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“Racial and Religious Democracy”: Identity and Equality in Midcentury Courts

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Abstract. In our current political moment, discrimination against minority racial and religious groups routinely makes headlines. Though some press coverage of these occurrences acknowledges parallels and links between racial and religious prejudices, these intersections remain undertheorized in legal and historical scholarship. Because scholars typically study race and religion separately, they have overlooked the legal significance of how race and religion coexist in both perpetrators and victims of discrimination. By contrast, this Article demonstrates that the intersection of racial and religious identities has meaningfully influenced legal and political efforts to achieve equality.

Drawing from extensive archival research, this Article unearths forgotten yet formative connections between racial and religious antidiscrimination efforts, at the local through federal levels, from the 1930s through the 1950s. To examine these links, this account

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centers on the Domestic Relations Court of the City of New York, an unusually influential and high-profile trial court. In the 1930s, the Domestic Relations Court welcomed the most diverse bench ever assembled in the United States by that time (including women and men; blacks and whites; and Protestants, Catholics, and Jews), a development celebrated as bolstering American democracy and countering Nazi bigotry abroad. Several judges held leadership positions in the National Association for the Advancement of Colored People and the American Jewish Congress, pathbreaking civil rights organizations with legal arms headquartered in New York City.

The city’s family court served as a testing ground for identity-related legal arguments that later rose to the national level because of its judges’ views and the fact that it merged two antidiscrimination focal points: public institutions’ treatment of children and the application of fair employment practices. Longstanding policies required the court to match probation officers to juvenile delinquents by race and religion, an approach one prominent commenter argued should be eliminated in order to promote “racial and religious democracy.” By the 1940s, a coalition of black and Jewish judges regarded both types of identity matching as unlawful segregation. These judges successfully fought against their white Christian colleagues to end race matching, but their challenge to religion matching proved more difficult, both legally and politically. While the opponents of religion matching perceived the practice to be discriminatory and a violation of the separation of church and state, its supporters saw it as a lawful and beneficial protection for religious identity.

Foreshadowing, connecting, and continuing through canonical Supreme Court Establishment Clause and civil rights cases—such as *McCullum v. Board of Education* and *Brown v. Board of Education*—the family court judges and their allies both anticipated and influenced doctrine and norms that remain with us today. This history complicates and raises important questions about ongoing issues ranging from the significance of judges’ racial and religious backgrounds to the scope of religious groups’ involvement in child welfare services and penal contexts. This Article also calls for additional studies that free racial civil rights and First Amendment religion scholarship from their current silos in order to better understand the concurrent development of these crucial and contested areas of law.

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Introduction

In December 1937, New York City Domestic Relations Court Justice Herbert A. O'Brien spoke angrily to a packed breakfast meeting of 1,100 Catholic social workers employed by the city.¹ After exclaiming that he could "strangle" Mayor Fiorello La Guardia for denigrating some of the court's work, Justice O'Brien moved on to his more pressing concern.² A vocal proponent of Catholic causes, O'Brien implored his listeners to demand that the mayor appoint additional Catholic judges. "I've respected the policies of Protestant and Jewish justices," he explained by way of justification, "but I've been unable to get respect for Catholic policies."³ O'Brien disclosed that a Jewish judge had attempted to persuade him "that no man is appointed as a 'Jewish justice,' a 'Catholic justice' or a justice of any other sect."⁴ Still, O'Brien—whom the mayor had selected to fill a spot vacated by another Catholic⁵—insisted he was "appointed to represent the great Catholic population in this city."⁶ The justices' confidential meeting minutes reveal that O'Brien's outburst arose from a disagreement over the importance of the religious affiliations of court staff who interacted with children.⁷ In the following decades, the salience of identity in the court's work continued to divide the justices, who constituted the most diverse bench ever assembled in the United States by that time.⁸

This Article situates religion-related politics and legal reform efforts within the better-known history of the movement for race-based civil rights. Religious affiliation was a powerful facet of identity in the mid-twentieth century, a fact sometimes obscured by attentiveness to race. In the influential and diverse legal community of New York City, the intersection of racial and religious identity shaped alliances, legal arguments, and outcomes. New York City housed the headquarters of the most important organizations focused on racial and religious issues, including the National Association for the Advancement of Colored People (NAACP),⁹ leading Jewish groups, the wealthy and powerful

1. *Justice O'Brien Says He "Could Strangle Mayor,"* N.Y. HERALD TRIB., Dec. 6, 1937, at 17.

2. *Id.*

3. *Id.*

4. *Id.*

5. See *infra* text accompanying notes 207-12.

6. *Justice O'Brien Says He "Could Strangle Mayor," supra* note 1.

7. Board of Justices Meeting Minutes (Oct. 8, 1937), at 1-3, Papers of Justine Wise Polier, MC 413 [hereinafter JWP Papers], Box 6, Folder 43 (on file with the Arthur and Elizabeth Schlesinger Library on the History of Women in America, Radcliffe Institute, Harvard University).

8. On the diversity of the bench, see Part I.B below. On the issue dividing the justices, see Parts II.A, II.B, IV.A, IV.B, and IV.E below.

9. See MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 1 (2003) (explaining why Harlem was "a launching pad for
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Roman Catholic Archdiocese of New York, and Protestant groups ranging from pan-Protestant organizations to individual denominations.¹⁰ The city's local disputes received outsized attention and served as a harbinger for the nation's identity-related social and legal challenges.¹¹

New York City's family court justices were at the forefront of contestations over the legal and political significance of racial and religious identity. By the late 1930s, the city's family court bench was celebrated as a paragon of democracy because of its pathbreaking inclusion of women and men; blacks and whites; and Protestants, Catholics, and Jews.¹² The justices were both embodiments of the importance of identity in public life and active

the U.S. civil rights movement"); see also Clarence Taylor, *Introduction to CIVIL RIGHTS IN NEW YORK CITY: FROM WORLD WAR II TO THE GIULIANI ERA* 5 (Clarence Taylor ed., 2011). On the location of the NAACP headquarters, see *Nation's Premier Civil Rights Organization*, NAT'L ASS'N FOR ADVANCEMENT OF COLORED PEOPLE, <https://perma.cc/7JY8-J473> (archived June 16, 2020).

10. See MARK SILK & ANDREW WALSH, *ONE NATION, DIVISIBLE: HOW REGIONAL RELIGIOUS DIFFERENCES SHAPE AMERICAN POLITICS* 22-23, 33 (2008) (pinpointing New York City as the "more or less official capital of the country's pan-Protestant establishment" and New York as the "effective capital of Jewish America"). The New York Archdiocese was the wealthiest Catholic diocese in the world as of 1939, when Francis Spellman became its Archbishop. *Rich New York Archdiocese Gives More Than All of Europe*, BOS. DAILY GLOBE, Apr. 25, 1939, at 1. Around one million Catholics lived within the archdiocese's five thousand square miles, an area that included Manhattan and the Bronx. *Id.* By the time Spellman died in 1967, the diocese remained the wealthiest and was home to around two million Catholics. William Travers et al., *Spellman Dies of Stroke at 78*, SUNDAY NEWS (N.Y.C.), Dec. 3, 1967, at 38. According to a historian of the Catholic Church, Archbishop Spellman was "[t]he principal national figure among the [American] bishops . . . , close personal associate of Pius XII, who named him cardinal in 1946, and friend of Presidents from Roosevelt to Johnson." JAMES HENNESSEY, *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* 285 (1981). The Archdiocese of New York often worked closely with the "vast" Diocese of Brooklyn. See HENRY PRATT, *CHURCHES AND URBAN GOVERNMENT IN DETROIT AND NEW YORK, 1895-1994*, at 33 (2004); JOSHUA M. ZEITZ, *WHITE ETHNIC NEW YORK: JEWS, CATHOLICS, AND THE SHAPING OF POSTWAR POLITICS* 25, 78 (2007).
11. For example, two of the most important church-state cases from this period were appealed from New York: *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952), in which the Court held that a state policy permitting the release of public school students during school hours for religious instruction was constitutional; and *Engel v. Vitale*, 370 U.S. 421, 436 (1962), in which the Court held that it was unconstitutional that the state encouraged schools to begin the day by reciting a nondenominational prayer composed by state officials. New York was a trendsetter in antidiscrimination law as well. See *infra* Part III.B.
12. For an example applauding diverse city appointments generally, see Roy Wilkins, *Watchtower*, N.Y. AMSTERDAM NEWS, Aug. 12, 1939, at 11. For praise of Mayor La Guardia's appointment of African American judges, including one to the family court, see Opinion, *Judges and Things*, AFRO-AM. (Balt.), Aug. 5, 1939, at 16. For sample coverage heralding specific appointments to the family court, see Alice Cogan, *Justine Tulin Takes Her Place on Bench*, BROOK. DAILY EAGLE, July 15, 1935, at 1; *Negro Woman First in City to Be Made Judge*, N.Y. HERALD TRIB., July 23, 1939, at 13.

agents in molding Americans’ views on the appropriateness of government consideration of religion and race. Several justices (as well as their spouses) held leadership positions in civil rights organizations, including the NAACP and the American Jewish Congress (AJC).¹³ And many were actively and publicly engaged in their religious communities.¹⁴

In their early years of service, the family court judges differed sharply on identity-related issues within their court, state, and nation—disagreements magnified or manufactured by escalating Nazi discrimination abroad.¹⁵ Two of the most contentious antidiscrimination efforts spanning the 1930s through the 1950s centered on fair employment and public institutions’ treatment of children. These crucial fields merged in the family court, where judges assigned court staff to oversee juvenile delinquents.¹⁶ Decades-old state laws required the tribunal to match children by religion to institutions, foster homes, adoptive parents, and probation officers.¹⁷ In a city where more than three-quarters of the youth population were white Catholics or Jews, and a significant portion of the Protestant children who needed welfare services were African Americans, religion matching translated into de facto race matching.¹⁸ Race matching was reinforced in the juvenile probation context by an internal court policy.¹⁹

By the 1940s, recently appointed Jewish and black judges perceived matching probation officers to juveniles by religious or racial identity as inconsistent with American equality and democracy. In their view, government-imposed identity matching was analogous to segregation.²⁰ The

13. See *infra* Parts I.B, IV.B-C. The American Jewish Congress is distinct from the American Jewish Committee. For a helpful discussion of how these organizations differed, see STUART SVONKIN, *JEWES AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES* 12-13 (1997).

14. See *infra* Parts I.B, IV.B-C.

15. See *infra* Part III. For model scholarship examining the intersection of the civil rights movement and international politics, see generally CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955* (2003) (examining how the aftermath of World War II, and the Cold War, influenced NAACP advocacy for human rights); and MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2011 prtg.) (arguing that Cold War politics facilitated yet also constrained civil rights reforms).

16. See *infra* Parts II, IV.

17. See *infra* text accompanying notes 303-05. Scholarship on juvenile courts acknowledges religion and race matching of probation officers to children but does not consider the legal significance of this practice. See, e.g., DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 36 (2004).

18. See *infra* Part II.A.

19. See *infra* Part IV.B.

20. See *infra* Part IV.B.

judges’ understandings were likely informed by their professional connections to Harlem psychologists Kenneth B. Clark and Mamie Phipps Clark.²¹ The Clarks’ research, later made famous in *Brown v. Board of Education*,²² found that treating children differently based on race harmed black childrens’ self-perceptions.²³ In the mid-1940s, buoyed by the recent passage of New York’s pioneering employment discrimination laws,²⁴ the black and Jewish judges were able to dislodge what they termed “Jim Crow” race matching with only minor pushback.²⁵ These judges and their communities agreed that colorblind treatment of employees and children was the democratic approach.²⁶

Matching probation officers to juveniles by religion proved more difficult to end because some of the white Christian judges believed the practice was beneficial and legally obligatory. In fact, vocal Catholic judges and their communities sought to extend religion matching to other contexts.²⁷ Because the Jewish judges found that they were unable to garner sufficient support among their colleagues to stop religion matching of probationers, one turned to AJC (which she and her husband led) to craft a legal strategy.²⁸

In the surrounding years, AJC lawyers challenged racial segregation and religious activities in public schools, arguing that both practices were psychologically harmful to minority children.²⁹ In the 1940s, AJC achieved successes in both areas, employing civil rights and Establishment Clause arguments, respectively. But then the trajectories diverged. In the 1950s, civil rights legislation and litigation victories increased, just as religion-related cases became precarious.³⁰ Recognizing that an Establishment Clause challenge to religion matching in probation was unlikely to succeed, AJC lawyers decided to frame the issue as one of employment discrimination. Pointing to the presiding judge’s imposition of a quota to limit hiring of Jewish officers to the proportion of Jewish juvenile delinquents, they filed a claim before New York’s State Commission Against Discrimination (SCAD), the country’s first

21. See *infra* text accompanying notes 567-97.

22. 347 U.S. 483 (1954).

23. See generally Kenneth B. Clark & Mamie P. Clark, *Emotional Factors in Racial Identification and Preference in Negro Children*, 19 J. NEGRO EDUC. 341 (1950).

24. See *infra* text accompanying notes 506-24.

25. See *infra* Part IV.B.

26. See *infra* Parts IV.B, .D.

27. See *infra* Parts IV.A, .D.

28. See *infra* Part IV.E.

29. See *infra* Part IV.C.

30. See *infra* Part IV.D. On the influence of post-World War II and Cold War politics on Establishment Clause litigation, see John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 305-27 (2001); and Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA.L. REV. 1, 46-62 (1996).

state antidiscrimination agency.³¹ SCAD granted AJC a partial victory, affirming the presiding judge's revised policy of hiring without regard to religion but still permitting assignment of cases by religion. The religion-blind argument failed.³²

This Article builds on legal historians' contributions to the "long civil rights movement"³³ by foregrounding the significance of religious identity and examining the interplay between religious and racial discrimination.³⁴ Legal historians have embraced the concept of "the long civil rights movement," expanding their periodization and turning their attention to locations beyond the South, efforts outside court litigation, and a range of minority racial groups in addition to African Americans.³⁵ Among their many contributions, these scholars have unearthed tenuous and complex coalitions, as well as lawyers' strategic use of cross-group analogies to further civil rights causes.³⁶ Likewise, in recent years legal history scholarship focused on fair employment has

31. See *infra* Part IV.E. On SCAD's origins and novelty, see *infra* notes 506-07, 522-24 and accompanying text.

32. See *infra* Part IV.E.

33. See generally Jacquelyn Dowd Hall, Presidential Address, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005) (arguing that the meaning of the civil rights movement has been constrained by centering on the mid-twentieth-century South and encouraging a broadened temporal and geographic lens).

34. On the need for such scholarship, see Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 397 (2012) (noting the lack of scholarship on "how religion and race doctrine have converged and diverged over the last half-century"); and Nomi Maya Stolzenberg, *Righting the Relationship Between Race and Religion in Law*, 31 OXFORD J. LEGAL STUD. 583, 602 (2011) (reviewing EVE DARIAN-SMITH, *RELIGION, RACE, RIGHTS: LANDMARKS IN THE HISTORY OF MODERN ANGLO-AMERICAN LAW* (2010)) (calling for more scholarship "on the relationship between race and religion" so that the "acoustical separation between [the two] may yet be overcome").

35. For a helpful summary of this historiography, see Kenneth W. Mack, *Legal History Dialogue, Bringing the Law Back into the History of the Civil Rights Movement*, 27 LAW & HIST. REV. 657, 657-69 (2009) (commenting on NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006)). See generally TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011) (decentering the Supreme Court and the NAACP's litigation strategy in the legal history of the civil rights movement); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007) (incorporating the pre-*Brown* litigation of collective labor rights claims on behalf of black workers in the South into the legal history of the civil rights movement).

36. See, e.g., MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941-1978*, at 263-64 (2010) (analyzing multiracial coalitions and tensions in the pursuit of civil rights in California); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 3-4, 226, 228-29 (2011) (tracing the use of race-sex analogies in civil rights advocacy).

expanded chronologically and geographically and has plumbed the depths of administrative law for new insights.³⁷

Though these accounts have many strengths, they typically devote little attention to the role of religious identity in motivating civil rights champions and opponents.³⁸ They likewise rarely acknowledge that part of the civil rights agenda was to address prejudice directed against religious groups, even though twentieth-century antidiscrimination legislation routinely included protections for "religion" or "creed."³⁹ Because the distinction between race, religion, ethnicity, and related facets of identity was in flux throughout the mid-twentieth century, and because these categories were often blended or correlated, attempting to study one without the others misses essential strategies and dynamics.⁴⁰

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37. For examples, see generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014) (situating the movement for the expansion of constitutional protections in the workplace within the civil rights movement); and David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071 (2011) (studying the pre-Title VII efforts to combat employment discrimination).
38. More broadly, historians of American religion observe that scholarship on the twentieth-century United States fails to adequately consider the pervasive influence of religion (though notable exceptions include attention to how religion motivated African American civil rights leaders and the conservative backlash to their efforts). See, e.g., Jon Butler, *God, Gotham, and Modernity*, 103 J. AM. HIST. 19, 21 (2016); Jon Butler, Special Essay, *Jack-in-the-Box Faith: The Religion Problem in Modern American History*, 90 J. AM. HIST. 1357, 1357-59, 1369 (2004); Kevin M. Schultz & Paul Harvey, *Everywhere and Nowhere: Recent Trends in American Religious History and Historiography*, 78 J. AM. ACAD. RELIGION 129, 130-31 (2010). For a recent example of scholarship that brilliantly begins to fill this void, see RONIT Y. STAHL, *ENLISTING FAITH: HOW THE MILITARY CHAPLAINCY SHAPED RELIGION AND STATE IN MODERN AMERICA* 5 (2017) (explaining that studying military chaplaincy "underscore[s] the centrality of religion in modern America").
39. For representative evidence, see, for example, MILTON R. KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* 115-17 (1947) (describing then-recent legislation in numerous states barring discrimination on these bases); and Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 363 n.1, 392-93 (1953) (defining "civil rights" as those "rights commonly denied based on race, color, religion, national origin, or ancestry," before discussing pertinent statutes).
40. Historians of religion have been more attentive to the relationship between religion and civil rights than have civil rights scholars, especially in recent literature. See, e.g., DAVID A. HOLLINGER, *PROTESTANTS ABROAD: HOW MISSIONARIES TRIED TO CHANGE THE WORLD BUT CHANGED AMERICA* 266-87 (2017) (discussing how missionaries' experiences and connections motivated and facilitated their involvement in the civil rights movement); Carolyn Dupont, *White Protestants and the Civil Rights Movement*, in *THE OXFORD HANDBOOK OF RELIGION AND RACE IN AMERICAN HISTORY* 491, 507 (Kathryn Gin Lum & Paul Harvey eds., 2018) ("While ministers and other white Protestant leaders participated visibly in the black freedom struggle, these efforts came late, lasted but a short while, and evoked substantial backlash from laypeople."); Curtis J. Evans, *White Evangelical Protestant Responses to the Civil Rights Movement*, 102 HARV. THEOLOGICAL REV. 245, 247 (2009) (noting that "there are no detailed academic works
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When Jews supported and brought civil rights claims, they did not do so as a group neatly described as a "race" or a "religion." Jewish Americans have differed both with each other and over time in understanding their identity as a race, ethnicity, religion, nationality, or some combination thereof.⁴¹ Like other European immigrant groups, Jews were increasingly accepted as "white" in the early to mid-twentieth century because of changing ideas about the nature of race in combination with aversion to Nazi eugenics policies.⁴² Yet by midcentury, Jewish identity remained contested.⁴³ For instance, in 1950, a range of Jewish groups and intellectuals influenced by post-Holocaust and Zionist considerations maintained that "Jews constituted a unique religio-cultural-ethnic group, to be described not as a race, a nationality or a religious sect, but by the less technical Hebrew term *am*—meaning 'people.'"⁴⁴

Jewish identity therefore offered a multidimensionality that facilitated civil rights coalitions and analogies, reasoning from religion to race and vice versa.⁴⁵ To be sure, scholarship has long considered the relationship between black and Jewish civil rights leaders. But these accounts typically treat Jewish identity as akin to that of racial groups and focus on efforts to achieve black civil rights, with Jewish participants playing a supportive role for a mix of self-interested and principled reasons.⁴⁶ Similarly, studies of employment

on evangelicals and the civil rights movement," perhaps because "this is not a politically progressive story"); Gene Zubovich, *For Human Rights Abroad, Against Jim Crow at Home: The Political Mobilization of American Ecumenical Protestants in the World War II Era*, 105 J. AM. HIST. 267, 269 (2018) ("This article situates ecumenical Protestants in the politics of their era and emphasizes the interconnected nature of the discourses on human rights, the UN, and antiracism.").

41. See ERIC L. GOLDSTEIN, *THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY* 1-3, 86-87, 114-15, 206 (2006).

42. MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 95-110 (1998).

43. GOLDSTEIN, *supra* note 41, at 204-05. For an illuminating discussion of Jewish lawyers' engagement with the legal significance of contested Jewish identity in an earlier period, see William E. Forbath, *Jews, Law and Identity Politics* 14-24 (Mar. 31, 2014) (unpublished manuscript), <https://perma.cc/QA8V-2E4J>.

44. See, e.g., Robert Gordis, *Religion*, 51 AM. JEWISH Y.B. 146, 146-47 (1950).

45. Historians have provided compelling accounts of how civil rights proponents found rhetorical value in analogizing Jim Crow to Nazi Germany's treatment of Jews. E.g., HASIA R. DINER, *WE REMEMBER WITH REVERENCE AND LOVE: AMERICAN JEWS AND THE MYTH OF SILENCE AFTER THE HOLOCAUST, 1945-1962*, at 293-98 (2009); GLENDA ELIZABETH GILMORE, *DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919-1950*, at 157-200, 254-55, 266-67 (2008). There has not been a similarly careful analysis of how such analogies played into litigation strategies.

46. *But see* BIONDI, *supra* note 9, at 99 ("The campaigns to pass antidiscrimination laws in postwar New York constituted an important piece, even the heart, of the much vaunted but often misunderstood Black-Jewish alliance in the civil rights movement. It was not primarily a phenomenon of one group aiding in another group's liberation
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discrimination treat anti-Semitism as a variant of racism.⁴⁷ Recognizing the religious facet of Jewish identity surfaces distinct dynamics in the civil rights context.

In the years following World War II, the religious component of Jewish identity often mattered most in American politics. In opposition to Nazism and increasingly as a counterpoint to “godless” communism during the Cold War, many Americans embraced a vision of their society as Judeo-Christian or, relatedly, as tri-faith, with Protestantism, Catholicism, and Judaism as coequal.⁴⁸ Both the celebration of a supposed Judeo-Christian heritage and the tri-faith exaltation of religious pluralism further solidified Jewish identity as “white” by replacing previous divisions along national or ethnic lines.⁴⁹ At the same time, the primacy of religious identity emphasized Jews’ continuing distinctiveness,⁵⁰ a situation many perceived as consequential for their attainment of civil rights.

Catholic identity also remained salient. Longstanding prejudice against Catholics intensified during the Great Depression, and through the 1930s Catholics routinely suffered discrimination similar to that experienced by Jews.⁵¹ Though the anti-Catholicism of previous generations mostly dissipated by midcentury, American intellectuals and other leaders remained concerned that Catholic separatism, hierarchy, and policies on family conduct posed a challenge to American ways of life.⁵² Most notably, many believed that Catholic

struggle; rather, it was a collaboration between liberal organizations in fighting for laws that were sought by both groups. It was a coincident legislative and legal campaign against racial and religious discrimination.”). Other nuanced treatments of black-Jewish cooperation and divergence include HASIA R. DINER, *IN THE ALMOST PROMISED LAND: AMERICAN JEWS AND BLACKS, 1915-1935* (1977); CHERYL LYNN GREENBERG, *TROUBLING THE WATERS: BLACK-JEWISH RELATIONS IN THE AMERICAN CENTURY* (2006); and SVONKIN, *supra* note 13, at 13, 18, 21-22.

47. For a representative example, see PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972*, at 121-24 (1997).

48. KEVIN M. SCHULTZ, *TRI-FAITH AMERICA: HOW CATHOLICS AND JEWS HELD POSTWAR AMERICA TO ITS PROTESTANT PROMISE* 7 (2011); Mark Silk, *Notes on the Judeo-Christian Tradition in America*, 36 *AM. Q.* 65, 66-67 (1984); see also SILK & WALSH, *supra* note 10, at 17 (identifying New York City as the location that first popularized the term “Judeo-Christian”).

49. TISA WENGER, *RELIGIOUS FREEDOM: THE CONTESTED HISTORY OF AN AMERICAN IDEAL* 145-46, 164-82 (2017) (further explaining that Catholics’ acceptance as a religious minority facilitated the transition of Jewish identity from race to religion).

50. GOLDSTEIN, *supra* note 41, at 206.

51. SCHULTZ, *supra* note 48, at 22-23.

52. JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 169, 175-82 (2003); John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 *J. AM. HIST.* 97, 107 (1997) [hereinafter McGreevy, *Thinking on One’s Own*]. While McGreevy casts midcentury attitudes toward Catholics as a shift

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parochial schools—which greatly expanded in the 1940s and 1950s—isolated Catholic youth and interfered with teaching democratic values, which was particularly worrisome as America fought fascism abroad.⁵³ That Catholics sought public money to fund such endeavors heightened wariness, especially in the large cities where Catholics increasingly constituted a majority of residents and could potentially undermine other groups' religious freedoms.⁵⁴

Politically conservative and focused on their own religious communities' priorities, Catholics did not substantially participate in efforts to achieve race-based civil rights until the late 1950s.⁵⁵ Indeed, many Catholic congregations and religious institutions remained segregated in these years, which was a

from prior periods, other scholars emphasize continuities in anti-Catholic sentiment from earlier periods. *See, e.g.*, PHILIP JENKINS, *THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE* 30-43 (2003).

53. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 452-53 (2002); McGreevy, *Thinking on One's Own*, *supra* note 52, at 119-21, 125.
54. Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121, 126, 134-35, 138 (2001).
55. In his canonical study of Catholics and race in the urban North, historian John T. McGreevy traces gradual Catholic support for racial integration, identifying the late 1950s as the time when a significant number of Catholic leaders formally and openly opposed segregation. JOHN T. MCGREEVY, *PARISH BOUNDARIES: THE CATHOLIC ENCOUNTER WITH RACE IN THE TWENTIETH-CENTURY URBAN NORTH* 133-34 (1996). Catholic interest in the civil rights movement grew in the early 1960s because of the publicity surrounding civil rights demonstrations, *see id.* at 140, and "the new interfaith spirit" introduced by the 1962 Second Vatican Council, *id.* at 145, 148. Pope John XXIII condemned racial discrimination in 1963. *Id.* at 152. These developments led to major divisions within Catholic communities. *See id.* at 173. In a book focused on New York, historian Joshua Zeitz observes that "in the 1940s and 1950s, rooting out communism was the central concern of the [Catholic] church and many of its followers; this state of affairs precluded widespread cooperation with left-wing civil rights activists, many of whom were Jewish." ZEITZ, *supra* note 10, at 129. Many Irish and Italian Catholics thought "advocacy of black rights was surely a cynical ploy to disrupt social harmony." *Id.* Consequently, Catholic leaders and publications attacked civil rights groups, including the NAACP. *See id.* Though surveys conducted beginning in the late 1940s indicated Catholics held more liberal views on race relations "than other non-Jewish whites" and disavowed Jim Crow, *id.* at 129-30, "the Catholic Church's war on racism took a second seat to its epic struggle with communism," *id.* at 131. Historians focused on other regions have reached similar conclusions. For example, in an article focused on the South, Andrew Moore identifies the late 1950s and early 1960s as the period when the Catholic Church turned decidedly and officially against racial segregation. Andrew S. Moore, *Practicing What We Preach: White Catholics and the Civil Rights Movement in Atlanta*, 89 *GA. HIST. Q.* 334, 334, 338-39 (2005). Moore observes that "[t]hrough the 1950s, the primary goal of southern Catholic dioceses like Atlanta was building their church's institutional presence in the region," which included racially segregated institutions. *Id.* at 337. *But see* William Issel & Mary Anne Wold, *Catholics and the Campaign for Racial Justice in San Francisco from Pearl Harbor to Proposition 14*, *AM. CATH. STUD.*, Fall 2008, at 21, 24, 30 (2008) (describing how some liberal Catholics in San Francisco began advocating for racial justice in the 1940s, whereas the Catholic Church as a whole did not turn to this issue until around 1960).

growing source of tension among Catholics.⁵⁶ Even the small percentage of Catholics who were black remained focused on Catholic institution building, rather than on assuming leadership roles in the civil rights movement.⁵⁷ Often perceiving themselves as an embattled minority, Catholics concentrated on securing laws to protect their religious interests.⁵⁸

Religious identity could also complicate or prompt direct opposition to civil rights measures. In some locations, religious identity was strongly correlated with race, and such intersectionality undermined efforts to challenge racial discrimination.⁵⁹ Predominantly white religious groups could claim they were differentiating on the legitimate basis of religion, despite the profound consequences their exclusions held for African Americans.⁶⁰ Catholics' religion-related goals sometimes caused them to oppose civil rights laws. For example, some Catholic leaders expressed skepticism about fair employment legislation because it might impede hiring practices in their schools and other institutions.⁶¹ Religious beliefs could also feed prejudice. White Southern Protestants' religiosity infused anti-integrationist beliefs and rhetoric.⁶² Civil rights historians' frequent glossing over of conflicts turning

56. When the number of black Catholics began to steadily increase in the 1920s, racially segregated parishes seemed akin to those organized along national or ethnic lines and therefore did not spark opposition. *See* MCGREEVY, *supra* note 55, at 30-32. Yet by the 1930s and 1940s, as white ethnic groups increasingly blended in Catholic institutions, segregation along racial lines became offensive to black Catholics. *See id.* at 34, 82. Nevertheless, racial segregation largely continued until meetings of the Second Vatican Council in the early 1960s shifted Catholic views on race and interfaith cooperation. *Id.* at 145-54, 161-62.

