PRESS, Nov. 19, 1927, at 4–5 [hereinafter *Facts, Not Theories*].

¹⁵⁵ *Id.* at 4. See also WISTRICH, *supra* note 9, at 260 (referencing militantly Islamist “religious texts identifying Jews as the ‘sons of apes and pigs’”).

¹⁵⁶ See, e.g., *Facts, Not Theories*, *supra* note 154, at 4.

¹⁵⁷ See, e.g., WISTRICH, *supra* note 9, at 248 (Wistrich quotes Hitler in his last official public communication to the German people: “[I]f the peoples of Europe were treated again as bundles of stocks belonging to the international conspiracy of money and finance, then the culprit for this murderous struggle would have to pay.”).

¹⁵⁸ See, e.g., *Facts, Not Theories*, *supra* note 154, at 4.

¹⁵⁹ Before the creation of the modern state of Israel, the word “Israel” was occasionally used to connote the Jewish nation more generally. Modern writers describing sociological interactions among ancient peoples could also use the term in this sense. E.g., the *Universal Jewish Encyclopedia* (1948), under the entry for “Israel,” includes the following as one of its definitions: “The people of Israel as a whole, who were regarded as the descendants of Jacob The usual term for the nation is [‘]children of Israel,’ though Israel is sometimes used alone. This name, with its implication of common blood and common interest, proved to be a powerful influence in molding the scattered tribes of the Hebrews into a single nation.”

¹⁶⁰ *Gil’s Chatterbox*, SATURDAY PRESS, Sept. 24, 1927, at 5 [hereinafter *Gil’s Chatterbox*].

¹⁶¹ *Facts, Not Theories*, *supra* note 154, at 6.

infamous night of the Nazi “Kristallnacht” was still seven years away,¹⁶² but the practice of breaking the window glass of Jewish merchants was undoubtedly not unknown at the time, and the foretaste of future events is chilling.

F. *Earlier Issues of The Saturday Press*

Antisemitism was characteristic of the entire run of *The Saturday Press*. Yet the different issues varied considerably as to the quantity and degree of antisemitism presented in each. As noted earlier, the last and final issue (on November 19) contained the most virulent antisemitism. Earlier issues presented more casual forms of antisemitism,¹⁶³ with the intensity of antisemitic content increasing incrementally over time, even if this pattern emerges chiefly due to the much lesser concentration of antisemitic material in the earliest issues.¹⁶⁴ In addition, bigotry toward other groups was also characteristic of the run as a whole.¹⁶⁵ However, expressions of other bigotries were less frequent and less concentrated.

There was also a pattern regarding the expressions of antisemitism. The first four issues contained only one expression in each issue or no

¹⁶² See, e.g., ROBERT S. WISTRICH, *A LETHAL OBSESSION: ANTI-SEMITISM FROM ANTIQUITY TO THE GLOBAL JIHAD* 244–45 (2010) (regarding the character and reception of the Nazi “Crystal Night” on November 9–10, 1938). Wistrich describes Kristallnacht as “an unprecedented orgy of anti-Jewish violence.” He further summarizes the toll of that night:

The storefront glass of about seventy-five hundred businesses and other properties owned by Jews were shattered; more than four hundred synagogues burned across Germany. Approximately one hundred Jews were murdered, and many more were injured; thirty thousand Jews were packed off to concentration camps, where they would suffer unspeakable indignities.

Id. at 149.

¹⁶³ The first issue contained only one antisemitic expression, an off-hand reference Guilford makes to the effect that he is enjoying lunch on a particular afternoon, composed of “a dish so beloved to orthodox Jews—chop suey, which is always started off with the broth of boiled pork and chicken.” *Gil’s Chatterbox*, *supra* note 160, at 9. Although he appears to view his remark as humorous, he is clearly charging orthodox Jews with a kind of hypocrisy. The reference is casual and does not appear as part of a lengthy or organized diatribe. *Id.*

