

How Can Law Protect Groups.mp4

[00:00:00] **William Forbath** Good afternoon and thank you for joining us for the second session of our virtual conference. How the Law Treats Hate, antisemitism and Anti-Discrimination presented by UVA's Religion, Race and Democracy Lab, UVA's Jewish Studies Program and its Karsh Center for Law and Democracy.

[00:00:22] **William Forbath** I'm Willy Forbath. I teach at UT Austin, at the law school and occasionally in the history department. Let me introduce you to extraordinary speakers who are joining me while I moderate, make some comments and gather up your questions. David Luban is university professor and professor of law and philosophy at Georgetown University. He's the author. His books include Legal Ethics and Human Dignity and Torture, Power and Law. He'll be visiting professor of law at the UVA law school in spring 2021. Professor Nomi Stolzenberg is the Nathan and Lilly Chapell chair in law at the University of Southern California's School of Law. She is the author of He Drew a Circle That Shut Me Out: Assimilation, Indoctrination and the Paradox of a Liberal Education. And the forthcoming book, American Shtetl, Curious Youghal through the lens of Jewish history and American law. Professor Luban will be speaking first. Let me just tell you before I turn it to David. Forgive me, David. That registration for the remaining two conference sessions will remain open until their respective start times. If you'd like to visit. Please visit the website religionlab.virginia.edu for the full schedule, we encourage audience members to engage in the conversation by raising questions throughout the program. Use the Q and A function at the bottom of your screens. The chat and the raise hands functions have been disabled. Today's speakers will be able to see your questions and we will reserve time at the end of the conversation to field some of them.

[00:02:25] **William Forbath** David.

[00:02:30] **William Forbath** I think we have lost David. And I believe we will let Nomi go.

[00:02:38] **Nomi Stolzenberg** Well, hello, everyone. I'm really looking forward to the return of David. I'm eager to hear his remarks as as I thank you all. Well, first of all, I want to thank the conference organizers and my fellow panelists. And all of you who are here to address this really important subject and complicated subject, as I think you all know, the charge to me and David was to address the question of how can law protect groups?

[00:03:19] **Nomi Stolzenberg** And a choice that is often put between seeking to build frameworks that protect people from discrimination, whether we're talking about antisemitism or discrimination based on other identity categories, whether we should seek to develop frameworks that protect people on the basis of their group-based identities, or rather, should we focus on preventing discrimination and harm to individuals. And I was going to speak to the issue from the perspective of American constitutional law, while David, who I'm happy to see has returned. I guess now in reverse order, we'll address the question from a more international perspective. I have to confess that while this choice, this dichotomy, as it's oftentimes presented between an individual or a group right based approach to freedom from or protection from discrimination has been a lifelong or career long, many decades long interest, even obsession of mine.

[00:04:37] **Nomi Stolzenberg** When I think about that question on its own, it almost starts to dissolve and seem meaningless, because obviously, if we're talking about protecting people from discrimination, we're talking about protecting individuals who are being discriminated against by virtue of their membership in groups or at least being perceived

as belonging to a certain group. That's not to say it is a mean it has a lot of meaning and practice. But I find that seeming choice, if it is a choice between thinking of protection from discrimination as an individual or group, right gains its meaning in so far as that dichotomy is conceptually connected to other dichotomies that structure discrimination law and the very concept, the definition of discrimination. Or more to the point, competing definitions of discrimination. So that's what I'm going to address in my remarks. It's an old question, right? The individual or group that has been given new salience by many factors and our contemporary political situation, not least of which is the recent appointments to the United States Supreme Court who are very committed to a highly individualistic approach to defining discrimination. Any of you who read Justice Gorsuch's opinion for the court in *Both stock* will know what I'm talking about. *Both stock* (?) was the case that too many seemed like a happy surprise. It was a Title seven case, that is to say, a case applying and interpreting the law of workplace discrimination. I mean, the particular question in that case was how to interpret discrimination on the basis of sex and whether or not sex or discrimination should be interpreted to protect people who are fired not strictly speaking, because of their gender or not only because of their gender, but because of their sexual orientation. In one case, or if a trans person is fired or otherwise discriminated against, is discrimination against trans people properly classified as a species of sex discrimination under Title seven? And many people were surprised that a conservative justice, Justice Gorsuch, sided with the Liberals and holding that Title seven should be interpreted to protect trans people and people who are discriminating on the basis of their sexual orientation. Um certainly, from my point of view, that was a very welcome outcome. But they found many aspects of Justice Gorsuch's reasoning very troubling, not least being his very assertive, I would even say, aggressive statement of his commitment to a highly individualistic model of what discrimination is. And I'll just read some of the relevant language. This is just discourse which says at first glance, another interpretation other than the one he's offering, might seem possible. Discrimination sometimes involves the act practice or an instance of discriminating categorically rather than individually. On that understanding, this statute would require us to consider the employer's treatment of groups rather than individuals to see how a policy affects one in sex as a whole versus the other of the whole as a whole. That idea holds some intuitive appeal to, says Justice Gorsuch. Maybe the law concerns itself with simply ensuring that employers don't treat women generally less favorably than they do men. But after entertaining that possibility, Justice Gorsuch resoundingly rejects it and insists that the only proper interpretation of discrimination on the basis of sex is one that sees it not as a matter of protecting women or a group defined by gender as a whole.