57. CYPRIAN DAVIS, *THE HISTORY OF BLACK CATHOLICS IN THE UNITED STATES* 256 (1990); MCGREEVY, *supra* note 55, at 162-63. *But see* Karen Joy Johnson, *Another Long Civil Rights Movement: How Catholic Interracialists Used the Resources of Their Faith to Tear Down Racial Hierarchies*, 126 *AM. CATH. STUD.* 1, 2-3, 13-14 (2015) (discussing a small interracial group of Catholics in Chicago who fought for black civil rights, partly out of fear that otherwise African Americans would become Communists).

58. *See infra* notes 444-62 and accompanying text.

59. This was true in many American cities that contained significant numbers of Jews or Catholics because nearly all African Americans were Protestant. Northern cities had almost no black Catholics until the Great Migration of the early twentieth century. *See* MATTHEW J. CRESSLER, *AUTHENTICALLY BLACK AND TRULY CATHOLIC: THE RISE OF BLACK CATHOLICISM IN THE GREAT MIGRATION* 4-5 (2017). Even by 1940, by my calculation, only approximately 2% of African Americans in the United States were Catholic. *See* BUREAU OF THE CENSUS, *SIXTEENTH CENSUS OF THE UNITED STATES: 1940; POPULATION—CHARACTERISTICS OF THE NONWHITE POPULATION BY RACE 2* (1943), <https://perma.cc/GP5N-AKSF>.

60. *See infra* Part II.A.

61. *See infra* notes 518-21 and accompanying text.

62. CAROLYN RENÉE DUPONT, *MISSISSIPPI PRAYING: SOUTHERN WHITE EVANGELICALS AND THE CIVIL RIGHTS MOVEMENT, 1945-1975*, at 2-3 (2013) (noting the failure of scholarship to recognize the "relationship between white supremacy and white religion" and
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on religious identity therefore misses core features of midcentury politics that influenced civil rights strategies and disputes.

The intersection of race and religion also shaped the development of Establishment Clause doctrine in ways eminent legal scholars have not fully appreciated.⁶³ This Article helps solve a timeline and causation issue that has long puzzled Establishment Clause experts. In recognizing commonalities between *Brown* and earlier Establishment Clause cases, scholars have assumed the primacy of racial civil rights efforts and so have floated the possibility that a general midcentury sensitivity to discrimination against minority racial groups bled into Establishment Clause doctrine.⁶⁴ This Article is the first to

examining the interaction of Mississippi “evangelicals’ two great enthusiasms—ardent devotion to the Christian gospel and equal zeal for what can only be described as white supremacy”); Jane Dailey, *Sex, Segregation, and the Sacred After Brown*, 91 J. AM. HIST. 119, 122 (2004) (exploring “how religion served as a vessel for one particular language crucial to racial segregation in the South: the language of miscegenation”). *But see* DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 6 (2004) (“White supremacists in the South failed to get their churches to give their cause active support. That was their Achilles’ heel.”).

63. One of the most detailed and perceptive accounts of AJC civil rights litigation does not mention its First Amendment lobbying or litigation at all. *See* SVONKIN, *supra* note 13, at 79-112. Similarly, the best treatments of Jewish efforts in church-state litigation do not consider civil rights litigation. *See generally, e.g.*, NAOMI W. COHEN, *JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY* (1992); GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* (1995). Some scholarship focused on Jewish history considers both civil rights and First Amendment litigation, but this treatment is limited. *See, e.g.*, MARC DOLLINGER, *QUEST FOR INCLUSION: JEWS AND LIBERALISM IN MODERN AMERICA* 143-56 (2000) (devoting two separate, brief sections to employment discrimination law and separation of church and state).

64. Writing in 1965, Mark DeWolfe Howe identified “egalitarian overtones” in influential midcentury Establishment Clause cases and suggested that some U.S. Supreme Court Justices may have perceived analogies to race-segregated schools. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 140 (1965). Howe acknowledged that the religion cases came to the Court before *Brown* but offered that “the problem of segregation was on the nation’s conscience and therefore on the Court’s docket.” *Id.* at 140-42. Noah Feldman argues that the Supreme Court transformed the Establishment Clause to guarantee religious minorities’ political rights beginning in the 1940s largely because of “the emergence of equality as a dominant constitutional value.” Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 702 (2002). Building from the premise that racial inequality was the “single most important challenge to the American constitutional order,” Feldman conjectures that the concern for racial minorities “transferred” to the religion context. *Id.* As evidence, he turns to *Brown*’s famous footnote eleven, which used psychological studies to suggest that government-imposed segregation harmed black children’s self-perception. *Id.* Feldman claims this argument provided a “paradigm” that could plausibly be extended to treatment of religious minorities (even though some of the religion cases preceded *Brown*, which he does not explain). *Id.* at 702-04; *see* NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2004).
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identify these similarities as resulting from a deliberate litigation strategy. AJC lawyers active in racial civil rights and Establishment Clause cases offered similar arguments in each because they perceived racial segregation and religion in public schools as implicating the same core issue: psychologically harmful state distinction among children based on identity.⁶⁵

This Article’s bottom-up account of forgotten links between racial and religious antidiscrimination efforts bolsters understandings of how facets of identity acquired new legal meanings in tandem, yet diverged in legal protections and social understandings. Part I presents the appointment of a demographically representative family court bench as an early chapter in both tri-faith America and the overlapping movement for racial and religious civil rights. Part II examines how this uniquely diverse bench confronted longstanding child welfare practices that segregated children by race and religion, prompting impassioned divisions among the new judicial colleagues. Part III explores how Nazi race laws and violence in Europe shaped American discourse on and passage of antidiscrimination laws. It traces direct connections among international events, national politics, and local controversies. Part IV follows the judges as they battled over what the new antidiscrimination laws meant for their court’s practice of matching juvenile delinquents to probation officers by race and religion. Beginning in the mid-1940s, a black-Jewish coalition cast identity matching as violating evolving norms against discrimination, and they successfully eliminated the court’s race-matching policy. Their efforts to end religion matching proved more difficult. Many white Christians (especially Catholics) resolutely favored the continuation and even expansion of religion matching as a protective and lawful measure. Ultimately, Cold War politics and precedents dictated that the court’s assignment of probation officers to children had to be colorblind but not religion blind.⁶⁶ The legacy of this divergence remains meaningful in many contexts today.

[hereinafter FELDMAN, *DIVIDED BY GOD*] 180, 183 (2005); *see also* Thomas C. Berg, *The Story of the School Prayer Decisions: Civil Religion Under Assault*, in *FIRST AMENDMENT STORIES* 193, 216 (Richard W. Garnett & Andrew Koppelman eds., 2012) (“The asserted connection between civil religion and social or racial injustice . . . was probably not in the justices’ minds, except in the very general sense that they thought of both racial-desegregation and the school-prayer decisions as protecting minority rights.”).

65. *See infra* Part IV.C.

66. There is a rich body of scholarship discussing the colorblind argument. These works do not consider comparisons to religion. *See generally, e.g.*, Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996); Christopher W. Schmidt, *Essay, Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

I. Mayor La Guardia’s “Democratic” Family Court Bench

In the 1930s, inclusion of racial and religious minorities in powerful New York City posts became important for political and symbolic reasons. Reform-minded and savvy Mayor Fiorello La Guardia considered candidates’ race and religion (as well as political party and sex) to attract votes, signal the administration’s commitment to fair employment, and condemn Nazi treatment of Jewish civil servants in Germany. The family court bench became a showcase for the mayor’s approach because it was one of the more prestigious judicial positions open to mayoral selection. Nationwide press coverage of the judges’ appointments and subsequent activities challenged common perceptions about which identity factors were relevant for public positions and set the stage for more substantial changes.

A. A “Fusion” Mayor and the Symbolism of Public Employment

La Guardia inaugurated a dramatic shift in city politics—toward greater efficiency and inclusiveness—beginning during his 1933 mayoral campaign.⁶⁷ The corrupt Tammany Democratic machine had long monopolized control of the city through patronage and graft.⁶⁸ La Guardia’s reputation as a progressive former member of the U.S. Congress set him apart. He ran on a Fusion Party platform (meaning the platform was supported by Republicans, reform-minded Democrats, and independents) that promised more honest government.⁶⁹

Nationality and religion were deeply relevant in New York City politics and social life in the 1930s. Approximately 2.3 million of the city’s almost 7 million residents were born abroad,⁷⁰ and 65% of the city’s American-born white residents had at least one foreign-born parent.⁷¹ The most common countries of origin, which were highly correlated with religious affiliation, were Russia (nearly all Jewish), Italy and Ireland (nearly all Catholic), Germany (majority Protestant), and Poland (including all three religions, with the religious affiliation ratio changing over time).⁷² Determining the religious makeup of American cities in this period is difficult, as religious affiliation was

67. See RONALD H. BAYOR, *NEIGHBORS IN CONFLICT: THE IRISH, GERMANS, JEWS, AND ITALIANS OF NEW YORK CITY, 1929-1941*, at 33 (1978).

68. *Id.* at 30-33; CHARLES GARRETT, *THE LA GUARDIA YEARS: MACHINE AND REFORM POLITICS IN NEW YORK CITY* 55-59 (1961).

69. BAYOR, *supra* note 67, at 33-34; GARRETT, *supra* note 68, at 107-09.

70. IRA ROSENWAIKE, *POPULATION HISTORY OF NEW YORK CITY* 93 tbl.36, 141 tbl.69 (1972).

71. *Id.* at 101 tbl.42.

72. *Id.* at 94 tbl.37, 98 tbl.40, 123 & tbl.58.

not requested in the census.⁷³ A general estimate, drawn from the most comprehensive source on New York City’s demographics, is that the city was roughly half Catholic, almost one-third Jewish, and the remainder Protestant.⁷⁴ As of 1930, the city’s black population (nearly all Protestant) was relatively small, at around 330,000, or less than 5% of city residents.⁷⁵

La Guardia appealed to previously underrepresented communities through his campaign decisions and personal background. Whereas Tammany was dominated by Irish Catholics and often ran Irish Catholics for top spots, La Guardia ran on a ticket that included Irish and Italian Catholics, Jews, and white Protestants.⁷⁶ His heritage also attracted votes. Born to an Italian lapsed-Catholic father and an Italian-descended Jewish mother (though his maternal lineage was not common knowledge during the campaign⁷⁷), La Guardia had attended a Protestant Sunday school and was a practicing Episcopalian.⁷⁸ His

73. SCHULTZ, *supra* note 48, at 159.

74. The most comprehensive compendium of demographic information available for New York City is Ira Rosenwaike’s *Population History of New York City*, which provides more than one hundred tables and related discussion of methodology. ROSENWAIKE, *supra* note 70. No single table provides the relative percentages of the city population by religion over time, but reviewing several in combination supports the claim that the city was roughly half Catholic, almost one-third Jewish, and the remainder Protestant from the 1930s through 1950s. One table shows that in 1935, city residents ages sixteen to twenty-four were 49% Catholic, 31% Jewish, and 18% Protestant. *Id.* at 125 tbl.59. Relying on this table and another focused on the Jewish population over age twenty-five in 1940, Rosenwaike notes several measures indicating that in these years the Jewish population was around a third of the white population, which means Jews comprised slightly less than a third of the total population regardless of race, after considering the relatively small black population in the calculation. *Id.* at 130. Rosenwaike also estimates that as of 1940, roughly half of the white population was Catholic. *Id.* at 130. Accounting for the black population would lower this estimate less than for the Jewish estimate because some black residents were Catholic, whereas none were Jewish. *Id.* at 130. In a 1952 study, 47.6% of the total population was Catholic, 26.4% Jewish, and 22.8% Protestant. *Id.* at 153 tbl.79. Taken together, these tables and related discussion show the consistent pattern that the city’s population was roughly half Catholic, almost one-third Jewish (decreasing slightly over time), and the remainder Protestant (growing slowly over time).

75. *Id.* at 130, 141 tbl.69. The black population in New York City increased to 6.1% in 1940 and 9.5% in 1950. *See id.* at 141 tbl.69. Throughout these decades, black residents of the city remained predominately Protestant. *See id.* at 125 tbl.59 (showing that in 1935, 85% of black residents ages sixteen to twenty-four were Protestant, 13.8% Catholic, 0% Jewish, and 5.5% other); *id.* at 153 tbl.79 (showing that in 1952, black residents were 80.7% Protestant, 13.8% Catholic, 0% Jewish, and 5.5% other).

76. BAYOR, *supra* note 67, at 30-34; THOMAS KESSNER, *FIORIELLO H. LA GUARDIA AND THE MAKING OF MODERN NEW YORK* 245 (1989).

77. *See, e.g., infra* text accompanying notes 96-98.

78. RONALD H. BAYOR, *FIORIELLO LA GUARDIA: ETHNICITY, REFORM, AND URBAN DEVELOPMENT* 4, 9 (2d ed., 2018); GARRETT, *supra* note 68, at 117; MASON B. WILLIAMS, *CITY OF AMBITION: FDR, LA GUARDIA, AND THE MAKING OF MODERN NEW YORK* 17-18
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first wife was Catholic and his second was Lutheran.⁷⁹ In a sense, he embodied a “fusion” candidate. He beat his two competitors in large part by attracting nearly all Italian votes, which had previously gone to Tammany.⁸⁰ La Guardia thus became New York City’s “first [F]usion mayor since World War I” and the city’s first-ever Italian American mayor.⁸¹

Mayor La Guardia’s campaign coincided with rising religious and racial hostility in Germany, developments closely followed by New York City residents. The Reich passed its first anti-Jewish legislation in April 1933.⁸² These laws severely curtailed the practice of Jewish professionals, mandating widespread disbarment of Jewish lawyers and expelling most Jews from the civil service.⁸³ American newspapers vividly described how Jewish lawyers and judges were barred from German courthouses and forcibly removed by Nazi mobs.⁸⁴ In response, elite members of the New York bar sent a letter of protest to the U.S. Secretary of State, condemning Germany’s exclusion of lawyers from bar and bench on the basis of race or religion.⁸⁵

Mayor La Guardia was among those who supported a more active anti-Nazi response. When some Jewish groups headquartered in New York City launched a controversial boycott of German goods, Mayor La Guardia vocally supported them.⁸⁶ To that end, the mayor spoke alongside notables such as Rabbi Stephen S. Wise, a leader of AJC,⁸⁷ which was the most progressive and outspoken of the major Jewish organizations.⁸⁸ Wise was the most influential rabbi in the United States and a well-connected advocate for liberal causes.⁸⁹ In addition to founding AJC with Felix Frankfurter and Justice Louis Brandeis

(2013). On La Guardia’s parents’ marriage license, his mother wrote “Israelite,” and his father wrote “nessuna,” meaning “nothing.” KESSNER, *supra* note 75, at 5.

79. BAYOR, *supra* note 77, at 4.

80. BAYOR, *supra* note 67, at 129-30.

81. KESSNER, *supra* note 76, at 253.

82. *See Law for the Restoration of the Professional Civil Service*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://perma.cc/KM39-XPJ6> (archived June 16, 2020).

83. *Id.*

84. *E.g.*, John Elliott, *Nazis End Boycott Tonight if Jews Call Off Protests*, N.Y. HERALD TRIB., Apr. 1, 1933, at 1; *Hitler Closes Civil Service Doors to Jews*, SUN (Balt.), Apr. 9, 1933, at 1. The 1933 law exempted war veterans, but Jews were completely banned from the bar a few years later. *Reich Bar Closed to Jews*, N.Y. TIMES, Feb. 11, 1936, at 4.

85. *Lawyers Here Protest Nazi Exclusion of Jews*, N.Y. HERALD TRIB., May 29, 1933, at 5.

86. *See* BAYOR, *supra* note 67, at 51, 68.

87. *100,000 Nazi Foes to Parade Today*, N.Y. TIMES, May 10, 1933, at 11; *250,000 Here Join in Jewish Hitler Protest*, N.Y. HERALD TRIB., May 11, 1933, at 1.

88. SVONKIN, *supra* note 13, at 23.

89. *Id.* at 12-13.

(largely to advocate for Zionism),⁹⁰ he cofounded the NAACP.⁹¹ The boycott drew retaliation from the German American community and aggravated New York's Irish population, which was more sympathetic to Germany because of a shared goal of destroying communism.⁹²

Though appealing to Jewish constituents surely factored into La Guardia's stand with the Jewish community,⁹³ family history may have bolstered his resolve. La Guardia's mother descended from an Italian Jewish family.⁹⁴ His parents named him "Fiorello" for his Jewish grandmother, Fiorina, and his father instilled pride in him and his sister Gemma regarding their Jewish heritage.⁹⁵ The elder La Guardia even instructed Fiorello and Gemma in reciting the central Jewish prayer, *Shema Yisrael*, before bed every night during their childhoods.⁹⁶ A Nazi newspaper seems to have been the first to publicize La Guardia's Jewish ancestry, printing a story the month before he took office as mayor.⁹⁷ In a subsequent interview, La Guardia employed his characteristic wit in explaining he had not previously mentioned his Jewish background because "I never thought I had enough Jewish blood in my veins to justify boasting of it."⁹⁸ Though La Guardia could safely jest, Nazi policy directly threatened some of his relatives in the coming years. Gemma was married to a Jewish man and lived in Hungary,⁹⁹ where anti-Jewish measures were

90. SVONKIN, *supra* note 13, at 12, 133; *Founders of the American Jewish Congress*, JEWISH ADVOC., June 12, 1942, § A, at 14.

91. SVONKIN, *supra* note 13, at 13; *see also* DINER, *supra* note 46, at 118-19 (discussing the motives of Wise and other Jews in cofounding and contributing to the NAACP); GREENBERG, *supra* note 46, at 24-25 (noting that Wise was one of at least four Jews who were original signatories on a "Call" to form the NAACP and that "Jews made up one-seventh of its first general committee and board of directors").

92. *See* BAYOR, *supra* note 67, at 69, 76-77, 87-89.

93. Some La Guardia biographers have cast his anti-Nazi efforts as a cynical ploy to win Jewish votes. For a more nuanced account, *see* David M. Esposito & Jackie R. Esposito, *LaGuardia and the Nazis, 1933-1938*, 78 AM. JEWISH HIST. 38, 38-39 (1988).

94. GEMMA LA GUARDIA GLUCK, *FIORIELLO'S SISTER: GEMMA LA GUARDIA GLUCK'S STORY* 20 n.1 (Rochelle G. Saidel ed., 2007 expanded ed.).

95. *Id.* at 20-21.

96. *Id.* at 20.

97. *LaGuardia Is Jewish, Budapest Nazi Paper Says*, WIS. JEWISH CHRON., Dec. 1, 1933, at 7.

98. *La Guardia's Proud of His Jewish Blood*, DAILY NEWS (N.Y.C.), Jan. 13, 1934, at 3.

99. GLUCK, *supra* note 94, at 20-22.

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introduced in 1938.¹⁰⁰ The couple was sent to concentration camps, where Gemma’s husband died.¹⁰¹

After La Guardia took office on January 1, 1934,¹⁰² he continued his vocal opposition to Nazi policies—now using his power over employment in America’s largest city to draw headlines. In one of his first high-profile moves, in July 1935, he caused an international incident by denying a masseur license to a German immigrant on the basis that Germany had violated a treaty guaranteeing equal treatment of American professionals by discriminating against American Jews.¹⁰³ Despite an outcry by the Acting German Consul General in New York City and the local German community (which denigrated him as “an irresponsible Jewish Mayor”), La Guardia refused to change his stance.¹⁰⁴

Other officials, both American and German, likewise saw New York City as a rich symbolic battleground.¹⁰⁵ In September 1935, Jewish New York City Magistrate Judge Louis Brodsky released men who had been arrested for ripping a swastika flag from a German ship docked nearby. He declared from the bench that the swastika was a “black flag of piracy” and “antithetical to American ideals.”¹⁰⁶ The Nazi Minister of Justice and president of the Academy of German Law condemned Brodsky’s action as “excessively deplorable” and questioned whether the American people thought it just that a “person escaped from some ghetto” should judge the Nazi flag.¹⁰⁷ The official Nazi newspaper doubted Germany could reach an understanding with the United States on this issue “so long as such men as [Mayor La Guardia], who recently denied a license to a German masseur,” and Brodsky remained involved in American politics.¹⁰⁸

100. *Anti-Jewish Laws in Hungary*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://perma.cc/58CH-UZYF> (archived June 16, 2020).

101. GLUCK, *supra* note 94, at 30-34, 111-15; *see also* WILLIAMS, *supra* note 78, at 293; Heidi Tworek, *How Fiorello La Guardia Helped Refugees and His Own Sister*, UNITED NATIONS FOUND.: BLOG (Oct. 1, 2015), <https://perma.cc/2S4D-4WM4>.

102. KESSNER, *supra* note 76, at 257.

103. *LaGuardia Bars German from Trade Here Because Nazis Restrict U.S. Jews*, N.Y. HERALD TRIB., July 24, 1935, at 1; *see also* BAYOR, *supra* note 67, at 51-52.

104. *Consul Will Act on Own Initiative in Answer to LaGuardia’s Retaliation for Nazis’ Restrictions*, N.Y. HERALD TRIB., July 25, 1935, at 1; *N.Y. Germans Cheer Attack on LaGuardia*, SUN (Balt.), July 31, 1935, at 1.

105. Nazis in Germany also frequently delighted in publicizing that American Jews were not hired by elite New York law firms. JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 20 (2017).

106. *Id.* at 20-22 (quoting *Brodsky Releases 5 in Bremen Riot*, N.Y. TIMES, Sept. 7, 1935, at 1).

107. *Reich Minister Assails Brodsky on Flag Verdict*, N.Y. HERALD TRIB., Sept. 9, 1935, at 7.

108. *Id.*

A few weeks later, the Nazis adopted the swastika as their official symbol in the first of the three Nuremberg Laws, a move they characterized as a “reply” to the Jewish magistrate’s “insult.”¹⁰⁹ The two other Nuremberg Laws passed concurrently were expressly anti-Jewish. They stripped Jews of German citizenship and banned mixed marriages and sexual relations between Germans and Jews.¹¹⁰

As the Nazis’ power grew, La Guardia continued using his control over aspects of New York City’s public employment to garner headlines. Another example that received worldwide press followed the Kristallnacht pogroms of November 1938.¹¹¹ After the attacks on Jews in Germany, someone telephoned a bomb threat against New York City’s German Consulate.¹¹² Part of Mayor La Guardia’s response was to dispatch a team of Jewish police officers to stand guard.¹¹³ German officials took note, with a Nazi newspaper condemning La Guardia and casting his decision as showing “a gross lack of taste.”¹¹⁴ The following month, the *New York Times* printed a photograph of a bullet and threatening letter addressed to La Guardia at City Hall.¹¹⁵ The letter read: “You will get this [the bullet] if you continue to attack the German Nazi Party,” and it was signed with a swastika.¹¹⁶

It was against this backdrop—New York City officials and employees receiving worldwide press for their speeches and symbolic stances—that Mayor La Guardia pursued one of his most important initiatives: conversion of city jobs from patronage posts to positions selected on merit.¹¹⁷ Though this plan originated in a desire to eliminate graft and incompetence,¹¹⁸ the international context seems to have contributed another level of meaning. La Guardia’s departure from partisan appointments was the antithesis of highly publicized Nazi emphasis on party loyalty.¹¹⁹

109. WHITMAN, *supra* note 105, at 17-20, 24 (quoting Otto D. Tolischus, *Reich Adopts Swastika as Nation’s Official Flag; Hitler’s Reply to “Insult,”* N.Y. TIMES, Sept. 16, 1935, at 1).

110. *Id.* at 18-19, 29-30.

111. *Kristallnacht*, U.S. HOLOCAUST MEMORIAL MUSEUM: HOLOCAUST ENCYCLOPEDIA (last edited Oct. 18, 2019), <https://perma.cc/9UFF-JC4N>.

112. *1,500 Urge Boycott Against Germany*, N.Y. TIMES, Nov. 13, 1938, § 1, at 39.

113. *See Jewish Police to Guard Nazis*, L.A. TIMES, Nov. 17, 1938, at 4; *see also* Esposito & Esposito, *supra* note 93, at 51-52.

114. *Nazis Deride La Guardia for Jewish Police Guard*, N.Y. TIMES, Nov. 18, 1938, at 1.

115. *Letter and Cartridge Sent to La Guardia Threatening His Life for Attacking Nazis*, N.Y. TIMES, Dec. 9, 1938, at 16.

116. *Id.*

117. WILLIAMS, *supra* note 78, at 138.

118. *See LaGuardia Charges Civil Service Graft*, N.Y. TIMES, Oct. 30, 1933, at 3.

119. *See, e.g., Nazis in German Civil Service*, MANCHESTER GUARDIAN (Eng.), Feb. 9, 1933, at 4; *Nazis Now Favored in Civil Service*, N.Y. TIMES, Oct. 1, 1933, at 39.

An overhaul of the New York City Civil Service Commission was the core of the effort.¹²⁰ Under Tammany control, hiring, promotions, and salaries for city positions reflected political pull rather than qualifications.¹²¹ Through a gradual and often controversial series of changes,¹²² La Guardia's administration increased the proportion of jobs in the competitive civil service category and modified examinations to minimize discretion.¹²³ Some of these changes were in response to demands by the NAACP and were deliberately geared toward eliminating discrimination against minority applicants.¹²⁴ The composition of city staff changed accordingly. Tammany-favored Irish Catholics lost significant ground, replaced by Jews, Italians, and African Americans.¹²⁵ Jews benefitted in particular because of their rising numbers in the legal profession.¹²⁶ This shift inflamed ethnic tensions, as Irish Catholics suspected the mayor of anti-Irish bias.¹²⁷

La Guardia also prioritized merit for the narrowed field of positions that remained subject to mayoral appointment, which included some judgeships.¹²⁸ Past mayors, according to a Columbia Law professor writing in 1932, "for the

120. GARRETT, *supra* note 68, at 132-36.

121. See KESSNER, *supra* note 76, at 287-88.

122. E.g., *Civil Service Shift Is Called Illegal*, N.Y. TIMES, Nov. 26, 1936, at 16; *La Guardia Dooms 4,000 Exempt Jobs*, N.Y. TIMES, June 28, 1936, § 2, at 1.

123. WILLIAMS, *supra* note 78, at 138.

124. The NAACP proposed several changes to the civil service law to reduce discrimination, such as placing more emphasis on the written rather than oral part of the exam, hiring eligible candidates in order of rank, and prohibiting the use of photographs. *Civil Service Statute Under Fire in N.Y.*, CHI. DEFENDER, June 18, 1938, at 5.

125. La Guardia's election to office in 1933 brought about "a change in civil service appointments. Before the advent of La Guardia, Jews, Italians and blacks had been discriminated against when applying for civil service jobs; most of the positions had gone to the Irish." BAYOR, *supra* note 67, at 25. As mayor, La Guardia "increased the number of civil service jobs in the competitive category." *Id.* Newly instituted educational requirements "had the effect of eliminating many Irish." *Id.* "Thus, La Guardia managed to increase the number of non-Irish, notably the better-educated Jews, in the City's civil service. . . . It was natural for them [the Irish] to feel resentment toward the Jews, who were the major competitors for these positions." *Id.*

126. See *id.* at 21; see also Roger Waldinger, *When the Melting Pot Boils Over: The Irish, Jews, Blacks, and Koreans of New York*, in BUBBLING CAULDRON: RACE, ETHNICITY, AND THE URBAN CRISIS 267 (Michael Peter Smith & Joe R. Feagin eds., 1995) ("The depression and LaGuardia's reforms made city jobs more attractive to highly educated workers, which, under the circumstances, mainly meant Jews.").

127. BAYOR, *supra* note 67, at 37 ("The Irish came to perceive two things about the new political scene. First, that La Guardia was anti-Irish, and second, that they were losing their power to other ethnic groups . . .").

128. By 1938, only 607 of the city's approximately 107,000 public employees were political appointees. *Civil Service: New York City Leads Nation*, CHRISTIAN SCI. MONITOR (Bos.), Aug. 1, 1938, at 1.