¹⁶⁴ Issue 1 contained only the expression quoted. See *id.* Issues 2 and 4 contained no antisemitic expression. See *SATURDAY PRESS* (Oct. 1, 1927); *SATURDAY PRESS* (Oct. 15, 1927). Issue 3 contained only an oblique reference to a person who was clearly Jewish in the circumstances as a “Russian.” *Police ‘Baffled’ in Their Attempts to Identify Acid-Throwing Thugs who Assaulted Samuel Shapiro*, *SATURDAY PRESS*, Oct. 8, 1927, at 1 [hereinafter *Police ‘Baffled’*]. This was akin to Hjalmar Petersen’s use of the phrase “Mexican Generals” to describe Jewish political activists in Minneapolis. Hyman Berman, *Political Antisemitism in Minnesota during the Great Depression*, 38 *JEWISH SOC. STUD.* 247, 251 (Summer–Autumn 1976). See section III-C, *infra*.

¹⁶⁵ *Will He? Watch Him Do It!*, *SATURDAY PRESS*, Nov. 5, 1927, at 3. (referencing statements by police chief Frank Brunskill as “the blah of a Polack”); *id.* at 6 (sideline item attempting to joke about a “modern working girl” as being able to cook only if it involved driving a car).

expressions.¹⁶⁶ But then, during the next four issues, the expressions became more frequent and more intense. Finally, the last issue contained the virtual explosion of antisemitism picked up in Justice Butler's dissent and discussed above.

The increase in frequency and intensity might have been attributable to frustration on Near's part with what he perceived as the lack of effective prosecution of Mose Barnett for Guilford's shooting. The longer Barnett remained free and unprosecuted, the more galling the situation may have been to Near, and the more susceptible he was to disparaging Barnett for being Jewish. Then, the final explosion in the last issue would be the culmination of that frustration, being the first published after Guilford's release from the hospital.

The pattern of antisemitic expressions through the run of *The Saturday Press* raises certain significant points:

First, Near's writings establish a kind of equipoise dynamic between generalized and specific antisemitism. On the one hand, the antisemitic expressions themselves focused on Barnett's Jewishness and seemed to generalize from the fact that he was Jewish. The repeated references to his Jewish ethnicity, branding his activities as the activities of a Jew, seemed to convey the idea that his activities were characteristic of Jews. At the same time, however, Near never explicitly made totalistic statements about "all Jews." He never argued or explicitly suggested that all Jews should be punished or treated in a distinct way. He thereby avoided the Ignominy Threshold, and also set up this kind of equipoise dynamic. His repeated references to Barnett's Jewishness seemed to generalize criminal activity as a facet of Jewish status, but the lack of generally condemnatory language, and the focus specifically on Barnett, seems to disclaim general application.

Second, Near made use of this dynamic when readers of *The Saturday Press* complained about his antisemitic material. The last three issues reference complaints sent to Near or *The Saturday Press*, said to criticize Near for using anti-Jewish language just because Mose Barnett himself was Jewish. In responding, Near still engages in the equipoise dynamic. He admits that "not all Jews are gunmen,"¹⁶⁷ in Issue 7, for example. But in Issue 9, in the language quoted in the Butler dissent and in this Article above, he asserts that it is the responsibility of Minneapolis Jews

¹⁶⁶ See *Gil's Chatterbox*, *supra* note 160 (one expression—the "chop-suey" comment); SATURDAY PRESS (Oct. 1, 1927) (no expressions); *Police 'Balled'*, *supra* note 164 (the "Russian" reference); SATURDAY PRESS (Oct. 15, 1927) (no expressions).

¹⁶⁷ *Not a Matter of Race*, SATURDAY PRESS, Nov. 5, 1927, at 5 ("I recognize the fact that not all Jews are gunmen, that there are 'good and bad' Jews, just as there are 'good and bad' of every other race.").

to address gangsterism by Jews in their city.¹⁶⁸ Such an assertion can infer that the responsibility for Barnett's criminality is tied up in his Jewish ethnicity, and that is essentially generalizing criminality from Jewish identity.