[00:10:06] **Nomi Stolzenberg** It's not about protecting groups, Justice Gorsuch insists, it's about protecting individuals. And presumably he would apply the same individualistic as opposed to more collective, categorical group based. Or we might simply say structural approach to defining discrimination on the basis of race or against Jews or against other groups. So the question is, you know, what's the significance of making that choice? This clearly seems to be the direction in which American life is headed.

[00:10:56] **Nomi Stolzenberg** This is a point of agreement between Justice Gorsuch and his fellow conservative colleagues on the bench who are in the dissent on this particular case. So this is this is the way the winds are blowing in the direction of defining discrimination as an individual right.

[00:11:21] **Nomi Stolzenberg** I think what we're it's worth just kind of highlighting that it matters, number one, because just there are many different forms of discrimination and there's disagreement about what discrimination is. And in the face of those two

phenomena, we have two problems. And I want to say, well, before Covid, I took to describing these twin problems in epidemiological terms as it's the coexistence of a problem of a false negative and a false positive, whether we're talking about an accusation of antisemitism or racism or sexism or some other form of discrimination. The problem of a false negative is of people, including judges, who are deciding whether or not a claim of discrimination is true. The problem of false negatives is the problem of people failing to recognize discrimination, antisemitism, race discrimination when it's actually there because it doesn't meet their definition of what discrimination is. There is also something that has been, I think, of increasing concern, which is the problem of false positives, seeing antisemitism or another form of discrimination when it's not there. Right? So we have these two twin problems that we need to solve. And it's hard enough to solve either one of them. It's really hard to solve one without exacerbating the other. So what are the implications of Gorsuch's insistence on the individual as opposed to group nature of the right? Well, to return to my introductory remark, the problem, we see the full force of the problem, once we recognize that that insistence on focusing on the individual and not the group is just one component of a broader picture, although in point of fact, it's a very narrow picture of discrimination that individuates at every turn. So not only does it view the victim of discrimination as an individual rather than a group, right? That's the point. Justice Gorsuch was emphasizing in the text of his Bozack (?) opinion. But that goes hand in hand with viewing the perpetrator of the act of discrimination as an individual actor, possessed of the intent to treat certain individuals differently from other individuals because of their race, sex, religion or whatever the basis of discrimination happens to be. So the victim is viewed as an individual. The perpetrator is viewed as an individual with bad thoughts in his or her head. Right? This is the bad apple model. It's an intent-based theory of discrimination and the act itself, right, the act of discrimination is seen through this lens as a discrete, isolated, individual action, isolated from other actions, isolated from its context, isolated from history. Right. It's not the product. There's no history to this act. It's irrelevant whether it's a widely shared, an act that many people engage in. We're not talking about social practices. We're just looking at an individual isolated, discrete action committed by one individual or maybe a set of individuals with bad intentions residing in their individual minds against other individuals. So what's missing from this picture? As I've already said, history, it doesn't matter. It is rendered irrelevant. If there was or wasn't discrimination against the group to which the individual victim of this ostensible act of discrimination belongs. So, and Justice Gorsuch made this very clear in a way that should have sent up a sent a chill up the spine of anyone invested in maintaining any vestige of affirmative action, [00:16:39] it doesn't matter if the supposed victim is a white person, the individual who is being treated differently by a black individual from how that black person would treat black people. So that's one thing that is lost from this highly individualistic picture. More generally, the distinction between members of dominant groups and members of subordinated or subaltern groups, it's just rendered irrelevant. Right. So that's one casualty of this highly individualistic, individualized picture. [00:17:22] Along with that goes the ability to recognize the existence of discrimination in the absence of discriminatory intentions. I've already alluded to that. Right. So the possibility of people unintentionally expressing or being the conduit of discriminatory beliefs is pretty flatly denied. As is the recognition of the systemic nature of discrimination or any systemic form of discrimination. Right. I mean, this is actually definitional. By definition, systemic discrimination consists not of isolated actions on the part of bad apple individual actors. Rather, it consists of social practices. Right. But social practices don't exist. They can't be seen through this highly individualistic prison. [00:18:24] It's important. Whereas a theory of structural discrimination requires us to recognize the existence and the nature of social practices. The fact that they are inherited from the past, the fact that they are often, if not most often, engaged in by people unthinkingly, automatically, without a complete understanding of the