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most part... had been guided by no high ideal of magisterial fitness” in selecting judges.¹²⁹ “In fact, [past mayors] had distributed these offices in accordance with the demands of district and borough political leaders, and with certain rough principles of apportionment, based upon the demands of active racial or national groups, such as the [German] Steuben Society.”¹³⁰ In the professor’s view, “this procedure yielded a choice variety of inadequacy.”¹³¹

Though La Guardia did not eliminate political calculations from his appointments, he significantly shifted the relevant considerations to value qualifications, bipartisanship, and inclusiveness.¹³² He granted new or more frequent opportunities to Jewish, Italian, and, later, black candidates (as well as women).¹³³ Notably, his seeming attentiveness to candidates’ race, religion, and sex was not a shift in approach¹³⁴ so much as a broadened perspective about which identities should be represented.

The question of which identities mattered also played out in federal appointments in these years. In 1939, President Franklin D. Roosevelt drew praise for a “highly significant trio” of appointments: Felix Frankfurter to the Supreme Court, Frank Murphy as Attorney General (and later Supreme Court Justice), and Harry Hopkins, who served as the Secretary of Commerce, among other roles.¹³⁵ As a prominent newspaper columnist explained, these men were “eminently qualified” individually, “[b]ut in combination they make an especially fitting symbol of American democracy. For one is a Jew who was born in Austria, one is a Catholic of Irish descent, and one is a Protestant, the son of an itinerant harness maker.”¹³⁶ These appointments carried “symbolic significance” and proved “to the whole world that the American system draws no distinction of origin, station, or creed.”¹³⁷ (Notably, neither sex nor race

129. RAYMOND MOLEY, *TRIBUNES OF THE PEOPLE: THE PAST AND FUTURE OF THE NEW YORK MAGISTRATES’ COURTS* 220 (1932).

130. *Id.*

131. *Id.*

132. See GARRETT, *supra* note 68, at 131, 275; KESSNER, *supra* note 76, at 399; WILLIAMS, *supra* note 78, at 138-39.

133. See BAYOR, *supra* note 67, at 35-36; WILLIAMS, *supra* note 78, at 233. On Mayor La Guardia’s appointment of women, see ELISABETH ISRAELS PERRY, *AFTER THE VOTE: FEMINIST POLITICS IN LA GUARDIA’S NEW YORK* 185-86 (2019).

134. See MOLEY, *supra* note 129, at 220 (describing previous mayors’ appointments based in part on “racial or national groups”).

135. See Ernst Lindley, *Highly Significant Trio*, *NASHVILLE TENNESSEAN*, Jan. 8, 1939, § D, at 3 (capitalization altered).

136. *Id.*

137. *Id.* According to this article, one of the main sources of opposition to Justice Frankfurter’s nomination was Jews who feared it would stoke anti-Semitism. *Id.*; see also NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 158 (2010).

made this list.¹³⁸) Unsurprisingly, the Nazis ridiculed President Roosevelt’s selection of Justice Frankfurter.¹³⁹

In combination with his own identity, Mayor La Guardia’s appointments rendered him a powerful international symbol of America’s supposed commitment to equality. In the words of a Canadian newspaper: “If we are ever asked to describe a man who typifies America let us remember . . . Fiorello La Guardia, the Mayor of America’s largest city and the mighty atom of democracy. Born of a Jewish mother and an Italian father,” the paper continued, “he hurls into the teeth of Hitler the lie of racial superiority, and thus symbolizes in his person the ideals of a free and civilized nation.”¹⁴⁰ One of Mayor La Guardia’s most powerful weapons against Nazi prejudice was his appointment of diverse judges.

B. Diverse Judges for the “Democratic Way of Life”

The family court bench provides an ideal stage to see Mayor La Guardia’s approach to diverse, meritorious, and strategic judicial selections because it had an unusual number of vacant seats and was among the top posts open to mayoral appointment. La Guardia increased the number of Jews, African Americans, and women on the bench, while continuing to include top-quality candidates from groups that had long enjoyed representation. This Subpart introduces the new judges and devotes particular attention to those who were most involved in identity-related conflicts in the following years.

The first step in forming this pathbreaking bench was the creation of a new court. In October 1933, the state legislature merged the Children’s Court of the City of New York (which primarily heard juvenile delinquency and neglect cases) and the Family Division of New York City’s Magistrates’ Court (which heard nonsupport cases) into a unified Domestic Relations Court.¹⁴¹ Though “unified,” the court maintained two distinct divisions that reflected its components: a Children’s Court Division and a Family Court Division.¹⁴² The legislation permitted the eight sitting Children’s Court judges to complete the

138. Moreover, as Michael Klarman notes, President Roosevelt showed little interest in the racial views of his nominees. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 193 (2004). Roosevelt also appointed former Klansman, Justice Hugo Black. *Id.*

139. *Frankfurter Appointment Scored by Berlin Papers*, PITT. PRESS, Jan. 6, 1939, at 1.

140. *American Public Opinion*, GLOBE & MAIL (Toronto), June 13, 1940, at 6.

141. Clarence M. Lewis, *The New Domestic Relations Court of New York City*, 5 N.Y. ST. B. ASS’N BULL. 484, 484-85, 489 (1933). For more detail about how and why the family court was reformed in 1933, see Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1279-83 (2019).

142. Katz, *supra* note 141, at 1280.

remainder of their ten-year terms, serving in both divisions.¹⁴³ These judges were politically connected white men in their fifties to seventies and included four Catholics, three Protestants, and one Jew.¹⁴⁴ Though the Children's Court had served as a plum retirement post, its merger into the Domestic Relations Court meant a higher workload for a lower salary.¹⁴⁵ By the end of the decade, all but one judge had retired or passed away.¹⁴⁶

Because of the rapid departure of the court's inherited judges, Mayor La Guardia had significant opportunity to shape the bench. The only eligibility requirement was admission to the New York state bar for five years.¹⁴⁷ More subjectively, the law instructed the mayor to appoint "persons who because of their character, personality, tact, patience and common sense are especially qualified for the court's work."¹⁴⁸ Though less attractive than the Children's Court posts had been, the Domestic Relations Court positions bestowed the distinguished title of "justice" as well as a \$12,000 annual salary.¹⁴⁹ (By contrast, the median income of a member of the New York City Bar was estimated at around \$3,000 per year.¹⁵⁰)

Mayor La Guardia's first trio of family court appointments, in late 1934, demonstrated his strategically balanced approach to city posts. He selected a Protestant Republican, a Catholic Democrat, and a Jewish Socialist.¹⁵¹ The Protestant appointee, who was designated as the presiding justice, was John Warren Hill. A graduate of Columbia University and Columbia Law School, Presiding Justice Hill had run for several judicial positions, was a member of a number of elite New York City clubs,¹⁵² and descended—by his own account—

143. See ANNUAL REPORT OF THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK 29, app. 6 (1933) [hereinafter 1933 ANNUAL REPORT].

144. For the list of judges, see *id.* at 3. For the judges' religious affiliations, see the Appendix.

145. Compare *Hanson Named Justice in Children's Court*, N.Y. TIMES, Dec. 14, 1927, at 24 (noting a salary of \$17,500 for a Children's Court judge in 1927), with *Mayor Selects Jurists from 3 Parties' Ranks*, N.Y. HERALD TRIB., Dec. 11, 1934, at 5 (noting an annual salary of \$12,000 for a Domestic Relations Court judge in 1934).

146. See *infra* Appendix.

147. 1933 ANNUAL REPORT, *supra* note 143, app. at 6.

148. *Id.* The law allowed the mayor to select judges for ten-year terms as existing terms expired or when two-thirds of the judges certified that court business required adding posts. *Id.* app. at 6-7.

149. See *Mayor Selects Jurists from 3 Parties' Ranks*, *supra* note 145 (noting also that the presiding justice earned a \$13,000 salary annually).

150. Melvin M. Fagen, *The Status of Jewish Lawyers in New York City: A Preliminary Report on a Study Made by the Conference on Jewish Relations*, 1 JEWISH SOC. STUD. 73, 87 tbl.XIV (1939).

151. See *Mayor Names 3 Justices to Domestic Court: Socialist, Republican and Democrat of 3 Faiths Picked for Vacancies*, BROOK. DAILY EAGLE, Dec. 10, 1934, at 2.

152. *Justice Hill Gets Full 10-Year Term*, N.Y. TIMES, Sept. 27, 1934, at 10.

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from three generations of clergymen.¹⁵³ The Catholic justice was Stephen S. Jackson, a graduate of Holy Cross College and Harvard Law School, who had served as a legal adviser to Catholic Charities.¹⁵⁴

The Jewish addition was Jacob Panken, whose background made him the most notable departure from prior appointments. An immigrant from Ukraine, he met Mayor La Guardia decades earlier when both were young New York University Law School alumni representing labor organizations.¹⁵⁵ In 1917, Justice Panken became the first person elected as a judge on the Socialist Party ticket in the United States, securing a ten-year term on New York City’s Municipal Court.¹⁵⁶ One of Mayor La Guardia’s motivations in appointing Justice Panken to the family court was likely to pander to labor groups, whose power was ascendant in the 1930s.¹⁵⁷ Though press coverage emphasized Justice Panken’s political and professional experience and reputation, it also recognized his Jewish heritage as relevant to his appointment.¹⁵⁸ Panken had taken vocal stands against anti-Semitism¹⁵⁹ and publicly opposed Zionism on the basis that it impeded assimilation.¹⁶⁰

153. See Presiding Justice John Warren Hill, Remarks at the Testimonial Dinner by the Board of Justices of the Domestic Relations Court of the City of New York in Honor of the Honorable Jacob Panken [hereinafter Panken Dinner] 10 (Dec. 1, 1954), Papers of Jacob Panken, MSS 424 [hereinafter JP Papers Wisconsin Collection], Box 1, Folder 7 (on file with the Wisconsin Historical Society).

154. See *La Guardia Names Three Justices*, N.Y. TIMES, Dec. 11, 1934, at 5.

155. See KESSNER, *supra* note 76, at 29-30; *Jacob Panken, Ex-Judge, Dies; A Socialist and Labor Pioneer*, N.Y. TIMES, Feb. 5, 1968, at 35.

156. *Jacob Panken, Ex-Judge, Dies*, *supra* note 155; see also JACK ROSS, THE SOCIALIST PARTY OF AMERICA: A COMPLETE HISTORY 202-03 (2015); Britt P. Tevis, “The People’s Judge”: Jacob Panken, Yiddish Socialism, and American Law, 59 AM. J. LEGAL HIST. 31, 31, 36 (2019).

157. See GARRETT, *supra* note 68, at 254, 264.

158. E.g., *Mayor Names 3 Justices to Domestic Court*, *supra* note 151.

159. E.g., *N.Y. Germans Cheer Attack on LaGuardia*, *supra* note 104.

160. See ROSS, *supra* note 156, at 253.

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Mayor La Guardia's first trio of Domestic Relations appointees. Left to right: Justices Stephen S. Jackson, John Warren Hill, and Jacob Panken.¹⁶¹

Future appointments to the Domestic Relations Court reflected Mayor La Guardia's blended goals of appealing to his constituents and using city positions to condemn Nazi discrimination. The same month as the German masseur license controversy, he filled the next Domestic Relations vacancy with Rabbi Wise's daughter, Justine Wise Tulin.¹⁶² Though an intelligent and credentialed candidate in her own right, nothing about Tulin's background made her a particularly good fit for this post¹⁶³—a fact noted even in the largely positive press coverage of her appointment.¹⁶⁴ Her father's identity

161. *Mayor Swears in Domestic Relations Court Justices*, BROOK. TIMES UNION, Dec. 10, 1934, at 3.

162. Cogan, *supra* note 12; *see also supra* text accompanying note 103.

163. Justice Tulin's background was in labor law, workmen's compensation, and unemployment. *See* PERRY, *supra* note 133, at 186.

164. *See, e.g., Mrs. Tulin Named Justice by Mayor*, N.Y. TIMES, July 8, 1935, at 4 (describing Justice Tulin's expertise in labor and workmen's compensation law and quoting her as stating that "[m]y first job is to find out all about my job"); *A Woman in the News*, CHRISTIAN SCI. MONITOR (Bos.), Aug. 19, 1935, at 4 (describing her as "an authority on workmen's compensation" who has "never had any particular absorption in matters of children's welfare, and the trying subject of broken homes," and noting that the appointment "will probably please Rabbi Wise"). Justice Tulin was skeptical about accepting the family court position and only promised to stay a year. Ellen Herman, *The Difference Difference Makes: Justine Wise Polier and Religious Matching in Twentieth-Century Child Adoption*, 10 RELIGION & AM. CULTURE 57, 61 (2000). She later recalled telling Mayor La Guardia she would prefer a position on the Magistrates' Court (a low-level criminal court). LYNN GILBERT & GAYLEN MOORE, PARTICULAR PASSIONS: TALKS WITH WOMEN WHO HAVE SHAPED OUR TIMES 121 (1981). At the time of her appointment, Mayor La Guardia also "intimated that he might promote [her] to some

footnote continued on next page

may have tipped the scales in her favor.¹⁶⁵ (Indeed, a political opponent of Mayor La Guardia later cast Justice Tulin's appointment as a favor to her father and Justice Jackson's the prior year as "at the request of one of the most prominent Catholic churchmen in the city."¹⁶⁶) Justice Tulin's selection was celebrated as a landmark moment for women because she was the first woman to become a judge above the magistrate level in the state.¹⁶⁷ It also symbolized Mayor La Guardia's solidarity with the Jewish community. His choice of a famous rabbi's daughter could be read as a poignant rebuke to Nazi removal of Jewish judges.

Justice Tulin's political sensibilities and experiences also made her an excellent candidate to stand against bigotry. After college she became enmeshed in the labor movement by going undercover to learn about odious conditions at a textile mill in Passaic, New Jersey.¹⁶⁸ After she was caught and blacklisted, her father suggested that law school might help her efforts in pursuit of social justice.¹⁶⁹ Family friend and then-Harvard Law Professor Frankfurter advised her that the only good law schools that accepted women were the University of Chicago and Yale.¹⁷⁰ In 1925, she followed his advice

other position before long." *Police Shake-Up to Aid Vice Drive; New Unit Planned*, N.Y. TIMES, July 9, 1935, at 1.

165. On the relationship between Rabbi Wise and Mayor La Guardia, see MELVIN I. UROFSKY, *A VOICE THAT SPOKE FOR JUSTICE: THE LIFE AND TIMES OF STEPHEN S. WISE* 250-52 (1982). It may have seemed prudent to Mayor La Guardia to appoint a Jewish judge because the open position was vacated by Justice Levy, who was Jewish. See *Mrs. Tulin Named Justice by Mayor*, *supra* note 164.

166. *Mayor a Machine Boss, Says Flynn*, DAILY NEWS (N.Y.C.), Oct. 27, 1941, at 6. The opponent also condemned Mayor La Guardia for appointing the president of the Steuben Society as a magistrate judge. *Id.* Mayor La Guardia had earlier defended his appointment of Justice Tulin as based "solely on merit," rather than because she was Rabbi Wise's daughter. *La Guardia Scores Slur on Dr. S.S. Wise*, N.Y. TIMES, Nov. 3, 1935, § 1, at 12.

167. For representative press coverage, see Cogan, *supra* note 12; and *Mrs. Tulin Studies New Role on Bench*, N.Y. TIMES, July 10, 1935, at 8. For evidence that women's groups tracked and sought appointments including Justice Tulin's, see *Drive Launched for More Women in Judge's Posts*, MINNEAPOLIS TRIB., Nov. 12, 1935, at 11. Indeed, the appointment may have been partly influenced by the demands of the New York League for Equal Representation of Women in Judiciary. See *La Guardia Names Three Justices*, *supra* note 154 (describing the group's reaction to the first trio of male appointees to the Domestic Relations Court). Justice Tulin explicitly rejected the suggestion by some feminists that women were better suited to the family court bench than men. *Mrs. Tulin Sits as Judge; Bars "Lady Justice" Title*, BROOK. TIMES UNION, Aug. 5, 1935, at 3.

168. Joyce Antler, *Justine Wise Polier*, JEWISH WOMEN'S ARCHIVE: ENCYCLOPEDIA JEWISH WOMEN (Mar. 20, 2009), <https://perma.cc/S5QE-GJL9>.

169. See Interview by Ann Fagan Ginger with Justine Wise Polier (June 22, 1982), in 39 GUILD PRAC. 121, 121 (1982) [hereinafter June 1982 Polier Interview].

170. See *id.*

and was one of a handful of women to enroll at Yale.¹⁷¹ There she served on the *Yale Law Journal* and became president of the school's honorary society for women, until she disbanded it upon learning that the national organization would not allow them to accept black women.¹⁷² During law school she married one of her professors, Leon Tulin, an expert on disparate racial punishment in the South.¹⁷³ She passed the bar exam a few weeks after giving birth to their first child.¹⁷⁴ The following years took Justine Tulin to New York, where she worked as a referee in Workmen's Compensation in the New York Labor Department.¹⁷⁵ After Mayor La Guardia's election, he appointed her to lead the Workmen's Compensation Division of the Corporation Counsel's office.¹⁷⁶

In 1933, Justine Tulin (then widowed¹⁷⁷) met her future husband and lifelong partner in combating racial and religious discrimination, Shad Polier.¹⁷⁸ Polier was a Jewish native of Aiken, South Carolina,¹⁷⁹ where his parents and uncle had been the first Jewish residents upon their arrival in the 1890s.¹⁸⁰ In 1903, a few years before Polier was born, a close relative (Abram Surasky) was gruesomely murdered by an anti-Semitic farmer.¹⁸¹ The sole witness available to dispute the murderer's claim that he had been defending his wife's honor was African American, and the jury apparently disregarded the witness's testimony to return an acquittal.¹⁸² During Polier's childhood, he

171. *See id.*

172. Antler, *supra* note 168; *see* Interview by Kitty Gellhorn with Justine Wise Polier (Nov. 24, 1980) [hereinafter Nov. 1980 Polier Interview], in *The Reminiscences of Justine Wise Polier* 132, 132-34 (1983) (on file with the Columbia Center for Oral History Research, Columbia University).

173. June 1982 Polier Interview, *supra* note 169, at 122.

174. Interview by Kitty Gellhorn with Justine Wise Polier (May 21, 1980), in *The Reminiscences of Justine Wise Polier*, *supra* note 172, at 65, 109-10.

175. June 1982 Polier Interview, *supra* note 169, at 123-24.

176. *Id.* at 124.

177. *See id.* at 123.

178. *See id.* at 125.

179. *See* Robert G. Tomasson, *Shad Polier, Lawyer, Dead; Active in Civil Rights Cases*, N.Y. TIMES (July 1, 1976), <https://perma.cc/Z9N8-VPY6>.

180. *See Encyclopedia of Southern Jewish Communities—Aiken, South Carolina*, GOLDRING/WOLDENBERG INST. S. JEWISH LIFE, <https://perma.cc/2A4E-UL8B> (archived June 16, 2020).

181. *Id.* Abram Surasky was the younger brother of B.M. Surasky, who was married to Shad's aunt. *Id.*

182. *See Encyclopedia of Southern Jewish Communities—Aiken, South Carolina*, *supra* note 180. For a more detailed account of the Surasky murder, using it as a case study to examine violent anti-Semitism in the South, *see* Patrick Q. Mason, *Anti-Jewish Violence in the New South*, 8 S. JEWISH HIST. 77, 80-88 (2005).

witnessed anti-Semitism and anti-black racism firsthand, which inspired him to seek reforms.¹⁸³ Residents of Aiken began calling Polier, whose birthname was “Isadore,” by the nickname “Shadrach”—the biblical figure who was thrown into a fiery furnace after standing by his principles—because of how Polier committed himself to fighting injustice.¹⁸⁴ The symbolic nickname stuck, and Polier later legally changed his name to “Shad.”¹⁸⁵ As a young man, Polier excelled at the University of South Carolina and then received a scholarship to attend Harvard Law School, where he studied under Frankfurter.¹⁸⁶

Fittingly, Justine Tulin and Shad Polier met through their involvement with the International Juridical Association (IJA), a group of lawyers focused on civil liberties and labor law issues.¹⁸⁷ Polier had become director of IJA in 1931,¹⁸⁸ and Tulin began volunteering there in 1933.¹⁸⁹ The first case they worked on together was defending a black labor leader charged with insurrection for organizing white and black workers in Atlanta, Georgia.¹⁹⁰ IJA’s highest-profile effort in the 1930s was its assistance in the defense of the so-called Scottsboro Boys, the nine black youths falsely accused of raping two white women near Scottsboro, Alabama.¹⁹¹

183. See Tomasson, *supra* note 179; Jack Greenberg, Lecture on Justine Wise Polier (Dec. 4, 1990) (on file with author). On the “pervasive, low-level antisemitism in southern culture” in this period, see Mason, *supra* note 182, at 77.

184. Greenberg, *supra* note 183.

185. On Shad Polier’s birth name, see Order at 1, *In re Polier* (N.Y.C. City Ct. Jan. 30, 1940); and Office of Clerk of Court, Cty. of Aiken, S.C., Certificate of Birth (1942), Papers of Shad Polier, MSS 424 [hereinafter SP Papers], Box 8, Folder 1 (on file with the American Jewish Historical Society).

186. See *Wins Scholarship*, AIKEN STANDARD (S.C.), Oct. 5, 1928, at 1. Polier received a law degree in 1929 and a Master’s of Law in 1931. *Shad Polier Papers*, CTR. FOR JEWISH HIST., <https://perma.cc/9M83-ZCGF> (archived June 16, 2020). Several pieces of correspondence between Polier and Frankfurter, spanning from 1929 to 1933, are held by the American Jewish Historical Society. See, e.g., Letter from Felix Frankfurter, Professor, Harvard Law School, to Isadore Polier (Feb. 28, 1933), SP Papers, Box 8, Folder 20.

187. See ANN FAGAN GINGER, CAROL WEISS KING: HUMAN RIGHTS LAWYER, 1895-1952, at 167-68.

188. See H.R. REP. NO. 81-3123, at 12-13 (1950) (detailing connections between the IJA and the National Lawyers Guild); GINGER, *supra* note 187, at 123.

189. See GINGER, *supra* note 187, at 168.

190. See Nov. 1980 Polier Interview, *supra* note 172, at 172, 174. The case culminated in *Herndon v. Lowry*, 301 U.S. 242 (1937). For details about Angelo Herndon and his prosecution, see Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2624-47 (1992); and Mark Tushnet, *The Hughes Court and Radical Political Dissent: The Case of Dirk De Jonge and Angelo Herndon*, 28 GA. ST. U. L. REV. 333, 359-61 (2012).

191. See GINGER, *supra* note 187, at 170-81.

Some aspects of the IJA’s involvement in the Scottsboro matter underlined the intersecting and parallel harms of anti-black and anti-Jewish prejudice. One of Shad Polier’s contributions to the case was to file a complaint with the Alabama Bar against the prosecutor,¹⁹² who had demanded in a closing argument that the jurors show that “Alabama justice cannot be bought and sold by Jew money from New York!”—a prejudiced remark directed against Samuel Leibowitz, the lawyer representing one of the defendants.¹⁹³ In the words of a New York journalist covering the trial: “An echo of the Nazi credo of hate sounded in Alabama today.”¹⁹⁴ The timing of the prosecutor’s slur was particularly chilling, occurring on the same day that the Nazis removed German Jews from the civil service.¹⁹⁵ Thus, newspapers around the world covered the Scottsboro case (including the “Jew money” language) directly alongside columns about German oppression of Jews.¹⁹⁶

The Poliers’ involvement with IJA had long-lasting consequences for their approaches to legal reform. Shad Polier’s work on the Scottsboro case inspired him to join the NAACP, and he later held leadership positions in the NAACP’s Legal Defense and Educational Fund (LDF).¹⁹⁷ He also went on to work as an attorney for the National Labor Relations Board (NLRB).¹⁹⁸ Meanwhile, Justine Polier was appointed a judge on the Domestic Relations Court, where she was attentive to racial inequality.¹⁹⁹ The Poliers married in 1937 and skipped a honeymoon so Justine Polier could return promptly to the bench.²⁰⁰

In the following years, Mayor La Guardia’s family court appointees typified his practice of selecting candidates from different political and religious backgrounds. He appointed Lawrence B. Dunham, a Unitarian and a Democrat, who had a long career in public service and had worked on the

192. Tom Cassidy, *Jurors Laugh Sending Colored Boy to Chair*, DAILY NEWS (N.Y.C.), Apr. 10, 1933, at 3.

193. Tom Cassidy, “*Jew Money from New York*” *Draws Scottsboro Fire*, DAILY NEWS (N.Y.C.), Apr. 8, 1933, at 4. Shad Polier also helped draft briefs on the merits in the *Scottsboro* litigation. *Shad Polier Papers*, *supra* note 186.

194. Cassidy, *supra* note 193. For further discussion of the case, including attention to the treatment of Jewish lawyers, see Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 399-403 (2009).

195. *See supra* text accompanying notes 82-83.

196. *E.g.*, MANCHESTER GUARDIAN (Eng.), Apr. 10, 1933, at 9; BROOK. DAILY EAGLE, Apr. 9, 1933, at 1; SUN (Balt.), Apr. 9, 1933, at 1; DES MOINES REG., Apr. 8, 1933, at 2.

197. *Shad Polier Papers*, *supra* note 186.

198. For a discussion of his involvement in a controversial case, see *Jeering Throng Flaunts Banners Assailing NLRB*, REG.-BEE (Danville, Va.), July 13, 1938, at 1.

199. *See infra* text accompanying notes 351-53, 463.

200. *Justice Tulin Wed to Isadore Polier*, N.Y. TIMES, Mar. 27, 1937, at 12.

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mayoral campaign.²⁰¹ Mayor La Guardia then added Jewish-turned-Episcopalian Republican Rosalie Loew Whitney, a trailblazing woman lawyer known for her earlier leadership of the Legal Aid Society of New York.²⁰² He also tapped W. Bruce Cobb, a Protestant who had been appointed as a magistrate judge by the previous Fusion mayor in 1915 and was by the mid-1930s serving as the chief of the Legal Aid Society.²⁰³

It was also in these years that Mayor La Guardia appointed the judge who would prove most controversial: Herbert O’Brien.²⁰⁴ O’Brien attended Catholic primary schools and Notre Dame College in Montreal before graduating from Brooklyn Law School.²⁰⁵ A strong anti-Tammany voice, O’Brien ran unsuccessfully as an independent Democrat for a number of positions.²⁰⁶ In these efforts, he was often endorsed by former New York City mayor John Hylan, a prominent Catholic who, by the early 1930s, was sitting on the Children’s Court bench.²⁰⁷ In 1933, the Fusion ticket selected O’Brien to run for the City Court in a play to get Hylan’s voters.²⁰⁸ O’Brien again lost.²⁰⁹ When Justice Hylan died in 1936, Mayor La Guardia selected O’Brien to fill the empty Domestic Relations position.²¹⁰ The son of an Irish father and Italian-speaking Swiss-born mother,²¹¹ Justice O’Brien later observed: “If I wasn’t appointed the

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201. *Lawrence Boardman Dunham*, in 44 NATIONAL CYCLOPÆDIA OF AMERICAN BIOGRAPHY 430 (1962).
202. *Mayor Appoints 14 to High City Posts; 2 Women on List*, N.Y. TIMES, Dec. 15, 1935, § 1, at 1; *Rosalie Whitney, Jurist, Dies at 66*, N.Y. TIMES, Sept. 4, 1939, at 19. For a beautiful treatment of Whitney’s background and professional life, see Felice Batlan, *The “Rabbi’s Daughter” and the “Jewish Jane Addams”: Jewish Women, Legal Aid, and the Fluidity of Identity, 1890-1930*, 4 IND. J.L. & SOC. EQUALITY 135, 136, 149 (2016).
203. *Mayor Names Cobb to Jurist’s Post*, BROOK. DAILY EAGLE, Mar. 17, 1938, at 1; see also *infra* Appendix.
204. Mayor La Guardia first appointed O’Brien briefly as a magistrate, *O’Brien Takes Magistrate’s Post in Queens*, N.Y. HERALD TRIB., Dec. 25, 1935, at 4, and some of the details cited here are from coverage of that appointment.
205. *Justice O’Brien Urged to Seek Appeals Bench*, N.Y. HERALD TRIB., July 27, 1939, at 2.
206. See *Fusionists Put Hylan Manager on Queens Slate*, N.Y. HERALD TRIB., Aug. 28, 1933, at 4 (including a list of past runs); *Last-Minute Attack Launched on Harvey*, BROOK. DAILY EAGLE, Nov. 4, 1933, at 4 (showing O’Brien’s anti-Tammany position).
207. *Ex-Mayor Hylan Dies Suddenly of Heart Attack*, N.Y. TIMES, Jan. 12, 1936, § 1, at 1; *Fusionists Put Hylan Manager on Queens Slate*, *supra* note 206; *Judge Hylan Backs Herbert H. O’Brien*, BROOK. DAILY EAGLE, Oct. 30, 1933, at 21.
208. *Fusion Makes Bid for Hylan Voters*, N.Y. TIMES, Aug. 28, 1933, at 3.
209. Dick Lee, *LaGuardia Is Swept In with 5-Borough Victory*, DAILY NEWS (N.Y.C.), Nov. 8, 1933, at 3.
210. *Hylan’s Successor Sworn In by Mayor*, N.Y. TIMES, Jan. 28, 1936, at 5.
211. Bureau of the Census, *Fourteenth Census of the United States: 1920—Population Queens County, Supervisor’s District No. 4, Enumeration District No. 279, Sheet 12B* (1920).