Third, the virulence and intensity of the antisemitism of the November 19 issue nearly approaches a call to violence against Jews. For example, saying that "Jew thugs . . . have 'pulled' practically every robbery in this city"¹⁶⁹ is close to vigilante advocacy, especially when part of the complaint is that the legally constituted authorities are complicit. But at the same time, there is no explicit call to assertive or aggressive action, and all the issues remain short (although sometimes barely) of the Ignominy Threshold. This factor demonstrates the fluid and dynamic nature of antisemitic discourse; it can veer toward and away from the Ignominy Threshold on an almost constant basis.

G. Ways in Which Antisemitic Content Could Have Been Appropriately Addressed

In the years since *Near* was decided, the Supreme Court has, on notable occasions, been careful not to disparage the concerns of social minorities when deciding cases in ways that do not advance their interests.

For example, in the now-overturned *Bowers v. Hardwick*,¹⁷⁰ the majority opinion declined to invalidate state criminal sodomy laws.¹⁷¹ The Court's language, while perhaps not completely sympathetic, nevertheless at least feigned to indicate that hostility to gay men and lesbians was not its primary motivation. The Court insisted:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds.¹⁷²

The Court implied that the flaw in the defendant's case was a misapprehension of constitutional doctrine, rather than any basic or fundamental inferiority of the defendant's status as a gay man. While cold comfort, such language can at least provide some degree of assurance or claim of protection for the affected group.

¹⁶⁸ *Facts, Not Theories*, *supra* note 154, at 4 (stating that "[i]f the people of the Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call 'Jews' they can easily do so BY THEMSELVES CLEANING HOUSE.").

¹⁶⁹ *Id.*

¹⁷⁰ 478 U.S. 186 (1986) (reversed on other grounds); *see also* *Lawrence v. Texas*, 539 U.S. 558 (2013).

¹⁷¹ *Bowers*, 478 U.S. at 189.

¹⁷² *Id.* at 190.

Similarly, when the Court majority invalidated a city ordinance that could have punished the burning of a makeshift cross on the front lawn of a Black family's house, the Court suggested that the motivation behind such a prosecution could be legitimate, even if the particular ordinance was invalid: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."¹⁷³ Again, the message to those in the position of the Black family involved can at least provide some assurance that it is not hostility to them that has motivated the release of the young man who tried to attack their home.

Most recently, when the Court overturned a state administrative order forbidding a baker from discriminating against a gay couple in the conduct of his bakery business, the Court attempted to assure lesbian, gay, bisexual, and transgender readers that the opinion was not born from disrespect of them:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.¹⁷⁴

In this case, the Court was signaling that the baker's Free Exercise rights were motivating its invalidation of the non-discrimination order, rather than hostility to the plaintiffs as such.

The Court's decision in *Near*, in light of the clearly antisemitic character of *The Saturday Press*, contained no such compensatory language. It is this reticence on the part of the Court that is one of the key foci of this Article. In the context of 1931, the Court may have felt that the content of the affected speech was irrelevant to the principle it was declaring: the rule against prior restraints. But in the context of the present, the need to respect the interests of social minorities is more compelling than perceived in earlier generations. The quotations from the cases noted above indicate the Court's awareness of this need.

As the Court's work moves forward, it will still have discretion regarding any assurances of this kind that it offers in its opinions. But it

¹⁷³ R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

¹⁷⁴ Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

should never again show the kind of reticence displayed in *Near* when the Ignominy Threshold has been passed for any particular social group.

III. ANTISEMITISM IN MINNESOTA DURING AND SHORTLY AFTER THE *NEAR* ERA

Carey McWilliams, a noted social critic and essayist of mid-20th century America, in 1946 referenced Minneapolis as “the capitol [*sic*] of anti-semitism in the United States.”¹⁷⁵ His statement has been much noted by other regional authors on the subject of antisemitism.¹⁷⁶ A review of antisemitism in mid-20th century Minneapolis both illustrates his proposition and confirms the existence of the violence threshold. This review will focus on employment discrimination and related exclusions, the advent of the Silver Shirt movement, and the gubernatorial elections of 1936 and 1938.