social meaning that they carry. In some cases, without any understanding of the social meaning that they carry, of the beliefs, of the past, of which these practices are a product. And with which they are still impregnated. Right. So, again, thinking kind of virally. You might think of practices that are inherited from the past, as all social practices are as well, their customs, their social norms. And they are impregnated with the beliefs which originally gave rise to these practices, even if few of the contemporary participants are fully, if at all, cognizant of the social meaning that they used to carry. And yet the beliefs of the past that originally shaped these practices, gave birth to them, remain latent in the practices and are always capable of being reactivated, rather like spores or viruses that remain in the body, or perhaps in some other body, sometimes for long periods of time, lying dormant before coming into contact with what biologists or epidemiologists would call an appropriate host. [00:20:29] Right. What's an appropriate host? Well, it could just be someone who facilitates the transmission of the virus. [00:20:37] Let's say the antisemitism virus completely unwittingly, doesn't understand that when he or she refers to Jews as rich or and powerful and controlling the media, that that is repeating and promoting an old ancient antisemitic trope. So the host might be wholly unaware or the host might be or become [00:21:12] someone who taps into the long dormant DNA, that is to say, the genetic code, that is to say the social code that constitutes the cognitive content of the inherited pathological beliefs about Jews. Or in another instance, it might be about blacks or women. So I've just offered what I'm sure as to all of you in this room, a familiar picture. A very different picture of what discrimination is, how it works, how it survives and reproduces itself over time. That is a very bad fit with Gorsuch's picture of individual actors intentionally treating people of different, whatever it is, sexual orientations, gender identities, genders, races, religions, differently.

[00:22:17] **Nomi Stolzenberg** In fact, I mean, that's an understatement. These two pictures don't fit together at all. They are oppositional to one another. So I think I've probably said enough to convey why I think that is a way of conceptualizing discrimination that is wholly inadequate to capture the nature of antisemitism. If I have a few moments left, I would make just two final points. One, I want to return to, I thought the very, very important issue that already raised in the first panel, which is the role of emotions. I talked about the cognitive content of beliefs that are sometimes latent in practices but always capable of being reactivated. But I think Orit is quite right that it is essential, albeit exceedingly difficult, to attend to the emotional as well as the cognitive aspect of the psychology of discrimination. Now, the first word in the title of this conference, hate, right? Hate looms large. I have I have worries about singling out hate as it oftentimes seems like it's become a synonym for discrimination. And that troubles me, to be sure. Right? Assuredly, there are all too many manifestations of antisemitism, racism, discrimination against other groups that are expressive of hate, that are violent. So, of course, I'm not arguing against the need to attend to that very real phenomenon. But it's also the case both that there are many forms of discrimination that are not expressive of hatred. In the previous panel, there were discussions of positive stereotypes of philosemitism. If we could all multiply the examples, you the traditional justification for patriarchy. We love women. We exalt women. We know love is not the answer to discrimination.