Mayor would have been forced to appoint some other Catholic.”²¹² Foreshadowing the outspokenness that would later land him in trouble, Justice O’Brien explained during his swearing-in ceremony that he had persuaded his brother, a former state senator, to introduce legislation that would allow violent criminals to be sentenced to whipping.²¹³ The bill did not pass.²¹⁴ On a gentler note, Justice O’Brien said he was inspired by watching other respected lawyers leave their private practices to perform public service, so he decided it was time he did so as well.²¹⁵

Justice O’Brien quickly showed a willingness to speak out on issues involving Catholics. He denounced a child labor bill as “a deadly peril to the Christian religion”²¹⁶ and penned a column criticizing the lack of American attention to the treatment of Catholics in the Spanish Civil War.²¹⁷ (American Catholics in these years felt that Communist oppression of their coreligionists in Mexico, Spain, and Russia received inadequate sympathy or response from the United States.²¹⁸) Justice O’Brien also spoke at a meeting of the Catholic Club of the City of New York, during which the group unanimously adopted a resolution demanding that recently appointed Supreme Court Justice Hugo Black resign or be impeached because of his membership in the Ku Klux Klan, which was anti-Catholic in addition to being anti-black and anti-Jewish.²¹⁹

Justice O’Brien also expressed strong opinions on the importance of the religious affiliation of the court’s judges and other employees. In the heated speech he delivered to Catholic social workers in December 1937, Justice O’Brien encouraged his listeners to stop “chasing the rainbow of harmony” and instead press Mayor La Guardia to tap another Catholic for the bench.²²⁰ “Stop pussy-footing,” he commanded. “How long would it take for the Mayor to appoint a Catholic to that bench if the Catholic authorities requested it? Five minutes!”²²¹ Newspaper coverage concluded with a comedic breather,

212. *Justice O’Brien Says He “Could Strangle Mayor,” supra note 1.*

213. *O’Brien Takes Magistrate’s Post in Queens, supra note 204.*

214. *Id.*

215. *Id.*

216. *Child Labor Bill Denounced by Judge*, DEMOCRAT & CHRON. (Rochester, N.Y.), Mar. 13, 1937, at 1.

217. Herbert A. O’Brien, Letter to the Editor, *Spain’s Civil War: Justice Herbert A. O’Brien Thinks Its Causes Have Not Been Adequately Explained*, N.Y. HERALD TRIB., Sept. 20, 1936, at 15.

218. DAVID J. O’BRIEN, AMERICAN CATHOLICS AND SOCIAL REFORM: THE NEW DEAL YEARS 174 (1968).

219. *Catholic Club Demands Black Be Disqualified*, N.Y. HERALD TRIB., Sept. 23, 1937, at 1.

220. *Justice O’Brien Says He “Could Strangle Mayor,” supra note 1.*

221. *Id.*

explaining that Justice O'Brien had stopped speaking "suddenly."²²² He then observed that his secretary "had been signaling nervously during most of the talk, urging him to stop speaking, and he said he decided to take her advice."²²³ Justice Jackson, who arrived late and heard the end of the speech, declined to comment.²²⁴

Coming just ten days after O'Brien's speech, it is perhaps no coincidence that Mayor La Guardia's final appointment in his first term—though he had already been reelected at this point—was Juvenal Marchisio, an Italian Catholic.²²⁵ Marchisio was a professor of government at St. John's College in Brooklyn and "managing editor of *Il Crociato* (The Crusader), [the] official Italian publication of the Brooklyn Catholic Diocese."²²⁶

Mayor La Guardia easily won reelection in 1937, besting the plurality (40%) he obtained in 1933 with a definitive majority (60%).²²⁷ He maintained significant popularity within the Italian community and increased his support among Jewish and black voters.²²⁸ In previous elections, the Jewish population spanned party lines, which is part of why Jewish New Yorkers had long enjoyed at least some representation in New York City posts; politicians could not take Jewish votes for granted.²²⁹ Now, with Mayor La Guardia's outspoken attacks on Nazi Germany and the increased opportunities granted to Jews through mayoral appointments and reform of civil service laws, nearly 70% of Jewish voters cast their ballots for Mayor La Guardia, around twice what he received in 1933.²³⁰

Although La Guardia had not been particularly attentive to black voters in his first campaign, by 1937 he had earned their appreciation through greater attentiveness to Harlem and by appointing black New Yorkers to important

222. *Id.*

223. *Id.*

224. *Id.* Coverage in Brooklyn's Catholic newspaper, the *Tablet*, appeared several days later and was consistent with the *New York Herald Tribune*, including most of the same quotations and even some verbatim descriptions. One extra detail in the *Tablet's* story was that O'Brien stated, "[t]ell me . . . how . . . a probation officer can successfully mend broken lives and bring comfort and inspiration to a crushed and friendless family unless he himself believes in God, regardless of what his particular religion may be." *Justice O'Brien Insists Moral Issues Are Vital*, TABLET (Brook.), Dec. 11, 1937, at 1.

225. *New 30-Day Judge Named*, N.Y. TIMES, Mar. 11, 1937, at 2.

226. Marchisio first received a temporary term. *Id.* Later that year, about ten days after O'Brien's speech, Marchisio received a ten-year term, filling the expired spot of Justice Peter Hanson, a Protestant. *See Isaacs Is Sworn In as Family Watches*, N.Y. TIMES, Dec. 17, 1937, at 2; *infra* Appendix.

227. WILLIAMS, *supra* note 78, at 233.

228. *Id.* at 232-33, 232 tbl.6.1.

229. *See* BAYOR, *supra* note 67, at 37; WILLIAMS, *supra* note 78, at 232-33.

230. *See* WILLIAMS, *supra* note 78, at 232 & tbl.6.1.

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city posts.²³¹ He received 70% of black votes, up from just over a third in 1933.²³² No New York City mayor had ever appointed a black judge; the only two black men to serve as New York City judges were elected to their positions in 1930.²³³ Mayor La Guardia was the first New York City mayor to place a notable number of black professionals in prestigious positions including judgeships, garnering positive coverage from the black press in the years leading up to his reelection.²³⁴

In 1934, Mayor La Guardia named Hubert T. Delany as Tax Commissioner for Manhattan, regarded as one of the most important city positions.²³⁵ Delany was a leader in the black community; he served on the boards of the NAACP and the Urban League.²³⁶ Black newspapers were ebullient, noting that this was the highest paid appointive post held by any black professional in the country, at \$10,800 per year.²³⁷ One black newspaper ran the headline: "The Career of Hubert T. Delany Reads Like a Success Story Written by Horatio Alger."²³⁸

Delany came from a distinguished family. The patriarch, Henry Delany, was born into slavery and freed at age six because of the Civil War, served as the vice-principal at Saint Augustine's (a private black college in North Carolina), and later became the "first elected black bishop of the Episcopal Church in America."²³⁹ Delany's mother, Nanny Delany, was a respected

231. See *id.* at 239-41; Dominic J. Capeci, *From Different Liberal Perspectives: Fiorello H. La Guardia, Adam Clayton Powell, Jr., and Civil Rights in New York City, 1941-1943*, 62 J. NEGRO HIST. 160, 160-61 (1977).

232. WILLIAMS, *supra* note 78, at 232 & tbl.6.1.

233. *Judges to Mount Bench*, N.Y. AMSTERDAM NEWS, Dec. 31, 1930, at 1. On black lawyers and judges in New York, see J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 391-406 (1993) (noting that only one black man had been appointed as a judge in the state by this time).

234. CHERYL LYNN GREENBERG, "OR DOES IT EXPLODE?": BLACK HARLEM IN THE GREAT DEPRESSION 85-86 (1991). For representative coverage, see *Seek to Keep La Guardia in Mayor's Job*, N.Y. AMSTERDAM NEWS, Feb. 27, 1937, at 4 (describing a talk by a prominent black minister encouraging support of Mayor La Guardia's reelection in part because Mayor La Guardia "had appointed members of the race to more responsible positions than any former Mayor").

235. Robert Hinton, *Delany, Hubert T.*, in 2 AFRICAN AMERICAN NATIONAL BIOGRAPHY 634, 635 (Henry Louis Gates Jr. & Evelyn Brooks Higginbotham eds., 2008).

236. George James, *Hubert T. Delany, 89, Ex-Judge and Civil Rights Advocate, Dies*, N.Y. TIMES (Dec. 31, 1990), <https://perma.cc/2CWB-VKP7>; *Walter White Praises Delaney [sic] Appointment*, PHILA. TRIB., Feb. 8, 1934, at 4.

237. *Harlem Lauds Delany Choice*, PITT. COURIER, Feb. 17, 1934, at 3.

238. Edgar T. Rouzeau, *The Career of Hubert T. Delany Reads Like a Success Story Written by Horatio Alger*, N.Y. AMSTERDAM NEWS, Feb. 7, 1934, at 2.

239. Amy Hill Hearth, *Two "Maiden Ladies" with Century-Old Stories to Tell*, N.Y. TIMES (Sept. 22, 1991), <https://perma.cc/6BVF-4HS8>.

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teacher at the school.²⁴⁰ Although Delany’s parents expected him to become a priest like his father, he was dissuaded from this path by church segregation.²⁴¹ Instead, he followed many of his nine siblings—all of whom became successful professionals, including doctors, lawyers, and teachers²⁴²—to New York. He worked to support himself through City College and NYU Law School as a Red Cap at Penn Station and then as a public school teacher.²⁴³ His sisters recalled him joking that he earned “an MBC degree—‘master’s of baggage carrying.’”²⁴⁴ In 1926, Delany married Clarissa Scott, a poet and teacher who graduated from Wellesley and whose father was the former personal secretary of Booker T. Washington and Secretary-Treasurer of Howard University.²⁴⁵ The marriage, in the words of one black newspaper, “united two of our oldest and most outstanding families”; President and Mrs. Calvin Coolidge sent flowers.²⁴⁶ After Delany was widowed not long thereafter, black newspapers described him as one of the most eligible bachelors in Harlem.²⁴⁷

Delany forged a distinguished career. After working in private legal practice, in 1927 he became an Assistant U.S. Attorney for the Southern District of New York, where he was celebrated for winning 498 of his 500 cases.²⁴⁸ It was there that he first met then-Congressman La Guardia.²⁴⁹ In 1929, Delany ran for Congress and La Guardia for mayor, both on the Republican ticket.²⁵⁰ La Guardia stumped for Delany, explaining that he backed him “not because of his race, but because he is the best fitted for the position.”²⁵¹ Neither won.²⁵² After leaving his federal post, Delany became a

240. For biographical information on Nanny Delany, see James G. Fleming, *Mrs. Delany, 73, Steals Show from Her Son*, AFRO-AM. (Balt.), Apr. 7, 1934, at 13.

241. Hinton, *supra* note 235, at 635.

242. Fleming, *supra* note 240.

243. Rouzeau, *supra* note 238.

244. SARAH DELANY & A. ELIZABETH DELANY WITH AMY HILL HEARTH, *HAVING OUR SAY: THE DELANY SISTERS’ FIRST 100 YEARS*, at 109 (1993).

245. T. J. Bryan, *Clarissa Scott Delany*, in *NOTABLE BLACK AMERICAN WOMEN* 268, 268 (Jessie Carney Smith ed., 1992).

246. *Emmett Scott’s Daughter Weds*, N.Y. AMSTERDAM NEWS, Oct. 13, 1926, at 1.

247. See, e.g., *Marian Denies Marriage Rumor*, PITT. COURIER, Apr. 6, 1940, at 1; Edgar Rouzeau, *Are Harlem’s Eight Most Eligible Men Immune to Cupid’s Darts? . . . No! No! No!*, PITT. COURIER, July 15, 1939, at 9.

248. See Edgar T. Rouzeau, *Delaney [sic] Gets First “Pay-Off” in New York Political Deal*, PHILA. TRIB., Feb. 1, 1934, at 2.

249. *Harlem Lauds Delany Choice*, *supra* note 237.

250. See *Harlem Must Elect Delany to Prove Interest in Self, LaGuardia Avers*, N.Y. AMSTERDAM NEWS, Sept. 11, 1929, at 3.

251. *La Guardia Contends Tammany Proves Enemy of Negro by Fighting Delany*, N.Y. AMSTERDAM NEWS, Oct. 30, 1929, at 3.

252. *Delaney [sic] Loses in N.Y. Congressional Race*, CHI. DEFENDER, Nov. 9, 1929, at 1.

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law partner in a firm with other former federal prosecutors,²⁵³ two Jews and one Italian Catholic.²⁵⁴ Then, in February 1934, Mayor La Guardia appointed Delany as the Tax Commissioner, a position described by black journalists as "the greatest amount of responsibility ever reposed in a Negro by the city government."²⁵⁵ (Delany held this position until Mayor La Guardia appointed him to the Domestic Relations Court in 1942.²⁵⁶)

Additional appointments from the black community followed the Harlem Riot of 1935. Residents of Harlem had long suffered from underemployment, discrimination, and poverty. These circumstances worsened during the Great Depression, as black laborers suffered more unemployment and lower wages than white workers in the same jobs.²⁵⁷ Moreover, housing discrimination segregated black families into Harlem, where landlords charged excessive rent for poorly maintained units, and the neighborhoods had inferior hospitals, playgrounds, and schools.²⁵⁸ These conditions led to higher crime rates, which exacerbated conflicts with police.²⁵⁹ In the 1920s and 1930s, a political culture

253. *Along the Color Line*, 40 CRISIS 88, 90 (1933) (describing Delany joining a firm with leading members George J. Mintzer, Thomas T. Todarelli, and Emanuel G. Kleid). On the attorneys' backgrounds as federal prosecutors, see sources cited *infra* note 254. The firm was involved in civil rights cases. For example, an associate represented Roy Wilkins and others in a successful action against a restaurant that refused them service on the basis of race. *N.Y. Restaurant Ordered to Pay \$600 for Jim Crow*, PITT. COURIER, Jan. 19, 1935, at 3.

254. Though historian J. Clay Smith has cast this episode as Delany joining "a white law firm," SMITH, *supra* note 233, at 401, the more relevant description for present purposes is that Delany joined a practice led by two Jews and one Italian Catholic, during a time when none would have been welcome in a white Protestant law firm. On the exclusion of Jews, Catholics, and African Americans from elite New York legal practice, including corporate firms, see Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 73, 78-81, 104 (Michael Grossberg & Christopher Tomlins eds., 2008). On these attorneys' backgrounds, see *Charge Banker Fleeced Friends*, EL PASO EVENING POST, Oct. 12, 1929, at 2; *George Mintzer, Lawyer, Dies; Arbiter of Industrial Disputes*, N.Y. TIMES (May 6, 1976), <https://perma.cc/K2W3-DHP3> (describing Mintzer's accomplishments, including more than a decade as counsel to the American Jewish Committee); *Thomas Todarelli*, N.Y. TIMES (Mar. 5, 1975), <https://perma.cc/54MC-MRPG> (describing Todarelli as a graduate of Holy Cross College); and *Kleid Family History*, ANCESTRY.COM, <https://perma.cc/PR7J-7RZH> (archived June 16, 2020) (identifying Kleid as a Jewish surname).

255. *Delaney [sic] New Commissioner of Taxes, Assessments of N.Y.C.; Appointment Sets Precedent*, NEW J. & GUIDE (Norfolk, Va.), Feb. 3, 1934, at 1.

256. *Delany Named Judge in N.Y. by Mayor La Guardia*, PHILA. TRIB., Aug. 8, 1942, at 1.

257. See MICHAEL W. FLAMM, IN THE HEAT OF THE SUMMER: THE NEW YORK RIOTS OF 1964 AND THE WAR ON CRIME 32-33 (2017); Cheryl Greenberg, *The Politics of Disorder: Reexamining Harlem's Riots of 1935 and 1943*, 18 J. URB. HIST. 395, 398-99 (1992).

258. See Greenberg, *supra* note 257, at 398-99.

259. See *id.* at 399.

emerged in Harlem to address these inequities. One prominent effort was a “Don’t Buy Where You Can’t Work” campaign, in part targeting Jewish-owned stores.²⁶⁰ This effort seemed promising until a New York court held that the associated picketing was illegal in the absence of a labor dispute, whereas this was “solely a racial dispute.”²⁶¹ According to historian Cheryl Greenberg, “Harlemites were left in early 1935 with a strong sense of common grievance and a recognition of the potency of mass action but no organized way of channeling the struggle that had a broad appeal.”²⁶² This tension exploded into a riot on March 19, 1935.²⁶³ As the riot was ongoing, Mayor La Guardia and Delany walked through Harlem together in an effort to calm the situation.²⁶⁴

In the riot’s aftermath, Mayor La Guardia convened the Mayor’s Commission on Conditions in Harlem to help address underlying causes.²⁶⁵ This group of fourteen experts—led by eminent black sociologist E. Franklin Frazier and including other prominent members such as Delany and labor leader A. Philip Randolph—blamed social and economic ills.²⁶⁶ Among their recommendations were changes to New York City employment, including integrating hospital staffs and appointing more African Americans to public positions.²⁶⁷

Flowing directly from this proposal, Mayor La Guardia selected Harlem leader Myles Paige for the Magistrates’ Court bench.²⁶⁸ (Paige’s then-rare identity as a black Catholic may have cemented his selection, as it allowed Mayor La Guardia to satisfy Catholic demands that the seat—vacated by a Catholic—remain Catholic.²⁶⁹) Still, as Paige had observed a few years earlier, it was actually the Children’s Court that was “most important to the Negro as to any other race,” presumably because of the potential to rehabilitate troubled children.²⁷⁰

260. Greenberg, *supra* note 257, at 402-06.

261. *A.S. Beck Shoe Corp. v. Johnson*, 274 N.Y.S. 946, 953-54 (Sup. Ct. 1934). For additional discussion of the case and its consequences, see Greenberg, *supra* note 257, at 402-06.

262. Greenberg, *supra* note 257, at 406.

263. FLAMM, *supra* note 257, at 34-36; Greenberg, *supra* note 257, at 406-08.

264. DELANY & DELANY, *supra* note 244, at 148.

265. Greenberg, *supra* note 257, at 409.

266. *Id.* at 409-18, 438 n.20.

267. *Id.* at 418.

268. *Harlem Negro Gets Job Today as Magistrate*, N.Y. HERALD TRIB., Sept. 2, 1936, at 8.

269. See Alvin E. White, *Eleven Judges*, AFRO-AM. (Balt.), May 24, 1958, at A1 (noting that in New York “political patterns are dictated by custom” and that “[r]ace, religion, and ethnic connections are the ingredients”).

270. *Attorney Myles Paige in Radio Talk Urges Home for Delinquent Boys*, N.Y. AGE, Mar. 18, 1933, at 7. Paige joined the Domestic Relations Court bench in the late 1950s. See White, *supra* note 269.

In July 1939, Mayor La Guardia used the Domestic Relations Court bench to make his most striking statement in favor of diversity by appointing Jane Bolin, making her the country's first black woman judge.²⁷¹ Justice Bolin maintained that she knew from her childhood that she wanted to be a judge.²⁷² Her father was the first black lawyer in Poughkeepsie and raised her alone after her (white) mother died.²⁷³ She excelled while attending Wellesley College, though, as one of only two black freshmen, she found the experience isolating due to racial discrimination.²⁷⁴ After graduation, her father discouraged her from pursuing the masculine field of law.²⁷⁵ Nevertheless, she persisted in attending Yale Law School, becoming the school's first black woman graduate.²⁷⁶ (She overlapped there with Justine Polier.²⁷⁷)

By the mid-1930s, Bolin had become a leader in the black community. She served on the executive boards of the New York Urban League and the local branch of the NAACP.²⁷⁸ In 1937, after an unsuccessful run as a Republican candidate for the state assembly, she was appointed as an Assistant Corporation Counsel (lawyer for the city) assigned to the Domestic Relations Court.²⁷⁹ Her husband, Ralph Mizelle, had similar affiliations and was appointed as assistant attorney in the Post Office Department in Washington, D.C., in 1937, in part, according to unnamed "[p]olitical observers," to "placate antagonisms aroused over the revelations of Justice Hugo Black's membership in the Ku Klux Klan."²⁸⁰

Though the appointment of Justice Bolin had clear symbolic significance,²⁸¹ Mayor La Guardia seemingly orchestrated the circumstances to

271. JACQUELINE A. MCLEOD, *DAUGHTER OF THE EMPIRE STATE: THE LIFE OF JUDGE JANE BOLIN* 40-42 (2011).

272. Harry B. Webber, *Woman Made Judge: Jane Bolin Takes Oath*, *WASH. AFRO-AM.*, July 29, 1939, at 1.

273. MCLEOD, *supra* note 271, at 7, 9-11.

274. *Id.* at 16-17.

275. *Id.* at 20.

276. *Id.* at 25.

277. Bolin matriculated in 1928, *id.* at 24, when Polier was in her third year, *see supra* text accompanying note 171.

278. MCLEOD, *supra* note 271, at 83; Judy Klemesrud, *For a Remarkable Judge, A Reluctant Retirement*, *N.Y. TIMES* (Dec. 8, 1978), <https://perma.cc/66PP-QVNG>; *Negro Woman First in City to Be Made Judge*, *supra* note 12.

279. *Miss Jane Bolin Appointed Asst. to Corp. Counsel*, *N.Y. AGE*, Apr. 17, 1937, at 1.

280. *N.Y. Attorney Is Solicitor in P.O. Dept.*, *AFRO-AM.* (Balt.), Oct. 9, 1937, at 22. His appointment may also have been related to advocacy efforts to move plum post office positions from patronage to merit. *See, e.g.*, Kelly Miller, *Dr. Miller Discovers: Appointive Officers Discretionary Power Defeats Purpose of Civil Service Reform*, *J. & GUIDE* (Norfolk, Va.), Aug. 14, 1937, at 9.

281. KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* 131-32 (2012).

emphasize the point. During Mayor La Guardia's reelection campaign in 1937, he had delivered a provocative speech before the Women's Division of AJC, whose leader was Louise Waterman Wise, Justice Polier's mother.²⁸² In the speech the mayor suggested that when New York City hosted the then-upcoming World's Fair, it should include a figure of Hitler—"that brown-shirted fanatic who is now threatening the peace of the world"—in a "chamber of horrors."²⁸³ This remark so inflamed German representatives to the United States that the U.S. Secretary of State issued an official "expression of regret" to the German government.²⁸⁴ Not to be outdone, Louise Wise demanded an apology from the German Embassy, after official German newspapers covering the story referred to the 1,200 members of the Women's Division of AJC as "women of the streets" gathered to be entertained by their "pimp" Mayor La Guardia.²⁸⁵ The U.S. Secretary of State tasked the American Ambassador with making an "emphatic comment" to the German Foreign Office.²⁸⁶ Once the World's Fair arrived, Mayor La Guardia offered an even more emphatic comment; he summoned Bolin to meet there to inform her of her appointment.²⁸⁷

Black newspapers across the country reveled in recounting Justice Bolin's qualifications and early tenure on the bench.²⁸⁸ On her first day, they reported, Justice Panken welcomed Justice Bolin with praise of her "sterling qualities, fine ability, and . . . humaneness."²⁸⁹ Justice Panken further proclaimed: "It is not amiss to say here, 'Bless America, bless its traditions and the democracy it has given the world regardless of religion, race or color.'"²⁹⁰ Seconding Justice Panken's sentiments, the *Afro-American's* editorial page added, "Also we say, Bless LaGuardia."²⁹¹

282. *Now U.S. Wants an Apology for a German Slur*, CHI. DAILY TRIB., Mar. 12, 1937, at 16; see also Joe Rooks-Rapport, *Louise Waterman Wise*, JEWISH WOMEN'S ARCHIVE: ENCYCLOPEDIA JEWISH WOMEN (Feb. 27, 2009), <https://perma.cc/G2E7-E9MM>.

283. Esposito & Esposito, *supra* note 93, at 45-46.

284. *Hull Gives Reich Official "Apology"*, N.Y. TIMES, Mar. 6, 1937, at 1.

285. *Now U.S. Wants an Apology for a German Slur*, *supra* note 282.

286. *Id.*

287. For a description of the World's Fair meeting, including Mayor La Guardia's sexist discussion with Justice Bolin's husband, see MCLEOD, *supra* note 271, at 40-42. McLeod discusses the appointment's meaning for racial and gender norms at the time and does not situate it within the context of Mayor La Guardia's anti-Nazi stance.

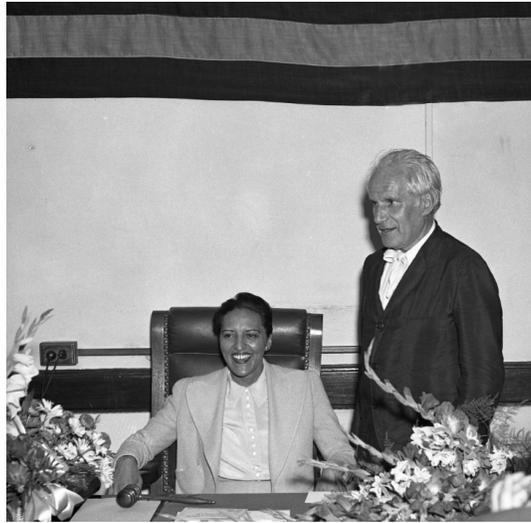
288. For representative coverage, see *For a Very Pleasant Day in Court—See New York's Judge Jane Bolin*, CHI. DEFENDER, Sept. 30, 1939, at 16. See also *Negro Woman First in City to Be Made Judge*, *supra* note 12.

289. See, e.g., Thelma Berlack-Boozer, *1st Negro Woman Judge in Harlem*, N.Y. AMSTERDAM NEWS, July 29, 1939, at 1.

290. Opinion, *supra* note 12.

291. *Id.*

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Justice Bolin on her first day, beside Justice Panken.²⁹²
Photo Credit: Ed Jackson/*New York Daily News*

Mayor La Guardia’s final appointments to the Domestic Relations Court before the United States entered World War II rendered its bench a nearly perfect reflection of the city’s racial and religious demographics.²⁹³ These two appointees were Jewish men: Dudley F. Sicher, an accomplished attorney who was one of Mayor La Guardia’s close friends,²⁹⁴ and former U.S. Congressman Isaac Siegel.²⁹⁵ This brought the number of Jewish judges to four of twelve, in contrast to one in eight as of 1933.²⁹⁶ Likewise, Justice Bolin’s inclusion rendered the still relatively small black community proportionally represented. White Protestants were slightly overrepresented with three positions, to the Catholics’ four.²⁹⁷

Formed against a backdrop of Nazi anti-Jewish violence and homegrown racism and anti-Semitism, Mayor La Guardia’s family court bench embodied

292. *Her Honor*, DAILY NEWS (N.Y.C.), July 25, 1939, at 20.

293. *See supra* text accompanying notes 70-75.

294. *Dudley F. Sicher, Ex-Justice, Dies*, N.Y. TIMES, Nov. 16, 1957, at 19.

295. *Isaac Siegel Promoted to Family Court Bench*, N.Y. HERALD TRIB., Sept. 9, 1940, at 13; *Justice Siegel Dies in 9-Story Plunge*, N.Y. TIMES, June 30, 1947, at 38.

296. *See infra* Appendix.

297. *See infra* Appendix.

the ideals of tri-faith America and the movement toward racial equality. For the first time in America, there was a court whose judges included women and men, blacks and whites, and members of the three major religions.²⁹⁸ In the words of NAACP leader Roy Wilkins, recounting Mayor La Guardia’s appointment of “[a]ll races and creeds and classes” throughout city administration, the mayor was “doing battle for the democratic way of life.”²⁹⁹

Moreover, it was a bench that included individuals who broke new ground. The drive, character, and bravery that made these people “firsts” did not fade when they reached the bench. Instead, they applied their ambitions, intelligence, and networks—bolstered by their new titles—to seek change. One early focal point was to challenge the place of religion (with significant implications for race) in the provision of child welfare services.

II. Religious Politics in the New Domestic Relations Court

Mayor La Guardia’s slate of Domestic Relations Court justices brought skeptical eyes to the operation of their institution. The judicial colleagues recognized that the primarily private, religious options available when they needed to place a dependent or delinquent child outside the child’s home had severe negative consequences. Private religious groups’ monopolization of child welfare institutions meant that New York City children received unequal services, with black Protestant children suffering most.