A. *Discrimination and Related Exclusions*

From the early years of industrialization through to the late 1940s, there was large-scale discrimination in Minneapolis against Jews in employment and related areas.¹⁷⁷ In the years preceding World War I, few if any Jews participated in major industries in Minnesota, such as iron mining or flour milling.¹⁷⁸ In Minneapolis and elsewhere, banking and the lumber industry excluded Jews and other populations not part of the original White protestant elite.¹⁷⁹ The post-World War I era was not better, since ethnocentrism inspired by the war continued even after the war’s end.¹⁸⁰

The downtown office buildings in Minneapolis often imposed quota limits on the proportion of Jewish tenants.¹⁸¹ Some excluded Jews entirely.¹⁸² Several prominent chain stores in Minneapolis refused to accept applications for employment from Jews.¹⁸³ There was substantial prejudice

¹⁷⁵ Carey McWilliams, *Minneapolis: The Curious Twin*, 7 COMMON GROUND 61, 61–62 (Autumn 1946), cited in Laura E. Weber, “*Gentiles Preferred*”: *Minneapolis Jews and Employment 1920–1950*, 52 MINN. HIST. MAG., 1991, at 167, 179.

¹⁷⁶ See, e.g., Weber, *supra* note 175; RHODA LEWIN, *JEWISH COMMUNITY OF NORTH MINNEAPOLIS* 41 (Arcadia Pub. 2001); FRED A. LYON, *MOUNT SINAI HOSPITAL OF MINNEAPOLIS, MINNESOTA: A HISTORY* 23 (1995); W. GUNTHER PLAUT, *THE JEWS IN MINNESOTA: THE FIRST SEVENTY-FIVE YEARS* 275–76 (Am. Jewish Hist. Soc’y 1959).

¹⁷⁷ Weber, *supra* note 175, at 168.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 169.

¹⁸¹ *Id.* at 170.

¹⁸² *Id.*

¹⁸³ LYON, *supra* note 176, at 24.

in the medical profession. A 1936 editorial in a Minnesota medical trade publication decried the “problem” of the increasing number of Jewish physicians in the already overcrowded medical profession.¹⁸⁴ One Minneapolis hospital administrator stated that “it has seemed expedient to limit the number of Jewish doctors to about ten percent of the total staff.”¹⁸⁵

In 1931, Jewish women activists in Minneapolis and the Jewish Family Welfare Association conducted a survey to determine the depth and breadth of anti-Jewish discrimination in employment in Minnesota.¹⁸⁶ The survey involved interviews with ninety-six employers and eight employment agencies.¹⁸⁷ The results indicated that discrimination was a key causative factor in the massive Jewish unemployment of the time.¹⁸⁸ Accordingly, the Jewish Free Employment Bureau, which had existed before the Depression, was reorganized and expanded to assist Minneapolis Jews in obtaining employment.¹⁸⁹ By 1934, progress was being made, as the bureau educated employers on the achievements attained by currently employed Jewish workers, and the satisfactory results experienced by their employers.¹⁹⁰

Nevertheless, a 1936 survey under the auspices of the Minneapolis Council of Social Agencies determined that Jews in Minneapolis were mostly “engaged in small business, with no extremes of wealth.”¹⁹¹ Although there was significant residential segregation of the Jewish population on the north side of the city, the survey concluded that the Jewish population had kept pace with the rest of Minneapolis in weathering the worst parts of the Depression.¹⁹² Despite some degree of progress, even by the late 1930s, help wanted ads in Minnesota newspapers were still stating “Gentile” or “Gentile preferred.”¹⁹³

With the advent of the 1940s and World War II, employment discrimination against Jews in Minneapolis continued.¹⁹⁴ There were also attempts to boycott Jewish businesses, and certain insurance companies discriminated against Jewish businesses as well.¹⁹⁵ Selden Menefee, a journalist affiliated with Princeton University, investigated antisemitism during the war years, and in his 1943 report, determined it to be the most

¹⁸⁴ *Id.* at 20.

¹⁸⁵ *Id.* at 21.

¹⁸⁶ Weber, *supra* note 175, at 174.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 176.

¹⁹¹ *Id.* at 177.

¹⁹² *Id.*

¹⁹³ *Id.* at 174.

¹⁹⁴ *Id.* at 179.