[00:24:46] **Nomi Stolzenberg** But I'm equally concerned, and this is the final point I will make about the fact that hate can be present. Hate can be expressed towards the beliefs that a group holds without it being discrimination. Right. I mean, isn't that really the rub? That's what makes this whole anti-Zionism, antisemitism conflation so difficult. And here I want to return or, you know, now we're talking about the coexistence of emotion, the emotional aspect of the psychology of what might or might not be discrimination and the cognitive. Right. So. Shifting to the back to the cognitive for a moment, and I'll wrap up

momentarily. Moral beliefs, political ideologies, whether it's the belief that the Jews need a Jewish state or more specific beliefs or the belief that the regime in China is good and should be good or bad and worthy of criticism, or Zionism should be criticized and rejected. Those are cognitive propositions, moral propositions. And it is appropriate to respond to moral propositions with which one disagrees with emotions. And sometimes it's appropriate to respond with negative emotions. Right. And this is exactly what happened the aspect if those of your film are familiar with the masterpiece cake shop case where an employment commissioner was accused of hate towards the religion of a baker who whose religious beliefs made him believe that homosexuality is a sin. And same sex marriage is a sin. And therefore, he would not sell cakes to participants in same sex marriage. And he wanted an exemption from a local ordinance that prohibited him from refusing to serve customers on the basis of their sexual orientation. And then employment commissioner expressed his sorrow and maybe outrage that sometimes religion has been used is to justify the worst atrocities such as slavery or the Holocaust. We should feel outrage and hate with respect to moral beliefs that we deem to be deeply immoral and dangerous, right? So hate is not always to be equated with discrimination. So that is my final point. Whether it's accompanied by heated emotions or not to. To disagree with someone's political ideology or their moral philosophy cannot in and of itself be equated with discrimination.

[00:28:07] **Nomi Stolzenberg** And on that point, I will cede my time, too. I hope my returned or not cede I will hand over the podium, as it were. I hope David is back.

[00:28:22] **William Forbath** This is Willy Forbath here. David. David's dwelling, rather, and his system was struck by lightning, a measure just how magnetic and electric. This discussion is.

[00:28:40] **William Forbath** All right. I am going to take over and deliver David's paper.

[00:28:47] **William Forbath** David writes, Our panel topic is how can law protect groups? And I'm going to begin with its thumbnail sketch of the device. Has international criminal law uses to protect groups against persecution. But then I want to ask whether law should protect groups over and above the individuals who make them up. That turns out to be a hard question. Let's start with the law against genocide. The word itself was coined in 1944 by the remarkable lawyer Raphael Lemkin.

[00:29:24] **William Forbath** It's time for us to see an image of Lemkin, you are operating, David Slideshow, Lemkin is someone whom Jim Loeffler is currently writing about.

[00:29:36] **William Forbath** He was a Polish Jew who escaped the Shoah after harrowing adventures and wound up in the United States for years. Lemkin, who had been obsessed with the issue of how to outlaw group exterminations like the Armenian genocide, and his inspiration was to coin a memorable name for the crime without a name. That just struck destruction of a group as such, not just a mass murder, but a group murder. Genocide was Lemkin's name for it. And it's a testimony to his genius that in less than a decade, the UN declared genocide and the international crime.

[00:30:17] **William Forbath** The Genocide Convention defines genocide as acts committed with intent to destroy in whole or in part a national, ethnic or racial or religious group as such. It goes on to outlaw five kinds of genocidal acts, killing group members, causing them serious bodily or mental harm, inflicting conditions calculated to bring about the group's destruction. Imposing measures to prevent births and taking away their

children. We could easily spend hours picking apart this legal definition clause by clause to examine the uneasy choices that went into its framing. We could spend a few more hours on the astonishing ways courts have interpreted its clauses, which I'm happy to talk about later, and let us hope David returns to talk about this. But let me skip over the legalisms to make just one point. Lemkin's core idea was to protect groups as such because groups matter. And, of course, what was most on Lemkin's mind was the Nazi destruction of the European Jews as a group. Most of Lemkin's own family perished in the Shoah. But then Lemkin's word genocide was not included in the Nuremberg charter and not because it was too novel. Interestingly, the Nuremberg indictment included genocide among the charges. But the tribunal's judgment ignored it completely. In place of genocide, the charter substituted a category called Crimes Against Humanity. Those included both the crime of extermination defined as mass murder and the crime of persecution on political, racial or religious grounds. Between them, these crimes covered much of the same ground as Lemkin's genocide concept, but with one crucial, crucial feature, Lemkin's focus on groups as such. Today, both genocide and crimes against humanity are international crimes. And nobody really blinks at that fact. But at the time of the Nuremberg Charter, they were competitors. And the question is why? As readers of Philippe Sands remarkable book, *East West Street Will Know*, Lemkin had a powerful intellectual adversary.