Though the justices had limited control over the availability of childcare services, there were related areas in which they had discretion: determining a child’s religion prior to placement and overseeing court staff. On both issues, the judges divided sharply along religious lines. The Jewish justices employed a relatively flexible conception of children’s religious membership and believed that their own and employees’ religious identities should be off-limits for government consideration. By contrast, many of their colleagues—led most vocally by Catholic Justice O’Brien—considered religious identity to be a critical feature for performing the court’s work.

298. The New York City Magistrates’ Court was nearly as diverse, but it did not include a black woman. On its first black (male) member, see text accompanying notes 268-70 above. On its first (white) woman, see Mae C. Quinn, *Fallen Woman (Re)Framed: Judge Jean Hortense Norris, New York City—1912-1955*, 67 U. KAN. L. REV. 451, 451 (2019).

299. Wilkins, *supra* note 12. After Mayor La Guardia appointed Justice Delany to the family court in 1942, the black newspaper the *New York Age* opined “it will be a long time before this city and country will have another Mayor to match his record. His squareness on the race question has been a source of gratification to Negroes not only in New York but also throughout the country.” *The New Justice of the Family Court*, N.Y. AGE, Aug. 15, 1942, at 6.

A. The Racial and Religious Segregation of Children

In 1930s New York City, child welfare services were organized primarily along religious lines. This system originated in the early nineteenth century, when Catholics created their own social service agencies and used political pressure to obtain protections in state laws.³⁰⁰ Catholics feared that Protestants would use welfare services or adoption as a wedge to indoctrinate their children in Protestantism or even “kidnap” them into Protestant families and institutions, a worry that seemed plausible based on prior occurrences.³⁰¹ The concern about cross-religious childcare was not unique to New York. As a result, many states required religion matching in institutional and foster care.³⁰²

New York was among the states that used law most extensively to require religion matching, leading to what became known as the “New York system.”³⁰³ The legislature required religion matching in institutional care beginning in 1875, and expanded the law in 1898 to read: “In every case where practicable, any child placed out shall be placed with individuals of like religious faith as the parents of the child.”³⁰⁴ In 1921, New York became the first state to enshrine this approach in its constitution, adding a provision that required religion matching when children were committed to institutions or “placed in the custody of any person by parole, placing out, adoption or guardianship . . . when practicable.”³⁰⁵ In the surrounding decades, Catholic, Jewish, and Protestant organizations dominated New York City’s child welfare services, providing institutional care for neglected and delinquent children and

300. JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 206-07 (1967).

301. *Id.* at 204-08; DAVID M. SCHNEIDER & ALBERT DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE, 1867-1940, at 73 (1969 prtg.); Herman, *supra* note 164, at 64.

302. See E. Wayne Carp, *Introduction* to ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 1, 7 (E. Wayne Carp ed., 2002) (discussing the spread of religion matching in institutional care and adoption placements in Chicago); Herman, *supra* note 164, at 65-66 (discussing how child welfare organizations supported religion matching); Leo Pfeffer, *Religion in the Upbringing of Children*, 35 B.U. L. REV. 333, 372-73 (1955) (describing how the law has required consideration of “the religious factor” in many childcare contexts since the eighteenth century).

303. See PRATT, *supra* note 300, at 267.

304. *Wilder v. Sugarman*, 385 F. Supp. 1013, 1020 (S.D.N.Y. 1974) (per curiam) (quoting Act of Apr. 14, 1898, ch. 264, § 6, 1898 N.Y. Laws 780, 781).

305. *Id.* (quoting Con. Res., 144th Sess., 1921 N.Y. Laws 2534). Nearly forty years later, a minimally modified version of this language was adopted into the New York Constitution. *Id.*; see also N.Y. CONST. art. VI, § 32.

overseeing placement of children with foster or adoptive parents of their same faith.³⁰⁶

Religious groups’ control over admissions to institutions permitted a religiously and racially segregated system. According to the best available source, as of 1935, nearly half of New York City youth were Catholic, a third Jewish, and the remainder Protestant—ratios the same source suggests remained roughly static into the 1950s.³⁰⁷ Seemingly all Jewish youth and nearly all Catholic youth were white.³⁰⁸ Approximately 85% of black children were Protestant (with the remainder Catholic).³⁰⁹ This meant that the obligation to provide services to black children fell almost exclusively on Protestant organizations, which frequently refused to take black children, or at least sufficient numbers of them.³¹⁰ Public, secular institutions were available only for delinquent (not neglected) children and were grossly inadequate.³¹¹ Consequently, there was a tragic void in caring for the most vulnerable black children, which worsened as black migration to New York City increased into the 1930s.³¹²

The justices agreed that the religion-based assignment system had unacceptable consequences for black children but differed on how to address these problems.³¹³ Some court officials attempted to convince the city to open

306. See DOROTHY M. BROWN & ELIZABETH MCKEOWN, *THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE* 3-5, 14-15, 50 (1997); PRATT, *supra* note 300, at 221, 267.

307. See *supra* note 74 and accompanying text.

308. See *supra* note 75 and accompanying text.

309. See *supra* note 75 and accompanying text. As the population of Harlem shifted from white ethnic groups to African Americans, the Catholic church sought to keep its parishes full and so enrolled black children in Catholic schools and succeeded in converting some of them and their families. Cecilia A. Moore, *Keeping Harlem Catholic: African-American Catholics and Harlem, 1920-1960*, 114 AM. CATH. STUD. 3, 4-5 (2003); see also MCGREEVY, *supra* note 55, at 56-57.

310. GERALD MARKOWITZ & DAVID ROSNER, *CHILDREN, RACE, AND POWER: KENNETH AND MAMIE CLARK’S NORTHSIDE CENTER* 8-11 (1996).

311. *Id.* at 11-12.

312. *Id.* at 4-6. A similar racial and religious dynamic led to insufficient institutional care for black children in Chicago. See TERA EVA AGYEPONG, *THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO’S JUVENILE JUSTICE SYSTEM, 1899-1945*, at 21, 35 (2018).

313. For the court’s official discussion about the “troublesome” problem of the lack of services available for dependent or delinquent black children, see 1933 ANNUAL REPORT, *supra* note 143, at 45-48. See also JUSTINE WISE POLIER, *EVERYONE’S CHILDREN, NOBODY’S CHILD: A JUDGE LOOKS AT UNDERPRIVILEGED CHILDREN IN THE UNITED STATES* 237-45 (1941) (detailing the failures of private religious groups to provide adequate services to black children in New York City).

new public facilities to serve children neglected by religious groups,³¹⁴ an effort opposed by the New York Catholic Archdiocese as “totalitarian,” according to correspondence between two of the justices.³¹⁵ Justices Polier and Bolin played leadership roles in founding a special school for black boys they hoped would somewhat compensate for religious groups’ racial discrimination.³¹⁶ For the most part, though, there was little the judges could do about the embedded parochial system they inherited.

B. The Domestic Relations Court’s “Baptism by Religious Fire”

Although the religion-segregated childcare system was not under the judges’ control, the prerequisite determination of a child’s religion sometimes was. It was in this role that the Domestic Relations Court colleagues faced their first religion-related controversy. In 1936, Justice Polier decided a case that presented facts seemingly designed to test New York City’s childcare system, a case she described as “a first baptism by religious fire.”³¹⁷

In re Vardinakis concerned a Catholic mother and Muslim father, married by a Protestant minister, who became unable to care for their four children.³¹⁸ Because of the law requiring religion matching in childcare, the children’s religious affiliations dictated their placement yet were difficult to establish. The oldest had been baptized (which for Catholics meant he was indisputably Catholic³¹⁹), but the religious training of each child varied.³²⁰

Against the backdrop of Nazi family law—which made headlines in New York and elsewhere for its demonization of Jewish-Aryan intermarriage and

314. 1933 ANNUAL REPORT, *supra* note 143, at 47-48 (calling upon “the public” to ensure that black children receive adequate care).

315. Letter from Hon. Justine Wise Polier, Justice, N.Y.C. Domestic Relations Court, to Hon. Stephen Jackson, Justice, N.Y.C. Domestic Relations Court (July 29, 1948), American Jewish Congress Records, Identifier: I-77 [hereinafter AJC Papers], Box 55, Folder 8 (on file with the American Jewish Historical Society). On organized Catholic opposition to federal provision of various child welfare services, in order to maintain funding and control for Catholic providers, see Elizabeth McKeown, *Claiming the Poor*, in WITH US ALWAYS: A HISTORY OF PRIVATE CHARITY AND PUBLIC WELFARE 145, 154-55 (Donald T. Critchlow & Charles H. Parker eds., 1998).

316. DENNIS A. DOYLE, *PSYCHIATRY AND RACIAL LIBERALISM IN HARLEM, 1936-1968*, at 72-73 (2016).

317. JUSTINE WISE POLIER, *JUVENILE JUSTICE IN DOUBLE JEOPARDY: THE DISTANCED COMMUNITY AND VENGEFUL RETRIBUTION* 131 (1989).

318. 289 N.Y.S. 355, 357-58 (N.Y.C. Dom. Rel. Ct. 1936). Catholic policy on the children of intermarriage was controversial. See *Church Council Assails Vatican Marriage Edict*, N.Y. HERALD TRIB., Mar. 28, 1932, at 1.

319. John A. Hardon, *The Sacraments of Baptism and Confirmation*, CATH. EDUC. RESOURCE CTR., <https://perma.cc/3ZV7-THMP> (archived June 16, 2020).

320. *In re Vardinakis*, 289 N.Y.S. at 358-60.

consideration of religion in child custody disputes³²¹—Justice Polier praised American notions of freedom of religion to couch her decision. “Happily for us,” she explained, “the American tradition of religious freedom and freedom of conscience demands that all religious groups shall be treated with respect and as equal in standing before the law.”³²² While recognizing a “custom” that a child who formally entered a particular church was treated as “belonging to that church so long as he is a minor,”³²³ Polier concluded this approach had no foundation in law. Instead, she continued, the court must evaluate the “entire situation” when the parents disagree.³²⁴ After interviewing the children about their own preferences, she placed the oldest with a Muslim paternal uncle and the other three in a Protestant foster home, as “a neutral meeting ground for both parents.”³²⁵ The foster parents were instructed not to provide religious education.³²⁶ Justice Polier authorized the mother to take the second oldest to Catholic church and the father to take the two youngest to Muslim services.³²⁷

Justice Polier’s *Vardinakis* compromise drew attention across the country. Most newspaper coverage relied on the unusual circumstances—the daughter of a prominent rabbi deciding a religious dispute between a Catholic and a Muslim by using a Protestant foster home—rather than editorializing to draw readership.³²⁸ Catholic sources expressed outrage. In a piece Justice Polier frequently recounted in later years, the *Tablet* (a Catholic newspaper published by the Brooklyn Diocese³²⁹) ran the headline: “Daughter of Rabbi Wise Gives Child of Christ to the Black Bearded Prophet of Mohammed.”³³⁰ Justice Polier

321. *E.g.*, *Jewish Mother in Reich Wins Custody of Girl*, 11, N.Y. HERALD TRIB., Feb. 16, 1936, § 1, at 14; *Nazis Demand Divorce of Jewish Wives by Officials if They Are to Retain Jobs*, N.Y. TIMES, Apr. 8, 1933, at 8; *Nazis Making Aryans Divorce Jewish Wives*, WASH. POST, Nov. 26, 1938, at 7.

322. *In re Vardinakis*, 289 N.Y.S. at 358.

323. *Id.* at 359.

324. *Id.*

325. *Id.* at 361-62.

326. *Id.* at 362.

327. *Id.*

328. *E.g.*, *Knotty Religious Problem Settled by Jewish Judge*, ST. LOUIS STAR-TIMES, Aug. 20, 1936, at 12; *Mohammedan Father and His Catholic Wife Can't Agree*, MUNCIE EVENING PRESS (Ind.), Aug. 20, 1936, at 15.

329. *About the Tablet*, TABLET, <https://perma.cc/ZZE7-ERJP> (archived June 16, 2020).

330. This quotation is drawn from Justice Polier’s recollections in POLIER, *supra* note 317, at 131. Due to gaps in the availability of the *Tablet* from these years, this article has not been located. However, the *Tablet* was still running critical commentary about this case several months later. In one article, the paper began by noting the decision “remains shocking and offensive to two million and more Catholics residing in Greater New York.” *A Strange Justice*, TABLET (Brook.), Oct. 3, 1936, at 8. The writer speculated that Justice Polier had “unconsciously changed” the children’s religion; the three sent to a foster home would likely become Protestant or else “indifferentists or atheists.” *Id.*

footnote continued on next page

later wrote that she knew she could have reduced the likelihood of press attention by handling the case orally (as was routine in domestic relations matters), yet she chose to issue a written opinion because there were no recent analogous decisions available.³³¹

Justice Polier’s decision to write an opinion in *Vardinakis*, and Catholic opposition to it, reflected the possibility that the holding could challenge the controlling nature of religious identity in other cases and contexts.³³² Both sides likely had in mind an unresolved controversy regarding the placement of “foundlings,” infants left on the doorsteps of hospitals, police stations, or private homes.³³³ New York City had a long-running policy of alternating between Catholic and Protestant designations for foundlings and then sending the infants to the appropriate parochial institutions for care and adoption.³³⁴ The only foundlings eligible for adoption by Jewish parents were those with indications that they had been born to Jewish parents, such as being found in a Jewish institution or with a note pinned on their clothing identifying them as Jewish.³³⁵

The exclusion of Jews from the foundling rotation system passed with little comment until December 1932. That month, a married and childless Jewish woman, Mrs. Hugo Connor, brought a baby girl, who had been found on her brother-in-law’s doorstep, to the Department of Welfare to pursue a formal adoption.³³⁶ The Department applied its rotation system, designating the child Catholic, and therefore refused to allow Connor to adopt her.³³⁷ Connor then sued to compel the Welfare Commissioner to return the baby to her, arguing that it was not a coincidence that the baby’s mother left the child

Justice Polier’s “personal comments on the philosophy of religion” made the decision “more irritating and disgusting.” *Id.* The “lesson” Catholics should take from the incident, the writer concluded, was that they “have a real interest in the manner of men and women put upon the bench to hear their cases.” *Id.*

331. POLIER, *supra* note 317, at 131. That written opinions were the exception to the norm is implied by Justice Polier’s description and further substantiated by the Author’s review of several justices’ papers and other court-related materials.

332. As Justice Polier later recalled, “that case has been used repeatedly in very many situations which I think are important to some extent.” Interview by Kitty Gellhorn with Justine Wise Polier (May 8, 1981), in *The Reminiscences of Justine Wise Polier*, *supra* note 172, at 185, 189.

333. For more information about foundlings and New York’s assignment policy, see Herman, *supra* note 164, at 72-77.

334. *Id.* at 72.

335. *Id.*

336. *Jews Denied Baby Due to Its Religion*, OGDEN STANDARD-EXAMINER (Utah), Jan. 13, 1933, at 13.

337. *Id.*

within a Jewish neighborhood.³³⁸ The lawyer for the city countered that “the mother of the child may have been deceived by the name Connor into thinking the Connors were Catholic.”³³⁹ Connor also posted a newspaper advertisement asking for the birthmother to clarify the child’s background and gave the court a letter signed “the mother” that claimed Jewish identity.³⁴⁰ But a second letter called the first a fraud and insisted the baby was Polish and Catholic.³⁴¹ As the flustered judge hearing the case wryly noted: “Anyone can write letters, especially if they don’t sign them.”³⁴² The judge then backed the rotation system, deeming the child Catholic.³⁴³

Justice Polier’s *Vardinakis* decision may have been a strategic play to bolster Jewish efforts to join the foundling rotation system—an effort led by Justice Polier’s mother, who ran a Jewish adoption agency.³⁴⁴ If what mattered most was the child’s needs and the family’s overall happiness, rather than the earliest religious group membership, more children might become available for Jewish would-be parents. The decision also pushed back against notions of religious identity as inborn or possibly racialized. Justice Polier’s analysis would not be the final word on children’s religious identities in the custody context, but no Catholic justices found a case permitting them to issue a contrary opinion until Justice O’Brien manufactured one through unnecessary dicta in the early 1940s.³⁴⁵

338. *Letters Confuse Parentage of Girl Foundling*, N.Y. HERALD TRIB., Dec. 29, 1932, at 36.

339. *Id.*

340. *Jews Denied Baby Due to Its Religion*, *supra* note 336; *Letters Confuse Parentage of Girl Foundling*, *supra* note 338.

341. *Letters Confuse Parentage of Girl Foundling*, *supra* note 338.

342. *Jews Denied Baby Due to Its Religion*, *supra* note 336.

343. *Id.*

344. On Wise’s adoption agency, see ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* 40–41 (2008); and Rooks-Rapport, *supra* note 282. For an example of Wise’s efforts to change the foundling system, see Mrs. Stephen S. Wise, Letter to the Editor, *Religion of Foundlings*, N.Y. TIMES, Jan. 3, 1933, at 22.

345. In *Ramon v. Ramon*, a Catholic man and Protestant woman had entered a prenuptial agreement stating that they would raise any children in the Catholic faith. 34 N.Y.S.2d 100, 102 (N.Y.C. Dom. Rel. Ct. 1942). The couple then wed and had a child. *Id.* When the couple later separated, the mother chose to send the child to public school and a Protestant church, so the father refused to pay child support. *Id.* Justice O’Brien wrote an unusually lengthy opinion to justify upholding the prenuptial contract. He noted the child’s baptism, discussed Catholic canon law, and concluded that “the spiritual and Catholic training of a child amid religious persons or institutions of its own faith is paramount over any material considerations.” *Id.* at 102, 108, 112. At the end of the opinion, Justice O’Brien essentially admitted that his decision was unnecessary, as the parties had already “placed the child in a Catholic boarding school,” for which the father agreed to pay. *Id.* at 113. All the court actually needed to do was approve the arrangement. *Id.*

C. Religious Identity, Judicial Roles, and Court Staffing

Another context in which state law required the judges to be attentive to religious identity was in the assignment of juvenile delinquents to probation officers. When New York adopted formal probation—a penal oversight method typically involving a preliminary investigation and postconviction supervision—for child offenders in 1903, the statute mandated that a child “when practicable . . . be placed with the probation officer of the same religious faith as that of the child’s parents.”³⁴⁶

New York’s religion-matching probation law formalized an approach that was common across the country.³⁴⁷ In the early decades of probation, volunteers or recent employees of child protective agencies or religious organizations often served as probation officers.³⁴⁸ As court-paid staff began to outnumber volunteers,³⁴⁹ courts still matched these employees to probationers by national origin, race, religion, and sex because of a belief that such commonalities would facilitate monitoring and rehabilitation.³⁵⁰

The fact that New York law required religion matching for probation officers but not other types of court staff became a source of judicial discord. In 1937, Justice Polier, who was friends with several leading child psychiatrists, collaborated with one to propose that a psychiatric treatment clinic be attached to the Children’s Court Division.³⁵¹ The primary goal was to provide psychiatric services for black children, who were unable to access such treatment because of their exclusion from parochial childcare services.³⁵² The plan was for the clinic to be staffed by volunteer graduate students from the New York School of Social Work at Columbia University.³⁵³

346. MERRIL SOBIE, *THE CREATION OF JUVENILE JUSTICE: A HISTORY OF NEW YORK’S CHILDREN’S LAWS 107-08* (1987) (quoting Act of May 15, 1903, ch. 613, sec 2, § 483, 1903 N.Y. Laws 1399, 1400).

347. BERNARD FLEXNER & ROGER N. BALDWIN, *JUVENILE COURTS AND PROBATION* 86-87 (1914) (“It is the practice in many courts to assign children [to probation officers] on the basis of religious belief.”).

348. *Department of Philanthropy, Charities, and Social Problems*, 26 *ANNALS AM. ACAD. POL. & SOC. SCI.* 774, 776 (1905); Homer Folks & Arthur W. Towne, *Probation in the Juvenile Court*, 1 *PROC. ACAD. POLI. SCI.* 682, 687 (1911).

349. The timing of the shift from volunteer to salaried probation officers varied by location. For sample discussion of this issue in New York, see *Probation Commission Reports on the System*, *BROOK. DAILY EAGLE*, Mar. 12, 1906, at 6.

350. See THOMAS D. ELIOT, *THE JUVENILE COURT AND THE COMMUNITY* 48-51 (1914); FLEXNER & BALDWIN, *supra* note 347, at 86-87, 145.

351. DOYLE, *supra* note 316, at 42-44.

352. *Id.*

353. ALFRED J. KAHN, *A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN’S COURT* 225-26 (1953).

Because clinic volunteers would not be subject to the religion-matching law, a religion-based divide arose among the justices about the acceptability of the proposal. According to the Board of Justices meeting minutes, Justice O’Brien opposed the plan because “although it was true he was not appointed as a Catholic Judge, that as such, he objected to having the supervision of Catholic children surrendered to any social school or group of irresponsible people who are not a part of the Court.”³⁵⁴ Justice Panken countered that no judge sat as a representative of any particular religion,³⁵⁵ foreshadowing Supreme Court Justice Frankfurter’s famous line six years later: “[A]s judges we are neither Jew nor Gentile, neither Catholic nor agnostic.”³⁵⁶ Justice Jackson interjected that he found it “unfortunate that our discussion has taken a turn other than that colored by the genial, tolerant and friendly spirit that is generally characteristic of our meetings.”³⁵⁷ Justice Jackson wished his colleagues could “approach the problem divorced entirely from any semblance of religious controversial aspect.”³⁵⁸ Presiding Justice Hill said he would take responsibility for the program, and with that the issue seemed resolved.³⁵⁹

Justices O’Brien and Panken, however, were not ready to let the issue drop. To O’Brien, the justices’ dispute was just one of many indications that religious identities mattered, a view he shared publicly at the breakfast held for Catholic social workers described in the Introduction.³⁶⁰ There Justice O’Brien alleged that a Jewish justice had not “handled Catholic issues according to Catholic philosophy.”³⁶¹ Though he did not explain the meaning of “Catholic philosophy,” *Vardinakis* provides an example of what he likely meant. A Jewish justice declining to take Catholic baptism as the final word on a child’s religion violated Catholic views.³⁶²

Justice Panken strongly disagreed with Justice O’Brien’s stance, as he expressed in private correspondence with Presiding Justice Hill. In an impassioned letter, Justice Panken maintained that under the federal and state constitutions, “no public official functions as a representative of any racial

354. Board of Justices Meeting Minutes, *supra* note 7, at 1.

355. *Id.*

356. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting). For discussion, see FELDMAN, *DIVIDED BY GOD*, *supra* note 64, at 159.

357. Board of Justices Meeting Minutes, *supra* note 7, at 2.

358. *Id.* at 3.

359. *Id.*

360. See text accompanying *supra* notes 1-7. At another such breakfast that Justice O’Brien attended, a speaker instructed Catholic social workers to “bring the principles of Catholic ethics into their daily work.” *Bleakley Deplores Civil Pay Reduction*, N.Y. TIMES, Dec. 7, 1936, at 6.

361. *Justice O’Brien Says He “Could Strangle Mayor,” supra* note 1.

362. See text accompanying *supra* note 319.

group nor as a spokesman for any religious denomination.”³⁶³ Religious freedoms were “embedded in the basic law of the land and in the traditions of our country.”³⁶⁴ Though he acknowledged probation officers’ religious denominations had to be considered by law “wherever practical,” he hoped no mayor had or would ever “appoint any person to act as a Justice of this Court because of a particular religious or racial adherence.”³⁶⁵ Notably, Justice Panken was comfortable with Jewish oversight of disputes on a voluntary basis, best demonstrated by his service as Vice President of the Jewish Conciliation Court, a private organization whose decisions were binding if in accord with state arbitration law.³⁶⁶ Justice Panken objected to consideration of racial or religious identity in *government positions*.³⁶⁷

Though Presiding Justice Hill agreed with Justice Panken’s view in general, he hedged on the court’s Probation Department. “For instance,” Hill wrote, “I can understand that a child might more readily respond to the sympathetic and understanding advice of a probation officer of its own religion or race.”³⁶⁸ But it did not follow, Hill believed, that either race or religion was relevant to a medical treatment such as psychiatry.³⁶⁹ Hill’s perspective was remarkably prescient. In the coming years, the question of whether race or religion matching in probation was benign or discriminatory would divide his colleagues and the city’s diverse communities.

III. World War II and the Fight for Racial and Religious Civil Rights

As Nazi oppression and violence directed against Jews and other minorities escalated in Europe, Americans discussed how their own cities, states, and country should respond—bringing discourse on the treatment of racial and religious minorities to the foreground. One national debate regarded whether the United States should relax its immigration laws to admit

363. Letter from Hon. Jacob Panken, Justice, N.Y.C. Domestic Relations Court, to Hon. John Warren Hill, Presiding Justice, N.Y.C. Domestic Relations Court (Nov. 3, 1937), JP Papers Wisconsin Collection, Box 7, Folder 11.

364. *Id.*

365. *Id.*

366. See *Jewish Court Reports*, N.Y. TIMES, Jan. 13, 1938, at 23. On the binding effect of these decisions, see Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 514 (2012).

367. See Letter from Hon. Jacob Panken to Hon. John Warren Hill, *supra* note 363.

368. Letter from Hon. John Warren Hill, Presiding Justice, N.Y.C. Domestic Relations Court, to Hon. Jacob Panken, Justice, N.Y.C. Domestic Relations Court (Nov. 4, 1937), Jacob Panken Papers, TAM 042 [hereinafter JP Papers New York Collection], Box 3, Folder 2 (on file with the Tamiment Library and Robert F. Wagner Labor Archive, New York University).

369. *Id.*

persecuted European Jewish children. Demonstrating the power of religious identity in American politics, the issue pitted Jews (and others) against noninterventionists (which prominently included some anti-Semitic Catholics). Justices Polier and O’Brien served as influential representatives of the two sides. The judges’ involvement in religion-inflected national politics raised the symbolic and moral stakes of court practices that turned on religious identity.

World War II also prompted introspection about Americans’ racial and religious prejudices. New York City’s black and Jewish domestic relations judges were among the leaders who pushed for antidiscrimination legislation, especially in the contexts of child welfare and fair employment. Meanwhile, some of the city’s leading Catholics (including O’Brien) pursued an agenda of religious protectionism that sometimes cut against civil rights efforts.

A. Religious Politics and U.S. Foreign Policy

As the conflict in Europe heightened, the Domestic Relations Court justices, like their compatriots,³⁷⁰ differed vehemently about whether and how the United States should become involved. One possible way to intervene while maintaining American neutrality was to relax immigration laws and welcome more refugees. Though there were a variety of people and organizations on both sides, a prominent feature, particularly in New York, was a Jewish-Catholic divide.

Justice Polier worked behind the scenes in an effort to rescue Jewish children from Germany.³⁷¹ Beginning in late 1938, she attended meetings of the Interim Committee of the Non-Sectarian Committee for Jewish Refugee Children, where she collaborated with the group’s unofficial liaison to the White House, Eleanor Roosevelt.³⁷² In the first days of 1939, Roosevelt advised Justice Polier on how to secure bipartisan support in Congress to allow children to get around the strict immigration quotas. “My husband,” Roosevelt wrote on White House stationery, “advises that you choose your people rather carefully and, if possible, get all the Catholic support you can.”³⁷³

370. See BAYOR, *supra* note 67, at 109-12.

371. Justice Polier describes the early stages of this development in Interview by Thomas F. Soapes with Justine Wise Polier, in New York, N.Y. (Sept. 14, 1977) [hereinafter Sept. 1977 Polier Interview], at 13-18, JWP Papers, Box 1, Folder 2.

372. Michelle Mart, *Eleanor Roosevelt, Liberalism, and Israel*, SHOFAR, Spring 2006, at 58, 63. Justice Polier first met Roosevelt in the early 1920s, through their volunteer work at the Women’s Trade Union League. Sept. 1977 Polier Interview, *supra* note 371, at 6-7.

373. Letter from Eleanor Roosevelt, First Lady of U.S., to Hon. Justine Polier, Justice, N.Y.C. Domestic Relations Court (Jan. 4, 1939), Justine Wise Polier and Eleanor Roosevelt Correspondence Collection, P-527, Folder 19 (on file with the American Jewish Historical Society).