¹⁹⁵ *Id.*

serious in Minnesota.¹⁹⁶ In 1946, he concluded that antisemitism was no longer much of a problem in most of the South and the West, but that it was still a problem in Minneapolis.¹⁹⁷

In the years following World War II, real estate developers proclaimed in their brochures that they would not sell to named minorities (including Jews), and Jews were excluded from social and business clubs.¹⁹⁸ In that context, Minneapolis Jewish community members opened Oak Ridge country club and other Jewish community organizations.¹⁹⁹

Discriminatory practices were still being reported in Minneapolis employment agencies, at the Mayo Clinic and St. Mary's Hospital in Rochester.²⁰⁰ There was significant discrimination against Jewish physicians by medical institutions and organizations.²⁰¹ It was largely due to these discriminatory patterns in medicine that the Jewish community established Mount Sinai Hospital of Minneapolis.²⁰²

B. The Silver Shirt Movement

In the early 1930s, a struggling American novelist and essayist named William Dudley Pelley established a national men's organization called the "Silver Legion."²⁰³ It was expressly designed to serve as a paramilitary organization patterned after the Nazi "Brown Shirt" organization that had helped Adolf Hitler rise to power in Germany.²⁰⁴ Pelley was an ardent supporter of Hitler who viewed Christians of European ancestry as being at the top of a racial hierarchy, with the nether reaches being populated by Jews, Native Americans, and African Americans.²⁰⁵ Members of the Silver Legion wore silver-colored shirts bearing a large capital "L," which was said to stand for love, loyalty, and liberation, and were usually called "Silver Shirts."²⁰⁶ Pelley developed a relatively small, but intensely devoted following; peak national involvement in the Silver Shirts comprised 15,000 members and 100,000 sympathizers.²⁰⁷

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ LEWIN, *supra* note 176, at 40.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See generally LYON, *supra* note 176 (describing in detail the historical organization and development of Mount Sinai Hospital of Minneapolis, Minnesota).

²⁰³ Sarah Atwood, "This List Not Complete": *Minnesota's Jewish Resistance to the Silver Legion of America, 1936-1940*, 66 MINN. HIST. MAG., Winter 2018-2019, at 143, 145.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 146.

Although the Silver Shirts were a national organization, sympathetic Minnesota audiences were receptive.²⁰⁸ By 1936, Pelley was claiming a membership of 6,000 in Minnesota.²⁰⁹ And apart from the Silver Shirts themselves, three smaller like-minded organizations of the time were located in Minnesota.²¹⁰ There were the Christian Vigilantes of Minneapolis, the Pro-Christian American Society, and the White Shirts in Virginia.²¹¹ It was in part due to the Silver Shirt membership that Edward Schwartz, a noted journalist and publicist, in reference to Minneapolis, declared in a later interview: “This was one of the worst Jew-hating communities in the world through the 1930s and into the 1940s.”²¹²

The Silver Shirts seem to have had two periods of major activity in Minnesota. The first was from 1934 to 1936. The initial period of involvement was reported on by a young Eric Sevareid, then recently graduated from the University of Minnesota.²¹³ His serialized exposé of the group in the *Minneapolis Journal*, treated by the editors as a kind of satirical commentary on the group’s members, seems to have had a somewhat suppressive effect on their activities.²¹⁴

The Minneapolis Jewish community also mobilized against the Silver Shirts, and even used a very effective informant to obtain knowledge about its activities.²¹⁵ Jewish activists developed a list of apparent Silver Shirt members and supporters, gleaned from the license plates of cars consistently in attendance for meetings, and from other sources.²¹⁶

The Silver Shirts began aggressively organizing in Minnesota again in the spring of 1938.²¹⁷ Resistance to the organization this time was strong, with the Minneapolis mayor, public commentators, and newspaper editorial boards taking strenuous positions against the group.²¹⁸ Newspapers reported the attendance of some leading businessmen at some of the 1938 meetings, and when the businessmen then needed to explain their attendance, their explanations contained disavowals of their knowledge or support of the group.²¹⁹

In late 1938, informants confirmed that two Minneapolis police officers had joined the Silver Shirts and that a third was a Silver Shirt

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 143.

²¹¹ *Id.*

²¹² *Id.* at 146.