[00:32:58] **William Forbath** This was the great British jurist, Sir Hersch Lauterpacht, POC, another Jewish refugee lawyer from Poland. Loud her pop disliked Lemkin's idea and proposed crimes against humanity as an alternative route to prosecuting the Nazi persecutions and genocides. Now, Hirsche Lauterpacht was a pioneering advocate of international human rights. You might wonder why a champion of human rights would oppose Lemkin's idea of criminalizing the greatest human rights violation in history. Why weren't they on the same team? The key difference is that human rights are with a few exceptions, individual rights from the perspective of human rights law groups matter because of the people in them, not because of the group as such. Focusing the law on the group as such rather than the individual might actually be dangerous for two reasons. The first is that valorizing groups risks reifying the very racial and tribal thinking that gives rise to genocide in the first place. As Leopold Kau warned Lemkin in 1945, Lemkin's fixation on groups came too close for comfort to Nazi biological thinking. Loathing for group thinking was high in the wake of the war. Perhaps it isn't surprising that human rights groups actively thwarted Lemkin's earliest efforts to get the U.N. to take up the cry of genocide.

[00:34:42] **William Forbath** Second, focusing on the group can actually demean the individual. If a persecutor rapes a member of a persecuted group, surely the focus of outrage should be on the harm to the victim, not the harm to the group. No one should say to a Nazi victim, terrible what they did to you, it's bad for the Jews! That's not respect for the victim. It's the opposite. It adds insult to injury. What can be said to respond to these individualist worries. In the few minutes left I'd like to discuss five possible answers. Number one is appealing to group rights, don't groups have rights like individuals? In his powerful book, *Genocide as Act an Idea*, Darryl Lange explains the genocide is a distinctive crime because it violates the group's right to exist in the future. I'm skeptical of this explanation. If the group's right to exist is simply the right against genocide, the group right doesn't really explain why genocide is distinctive. It assumes it. And I doubt that groups have a generalized right to exist broader than the right against persecution and genocide. Groups disappear through attrition and assimilation as well as violence. And nobody has a duty to keep a group on life support when its own members abandon it. For that reason, I think we do better by dropping the language of group rights and asking instead why groups have value. One answer is that groups are instrumentally important to their members, organized communities look out for their members. Coreligionists and

fellow ethnics have each other's backs in a way that nobody else does. That may be true, but the limitation of this answer is too obvious. Once the group is no longer able to protect its members precisely because it's being persecuted, it loses its instrumental value. If instrumental value were the only value groups, then the closer the group comes to disrupt destruction, the less claim it has not to be destroyed. That has to be wrong. Maybe then groups have intrinsic value to backup his theory of group, writes Darryl Lang argues the group's ontologically prior to their individual members to use a favorite word of communitarian thinker's relationships constitute the individual. So the unencumbered self is an abstraction. Cells are situated historical, relational. This certainly resonates with a powerful strand of the Jewish tradition. This answer, I'm afraid, is a metaphysical step too far. It dissolves away group identity into the intersection of art. Excuse me. It dissolves individual identity into the intersection of our group identities. Taken seriously, the theory implies the two people who belong to all the same racial, ethnic, religious and familial groups are quite literally the same person. A more promising fourth strategy is Lemkin's own answer to the question, why groups matter? The world's nations, as he called them, make their own distinctive contributions to universal civilization. Poland, he wrote, gave us a Chapin and Madam Curie Russia gave us Tolstoy and Shostakovich. Lemkin's passionate commitment to a universal civilization. It's inspiring and touching, but stuck. Despite its attractions, this theory to raise faces troubling questions on this theory. What's the value of isolated groups that make no contribution to universal civilization, for that matter? What if there is no such thing as a universal civilization? I think we do better speaking of civilizations in the plural and valuing that plurality itself. That's the fifth answer to our question of why groups matter. Groups matter because plurality. It's hanna arondt (?) put it, human diversity as such is a characteristic of the human status without which the very words mankind or humanity would be devoid of.