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In March 1939, the U.S. Senate began considering the Wagner-Rogers Bill, which would allow up to 20,000 Jewish, Catholic, and Protestant children to settle in U.S. homes of their faith.³⁷⁴ The legislation’s cosponsors were Senator Robert F. Wagner, a longtime New York politician who had emigrated from Germany as a child,³⁷⁵ and Representative Edith Nourse Rogers, the first woman to represent Massachusetts in Congress.³⁷⁶ Publicity materials showcased developing American conceptions of racial and religious equality, imploring “all Americans to join together without regard to race, religion or creed in offering refuge to children as a token of our sympathy and as a symbol of our faith in the ideals of human brotherhood.”³⁷⁷ Though deliberately pitched as a nonsectarian bill, it was clear that Jewish children were most likely to benefit. Testimony cited Nazi propaganda and leadership changes, warning that a pogrom annihilating German Jews was “not far away.”³⁷⁸

Politicians and other prominent Americans weighed in on both sides,³⁷⁹ with some of the most virulent opposition coming from the *Tablet* (the Catholic publication that condemned Justice Polier’s decision in *Vardinakis*).³⁸⁰ By summer 1939, the opponents prevailed, and the bill died in committee.³⁸¹ Though Justice Polier remained involved (alongside her mother and Judge Dunham) in a spinoff focused on finding homes for children who were able to obtain visas, the group’s reach was limited.³⁸²

374. 2 *Sects Ask U.S. Haven for Child Exiles*, WASH. POST, Apr. 22, 1939, at 2; *Aid to Child Exiles in U.S. Is Mapped*, N.Y. TIMES, Mar. 31, 1939, at 4; *Child Refugees to Be Assured of U.S. Homes*, N.Y. HERALD TRIB., Mar. 31, 1939, at 11; *Nation-Wide Group Backs Refugee Bill*, N.Y. TIMES, Apr. 19, 1939, at 4. For the text of the Wagner-Rogers Bill, see S.J. Res. 64, 76th Cong. (1939).

375. J. Joseph Huthmacher, *Senator Robert F. Wagner and the Rise of Urban Liberalism*, 58 AM. JEWISH HIST. Q. 330, 333 (1969). Wagner was raised Lutheran, practiced Methodism beginning in college, and converted to his wife’s and son’s faith of Catholicism in 1946. *Id.*

376. See KATHLEEN JOHNSON ET AL., OFFICE OF HISTORY & PRES., U.S. HOUSE OF REPRESENTATIVES, WOMEN IN CONGRESS, 1917-2006, at 73, 958 (Matthew A. Wasniewski ed., 2006), <https://perma.cc/F4PM-UCUE>.

377. Press Release, Providing for German Children in America (Jan. 10, 1939), JWP Papers, Box 2, Folder 452.

378. *Complete Nazi Pogrom Near, Inquiry Told*, WASH. POST, May 26, 1939, at 6.

379. See, e.g., *Refugee Child Bill Formally Reported*, N.Y. TIMES, May 6, 1939, at 4.

380. Judith Tydor Baumel, *The Jewish Refugee Children from Europe in the Eyes of the American Press and Public Opinion 1934-1945*, 5 HOLOCAUST & GENOCIDE STUD. 293, 298-99 (1990). On the *Tablet*’s condemnation of *Vardinakis*, see *supra* note 330 and accompanying text.

381. See *Senators Put Quota Limits on Child Exiles*, WASH. POST, July 1, 1939, at 2.

382. See Draft of Letter to Be Sent to Mailing List of Non-Sectarian Committee for Refugee Children (n.d.), JWP Papers, Box 37, Folder 452; Letter from Fay Spiro, Non-Sectarian Found. for Refugee Children, Inc., to Agnes King Inglis, Russell Sage Found. (May 29, 1940), JWP Papers, Box 37, Folder 452.

Justice Polier pinned significant blame for the defeat of Wagner-Rogers on New York’s Catholic leaders. As she recalled in private correspondence, the influential Archbishop of New York (Francis Spellman) and the *Tablet* consistently showed no interest in addressing anti-Semitism, and it was this Archbishop “who refused to join with ministers of all faiths in seeking the passage of federal legislation to save 20,000 Jewish children from Hitler.”³⁸³ The defeat of Wagner-Rogers may have felt particularly devastating to the Poliers because of a daily reminder in their home; they took in a German Jewish refugee child in 1939, and they later formally adopted her.³⁸⁴

When Justice Polier blamed Catholic leaders for the failure of the Wagner-Rogers legislation, she surely thought of her own colleague Justice O’Brien. O’Brien was one of the most prominent supporters of Father Charles E. Coughlin, a staunch isolationist and notorious anti-Semite.³⁸⁵ Coughlin printed the *Protocols of the Elders of Zion* and accused Jews of both controlling world finances and spreading communism³⁸⁶—thus casting Jews as responsible for their own persecution. Catholics were divided in their reception of Coughlin’s rhetoric.³⁸⁷ Still, Coughlin maintained significant support from the *Tablet* and among Brooklyn’s Irish Catholic community.³⁸⁸ Justice O’Brien served in leadership positions in isolationist groups and spoke at pro-Coughlin rallies.³⁸⁹ While presiding over an event that drew a crowd of nearly five thousand people, O’Brien shared a letter Coughlin had addressed to him personally.³⁹⁰ According to the *Tablet*’s coverage, the letter opposed “foreign entanglements” and concluded: “It is more important to keep the world safe for

383. Letter from Hon. Justine Polier, Justice, N.Y.C. Domestic Relations Court, to Zvi Ganin (Sept. 27, 1971), JWP Papers, Box 28, Folder 356. Her commentary on Spellman’s role was similar in a 1977 interview. See Sept. 1977 Polier Interview, *supra* note 371, at 16. There she stated that

Cardinal Spellman was the representative in the Catholic church—there were other cardinals but he was at the helm. I personally feel . . . that he was profoundly anti-Semitic. He had no feeling for helping or lifting his finger to help due to his own prejudices. I think he pretty much controlled and set the tone for the right wing and the hierarchy within the church.

Id.

384. *Trudy Festinger*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://perma.cc/XF72-WEV7> (archived June 16, 2020).

385. BAYOR, *supra* note 67, at 88-96, 111-13 (describing O’Brien’s involvement in a group formed to support Coughlin and naming him as “a leading Coughlinite”).

386. O’BRIEN, *supra* note 218, at 171-72; SVONKIN, *supra* note 13, at 113-14.

387. O’BRIEN, *supra* note 218, at 173.

388. *Id.* at 174-75.

389. See *Fr. Coughlin Protest Meeting in New York*, CATH. ADVANCE (Wichita), Dec. 31, 1938, at 1; Russell Turner, *Maj. Williams Denounces Bill*, DET. FREE PRESS, Feb. 8, 1941, at 3; *WMCA Boomed, Coughlin Hailed at Protest Rally*, N.Y. HERALD TRIB., Dec. 16, 1938, at 11.

390. *5,000 Celebrate Franco Victory*, TABLET (Brook.), May 27, 1939, at 9.

Christianity than to keep the world safe for the modern type of democracy which has been inflicted upon us."³⁹¹ Prominent New Yorkers accused O'Brien of also being involved in extremist groups, such as the Christian Front,³⁹² whose members physically attacked Jews.³⁹³

Justice O'Brien's rhetoric reached a national stage when he testified before the U.S. Senate Foreign Relations Committee on February 7, 1941.³⁹⁴ There he speculated that if the United States joined the war, it would spark a civil uprising in New York City because of the large foreign-born population.³⁹⁵ Reactions from city leaders were swift and condemnatory, with some suggesting that any racial or religious strife could be blamed on organizations Justice O'Brien supported.³⁹⁶ Justice Panken denounced Justice O'Brien's testimony as "the result of prejudice or worse" and "un-American," and charged that "[i]t can only serve one purpose—maybe it was intended that way—that is, to divide our people, sow dissension and foster intolerance."³⁹⁷

About a week later, it was Mayor La Guardia's turn to testify before the Committee. There the senators asked his thoughts on Justice O'Brien's predictions.³⁹⁸ "I didn't know the committee would be interested in stories of that kind," the mayor replied.³⁹⁹ "If I had thought so I could have given you several better ones from the psychopathic wards."⁴⁰⁰ When queried on the fact that he had been the one to appoint Justice O'Brien, the mayor responded:

391. *Id.*

392. *See, e.g., Albany Move Begun for Ouster of Justice Herbert A. O'Brien*, N.Y. HERALD TRIB., Feb. 26, 1941, at 1 ("Since [his appointment] critics have assailed Justice O'Brien for alleged friendliness to such organizations as the Paul Revere Sentinels, the Christian Front and the German-American Bund."); "Civil War" *Augury Draws Fire Here*, N.Y. TIMES, Feb. 9, 1941, § 1, at 44 (quoting the Executive Secretary of the Greater New York Federation of Churches as accusing O'Brien of having "connections" with the Christian Front).

393. O'BRIEN, *supra* note 218, at 179.

394. For a particularly full account of the reaction to O'Brien's testimony, see "Civil War" *Augury Draws Fire Here*, *supra* note 392. For evidence of how this story spread, see, for example, *Is New York City a Powder Keg?*, DAILY MAIL (Hagerstown, Md.), Feb. 21, 1941, at 4; and *Judicial Jitters*, WASH. POST, Feb. 10, 1941, at 6.

395. "Civil War" *Augury Draws Fire Here*, *supra* note 392.

396. A comment to this effect was offered by the executive secretary of the Greater New York Federation of Churches. *Id.* Other local leaders and organizations described Justice O'Brien's testimony as, for example, "a shameful misrepresentation of the true character of Americans living in New York City" and "utterly unfounded and untruthful." *Id.*

397. *Id.*

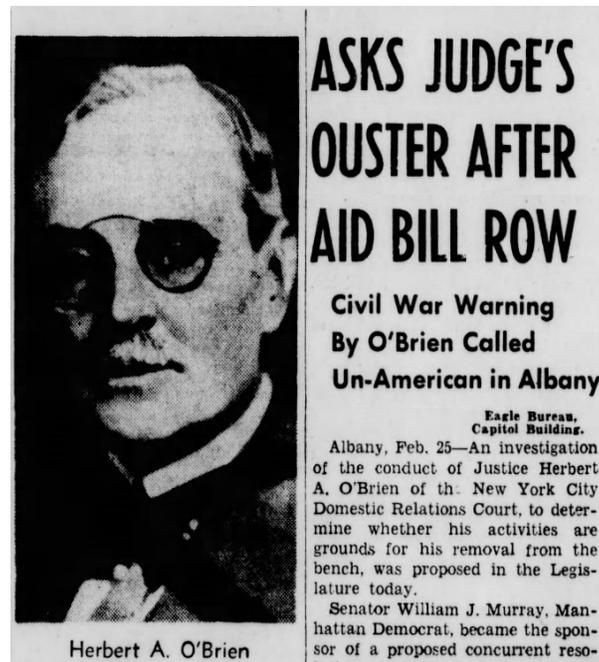
398. *Mayor Admits O'Brien Appointment a Mistake*, N.Y. TIMES, Feb. 12, 1941, at 9; *see also* KESSNER, *supra* note 76, at 491.

399. *Mayor Admits O'Brien Appointment a Mistake*, *supra* note 398.

400. *Id.*

"Senator, I have made a lot of good appointments and I think I am good . . . but when I make a mistake, it's a beaut."⁴⁰¹

Citing Mayor La Guardia's admission of error, New York legislators also condemned Justice O'Brien.⁴⁰² A proposed resolution listed Justice O'Brien's unacceptable conduct and called for the Appellate Division to remove him from office.⁴⁰³ Not only had O'Brien associated with hateful and prejudiced groups, he had "lent his high title of judge as a touch of respectability for organizations and purposes of the shabbiest, most demagogic character" and had been "a consistent and conspicuous promoter of faction along racial and religious lines," the legislators charged.⁴⁰⁴



News coverage from the peak of controversy over O'Brien.⁴⁰⁵
Photo Credit: *Brooklyn Daily Eagle* (Feb. 25, 1941, at 1)—Brooklyn Public Library—
Brooklyn Collection

401. *Id.*

402. *Asks Judge's Ouster After Aid Bill Row*, BROOK. EAGLE, Feb. 25, 1941, at 1.

403. *Id.*

404. *Albany Move Begun for Ouster of Justice Herbert A. O'Brien*, *supra* note 392.

405. *Asks Judge's Ouster After Aid Bill Row*, *supra* note 402.

Still, Justice O’Brien had defenders.⁴⁰⁶ He received sympathetic coverage from those who shared his view that radicals had infiltrated New York City’s education and welfare departments.⁴⁰⁷ In one letter to the editor of a local newspaper, the writer described O’Brien as the “squarest and fairest judge on the Domestic Court bench.”⁴⁰⁸ The Managing Editor of the *Tablet* cited the movement to oust O’Brien as an example of “bad propaganda” and charged that O’Brien was a “victim of a smear campaign.”⁴⁰⁹ One article in the *Tablet* claimed a “Manhattan official” had cast the situation as “definitely an attack on the Catholic Church.”⁴¹⁰ The paper also published numerous letters that cast O’Brien as an unprejudiced, fair, and religiously devout man who was simply exercising his right to free speech.⁴¹¹ Justice O’Brien remained on the bench and continued his political activities, though he proceeded more quietly.⁴¹² When his term expired in 1946, the new mayor appointed a different well-connected Catholic to fill the position.⁴¹³

B. Racial and Religious Rights and Protections

Events abroad also inflamed domestic tensions, which in turn inspired Americans to introduce laws to combat discrimination at the local, state, and federal levels.⁴¹⁴ New York was a leader in formulating and passing

406. Though not explicitly mentioned at the time, some may have recalled O’Brien’s advocacy on behalf of a black boy against an extradition request from Georgia that might otherwise have ended in the child’s execution. *Good Public Servant*, N.Y. AMSTERDAM NEWS, Nov. 11, 1939, at 14; *Harlem Wages Determined Fight to Save Boy from Georgia Mob Law*, CHI. DEFENDER, Nov. 11, 1939, at 5; see also *People v. Butts*, 14 N.Y.S.2d 881, 882-83 (Sup. Ct. 1939).

407. *The Record Should Speak for Itself*, PRESS & SUN-BULL. (Binghamton, N.Y.), Feb. 14, 1941, at 6.

408. J. Connolly, Letter to the Editor, BROOK. EAGLE, Mar. 8, 1941, at 8.

409. *Scanlan Hits Propaganda Against Hoover, O’Brien*, BROOK. EAGLE, Mar. 13, 1941, at 19 (quoting Patrick F. Scanlan, Managing Editor of the *Tablet*).

410. *Move Against Judge O’Brien Stirs People*, TABLET (Brook.), Mar. 1, 1941, at 1.

411. *Investigation of Judge O’Brien Arouses Many*, TABLET (Brook.), Mar. 8, 1941, at 8.

412. *Catholic Clergy Polled, Oppose U.S. War Entry*, N.Y. HERALD TRIB., Oct. 16, 1941, at 7 (identifying O’Brien as chairman of the Catholic Laymen’s Committee for Peace, a group that surveyed and publicized Catholic clergy’s opposition to America joining the war on the basis that they did not want give “aid to the Communist government of Russia”).

413. *Term Run Out, Justice O’Brien Returns to His Law Practice*, BROOK. EAGLE, Jan. 29, 1946, at 18; *Walter McClancy Appointed Judge*, TABLET (Brook.), Feb. 2, 1946, at 4 (emphasizing that O’Brien had reached the statutory retirement age of seventy and describing the new appointee’s deep involvement in Catholic organizations).

414. There were also related developments in the U.S. Supreme Court. *E.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 345 (1938) (holding that a state violated the Equal Protection Clause by offering an in-state law school only for white students); *United*
footnote continued on next page

antidiscrimination laws. These laws targeted racial and religious discrimination together as a matter of course. Crafting legislation to protect against discrimination on the basis of religion was particularly difficult, however, because many New Yorkers openly maintained that religious identity was sometimes a legitimate consideration. Moreover, the common correlation between religion and race meant that religious groups’ efforts to protect their discretion over employment and other matters complicated the struggle to outlaw racial discrimination.

The local blended with the international to prompt change. “The increasing racial and religious persecution in Europe,” a *Columbia Law Review* note observed in 1939, brought dire domestic consequences.⁴¹⁵ “It has stimulated advocacy of similar persecution here as evidenced by the appearance of the Nazi Bund . . . and the revival of the Ku Klux Klan,” and “[i]t has caused an actual increase in economic and social discrimination.”⁴¹⁶ This situation, the article continued, heightened Americans’ awareness of “the dangers to our democratic government inherent in the spread of such practices, and has led to a variety of legislative proposals to eliminate them.”⁴¹⁷

Some of the Domestic Relations judges were among the New Yorkers who pushed for antidiscrimination laws, especially pertaining to fair employment and child welfare. Justice Polier, for instance, was tapped to serve as Vice-Chairman of the Subcommittee on Bill of Rights and General Welfare, a group of experts selected to produce reports in the lead-up to New York’s Constitutional Convention of 1938.⁴¹⁸ The Subcommittee found that severe gaps remained in civil rights protections in public accommodations, schools, housing, and employment (most severely for African Americans but also for Jews) because of the narrow interpretation of the U.S. Constitution and

States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting in a famous footnote that special scrutiny might be warranted in some circumstances, such as when statutes are “directed at particular religious, or national, or racial minorities” or when “prejudice against discrete and insular minorities may” curtail involvement in political processes); see also SCHULTZ, *supra* note 48, at 51; Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 741-42 (1985).

415. Note, *Legislative Attempts to Eliminate Racial and Religious Discrimination*, 39 COLUM. L. REV. 986, 986 (1939).

416. *Id.* (footnotes omitted).

417. *Id.*

418. For an “Introductory Note” and membership list for this subcommittee, see SUB-COMM. ON BILL OF RIGHTS & GEN. WELFARE, N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO THE BILL OF RIGHTS AND GENERAL WELFARE, at iii-vi (1938).

piecemeal nature of state law.⁴¹⁹ The Subcommittee noted the view held by some that an amendment to the state constitution could help.⁴²⁰

When the delegates to the constitutional convention met from April through August 1938, many expressed strong support for the remarkably broad antidiscrimination amendment under consideration.⁴²¹ It read: “No person shall, because of race, color, creed, or religion, be subjected to any discrimination by any other person or by any firm, corporation or institution, or by this State or any agency or subdivision of the State.”⁴²² In the words of the judge who formally introduced the amendment, “I realize that we cannot hope to legislate religious and racial prejudices out of existence, but . . . [the amendment] is a step in the right direction.”⁴²³ Senator Wagner spoke next, connecting the tragic events unfolding in Europe to America’s need to address its own “manifestations of racial intolerance and prejudice,” specifically discussing anti-Semitism and the treatment of African Americans.⁴²⁴ Other delegates likewise connected the “racial and religious hatred, intolerance and bigotry” abroad to discrimination against racial and religious minorities in America.⁴²⁵ Proponents of the amendment believed it would “serve[] notice upon the rest of the world that the State of New York” would not abide discrimination.⁴²⁶

Opponents of the provision were largely motivated by concerns about preserving religious groups’ discretion. A member of the Board of Regents of the University of the State of New York described discrimination as a “liberty” and “God-given” right and raised the specter of religious groups no longer being permitted to bar nonbelievers.⁴²⁷ “Literally, would you have, for example, a Catholic seminary required to admit me, who might be an agnostic or a Protestant or a believer in some other faith?” he asked.⁴²⁸ Though his criticism of the proposed language as too broad gained traction, he also took his

419. *Id.* at 221-25. State law banned racial and religious discrimination against certain professionals, such as public school teachers, and in particular contexts, such as in public accommodations, jury service, and utility rates. *Id.* at 221 n.1; Caroline K. Simon, *New York State Law Against Discrimination*, 33 *WOMEN LAW. J.* 51, 51-52 (1947).

420. SUB-COMM. ON BILL OF RIGHTS & GEN. WELFARE, *supra* note 418, at 221-25.

421. *See, e.g.*, 2 *REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL FIFTH TO AUGUST TWENTY-SIXTH, 1938* [hereinafter *RECORD OF CONSTITUTIONAL CONVENTION*], at 1087-91, 1139-49 (1938).

422. *Racial Prejudice Hailed as “Liberty,”* *N.Y. TIMES*, July 20, 1938, at 8.

423. 2 *RECORD OF CONSTITUTIONAL CONVENTION*, *supra* note 421, at 1064-65.

424. *Id.* at 1066-67.

425. *Id.* at 1140.

426. *Id.*

427. *Id.* at 1142-43; *Racial Prejudice Hailed as “Liberty,”* *supra* note 422.

428. 2 *RECORD OF CONSTITUTIONAL CONVENTION*, *supra* note 421, at 1142-43.

rhetoric further, announcing that he wanted to be able to discriminate “when a Japanese race invades China” and “against the Arab and his religion where it involves death to everyone who does not believe in him.”⁴²⁹ The other delegates, as well as civil rights groups, promptly denounced these views as “un-American.”⁴³⁰

After further discussion, the judge who initially introduced the amendment proposed that it apply only to discrimination in “civil rights.”⁴³¹ Though a *Washington Post* editorial advised that the participants include a definition of “civil rights” so as “not to take in a lot of headaches,”⁴³² the text did no such thing. Rather, the judge orally defined civil rights as “the rights which are found in the Constitution, in the Civil Rights Law and in the statutes.”⁴³³ After further discussion, the constitutional convention unanimously adopted the narrowed antidiscrimination clause.⁴³⁴

The next step was to present the convention’s civil rights amendment and other proposals to New Yorkers in advance of the November 1938 election. The civil rights law was grouped with forty-nine of the convention’s suggested changes in an “omnibus amendment,” subject to a single vote up or down.⁴³⁵ Notably, one of the other prominent provisions in the omnibus amendment authorized the legislature to provide funding for transportation of children to religious schools, securing the Catholic Church’s official support.⁴³⁶ That November, a majority of New Yorkers voted in favor of the omnibus amendment, thereby simultaneously enhancing racial and religious civil rights protections and authorizing funding for transportation to religious schools.⁴³⁷

The civil rights amendment provided the foundation for a number of legislative proposals to outlaw racial and religious discrimination in the civil service, schools, public housing, and more—a list one black newspaper dubbed

429. *Id.* at 1142.

430. *Id.* at 1143-44; *Harlem Backs Constitution Civil Rights*, N.Y. AMSTERDAM NEWS, July 30, 1938, § 1, at 5; see also *The Right to Discriminate*, WASH. POST, July 23, 1938, at X6.

431. After the change, the first portion read: “No person shall, because of race, color, creed or religion, be subjected to any discrimination *in his civil rights* . . .” 4 RECORD OF CONSTITUTIONAL CONVENTION, *supra* note 421, at 2626-28 (emphasis added).

432. *The Right to Discriminate*, *supra* note 430.

433. *Civic Rights Bill Adopted in Albany*, N.Y. TIMES, Aug. 12, 1938, at 2.

434. *Id.*

435. See *Brief Summaries of 9 Amendments*, N.Y. TIMES, Nov. 6, 1938, § 1, at 43; *Six Amendments Carried in State*, N.Y. TIMES, Nov. 9, 1938, at 1.

436. See *Catholics Stress Four Amendments*, N.Y. TIMES, Nov. 7, 1938, at 2; *Drive Opens for School Bus Clause*, DEMOCRAT & CHRON. (Rochester, N.Y.), Oct. 31, 1938, at 13; see also PRATT, *supra* note 300, at 284-88 (discussing politics and campaigning surrounding the busing issue in 1938, and noting particular support from Catholics).

437. *Amendment 1 Is Carried by Big Majority*, BINGHAMTON PRESS, Nov. 11, 1938, at 13.

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"New York's New 'Bill of Rights.'"⁴³⁸ Many of these bills were signed into law by Governor Herbert H. Lehman,⁴³⁹ who already had a strong track record on racial issues.⁴⁴⁰ The son of German Jewish immigrants,⁴⁴¹ Governor Lehman linked the laws' significance to America's stand against foreign bigotry. "Legislation that serves to break down differences of race, color and religion," he declared, "has particular merit in these days of intolerance."⁴⁴² One of the new laws banned consideration of race or religion in appointment, promotion, or dismissal in civil service jobs (which included courts' probation departments).⁴⁴³

While some minority groups focused on expanding the civil rights laws, Catholics sought to protect their religion-related interests. In October 1939, Justice O'Brien delivered a talk outlining Catholic goals to eight hundred members of the New York Assembly of the Catholic Daughters of America.⁴⁴⁴ Though presented in an unrepresentatively abrasive manner, his remarks

438. *Summary of Measures Proposed for New York's New "Bill of Rights,"* PITT. COURIER, Mar. 4, 1939, at 4.

439. *Lehman OK's Bill Killing Racial Bans*, DEMOCRAT & CHRON. (Rochester, N.Y.), June 11, 1939, § 1, at 1 (discussing passage of laws prohibiting discrimination on the bases of race, color, or creed in the civil service as well as in specific public accommodations); *Lehman Approves Housing Program; Cost \$150,000,000*, N.Y. TIMES, June 12, 1939, at 1 (reporting on Lehman signing a bill that prohibited discrimination in selecting tenants for low-income housing).

440. Governor Lehman had already been on the NAACP's board of directors for nearly a decade by this point and would soon help to incorporate the LDF. DUANE TANANBAUM, HERBERT H. LEHMAN: A POLITICAL BIOGRAPHY 386 (2016). Much like Mayor La Guardia's city-level approach, Governor Lehman was hailed for appointing more black New Yorkers to state jobs than all of his predecessors combined and for being the first New York governor to devote meaningful attention to the black community. *Id.* at 386-87.

441. *Id.* at 1.

442. *Lehman Outlaws Discrimination*, SUN (Balt.), June 11, 1939, at 6 (quoting Governor Lehman).

443. *Id.* Aggrieved employees were authorized to appeal to a state or municipal civil service commission. *Id.* The existing civil service rules permitted an official to select one of the top three candidates on a list. *New York*, BERKSHIRE EVENING EAGLE (Pittsfield, Mass.), June 12, 1939, at 18. Lehman vetoed a law that would have required that when such an official did not select the first person on the list, the official would need to provide a sworn statement explaining the reason and stating that the decision had not been influenced by consideration of race, color, or religion. *Gov. Lehman Signs Racial Aid Laws*, COURIER-J. (Louisville, Ky.), June 11, 1939, § 1, at 9; *New York, supra*; see also *N.Y. Legislature Approves Two Bills Broadening Civil Rights Act for Race*, PITT. COURIER, May 13, 1939, at 1 (describing the bill after the legislature passed it unanimously). Lehman explained that he vetoed the bill because it might "seriously impair the efficiency of government administration under the civil service." *Lehman Outlaws Discrimination, supra* note 442 (quoting Governor Lehman).

444. *Catholics Chided for Party Loyalty*, N.Y. TIMES, Oct. 13, 1938, at 20.

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captured religious fault lines in New York City politics and foreshadowed religion-based controversies that would rock the nation in the following decades.

Justice O’Brien tied his commentary to critiques of three Democratic politicians. First, he criticized candidate for lieutenant governor Charles Poletti,⁴⁴⁵ characterizing him as a radical who allegedly hid his Catholic baptism to “make himself agreeable to his radical friends.”⁴⁴⁶ Next, O’Brien castigated Governor Lehman, who was running for reelection.⁴⁴⁷ Governor Lehman’s offense was his 1935 veto of a bill that would have permitted the use of public school buses to transport children to parochial schools.⁴⁴⁸ That Governor Lehman had signed a modified version the next year⁴⁴⁹ apparently did not appease Justice O’Brien.⁴⁵⁰ (The Court of Appeals declared the 1936 bus law unconstitutional, which is what led to the inclusion of this issue in the omnibus constitutional amendment in 1938.⁴⁵¹ In May 1939, just a few months before Justice O’Brien’s speech, the state legislature passed enabling legislation, which Governor Lehman signed.⁴⁵²)

Finally, Justice O’Brien came to Senator Wagner, whom he assailed for refusing to support Catholic demands to institute “released time,”⁴⁵³ a policy that would allow public school students to receive religious training during school hours.⁴⁵⁴ In the late 1930s, Catholic groups sought a state-level released-

445. *Id.*; see also *Catholics Hear Justice O’Brien Upbraid Poletti*, N.Y. HERALD TRIB., Oct. 13, 1938, at 10.

446. *O’Brien Asserts Poletti Was Baptized a Catholic*, N.Y. HERALD TRIB., Nov. 6, 1938, § 1, at 30.

447. *Catholics Chided for Party Loyalty*, *supra* note 444.

448. PRATT, *supra* note 300, at 283-84. Father Charles Coughlin and other Catholic leaders accused Governor Lehman of “bigotry” and of endangering Christianity based on this veto, which cost Governor Lehman many Catholic votes in the 1936 election. TANANBAUM, *supra* note 440, at 91.

449. PRATT, *supra* note 300, at 284.

450. *Catholics Chided for Party Loyalty*, *supra* note 444.

451. PRATT, *supra* note 300, at 284-88; see also *supra* note 436 and accompanying text.

452. PRATT, *supra* note 300, at 289. About a decade later, controversy over public funding to bus children to religious schools led to *Everson v. Board of Education*, the Supreme Court’s decision incorporating the Establishment Clause against the states. 330 U.S. 1, 15-16 (1947). For more on *Everson*, see notes 641-44 below and accompanying text.

453. *Catholics Chided for Party Loyalty*, *supra* note 444.