²¹³ *Id.*

²¹⁴ *Id.* at 146–47.

²¹⁵ *Id.* at 146.

²¹⁶ *Id.* at 146–47.

²¹⁷ *Id.* at 148.

²¹⁸ *Id.* at 148–49.

²¹⁹ *Id.* at 149.

recruiter.²²⁰ Other Jewish community activists also finally identified the specific individuals in the community who had been publishing and circulating particularly incendiary Silver Shirt brochures and pamphlets.²²¹ Popular accounts indicate that the Minneapolis Silver Shirts were disbanded in late 1938, with the election of Harold Stassen as governor.²²² (His election somewhat subsumed the Silver Shirts, as discussed in more detail below.) Nationally, William Pelley dissolved the Silver Legion of America in 1941.²²³

C. The Gubernatorial Elections of 1936 and 1938

A notably “massive trauma” inflicted upon the Minnesota Jewish community stemmed from the “open and flagrant use of antisemitism” in the 1938 gubernatorial election.²²⁴ That election was between Harold Stassen and Elmer Benson, who was not Jewish but was nevertheless attacked for his ties to certain politically active Jews.²²⁵

The precursor to the 1938 gubernatorial election, however, was the gubernatorial primary within the Farmer-Labor party in 1936.²²⁶ The 1936 primary was between Benson, then state Bank Commissioner, and Hjalmar Petersen, then Lieutenant Governor.²²⁷ Petersen and his political allies began attacking certain people working with Benson as “Mexican Generals.”²²⁸ This phrase was understood as a code reference for Jewish advisors then associated with Benson or the Farmer-Labor Party.²²⁹ Petersen claimed during the primary that these “Mexican Generals” actually “tightly controlled” the Farmer-Labor Party, and Petersen tried to position himself as an outside challenger to those purportedly under their control, like Benson.²³⁰

The antisemitic ploy during the primary did not work, and Benson not only attained the Farmer-Labor nomination, but was then elected governor in the general election with a substantial majority.²³¹ Petersen, however, had negative feelings from losing the nomination, and continued complaining about the supposed “Mexican Generals” even after the

²²⁰ *Id.* at 150.

²²¹ *Id.* at 152.

²²² *Id.*

²²³ *Id.* at 153.

²²⁴ Hyman Berman, *Political Antisemitism in Minnesota during the Great Depression*, 38 JEWISH SOC. STUD. 247 (1976).

²²⁵ *Id.* at 261 (describing the “whispering campaign” used by Stassen supporters tying Benson to Jewish and communist activists).

²²⁶ *See, e.g., id.* at 250 (describing a “succession struggle” beginning before 1936).

²²⁷ *Id.* at 250–51 (identifying both candidates and their then-current positions).

²²⁸ *Id.* at 251.

²²⁹ *Id.*

²³⁰ *Id.* at 252.

²³¹ *Id.* at 252–53.

election, well into 1937.²³² Petersen also linked the “Mexican Generals” to purported Communist infiltrators whom he claimed were infiltrating the Farmer-Labor Party.²³³ Through 1937, Petersen established a following among disgruntled operatives, evangelical antisemites, and others who actively pursued antisemitic rhetoric against Benson and the Farmer-Labor Party.²³⁴ Although challenged by Jewish observers and other activists, both during and after the 1936 primary, Petersen never backed down from his taunting tactics.²³⁵

During the Farmer-Labor gubernatorial primary of 1938, Benson was again running against Petersen, and Petersen continued with his antisemitic assertions.²³⁶ This time, the antisemitic targets were more specifically drawn, and they included Benson’s advisors Roger Rutchick and Abraham Harris, editor of the Farmer-Labor Party newspaper.²³⁷ Benson narrowly won the primary, and was then up against the Republican candidate, Harold Stassen.²³⁸

The Republican campaign in the general election continued the antisemitic tactics, but with increased vigor.²³⁹ The main architect of the Republican antisemitic campaign was Ray P. Chase, a former one-term Congressman and former State Auditor.²⁴⁰ Chase had created a Ray P. Chase Research Bureau, among whose aims was to “block the efforts of the present Governor and his communistic Jewish advisors to perpetuate themselves in power”²⁴¹