[00:39:17] **William Forbath** Deep plurality, not universal civilization, defines the human condition. And what made out of white an enemy of all humanity is that he and his superiors thought they could dictate which groups get to inhabit the earth, which groups don't. Obviously, Arondt's (?) answer fishes in deep philosophical waters, no doubt. It raises as many questions as it answers. But perhaps we don't need to go that deep, even if we don't accept that groups constitute personal identity, it seems plainly true that we that who we come from and where we come from is woven deeply into our personal histories and affections. Perhaps the legal need to protect groups doesn't go deeper than that. The fate of our group matters to us, even if we can't exactly say what.

[00:40:21] **William Forbath** All right. I think it's I now who might should be on the video screen as I offer some comments on Professor Stolzenberg's or Professor Luban's remarks. Tell me. Can you hear me?

[00:40:48] **Nomi Stolzenberg** I hear you loud and clear, but I think you haven't spoken and me, sadly, having to speak on David's behalf, it may be I who folks should see. Here we go. Let's see if that works.

[00:41:06] **David Luban** And I should say that I my power just came back and my Internet just came back, so I'm back on.

[00:41:14] **William Forbath** Welcome back. It's good. I lament having to have read your talk,

[00:41:20] **David Luban** but like, I like your voice better than the sound of my own.

[00:41:23] **William Forbath** So that's just I know that feeling. And it's a fabulous talk. All right. My comments follow.

[00:41:32] **William Forbath** So what, if any kinds of legal schemes to protect Jews as a group are wise, or should Jews focus instead on preventing discrimination as a harm to individuals. For at least a century and a half, Jews have thought about these questions generally under the rubric of group rights versus individual rights, much as David Sketch of Lemkin and Lauterpacht devote.

[00:41:59] **William Forbath** So a generation earlier than Lemkin about the thought, it was the two Lewis, Louis Marshall and Louis Brandeis who had this fight, the one at the helm of the American Jewish Committee, the other at the helm of the American Jewish Congress. The one, Marshall, championing solely individual rights, the other, Brandeis, championing both individual and group rights. The very thin, individualistic anti-discrimination norm that Nomi sketched and that conservatives like Gorsuch championed today is not that different from the kind of legal protection that leading reform Jewish lawyers like Louis Marshall championed a century ago. The idea was to keep any group-based classification of Jews as a race or a nation out of American law and public discourse.

[00:43:01] **William Forbath** Marshall ended up changing his tune as he grew closer to the nationalist minded Jewish masses on the Lower East Side and ended up championing group rights in some important international arenas, partly in order to remain the spokesman of American Jewry after the American Jewish Congress and Brandeis and his more left-wing comrades came on the scene.

[00:43:28] **William Forbath** So Marshall managed to remain a spokesman for American Jewry at the Versailles Paris Treaty conferences. But by championing group rights. But even then, back in the U.S., Marshall translated the group rights outlook that prevailed among scientists and diasporic nationalists into a liberal idiom in cases before the Supreme Court that remain landmarks of pluralism. The rights groups have their own schools and teach in their own languages, for example.

[00:44:01] **William Forbath** Marshall's trajectory and his grudging partial embrace of group rights came to mind as I listened to David.

[00:44:09] **William Forbath** But contrary in a more modest way, perhaps, to David, I think the lesson that Marshall learned might be summed up as group rights.

[00:44:19] **William Forbath** You can't live with them and you can't live without them. Group-based legal and political ideas are fraught with dangers. But to borrow David's phrase, you can't have a legal framework for anything like deep pluralism without some underlying notion of group autonomy and some set of constitutionally guaranteed or functionally entrenched rights of the kind that may be exercised only collectively and publicly through participation in some corporate body. And group rights is the phrase that Jewish nationalists like Brandeis and his left-wing comrades in the American Jewish Congress used for this conception.

[00:45:05] **William Forbath** They used group rights interchangeably with national rights, but their brand of Jewish nationalism was just as concerned with legal safeguards for Jewish group rights, group dignity and group institutions in the diaspora, as it was with a homeland in Palestine. For them, group rights were bound up with the new Jewish

immigrants' right to be different, as Brandeis put it, not to be ashamed of publicly embracing what he called their peculiarities.