454. Released time could entail either separating students by religion for instruction by private groups on campus or permitting the students to leave for teaching elsewhere. PRATT, *supra* note 300, at 273. Though some New York localities had adopted released time by the 1930s (a practice upheld by the New York Court of Appeals), New York City had not. COHEN, *supra* note 63, at 118-19. Indeed, released time had long proven controversial in the city. In the 1910s, Jewish groups had rallied against released-time proposals. *Id.* In the words of one New York rabbi in 1915, the proposal was “un-American, undemocratic, and . . . subversive of the fundamental principle of American liberty.” *Rabbi Opposes Gary Plan*, N.Y. TIMES, Nov. 7, 1915, § 2, at 6. He further charged

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time law that would include New York City, an effort that was supported by some Protestants and interfaith groups.⁴⁵⁵ Senator Wagner opposed it.⁴⁵⁶ Justice O’Brien contrasted Senator Wagner’s position on released time to the Senator’s announcement that he would visit President Roosevelt to discuss an appeal to Great Britain on behalf of Jewish immigrants to Palestine.⁴⁵⁷ “Wagner wants to help the Jews in Palestine,” the justice declared, “[b]ut what has he done to help Catholics in New York State?”⁴⁵⁸

In 1940, New York Catholics succeeded in passing a released-time bill.⁴⁵⁹ Jewish New Yorkers were worried about rising anti-Semitism and chose to take an accommodationist stance.⁴⁶⁰ After Governor Lehman signed the bill into law, few Jewish students participated.⁴⁶¹ What Catholics understood as a form of religious protection, some Jews feared as a threat to their equality and civil rights.⁴⁶²

Tensions between protecting minorities’ rights and preserving religious groups’ authority also manifested in child welfare services, an area in which the Domestic Relations Court justices had special authority. In 1942, Justices Bolin and Polier—through their involvement with the City-Wide Citizens’ Committee on Harlem (CWCCH)—secured passage of a “Race Discrimination Amendment” (written by Shad Polier) in New York City’s appropriations budget.⁴⁶³ The provision prohibited public funding for private childcare

that the proposed plan would violate “the complete separation of Church and State” and require harmful “segregation according to credal beliefs.” *Id.*

455. See PRATT, *supra* note 300, at 274-77.

456. *Catholics Chided for Party Loyalty*, *supra* note 444. Senator Wagner’s reluctance may have been partly informed by how the practice of separating children by religion ominously resembled one of the Nazis’ earliest discriminatory acts—segregating Jewish and half-Jewish children from Aryans on the basis that Jews were an “alien race.” See *Nazis Order Jewish Pupils Segregated*, N.Y. HERALD TRIB., Sept. 11, 1935, at 1.

457. *Catholics Chided for Party Loyalty*, *supra* note 444; see *Roosevelt Asked to Help the Jews by Urging Britain to Keep Pledge*, N.Y. TIMES, Oct. 7, 1938, at 1.

458. *Catholics Chided for Party Loyalty*, *supra* note 444.

459. PRATT, *supra* note 300, at 279-80, 280 n.49.

460. COHEN, *supra* note 63, at 118-19.

461. *Id.* at 119. One study found that 28% of New York City children registered for release time—23% were Catholic, 4% were Protestant, and 1% were Jewish. ROBERT I. GANNON, *THE CARDINAL SPELLMAN STORY* 306 (1962).

462. This disagreement later led to *Zorach v. Clauson*, 343 U.S. 306 (1952), in which the Supreme Court sided with the Catholic perspective in upholding New York City’s released-time policy. For further discussion of *Zorach* and released time, see text accompanying notes 672-79 below.

463. See DOYLE, *supra* note 316, at 93; MARKOWITZ & ROSNER, *supra* note 310, at 9-10. On Shad Polier’s authorship of the bill, see Sept. 1977 Polier Interview, *supra* note 371, at 40. Justice Jackson was also involved with CWCCH, but it is unclear whether he

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agencies that discriminated based on race.⁴⁶⁴ But because these groups could lawfully provide services along religious lines, this rule offered little assistance to black children.⁴⁶⁵ Jewish and Catholic organizations faced no pressure to serve them, and Protestant groups moved slowly or declined funds in order to avoid integration.⁴⁶⁶ Permissible religious segregation shielded de facto racial discrimination.⁴⁶⁷

Religious groups' unwillingness to provide adequate services to black children led some of the Domestic Relations Court justices, including newly appointed Justice Delany,⁴⁶⁸ to support creation of special institutions for black New Yorkers. In 1943, Justice Delany hosted the formal opening of a Harlem campaign for a Colored Orphan Asylum.⁴⁶⁹ The event's guest of honor was Eleanor Roosevelt.⁴⁷⁰ Other attendees included Justices Polier and Bolin, Justice Delany's female relatives, the wife of Justice Paige, and the wives of civil rights leaders A. Philip Randolph and Roy Wilkins.⁴⁷¹ Justice Delany welcomed Roosevelt "with especial emphasis upon the fact that she was a woman who had continually shown deep interest in the welfare of children as a whole, and that she was, as children are, 'color blind' in the matter of race."⁴⁷²

In the following years, Justices Delany and Bolin sharply rebuked Christian groups for racial prejudice, often emphasizing the harmful consequences of discrimination on children. Justice Delany blamed "religious agencies" for their failure to provide adequate care for youth in need and

participated in this particular effort. For evidence of his membership, see *City-Wide Citizens' Committee Names 12 to Executive Board*, N.Y. AGE, Nov. 7, 1942, at 2.

464. See MARKOWITZ & ROSNER, *supra* note 310, at 10.

465. See *id.* at 10-11.

466. See DOYLE, *supra* note 316, at 93; MARKOWITZ & ROSNER, *supra* note 310, at 10-11.

467. Parochial control over child welfare services remained so intense that it took a multidecade litigation, in which a retired Justice Polier played a significant part, to secure concessions that extended services to black children in foster care. For a discussion of the litigation and surrounding circumstances, see generally NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* (2001).

468. Mayor La Guardia appointed Justice Delany in 1942, first to fill a temporary position (as Justices Hill and Dunham departed for the military) and later for a full term. *Justice Delany Named for Full Term on Bench*, N.Y. HERALD TRIB., Sept. 2, 1945, § 1, at 18; *Stitt and Delaney [sic] Sworn to Family Court Bench*, N.Y. HERALD TRIB., Aug. 1, 1944, at 16A.

469. *Mrs. Roosevelt Guest of Honor at a Reception Held at the Delany's*, N.Y. AMSTERDAM NEWS, Nov. 20, 1943, § A, at 11.

470. *Id.*

471. *Id.*

472. *Id.*

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singled out Protestant groups for being particularly negligent.⁴⁷³ More broadly, Justice Delany charged “white churches” with “merely giving lip service to Christianity and democracy.”⁴⁷⁴ He suggested that “[i]f the church . . . would raise its voice against segregation there would be no segregation.”⁴⁷⁵ Justice Bolin similarly castigated Christian groups for contributing to inequality. Speaking to a hometown Poughkeepsie audience, she cast Christian groups that discriminated as “hypocrites” and described employment discrimination as harmful to the dreams of “Negro and Jewish and Catholic and Chinese, Japanese and Indian youngsters.”⁴⁷⁶ She implored her listeners to consider these children and demanded: “What will you make democracy mean to them?”⁴⁷⁷

Meanwhile, prominent Americans increasingly called for fair employment laws, an effort Justices Bolin, Delany, Jackson, Panken, and Polier supported.⁴⁷⁸ Many proponents stressed that stopping discriminatory employment practices was crucial for the United States to win the war, for symbolic and practical reasons.⁴⁷⁹ In one typical example, Senator Wagner

473. Catherine MacKenzie, *Says Children Fail to Get Needed Aid*, N.Y. TIMES, Nov. 15, 1946, at 25.

474. Cliff MacKay, *Fight for Full Equality, Judge Delaney [sic] Urges*, ATLANTA DAILY WORLD, May 31, 1944, at 1.

475. *Id.* (quoting Justice Delany).

476. *Judge Bolin Declares “Brotherhood” Pointless Unless Poughkeepsie Ends Its Intolerance*, POUGHKEEPSIE NEW YORKER, Feb. 23, 1944, at 1.

477. *Id.* (quoting Justice Bolin).

478. *See, e.g., 100 Prominent Citizens Urge Funds for FEPC*, DAILY WORKER (N.Y.C.), June 8, 1944, at 2 (including Justices Bolin and Delany in a list of supporters of the Fair Employment Practice Committee (FEPC)); *A Lesson in Democracy*, N.Y. AGE, Aug. 25, 1945, at 6 (reporting on a speech by Justice Panken, in which he cast a U.S. senator who filibustered the FEPC as racist, anti-Semitic, and “anti-American[]”); *Mrs. F.D. Roosevelt and Lillian Smith Endorse FEPC Rally*, N.Y. AGE, Mar. 2, 1946, at 12 (listing individuals supporting the New York Council for a Permanent FEPC, including Justices Polier and Panken, as well as Mayor La Guardia, Governor Lehman, and Rabbi Stephen Wise); *Welfare Agencies Ask for Interracial Practices*, N.Y. AGE, May 27, 1944, at 3 (noting Justice Polier’s involvement in a meeting that “urged support for appropriations for the FEPC”). On Justice Jackson’s views, see text accompanying notes 487-92 below.

479. For a collection of opinions demonstrating perceived connections between the war effort and antidiscrimination efforts in employment and other contexts, see *Are Colored People Needed to Win the War?*, AFRO-AM. (Balt.), Nov. 7, 1942, at 12. *See also* Alex Elson & Leonard Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 YALE L.J. 431, 431-32 (1947) (“The recent war, with its emphasis upon ideologies, intensified the struggle [against discrimination], for it was difficult—and embarrassing—to denounce the Nazis’ racial and religious theories when only the self-deceived could deny the existence of similar theories in America.”).

powerfully condemned discrimination in the defense industries as “mock[ing] the very principles of democracy we are preparing to defend.”⁴⁸⁰

Similarly, Justice Delany often delivered talks condemning the segregated armed forces and suggesting that American discrimination hurt the war effort.⁴⁸¹ “[I]t is difficult to convince our Allies that we seriously want to defeat Hitler abroad,” he proclaimed in a speech in 1943, “unless we defeat him here.”⁴⁸² In speeches the following year, Justice Delany expanded on this theme.⁴⁸³ “Hitlerism in America is as bad as it is in Europe, and an American ghetto is as bad as one in Berlin or Warsaw,” he argued.⁴⁸⁴ Referring to derogatory comments others made about African Americans, Jews, Catholics, and the Irish, Justice Delany encouraged his audience: “Let us shout that we in America are tired of being second class citizens”⁴⁸⁵ Moving to specific policy proposals, Justice Delany pressed for federal and state fair employment legislation.⁴⁸⁶

During these years, Justice Jackson often voiced the evolving Catholic perspective on fair employment laws. In 1940, Mayor La Guardia had appointed Justice Jackson as the head of the city’s new Bureau for the Prevention of Juvenile Delinquency, a component of the Children’s Court Division of the Domestic Relations Court.⁴⁸⁷ In this post, Justice Jackson technically retained his position on the court but rarely heard cases, instead concentrating on two projects: children’s “religious and moral training and

480. J. Robert Smith, *Senator Wagner Appeals to Knudsen to Check Jim Crowism in Defense Program*, N.Y. STAR & AMSTERDAM NEWS, Jan. 25, 1941, at 6.

481. For examples, see *Bankhead’s Suggestion Denounced*, AFRO-AM. (Balt.), Aug. 8, 1942, at 1 (discussing Justice Delany’s opposition to proposal that Northern black soldiers be quartered only in Northern camps); W.A. Brower, *The Week: Dixie Jim Crow Smells on Trains and Busses*, AFRO-AM. (Balt.), July 17, 1943, at 16 (discussing Justice Delany’s speech against Jim Crow during the dedication of a new USO building in North Carolina); and *Negro Leaders Protest Jimcrow Furlough System*, DAILY WORKER (N.Y.C.), Sept. 20, 1944, at 12 (including Justices Delany and Bolin among the listed leaders who opposed a “plan to set up separate facilities for Negro soldiers returning for relief from battle strain”).

482. “*We Don’t Like to Fight in a J.C. Army*,” AFRO-AM. (Balt.), July 3, 1943, at 3; see also *Urge War on Bias at College Forum*, AFRO-AM. (Balt.), May 20, 1944, at 8 (paraphrasing Justice Delany as warning “that Hitler has no monopoly on fascism” and that “the world realizes that Americans gloat about being the most prejudiced people in the world”).

483. See, e.g., *Jim Crow Must Go, Says Judge*, TROY REC. (N.Y.), Nov. 18, 1944, at 11.

484. *Id.*

485. *Id.*

486. *Id.*

487. *New Child Aid Unit Formed by Mayor*, N.Y. TIMES, June 2, 1940, § 1, at 4; see also DOMESTIC RELATIONS COURT FOR THE CITY OF N.Y., FOR TOMORROW: A COURT DEFENDS THE CHILD AND FAMILY TODAY; EIGHTH ANNUAL REPORT OF THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK 64 (1940).

character development" and better housing, especially in Harlem.⁴⁸⁸ After accepting this position, Jackson's involvement in the black community seems to have increased considerably.⁴⁸⁹ In addition to his city job, Justice Jackson spoke on behalf of Catholics on issues related to race. For example, in 1942, he was one of the featured speakers at a meeting of the National Catholic Committee on Negro Employment.⁴⁹⁰ This group issued a strong statement against discrimination in the defense industries, in part because of how the practice undermined the war effort.⁴⁹¹ It also called for "the serious attention of Catholic employers of labor and of Catholic labor leaders . . . to the moral culpability of race prejudice."⁴⁹²

Catholic attitudes toward race discrimination remained inconsistent, perhaps most starkly demonstrated by ongoing segregation within their own institutions.⁴⁹³ Black leaders condemned such conduct, even as they recognized growing Catholic support for racial justice.⁴⁹⁴ For instance, NAACP leader Charles Hamilton Houston praised papal encyclicals on discrimination yet in the same remarks noted that Catholic University did not admit black students into the school's cafeteria.⁴⁹⁵

As a consensus developed in favor of at least some fair employment legislation, New Yorkers innovated at the local and state levels and took prominent roles at the federal level. In 1941, A. Philip Randolph, with the support of other civil rights leaders, threatened a march on Washington to protest the segregated armed forces and exclusion of African Americans from defense-related jobs.⁴⁹⁶ Seeking to avoid harmful publicity, President Roosevelt asked Mayor La Guardia to negotiate a solution.⁴⁹⁷ This effort resulted in

488. "Religion in the Life of the Child" to Be Discussed at Meeting Next Sunday Afternoon, N.Y. AGE, June 6, 1942, at 3; see also R.P. Koenig Named to Be Magistrate, N.Y. TIMES, Sept. 9, 1940, at 17.

489. See, e.g., Justice Jackson Asks City for New Housing in Harlem, N.Y. AGE, May 23, 1942, at 12; Toyery for Harlem Children to Open at 39 West 135th Street, N.Y. AGE, July 4, 1942, at 2.

490. Urges Catholics to Employ Negro, TABLET (Brook.), May 23, 1942, at 4.

491. *Id.*

492. *Id.* In another endeavor, Justice Jackson served as a Catholic representative on an interracial and interreligious committee that studied discrimination in defense plants. Smith, *supra* note 480.

493. See MCGREEVY, *supra* note 55, at 30-34 (describing segregation within Catholic institutions).

494. See, e.g., Smith, *supra* note 480.

495. *Id.* Moreover, the shift in white Catholic attitudes toward the black community may have been partly motivated by efforts to convert new black city residents to Catholicism, to replace the white parishioners moving away, and to discourage African American support of communism. See MCGREEVY, *supra* note 55, at 56-61, 64.

496. WILLIAMS, *supra* note 78, at 310.

497. *Id.* at 308-13 (emphasizing Mayor La Guardia's role).

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Roosevelt’s issuance of Executive Order 8802, which banned discrimination in defense industries or government jobs “because of race, creed, color, or national origin.”⁴⁹⁸ The order also created the Fair Employment Practices Committee (FEPC).⁴⁹⁹ While the FEPC brought some benefits to black workers,⁵⁰⁰ discussants condemned how its weak enforcement mechanisms limited its impact.⁵⁰¹ Notably, though 78% of FEPC complaints nationwide were “based on racial discrimination,” 43% of cases in the New York office were filed by Jewish workers.⁵⁰²

Mayor La Guardia had become less of a leader on racial equality issues by the early 1940s, but his involvement with the FEPC inspired him to cooperate (with varying levels of enthusiasm) with the New York City Council’s efforts to secure local laws.⁵⁰³ These laws barred discrimination by employment agencies, in employment advertisements, and by employers holding municipal contracts.⁵⁰⁴ Here, too, results were mixed. Though Mayor La Guardia continued to appoint record numbers of black leaders to prominent posts, his administration did little to remedy discriminatory practices in ordinary jobs.⁵⁰⁵

At the state level, New Yorkers collaborated on interracial and interreligious commissions to develop employment legislation that would be broadly acceptable.⁵⁰⁶ This effort culminated in the proposal of a law that would ban discrimination in employment on the bases of “race, creed, color or national origin” and task a new agency, the New York State Commission Against Discrimination (SCAD), with education and enforcement.⁵⁰⁷ The proposed antidiscrimination law, called Ives-Quinn, received diverse support. A *New York Times* article reported that “representatives of the three major

498. Exec. Order No. 8802, 3 C.F.R. 957, 957 (1938-1943); see WILLIAMS, *supra* note 78, at 308-12.

499. WILLIAMS, *supra* note 78, at 312.

500. See FLAMM, *supra* note 257, at 39; Greenberg, *supra* note 257, at 419-20.

501. See WILLIAMS, *supra* note 78, at 312; Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 UCLA L. REV. 1393, 1420 (2005).

502. BIONDI, *supra* note 9, at 16.

503. See Dominic J. Capece, Jr., *Fiorello H. La Guardia and Employment Discrimination, 1941-1943*, IT. AMERICANA, Spring/Summer 1983, at 49, 53, 55-56.

504. See *id.* at 55-56.

505. See *id.* at 57-59.

506. See Anthony S. Chen, “The Hitlerian Rule of Quotas”: Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941-1945, 92 J. AM. HIST. 1238, 1242-49 (2006).

507. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 276-79 (2011) (quoting Ives-Quinn Act, ch. 118, sec. 1, § 126, 1945 N.Y. Laws 457, 458 (codified as amended at N.Y. EXEC. LAW § 291(1) (McKinney 2019))). For a detailed account, see Chen, *supra* note 506, at 1247-49.

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religious faiths of the country join[ed] with spokesmen for labor and Negro organizations in asking for its passage.”⁵⁰⁸ These speakers included Rabbi Wise and former Justice Jackson,⁵⁰⁹ whose ten-year appointment had expired a few months earlier.⁵¹⁰ Religious group support of Ives-Quinn was surely facilitated by the fact that nonprofit religious associations were excluded from the definition of “employer.”⁵¹¹ On behalf of the New York State Catholic Welfare Committee, Jackson sanctified the bill as “in line with sound Catholic doctrine.”⁵¹²

The strongest opposition to Ives-Quinn came from organized business, with common sources of concern including cost, bureaucracy, and the possible imposition of quotas.⁵¹³ Quotas had particular negative resonance in New York because of their use to limit Jewish enrollment in professional schools, a situation many denounced as a “Nazi practice.”⁵¹⁴ As one of a number of proponents of Ives-Quinn, Mayor La Guardia denied that the bill would impose a quota system.⁵¹⁵

Two family court justices who had long since become foes—Justices Polier and O’Brien—predictably took opposite stances on Ives-Quinn. Justice Polier was joined by her husband in penning an article in favor of the legislation. Writing under bylines that emphasized their expertise in labor and administrative law respectively, they wrote that “[t]he war ha[d] sharpened” Americans’ understanding of the need to address discrimination against all minority groups.⁵¹⁶ Refuting the argument that what was required was

508. Leo Egan, *Bias Bill Battle Waged at Hearing*, N.Y. TIMES, Feb. 21, 1945, at 1.

509. *Id.*

510. *See infra* Appendix. Newspaper coverage does not indicate any controversy over Mayor La Guardia’s decision not to reappoint Jackson. *See, e.g., La Guardia Admits “Blacklist” Policy*, N.Y. TIMES, Nov. 20, 1944, at 23.

511. The final version read: “The term ‘employer’ does not include a club exclusively social, or a fraternal, charitable, educational or religious association or corporation, if such a club, association, or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ.” Ives-Quinn Act, sec. 1, § 127(5), 1945 N.Y. Laws at 458 (codified as amended at N.Y. EXEC. LAW § 292(5)). The most common exceptions permitted in early employment discrimination bills were for religious organizations and domestic employers. *See* Harold Dublirer, Review Note, *Legislation Outlawing Racial Discrimination in Employment*, 5 LAW. GUILD REV. 101, 105 n.58 (1945).

512. Egan, *supra* note 508. Jackson also supported the creation of a permanent FEPC. *See Rep. Frank E. Hook to Speak at Boro Rally for FEPC*, BROOK. EAGLE, Apr. 1, 1945, at 9.

513. *See* Chen, *supra* note 506, at 1249-58.

514. *Id.* at 1257 (quoting Alonzo F. Myers, Chairman of the Department of Higher Education, New York University).

515. *Id.* at 1258.

516. Justine Polier & Shad Polier, *On the Calendar of Our Consciences*, 34 SURV. GRAPHIC 47, 47 (1945).

education rather than legislation, the Poliers queried: “But can the American people afford to wait until the least secure, least educated, and most prejudiced among us are transformed?”⁵¹⁷

Justice O’Brien deemed the bill “dangerous” and “a major communistic triumph.”⁵¹⁸ Some of his objections focused on the replacement of courts, which provided jury trials and evidentiary rules, with a “vast bureaucracy.”⁵¹⁹ More perplexingly, even though the legislation exempted religious organizations, Justice O’Brien warned that the bill would grant power to an agency to meddle in parochial school employment.⁵²⁰ Justice O’Brien implored New Yorkers to wait to learn more and offered a question markedly different from the Poliers’: “Is all of this American?”⁵²¹

Ives-Quinn passed with bipartisan support and became law on March 12, 1945, making New York the first state to create an agency to handle employment discrimination complaints.⁵²² The law proclaimed that employment discrimination was “a matter of state concern” that “menaces the institutions and foundation of a free democratic state.”⁵²³ Many other states soon followed.⁵²⁴ What this and other antidiscrimination legislation meant for the Domestic Relations Court’s practice of matching probation officers to juvenile delinquents by race and religion remained uncertain.

IV. Identity-Matching Conflicts at Midcentury

As New Yorkers developed antidiscrimination laws and norms, a Jewish-black coalition recognized new tools to challenge race and religion matching of probation officers and juvenile delinquents, a practice they increasingly understood as undemocratic and unlawful. In the tense World War II years,

517. *Id.* at 79.

518. Herbert A. O’Brien, Letter to the Editor, *Anti-Bias Bill Called Dangerous by Judge O’Brien*, BROOK. EAGLE, Mar. 4, 1945, at 18.

519. *Id.*

520. *Id.* Other prominent Catholics voiced similar concerns. For example, a Pulitzer Prize-winning journalist wrote: “Carried to its logical extremity, this law might be invoked some time to compel a Catholic parish to hire a rabbi” Westbrook Pegler, *Anti-Bias Bill Is Called Hitlerian*, BINGHAMTON PRESS, Feb. 27, 1945, at 6; see Westbrook Pegler of New York World-Telegram, PULITZER PRIZES, <https://perma.cc/Z8BT-GJCU> (archived June 16, 2020).

521. O’Brien, *supra* note 518.

522. Carle, *supra* note 507, at 276; Chen, *supra* note 506, at 1239, 1260-61.

523. Ives-Quinn Act, ch. 118, sec. 1, § 125, 1945 N.Y. Laws 457, 458. In 1946, the state attorney general determined that the State and its subdivisions were subject to the law. Comment, *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 YALE L.J. 837, 853 (1947).

524. Half of the states had similar laws by 1963. Carle, *supra* note 507, at 276, 279, 285.

with antidiscrimination laws untested and still under development, arguments against identity matching fell short. But in the following years, with greater legal protections and solidifying societal attitudes against identity-based discrimination, the judges who opposed matching gained traction. Leaning most heavily on the employment discrimination angle, yet also incorporating a nascent argument about the harm segregation could cause to children’s mental health, the black and Jewish judges succeeded in dismantling what they cast as the “Jim Crow” practice of race matching in 1946.

Meanwhile, the American Jewish Congress (AJC)—increasingly under the Poliers’ influence—created two new subdivisions to pursue psychological research and legal reform. Combining these efforts, AJC lawyers employed psychological harm arguments in Establishment Clause and civil rights litigation and achieved promising wins in both by the late 1940s. In the early 1950s, however, Cold War politics caused these lines of cases to diverge.

With civil rights wins ascendant and church-state cases precarious, AJC lawyers perceived an antidiscrimination claim (rather than a separation of church and state argument) as the most promising way to challenge ongoing religion matching in the Domestic Relations Court’s Probation Department. But as they learned, Cold War support for public religion undercut the power of civil rights laws to aid religious minorities.

A. Religion Matching During World War II

What did the laws enacted in the shadow of World War II mean for the Domestic Relations Court’s longstanding practices? Laws requiring religion matching in child welfare contexts remained in the state constitution and statute books, but the 1938 civil rights constitutional amendment and enabling legislation forbade public institutions from discriminating in “civil rights” based on race or religion.⁵²⁵ Were these provisions in opposition or reconcilable? The Jewish and black judges thought the constitutional language, and the new civil service law passed to partially implement it, rendered religion matching in probation unlawful.⁵²⁶ Their white Christian colleagues pointed to preexisting laws and disagreed.⁵²⁷

On January 6, 1941, during a meeting of the Board of Justices, those present approved a proposal put forth by the Board’s Legislative Committee (chaired by Justice Jackson) to extend the court’s religion-matching practice.⁵²⁸ Specifically, the proposal asked the state legislature to require religion

525. *See supra* Part III.B.

526. *See infra* notes 536–41 and accompanying text.

527. *See infra* notes 542–46 and accompanying text.

528. Board of Justices Meeting Minutes (Jan. 6, 1941), at 1, JWP Papers, Box 24, Folder 300.

matching of probation officers and probationers “whenever practicable” in the Family Court Division.⁵²⁹ (Previously, matching only applied in the Children’s Court Division.⁵³⁰) In early April 1941, Justice Polier was dismayed to learn from newspaper coverage that this proposal was a bill pending before both houses. Reviewing meeting minutes, she realized she had missed the January vote as she sat on the bench late into the evening.⁵³¹

As Justice Polier explained in correspondence to a family friend, the proposed bill would bring dire consequences. The religion-matching law in the Children’s Court already resulted in “skipping as many as forty people on [the Civil Service] list.”⁵³² “It also fits in with the attitude taken by a colleague on my Bench,” she wrote without naming Justice O’Brien, “to the effect that no one who is not a good Catholic and does not believe in the divinity of Christ ‘is competent to sit on the case of a Catholic child.’”⁵³³ Justice Polier saw the bill as “part of a planned program to build up ghettos of public employees on a religious basis,” which violated recently enacted state law.⁵³⁴ “In my opinion,” she concluded, “it will lead to further segregation of the people who are to be served as well as the people who are appointed with dangerous rapidity.”⁵³⁵

Justice Polier demanded that Presiding Justice Hill reopen the conversation, noting that Justices Bolin, Panken, Sicher, and Siegel (all of the Jewish and black justices) joined in the request.⁵³⁶ Pursuant to the laws governing the court’s operation, Presiding Justice Hill was obligated to

529. *Id.* at 1.

530. See Stephen S. Jackson, Legislative Comm., Board of Justices, Final Report of Legislative Committee in re: Proposed Changes to Be Submitted to the 1941 Session of the New York State Legislature 1 (n.d.), JWP Papers, Box 24, Folder 300; see also Board of Justices Meeting Minutes, *supra* note 528, at 1; 1933 ANNUAL REPORT, *supra* note 143, app. at 16-17 (showing that the section the justices were amending applied to the Family Court Division).

531. See Board of Justices Meeting Minutes (Apr. 15, 1941), at 1, JWP Papers, Box 24, Folder 300. The justices’ recollections differed regarding what transpired during the January 6 meeting. Justices Maguire and Jackson recalled a unanimous vote in favor of the proposal, whereas Justice Panken stated he did not recall voting for it and Justice Siegel said he did not recall discussing the subject. *Id.* at 2-3. Justice Bolin stated she was not present. *Id.* at 2.

532. Letter from Hon. Justine Polier, Justice, N.Y.C. Domestic Relations Court, to John Haynes Holmes (Apr. 29, 1941), JWP Papers, Box 28, Folder 356.