Chase maintained a “long time” correspondence with William Dudley Pelley and received numerous antisemitic reports on Jewish enrollment and other matters from Edward E. Nicholson, Dean of Student Affairs at the University of Minnesota.²⁴² Chase and other Stassen supporters peppered the general election campaign with broadly publicized innuendos, including false assertions that Benson’s wife was Jewish, and accusations that Benson’s Jewish advisors were Communist Party fronts.²⁴³ Most notorious was a pamphlet, authored by Chase, called “Are They Communists or Catspaws.”²⁴⁴ It contained doctored photographs of Benson with his Jewish

²³² *Id.* at 253.

²³³ *Id.* at 254.

²³⁴ *Id.* at 254–55.

²³⁵ *Id.* at 254, 256.

²³⁶ *Id.* at 256.

²³⁷ *Id.*

²³⁸ *Id.* at 257.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 258–59 (citing correspondence between Chase and financial backers of his bureau).

²⁴² *Id.* at 259.

²⁴³ *Id.* at 261.

²⁴⁴ *Id.*

associates, adjusted to accentuate Jewish facial features and suggest animalistic characters, directly in the mold of Nazi propaganda.²⁴⁵ The pamphlet also contained other information, most of it later considered false, regarding purported Communist activities by Rutchick, Harris, and others.²⁴⁶

Using the pamphlet and other similar materials, Chase was able to convince sympathetic members of Congress to hold hearings in Washington on supposed Communist influence in the Farmer-Labor Party.²⁴⁷ The proceedings featured the assertions of Hjalmar Petersen and Ray Chase, and accordingly partook of their distinctly antisemitic approach.²⁴⁸

In the closing days of the 1938 campaign, leading Minnesotans began to repudiate Chase, and a delegation of prominent Jewish Republicans met with Stassen, unavailingly, asking him to address the issue.²⁴⁹ Stassen overwhelmingly defeated Benson in the general election.²⁵⁰

D. The Later Events Concerning Charles Lindbergh

The 1938 gubernatorial election was not the last time during the 1930s and 1940s that antisemitism was a center of controversy in Minnesota. In October of 1938, Nazi Germany decorated Minnesota native Charles Lindbergh with its Commander Cross of the Order of the German Eagle.²⁵¹ He accepted the award and did not comply with suggestions that he return it, stating that a return would be an “unnecessary insult.”²⁵²

On September 11, 1941, Lindbergh gave a speech at a rally in Des Moines that was organized by a group called the “America First Committee.”²⁵³ In it, he asserted that U.S. President Franklin Roosevelt, the British government, and American Jews were trying to drag the United

²⁴⁵ *Id.* at 262; see also Zac Farber, *Politics of the Past: Anti-Semitic Red-baiting Swayed '38 Governor's Race*, MINN. LAWYER (Sept. 22, 2016), <https://minnlawyer.com/2016/09/22/politics-of-the-past-anti-semitic-red-baiting-swayed-38-race/> [https://perma.cc/P7TZ-6A34] (illustrating some of the photographic technique and the pamphlet in greater detail).

²⁴⁶ Berman, *supra* note 224, at 261.

²⁴⁷ *Id.* at 262.

²⁴⁸ *Id.* (noting that the hearings reinforced “the antisemitic low road efforts of Chase and his friends.”).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Steve Hunegs, *MSP Terminal Namesakes: At the Very Least, It's Time for a Reordering*, MINNEAPOLIS STAR TRIB. (Sep. 7, 2013), <https://www.startribune.com/msp-terminal-namesakes-at-the-very-least-it-s-time-for-a-reordering/443112753/> [https://perma.cc/QX5F-XRFF].

²⁵² *Id.*

²⁵³ See Letter from Arthur Brin, Chair, Jewish Anti-Defamation Council of Minnesota, to General Robert Wood, Chair, America First Committee (Sept. 14, 1941) (on file with the Law Review).