[00:45:41] **William Forbath** As a people and a race, it was a brand of what both Jews and black Americans alike called race pride. Or national self-assertion.

[00:45:53] **William Forbath** In Brandeis and the American Jewish Congress is worth. Legal thinkers in this crowd were both-and rather than either-or thinkers. They wanted both individual and group rights for Jews and other minorities. Both liberal. Individual rights of belonging to the American nation. And pluralist group rights of apartness as a separate people. They claimed multiple loyalties to the U.S. and to the Jewish nation, and they strove to mediate the inevitable tensions among these demands and aspirations. In their legal activism, as Jim Loeffler recently reminded us in *The Atlantic*, the American Jewish Congress crowd championed group libel laws as a species of group rights as they understood them. And indeed, they were. Like contemporary hate speech laws, a criminalized, hateful language against Jews and other minorities as groups, not individuals. And remarkably, the Supreme Court upheld the law in both *Hornig* (?). Reasoning that the freedom and opportunities of the individual, which our Constitution, our liberal constitutional tradition prizes, hinges on the reputation and good name of the group. The author of *Boharnay* (?), as the lawyers among, you know, was none other than Felix Frankfurter of the *Bomani March* (?). Artie and was Frankfurter himself had been Brandeis's lieutenant in the American Jewish Congress movement. These both-and legal thinkers and activists. We're not all of one mind about what David calls the ontology Jewishness. Some, including Brandeis, embraced the prevailing romantic, racialist conceptions of ethnoracial group identities. Their thinking fell prey to the kind of peril David evoked. But others forged a pragmatic, open ended view, that of what groupness consisted of or were Jewish people that emphasized Democratic agency, change and self invention.

[00:48:08] **William Forbath** On many days of the week. I'm somewhat of the same mind as my fellow student of these matters, Jim Loeffler, that we'd have a far better legal and constitutional culture today if this careful conception of group rights and group harms had prevailed. So I am now going to invite...

[00:48:39] **William Forbath** Why don't we go in reverse order first? David hasn't had a chance to speak at all and then Nomi if they if they want to respond, or we can turn right away to some some questions from the from the audience. We have only ten minutes remaining. David, what's your preference?

[00:49:02] **David Luban** Oh, yeah. I would like to take questions about I should first say that if ever I've had divine signs of disfavor for what I put in a talk, this has to be it. Lightning struck the very second that I was going to start speaking. And the Internet was taken out again. OK. So I may lose Internet again, so maybe I'd be happy to answer any questions. I think given the shortness of time, I don't want to make any statements. Right. I'll just respond to questions. Nomi, what about you?

[00:49:39] **Nomi Stolzenberg** I, I think that's a good idea. And I think three of the four questions that have been texted to us are directed to David. And so, David, why don't you go first? Because the human response to your paper was much better than the divine one. And I think we all would love to hear more of your thinking. So maybe I don't know, David, if you've had a chance to see the questions.

[00:50:12] **William Forbath** David, you take it away, read the question and and the and then respond, I see one from David Myers. I don't have the others in front of me.

[00:50:21] **David Luban** I see two from David Myers. One of them is whether international law is really the relevant law or how about the anti-antisemitic hate speech laws or that one finds in Europe. And obviously, I believe that you just spoke about having existed in the United States, but would probably be unconstitutional today. I'm actually completely in favor of anti-hate speech laws. And if I think that the kind of damage that hate speech can do to vilified groups of is Graven noche (?). That the loss of the right to rant and rave against them is, to me, at least, I weighed on that. The second question was about Doug Chu's own sense of collective self and also from David Myers. Groupness kind of centralized and objectify in ways that are not fully true to the diversity of the group. How do you account for that? Through the law here, there is actually an interesting international law answer to the question, and that is that in the laws about genocide and persecution, there was always a question what counts as an ethnic group? What isn't group? And the law has offered three answers. One of them is on the way that a lawyer would put it an objective test. Does the group share a culture? Does it share a language? Also, anthropological criteria. The other versions are two different, radically different versions of a more subjective tests. One is, does the group identify itself as a group? And I think that, you know, not only the fractiousness, fractious divisions within Jewish groups, but also certain kind of phenomena of assimilation. And if, in fact, could even put it closetedness that to been experiences of Jewish history and other countries at various times. The thing that the Sydney Morgan Bessler put Incognito, Aravosis, (?) some of you know, makes that makes self-identification as a group I think is very problematic. Of the third answer is it's a group if its enemies regard as a group. So it's the stigmatization of the enemies that makes a group of group, even if the group members don't identify themselves as part of the group and the law actually does what lawyers are good at, which is confronted with either or. Or it chamber disputes as them so that the current task of what counts as an ethnic group is something that either shares language or culture or identifies itself as an ethnic group or is identified by its enemies as an ethnic group. And I see a comment that Jeremy Waldron made the same speech as David and really in the harms in hate speech. And I think that Jeremy Waldron, it's an admirable book and I think he got it just right.