States into war against Germany.²⁵⁴ He also complained that Jews were contributing to the war sentiment through their asserted control of U.S. newspapers, radio stations, and motion picture production companies.²⁵⁵

Lindbergh's September 1941 speech garnered substantial attention. In Minnesota, the statewide Jewish Anti-Defamation Council published an open letter to the chairman of the America First Committee, General Robert Wood.²⁵⁶ The letter pointed out that many groups, and not simply Jews, were being persecuted by the Nazis and were supporting the downfall of the Nazi regime.²⁵⁷ It also refuted as a factual matter Lindbergh's assertion regarding control of newspapers, radio stations, and motion pictures.²⁵⁸

The Saint Paul Pioneer Press printed an editorial criticizing the speech, suggesting that Lindbergh, or at least his speech, was an "imitator of Hitler."²⁵⁹ The speech was of special concern in view of the public mood in the pre-war and wartime eras. National polls were conducted determining that during the 1938-1946 period, as many as 35-40% of Americans were prepared to participate in or support a widespread campaign against Jews in the United States.²⁶⁰ After the United States joined the war, Nazis dropped antisemitic leaflets on U.S. soldiers, implying that the United States was run by Jews and that World War II was fought only to vindicate Jewish interests.²⁶¹

The response across the nation to Lindbergh's forays into antisemitism was ultimately effective in stopping their political progress. Lindbergh was criticized and denounced as "unamerican."²⁶² But these episodes involving Lindbergh's activities remain infamous episodes of antisemitism in the United States.²⁶³

Lindbergh delivered his Des Moines speech ten years after the Supreme Court delivered its *Near* decision. Under the circumstances of September 1941, the Ignominy Threshold was much closer to being reached on a national basis. It is to be hoped, had *Near* been decided on that later date, that the Court's approach to *The Saturday Press* would have included much more explicit treatment, and disapproval, of its antisemitic content, even if the result invalidating the injunction would be the same.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Imitator of Hitler*, Editorial, SAINT PAUL PIONEER PRESS, Sept. 13, 1941.

²⁶⁰ Hunegs, *supra* note 251.

²⁶¹ "Who Rules the United States?," brochure on file with Steve Hunegs, Jewish Community Relations Council of Minnesota and the Dakotas.

²⁶² Hunegs, *supra* note 251.

²⁶³ *Id.*

E. *The Ignominy Threshold*

Although the Republican-backed effort in 1938 had been “the most successful use of political antisemitism in the United States,”²⁶⁴ once Stassen had won, the major impetus behind it had been satisfied.²⁶⁵ Also, although Lindbergh’s 1941 speech had had horrifying potential implications, they were successfully beaten back, in part by Minnesota activists. Furthermore, although Jay Near had won the invalidation of the Minnesota Gag Law, *The Saturday Press* never attained the same notoriety again, and its later life was short and unrenowned.²⁶⁶ Although the Ignominy Threshold had been approached, it appears that it had not been crossed. No statutory enactments were passed, and no public acts of violence resulted, from the relevant period of antisemitism.

It is fortunate that the antisemitic consequences of the publication of *The Saturday Press* were limited. It was, after all, a poorly-regarded paper, publishing mostly low-quality material. The period of its most consequential run lasted for only nine issues, and its most grievously antisemitic content was largely confined to the last of those nine issues. In light of these consequences, perhaps the Court’s reticence in the *Near* opinion can find justification.

IV. CONCLUSION

At the time of the publication of this Article, it is uncertain how close the United States may be to the Ignominy Threshold that it has described. If situations are brought before the courts that impair the interests of social minorities in ways that breach the Ignominy Threshold, courts should not proceed as though these interests are not being compromised, as the Court did in *Near*. Rather, at least when the Ignominy Threshold has been passed, courts should proceed by frankly acknowledging the effects of their opinions, even when the legal requirements of their judgments do not align with the interests impaired.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 264 (noting that those supporting Petersen and Stassen “were willing to use any weapon, including antisemitism, on order to recapture the instruments of state power,” suggesting that once that power had been captured the need to further pursue the same strains of antisemitism had been eliminated).

²⁶⁶ See FRIENDLY, *supra* note 106, at 163–67 (noting the economic difficulties of *The Saturday Press* since its re-opening in 1932, and the tussle of ownership and leadership between Guilford and Near during the later time).