[00:53:59] **Nomi Stolzenberg** So do you want me to address the questions put to me, Willy? I see. I'll start at the bottom and I hope I get to the top. So, Jim, our host, asks, do you see a fundamental causal connection between legal individualism and ascendent market capitalism? Can I just say yes? Or is it like with international human rights, as some argue, a coincidence and not a causal tie? That is a very big question. I don't think that I think there are real deep seated conceptual and then turning into practical and institutional ties between the two. So I am of the view, it's not merely a coincidence. And I think we have to wrestle with economic liberalism, and it's not coincidental coexistence, the embeddedness of economic liberalism, capitalism with the liberalism of freedom of speech and freedom of belief and freedom of religion. That doesn't mean they're reducible to one another. I guess I tend to have a, I'm a dialectical humanist when I come to these things. I think it's a synthesis that that maybe is about to collapse or someday will and it will be superseded by a new one. And then Victoria's question, she asks, Doesn't the logic of hate speech regulation tend to support the individualistic reading of Title seven? And I think all since time is short. And I'll focus on answering the second part of your question, which I think is very well taken. Put in a more long perspective form, American law has traditionally taken a dim view of group based rights. So the outlier nature of both arnay (?). And then she asks, doesn't that make it difficult to craft a conception of group rights under the 14th Amendment? So I agree with that. I agree both that there is a very deep seated

commitment to individualism, which produces very strong forms of resistance. Today we see it mostly on the right, but sometimes on the left or amongst liberals themselves. Yeah. That commitment to individualism is a perpetual source of resistance to conferring value, if not rights on groups. But I don't think that I don't think that's the end of the story. And as I hope my comments suggested, I think, while acknowledging that deep seated resistance and an attachment to this kind of hyper individualistic, individualizing way of thinking about the harm and the act and the nature of discrimination that is so antithetical to recognizing systemic forms of discrimination. I think most of us, when we think about it, and certainly if we take any kind of structuralist and or post-structuralist approach to thinking about the relationship between individuals and groups within which they're embedded. Once you do that, the group versus individual, that it just it dissolves. As I said. Right. It is revealed as a false dichotomy. We come to understand that is both the case that individuals are deeply, deeply shaped by the material and mental and cultural structures in which they exist. And yet. And therefore, we have to take those structures, those collective structures seriously. We have to take culture seriously. And yet that doesn't annihilate the [00:58:26] subjectivity of individuals. And so we continue, you know, embracing a more structural conception, a more structuralist conception of discrimination, of, you know, who or what is the perpetrator and who or what is the victim. And what is the nature of the practice of discrimination itself that doesn't eliminate at least not it's not it's not apriori clear that there is no individual responsibility in a world of systemic and structural discrimination. It's complicated to think how to assign it.

[00:59:12] **Nomi Stolzenberg** But and by the same token, we need to continue to attend to the individuals and their individuality who are harmed. So I think there is the potential. We see it out on the streets. People. Many, many Americans understand the systemic, structural nature of discrimination. And just because they're not the majority on the Supreme Court right now doesn't mean that there isn't a possibility of that view gaining purchase in our constitutional doctrine.

[00:59:51] **William Forbath** Oh, I think on that bracing note, we conclude this section on how law can protect groups. I'd like to thank Nomi and David and everyone who joined our conversation. And David, as for braving divine wrath to return to this very human conversation, as a reminder, this session was recorded and will be available on the Religion, Race and Democracy Lab's website next week at religionlab.virginia.edu. We hope you'll come back at 3:30 when the next set of panelists discuss Jewish identity and civil rights American law. Thank you again.