533. *Id.*

534. *Id.*

535. *Id.*

536. Letter from Hon. Justine Polier, Justice, N.Y.C. Domestic Relations Court, to Hon. John Warren Hill, Presiding Justice, N.Y.C. Domestic Relations Court (Apr. 11, 1941), JWP Papers, Box 24, Folder 300. On the judges’ racial and religious identities, see Part I.B above; and Appendix below.

comply.⁵³⁷ During the resultant meeting, Justice Polier schooled her colleagues on New York’s recent constitutional changes and public policy considerations. The extension of the religion-matching requirement to the adult probation context, she proclaimed, was contrary to both the country’s longstanding principle of equal protection of the laws and recently enacted New York law.⁵³⁸ Going further, Justice Polier cast doubt on the constitutionality of the preexisting law requiring religion matching in the Children’s Court Division.⁵³⁹ And as a practical matter, she argued that there was no justification for matching in the Family Court Division because probation officers there just oversaw support orders and did not engage in real social work.⁵⁴⁰ Finally, the bill seemed to set a dangerous precedent by “imply[ing] that public agencies and subdivisions of the state are to be reorganized to serve individuals on the basis of their religious persuasion rather than on their rights as American citizens. The policy runs contrary to the basic conception on which our democracy was founded.”⁵⁴¹

Opponents offered less substantive counterarguments but prevailed. Justice Jackson, who as Chairman of the Legislative Committee had publicized the justices’ support of the rule, stressed that he had circulated a memorandum with the language in advance of the January meeting and worried it would embarrass the court to publicly change stances.⁵⁴² Justice O’Brien unsuccessfully attempted to keep Justice Polier from voting with a motion to exclude those who hadn’t voted the first time around.⁵⁴³ Only Justice Dunham stated that Justice Polier had swayed his perspective.⁵⁴⁴ The final tally was a six-six tie: the four Jewish justices, plus Justices Bolin and Dunham, versus their white Protestant and Catholic colleagues.⁵⁴⁵ This meant the motion to reconsider was defeated.⁵⁴⁶

537. Presiding Justice Hill noted that he called the meeting pursuant to the Domestic Relations Court Act. Board of Justices Meeting Minutes, *supra* note 531, at 1; *see also* 1933 ANNUAL REPORT, *supra* note 143, at app. 8 (stating that the presiding justice must call a meeting of the Board of Justices when at least three justices have written to request a special meeting).

538. Board of Justices Meeting Minutes, *supra* note 531, at 4-5.

539. *Id.* at 4.

540. *Id.*

541. *Id.* at 5.

542. *Id.* at 3.

543. *Id.* at 6.

544. *Id.* at 5-6.

545. *Id.* at 6. On the judges’ racial and religious identities, see Part I.B above and Appendix below.

546. Board of Justices Meeting Minutes, *supra* note 531, at 6.

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After losing the internal revote, Justice Polier, now with NAACP support, tried a new tactic. Both houses of the legislature had passed the bill on their last days in session.⁵⁴⁷ Justice Polier drafted a letter to Governor Lehman—likely signed by the other Jewish judges and Justice Bolin—to request his veto.⁵⁴⁸ In an enclosed memorandum, she emphasized that the bill was contrary to state law.⁵⁴⁹ Moreover, she claimed that the parallel language in the Children’s Court Division had indeed resulted in hiring probation officers by religion, unlawfully out of the order in which they were listed based on merit by the Civil Service.⁵⁵⁰

NAACP Executive Secretary Walter White stressed to the governor that the religion-matching paradigm could lead to other types of discrimination. “Aside from doubtful constitutionality,” White wrote, “such a principle might conceivably be extended later to limit services of probation officers to members of [the] same race or denomination or creed or color, or even economic circumstance.”⁵⁵¹ White’s warning about the extension of religion matching to race matching was no mere speculation, as he likely knew. The Children’s Court Division already matched probation officers to juveniles by race as a court policy.⁵⁵²

547. Letter from Hon. Justine Polier et al., Justice, N.Y.C. Domestic Relations Court, to Hon. Herbert Lehman, Governor of N.Y. (Apr. 17, 1941), JWP Papers, Box 24, Folder 300.

548. *Id.* The letter refers to “the undersigned members of the Board [of Justices].” Though the copy in the archive does not include signatures, several sources suggest that the Jewish and black justices all signed the letter. First, these justices supported reconsidering the issue and then voted against the policy, as noted above. Second, Justice Polier saved a letter from Justice Dunham explaining why he declined to sign the letter, but her papers do not contain any similar correspondence from other justices. *See* Letter from Hon. Lawrence B. Dunham, Justice, N.Y.C. Domestic Relations Court, to Hon. Justine Wise Polier, Justice, N.Y.C. Domestic Relations Court (Apr. 18, 1941), JWP Papers, Box 24, Folder 300. Third, Justice Polier’s papers include a letter from Justice Sicher confirming that she could sign his name to the letter. Letter from Hon. Dudley F. Sicher, Justice, N.Y.C. Domestic Relations Court, to Hon. Justine Wise Polier, Justice, N.Y.C. Domestic Relations Court (Apr. 18, 1941), JWP Papers, Box 24, Folder 300. And fourth, Justices Polier and Bolin later reflected on how they—with Justice Sicher—fought against identity matching in probation. *See infra* text accompanying notes 788-90.

549. *See* Memorandum on Proposed Amendment to Section 32 of the Domestic Relations Court Act of the City of New York as Provided in the Young Bill, Introductory No. 1484, at 2 (n.d.), JWP Papers, Box 24, Folder 300.

550. *Id.* at 1.

551. Letter from Walter White, Sec’y, Nat’l Ass’n for the Advancement of Colored People, to Hon. Justine Polier & Hon. Jane Bolin, Justices, N.Y.C. Domestic Relations Court (Apr. 17, 1941), JWP Papers, Box 24, Folder 300 (quoting White’s telegram to Governor Lehman).

552. *See infra* Part IV.B.

Despite these efforts, Governor Lehman signed the new religion-matching bill into law the following month.⁵⁵³ As with several other Christian-preferred laws proposed during the war years (such as released time and parochial school busing), Jewish New Yorkers’ fear of stoking anti-Semitism likely eased passage.⁵⁵⁴

B. Race Matching as “Jim Crow” Discrimination

As Americans passed fair employment legislation at the local, state, and federal levels, the judges opposed to identity matching saw new paths to challenge the practice. Justice Bolin had protested race matching shortly after her appointment in 1939,⁵⁵⁵ later recalling that the court employed only two black probation officers when she began.⁵⁵⁶ At that time, she made no progress. By the mid-1940s, she had an additional partner in Justice Delany and could rely on evolving social norms and legal rules targeting employment discrimination.

In February 1946, Justices Bolin and Delany drew attention to what they deemed the “Jim Crow” practice of limiting black probation officers to working with black youth.⁵⁵⁷ This policy resulted in some of the court’s branches not hiring black officers because they lacked a full caseload of black children.⁵⁵⁸ Echoing Justice Panken’s earlier stance on religious identity, Justice Delany declared that “there is no such thing as a Negro probation officer, or a white probation officer.”⁵⁵⁹ A competent officer should be able to work with children regardless of race, he explained, and so the court’s race-based assignment policy “was not only undemocratic, but unscientific.”⁵⁶⁰ Still,

553. Act of May 2, 1941, ch. 943, sec. 1, § 32, 1941 N.Y. Laws 2181, 2181 (“The probation officer assigned to such duty [in the family court], whenever practicable, shall be of the same religious faith of the family or person under supervision whenever there are children in such family or in the custody of such person.”).

554. *See supra* text accompanying notes 459-61. Jews were not in complete agreement on this issue. Some ultra-Orthodox Jews supported released time. COHEN, *supra* note 63, at 132, 134.

555. *See* Interview by Jean Rudd (and Lionel Bolin) with Jane M. Bolin 9, 31 (June 4, 1990) [hereinafter Bolin Interview], Jane Matilda Bolin Papers, Sc MG 83, Box 1, Folder 2 (on file with the Schomburg Center for Research in Black Culture, New York Public Library).

556. Klemesrud, *supra* note 278.

557. *City Probes Kid Court Jim Crow*, N.Y. AMSTERDAM NEWS, Feb. 9, 1946, at 1; P.B. Kaye, *Judge Bolin Hits Court’s Jim Crowism*, N.Y. AMSTERDAM NEWS, Feb. 16, 1946, at 1.

558. *See Court Called “Lily-White,”* N.Y. AMSTERDAM NEWS, Feb. 2, 1946, at 1.

559. *City Probes Kid Court Jim Crow*, *supra* note 557; *see also* Kaye, *supra* note 557 (expressing Justice Bolin’s similar sentiment).

560. *City Probes Kid Court Jim Crow*, *supra* note 557.

temporary Presiding Justice Cobb (stepping in while Presiding Justice Hill served in World War II⁵⁶¹) and the chief probation officer demurred, with the latter claiming that black officers possessed a better understanding of “the emotional and cultural factors.”⁵⁶² It was only after Justice Bolin recruited a lawyer friend to threaten a lawsuit (presumably based on employment discrimination) that Presiding Justice Cobb discontinued the practice.⁵⁶³

Though fair employment was the driving rationale for Justice Bolin’s and Justice Delany’s challenge to race matching, Bolin also expressed concern about the consequences for the children. As Bolin told a local black newspaper, the matching practice had a “bad effect on the clients of the court,” meaning the children.⁵⁶⁴ “It is thoroughly demoralizing,” she insisted, “to see perpetuated in a public agency a pattern of segregation.”⁵⁶⁵ Bolin found it troubling for “children whose rehabilitation is a charge upon the court by law [to be] jim crowed.”⁵⁶⁶

While Justice Bolin’s characterization of the problem may have been based on her own observations, several justices’ professional connections to Kenneth Clark and Mamie Phipps Clark suggest that Bolin’s views were also informed by early familiarity with psychological studies conducted by the Clarks. This research—later famously cited in *Brown*⁵⁶⁷—found that separating children by race caused feelings of inferiority in black children.⁵⁶⁸ Kenneth Clark recalled that as a child he “became aware of color”⁵⁶⁹ and had a moment of racial awakening when he first saw a black teacher.⁵⁷⁰ Serendipitously, that teacher was Delany, who worked in New York City’s schools to support himself during law school.⁵⁷¹ In the 1930s, Kenneth Clark received a bachelor’s degree and a master’s degree in

561. On Justice Cobb’s temporary position, see *W. Bruce Cobb, 81, Retired Justice*, N.Y. TIMES, Nov. 13, 1959, at 29.

562. *Court Called “Lily-White,” supra* note 558; see also *City Probes Kid Court Jim Crow, supra* note 557.

563. Bolin Interview, *supra* note 555, at 31.

564. Kaye, *supra* note 557.

565. *Id.*

566. *Id.*

567. See *infra* notes 703-04 and accompanying text.

568. For an overview of Mamie Phipps Clark’s and Kenneth Clark’s pertinent research, which persuasively gives more credit to Mamie Phipps Clark than in many other accounts, see generally Shafali Lal, *Giving Children Security: Mamie Phipps Clark and the Racialization of Child Psychology*, 57 AM. PSYCHOL. 20 (2002).

569. Interview by Ed Edwin with Dr. Kenneth B. Clark 21 (Feb. 4, 1976) [hereinafter Feb. 4, 1976 Kenneth Clark Interview], <https://perma.cc/4VYJ-S7W4> (archived June 26, 2020).

570. MARKOWITZ & ROSNER, *supra* note 310, at 25.

571. See *id.*

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psychology from Howard University,⁵⁷² where he met then-undergraduate student Mamie Phipps.⁵⁷³ She graduated and they wed in 1938.⁵⁷⁴ The summer following her graduation, Mamie Clark worked as a secretary in the legal office of eminent African American lawyer Charles Hamilton Houston, who was then collaborating with Thurgood Marshall and other NAACP lawyers.⁵⁷⁵ Mamie Clark described this experience as “the most marvelous learning experience I have ever had”⁵⁷⁶ because it coincided with the NAACP’s early planning to overturn *Plessy v. Ferguson*.⁵⁷⁷ Mamie Clark then returned to Howard to pursue a master’s degree in psychology.⁵⁷⁸ In 1939, she completed a thesis titled *The Development of Consciousness of Self in Negro Preschool Children*.⁵⁷⁹ The Clarks later explained that this project sparked Kenneth Clark’s interest in children’s racial identity.⁵⁸⁰ In 1939 and 1940, the Clarks conducted their first tests using dolls to research black children’s self-perceptions.⁵⁸¹ They performed the studies in Washington, D.C., and then in New York City,⁵⁸² after moving to Harlem in 1940.⁵⁸³ They next became the first two African Americans to earn Ph.D.s in psychology at Columbia University, he in 1940 and she in 1943.⁵⁸⁴

572. Richard Severo, *Kenneth Clark, Who Fought Segregation, Dies*, N.Y. TIMES (May 2, 2005), <https://perma.cc/ANK2-GMMA>.

573. Ronald Smothers, *Mamie Clark Dies; Psychologist Aided Blacks*, N.Y. TIMES (Aug. 12, 1983), <https://perma.cc/JF94-LR5A>.

574. *Id.* Mamie Clark credited Kenneth Clark with influencing her initial interest in psychology. Interview by Ed Edwin with Dr. Mamie Clark [hereinafter Mamie Clark Interview] 14 (May 25, 1976), <https://perma.cc/W6F2-HM3H> (archived June 26, 2020).

575. Lal, *supra* note 568, at 22.

576. Mamie Clark Interview, *supra* note 574, at 18, <https://perma.cc/V439-5HVC>.

577. Alexandra Rutherford, *Clark, Mamie*, AM. NAT’L BIOGRAPHY (Oct. 2014), <https://perma.cc/S63B-6JY6>.

578. Lal, *supra* note 568, at 22.

579. *Id.*

580. *Id.*

581. Severo, *supra* note 572.

582. *Id.*

583. Smothers, *supra* note 573 (noting their move to New York City in 1940); *Columbia University Elects First Negro to Sigma Xi Society*, N.Y. AGE, June 1, 1940, at 1.

584. Smothers, *supra* note 573. Kenneth Clark chose to attend Columbia to study under eminent Jewish psychologist Otto Klineberg, whom Clark believed was one of “the outstanding social psychologists” of his time and “the specialist in race relations or racial psychology.” Feb. 4, 1976 Kenneth Clark Interview, *supra* note 569, at 56, <https://perma.cc/V7KQ-8TDQ>; Interview by Ed Edwin with Dr. Kenneth B. Clark 98-99 (Feb. 23, 1976) [hereinafter Feb. 23, 1976 Kenneth Clark Interview], <https://perma.cc/E8YN-AALB> (archived June 26, 2020); see also Andrew R. Heinze, *Jews and American Popular Psychology: Reconsidering the Protestant Paradigm of Popular Thought*, 88 J. AM. HIST. 950, 962 n.23 (2001) (describing Otto Klineberg as one of the
footnote continued on next page

In the following years, they continued their research on children and race.⁵⁸⁵

The Domestic Relations Court judges had many opportunities to learn from the Clarks’ research in the 1940s.⁵⁸⁶ Mamie Clark volunteered in the family court’s psychiatric clinic when she was completing her degree at Columbia.⁵⁸⁷ After encountering postgraduation difficulties in securing employment appropriate to her training because of discrimination based on her race and sex,⁵⁸⁸ Mamie Clark developed the idea to open the Northside Center for Child Development⁵⁸⁹ in order to provide psychological treatment and testing for black children in Harlem.⁵⁹⁰ The Clarks were initially turned away when they sought funding from community organizations.⁵⁹¹ Kenneth Clark later recalled that the first person to support their endeavor was Justice Polier, who then introduced them to a generous benefactor.⁵⁹² Mamie Clark’s recollections were similar. She further observed that Justice Polier was the “nucleus” of the Center’s board of directors, and that Shad Polier prepared the necessary paperwork for the Center’s incorporation and tax exemption pro

prominent Jewish psychologists of the period and “a leading critic of racist interpretations of intelligence and personality tests”). Mamie Clark chose to study under well-known eugenicist Henry Garrett, whom Kenneth Clark characterized as “Otto Kleinberg’s chief antagonist on matters of race and racial differences.” Feb. 23, 1976 Kenneth Clark Interview, *supra*, at 90-91, <https://perma.cc/K4Y6-8D2Z>; *see also* Rutherford, *supra* note 577. Because she was Garrett’s student, Mamie Clark was later called to rebut his testimony regarding the alleged inferiority of black children. Mamie Clark Interview, *supra* note 574, at 20, <https://perma.cc/C7KX-HZFY>.

585. Rutherford, *supra* note 577.

586. From late 1944 into 1945, Kenneth Clark was employed as a psychologist by AJC, in which the Poliers held leadership roles. *See infra* notes 602, 07.

587. BERNSTEIN, *supra* note 467, at 276-77. On the creation of the clinic, see Part II.C above.

588. Smothers, *supra* note 573. On the special obstacles faced by black women in psychology in this period, see Lal, *supra* note 568, at 22.

589. The center was originally called the Northside Testing and Consultation Center until it was renamed in 1948. Lal, *supra* note 568, at 24.

590. Severo, *supra* note 572; Interview by Ed Edwin with Dr. Kenneth B. Clark 124, 126-27 (Mar. 19, 1976) [hereinafter Mar. 19, 1976 Kenneth Clark Interview], <https://perma.cc/4SG9-5MH9>. The services were extended to white children in 1949. Severo, *supra* note 572. According to Bernstein, Northside was “the first integrated, non-sectarian child guidance center in the area.” BERNSTEIN, *supra* note 467, at 277.

591. Mamie Clark Interview, *supra* note 574, at 39, <https://perma.cc/WB6W-KL8R>; Mar. 19, 1976 Kenneth Clark Interview, *supra* note 590, at 131, <https://perma.cc/E93E-F9VD>.

592. Mar. 19, 1976 Kenneth Clark Interview, *supra* note 590, at 131-32, <https://perma.cc/F58D-6MPG>. Kenneth Clark also described Justine Polier and Shad Polier as “our first major supporters and advisors outside of the Harlem community.” Interview by Ed Edwin with Dr. Kenneth B. Clark 261 (July 20, 1976), <https://perma.cc/4ANF-X3M2>.

bono.⁵⁹³ The Clarks opened the Center in the basement of their Harlem apartment building in February 1946, the same month that Justices Bolin and Delany spoke against race matching in probation.⁵⁹⁴ Justice Bolin soon became a Northside committee member.⁵⁹⁵ Though Justice Delany does not seem to have been officially involved in the Center, he participated in programs on race and child welfare with Kenneth Clark.⁵⁹⁶ Given these interactions, the Domestic Relations Court judges were likely among the first to learn of the Clarks’ findings, and the probation race-matching objection was a step toward *Brown*.⁵⁹⁷

593. Mamie Clark Interview, *supra* note 574, at 48, <https://perma.cc/7ZQK-Q99P>.

594. Lal, *supra* note 568, at 24; Smothers, *supra* note 573. At the Center’s dedication ceremony, Mamie Clark told an audience that skin color “can be a factor in the development of consciousness of self.” *Dedication Is Held at Harlem Center*, N.Y. TIMES, Mar. 2, 1946, at 9.

595. MARKOWITZ & ROSNER, *supra* note 310, at 264 n.13.

596. For example, see *id.* at 169 (including a photograph of Justice Delany and Kenneth Clark participating in a radio interview in April 1946, titled “How Can We Work for Interracial Understanding?”); and C. Gerald Fraser, *Harlem Students Learn Inferiority*, N.Y. AMSTERDAM NEWS, May 1, 1954, at 1 (describing talks by Justice Delany and Kenneth Clark at a conference on Harlem’s public schools).

597. Sources identified for this Article do not indicate any disagreement on probation race matching within the black community, though some perspectives may not have been documented in the newspapers and court documents used herein. Notably, at other times and places, some black leaders supported race matching in probation or arguably analogous contexts. For instance, around 1930, black leaders in Richmond, Virginia, pressed for a black probation officer to oversee black children. For representative discussion, see NEGRO WELFARE SURVEY COMM., RICHMOND COUNCIL OF SOC. AGENCIES, THE NEGRO IN RICHMOND, VIRGINIA 99-100 (1929); and *Industrial and Labor Conditions*, 31 MONTHLY LAB. REV. 310, 314 (1930). And in the 1970s, the National Association of Black Social Workers issued a controversial statement opposing transracial adoption. See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 879 n.9 (1998). On division within black communities regarding “the goals, strategies, and tactics of the civil rights struggle,” see generally BROWN-NAGIN, *supra* note 35.

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AWARDED — Atty. and Mrs. Shad Polier receive a plaque for their services to the community and to Northside Center for Child Development from Judge Hubert Delany. The presentation took place at the Northside Center Luncheon last Saturday at the Hilton Hotel. More than 600 persons attended the affair which will benefit the Center's work with children in the community. (Gilbert Photo)

Delany presented an award to the Poliers for their service to the Clarks' Northside Center in 1964.⁵⁹⁸

Photo Credit: James Gilbert / *N.Y. Amsterdam News*

C. Litigating the Psychology of Racial and Religious Segregation

While New Yorkers worked through the application of new identity-related laws and understandings at the local level, they also organized to influence policies at the state and federal levels. One of the important players headquartered in New York City was AJC. According to historian Stuart Svonkin, AJC remained distinct from other major Jewish groups in the post-war years.⁵⁹⁹ Ideologically, AJC supported cultural pluralism and Zionism, issues they saw as connected by respect for “group rights and group distinctiveness as a fundamental civil liberty.”⁶⁰⁰ In contrast to the educational campaigns favored by more moderate Jewish advocacy groups, AJC endorsed coalition politics, legislative reform, and litigation—participation in which had the added benefit of bolstering a sense of Jewish community and identity.⁶⁰¹ In the 1940s, AJC’s leadership, which the Poliers were climbing,⁶⁰² created two

598. *Awarded*, N.Y. AMSTERDAM NEWS, Oct. 24, 1964, at 10.

599. SVONKIN, *supra* note 13, at 23.

600. *Id.* at 81.

601. *See id.* at 61, 79, 81.

602. Shad Polier was elected as a Vice-President of AJC in 1946. *See Jewish Group Elects Officers*, PITT. POST-GAZETTE, June 3, 1946, at 2. Justice Polier became a Vice-President of AJC in 1947 and then President of the Women’s Division when her mother died. *See Jewish Women’s Unit Re-elects President*, N.Y. TIMES, Nov. 15, 1949, at 20; *Mrs. Stephen footnote continued on next page*

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divisions to collaborate in furthering these goals: the Commission on Community Interrelations (CCI) and the Commission on Law and Social Action (CLSA).⁶⁰³

AJC founded CCI in 1944 to lead a “scientific attack” on discrimination.⁶⁰⁴ The use of psychology during World War II had bolstered the profession’s credibility and also shifted its focus, as leading Jewish psychoanalysts fled Nazi Europe to America and shaped research on anti-Semitism.⁶⁰⁵ One of these émigrés was Kurt Lewin, whose work inspired AJC to create CCI.⁶⁰⁶ Lewin was selected to lead the division, which included prominent Jewish and Christian (white and black) psychologists.⁶⁰⁷ CCI sought to use social engineering to reduce prejudice and to develop psychological studies as ammunition in litigation.⁶⁰⁸

The year after creating CCI, AJC formed CLSA as its legal arm.⁶⁰⁹ Shad Polier—who had become an active member of the NAACP after the Scottsboro case and later served on the Executive Committee of the NAACP’s legal branch, the LDF⁶¹⁰—became chairman and helped craft CLSA based on the LDF model.⁶¹¹ Further linking CLSA and the LDF, CLSA’s National Advisory

Wise, Rabbi’s Wife, Dead, N.Y. TIMES, Dec. 11, 1947, at 33; *Wise Again Heads Jewish Congress*, N.Y. TIMES, Apr. 5, 1948, at 4.

603. JOHN P. JACKSON, JR., SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION 65, 67-68, 75 (2001).

604. *Id.* at 65, 67-68.

605. *Id.* at 44, 51-52.

606. For an account of CCI that centers on Lewin’s contributions, see generally Frances Cherry & Catherine Borshuk, *Social Action Research and the Commission on Community Interrelations*, 54 J. SOC. ISSUES 119 (1998). Lewin is remembered today as the founder of social psychology. See, e.g., Travis Langley, *Kurt Lewin, the Refugee Who Founded Social Psychology*, PSYCHOL. TODAY (Jan. 29, 2017), <https://perma.cc/QM78-QSZJ>.

607. John P. Jackson, Jr., *Blind Law and Powerless Science: The American Jewish Congress, the NAACP, and the Scientific Case Against Discrimination, 1945-1950*, 91 ISIS 89, 95 (2000); *Improved Community Interrelations Sought by Year-Old N.Y. Commission*, AFRO-AM. (Balt.), Nov. 24, 1945, at 12 (“The staff is composed of Jews and Gentiles, white and colored persons . . .”). Kenneth Clark previously had been on the staff but left for a teaching position. *Improved Community Interrelations Sought by Year-Old N.Y. Commission*, *supra*. As Kenneth Clark explained in a letter, he left CCI because he felt he was “being employed on a token, rather than genuine basis.” MARKOWITZ & ROSNER, *supra* note 310, at 81.

608. Jackson, *supra* note 607, at 95-100.

609. JACKSON, *supra* note 603, at 74-75.

610. Tomasson, *supra* note 179.

611. See SVONKIN, *supra* note 13, at 92-95.

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Board included Justice Delany and Thurgood Marshall,⁶¹² and the CLSA and LDF staffs collaborated and interacted regularly.⁶¹³ AJC hired Will Maslow, a Columbia Law graduate who had previously worked as a trial attorney for the NLRB and as the director of field operations for the FEPC, as CLSA’s Director and AJC’s General Counsel.⁶¹⁴ Maslow embraced AJC’s plan to use social science in litigation,⁶¹⁵ perhaps in part because he was a cousin and close friend of famous psychologist Abraham Maslow.⁶¹⁶ Another influential member of the original team was Alexander Pekelis, a Russian-born Jew who escaped Nazi-controlled Europe for New York, where he too earned a law degree at Columbia.⁶¹⁷ Though Justice Polier was not officially part of CLSA in these years, Shad Polier’s papers reveal that she routinely weighed in behind the scenes.⁶¹⁸

CLSA’s mission was to defend civil liberties and fight discrimination against all minority groups, based on an understanding that prejudice against any group was a threat to others.⁶¹⁹ As Shad Polier explained in a CLSA press release titled “Why Jews Must Fight for Minorities,” circulated in 1949, “[t]he only really significant or effective way to guarantee minority rights is to round out democracy wherever it is incomplete.”⁶²⁰

612. Letter from Leo Pfeffer, Assistant Dir., Comm’n on Law & Soc. Action, Am. Jewish Cong., to unnamed recipients (May 19, 1952), AJC Papers, Box 243, Folder 2 (listing CLSA board members on the letterhead).

613. Martha Biondi writes that the “frequent collaborations” between CLSA and the NAACP “constituted the basis of the Black-Jewish alliance in the civil rights movement.” BIONDI, *supra* note 9, at 15-16.

614. SVONKIN, *supra* note 13, at 83.

615. *Id.*

616. See EDWARD HOFFMAN, THE RIGHT TO BE HUMAN: A BIOGRAPHY OF ABRAHAM MASLOW 10, 13-17, 25, 162 (1988) (discussing the close relationship between Will and Abraham Maslow). Will Maslow was also the nephew of David Ben-Gurion, Israel’s first prime minister. BIONDI, *supra* note 9, at 124.

617. JACKSON, *supra* note 603, at 75.

618. For example, Justice Polier is copied on many memoranda in a 150-page folder of CLSA-related materials from 1955 in Box 4, Folder 1 of the SP Papers on file with the American Jewish Historical Society. The pertinent files contain few written responses from Justice Polier, but those documents indicate she closely read and considered the materials. In one of the most surprising documents, she responded privately to Shad Polier after they received a letter in support of Bible reading in public schools. She wrote: “You may be shocked, but I am very sympathetic to [the letter writer], and am troubled by our rigid position against any Bible reading. Love.” Letter from Hon. Justine Wise Polier, Justice, N.Y.C. Domestic Relations Court, to Shad Polier, AJC (Oct. 20, 1955), SP Papers, Box 4, Folder 1.

619. See SVONKIN, *supra* note 13, at 18-23, 80.

620. Shad Polier, Office of Jewish Info., AJC, Press Release, Why Jews Must Fight for Minorities 2 (Nov. 4, 1949), SP Papers, Box 7, Folder 15.

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One of CLSA’s earliest forays into civil rights litigation was filing an amicus brief in *Westminster School District v. Mendez*,⁶²¹ a federal case that challenged segregation of Mexican-American children in California public schools.⁶²² As historians have discussed, the *Mendez* amicus briefs attracted cross-racial cooperation.⁶²³ Less often noticed is that AJC’s brief was a collaboration between Maslow, Pekelis, and Pauli Murray. Murray had taken a part-time AJC position after finding the legal field inhospitable to a newly graduated black woman lawyer, especially as veterans returned from service abroad.⁶²⁴ Though she later became renowned for her brilliant navigation of arguments at the intersection of African Americans’ and women’s civil rights, Murray was in earlier years more attentive to analogies between racial and religious discrimination.⁶²⁵

In their *Mendez* brief, the CLSA team compared American racial segregation to Nazi treatment of Jews and argued that segregation caused psychological harms.⁶²⁶ Because the CLSA team knew that the NAACP brief’s central argument was that separate institutions were unequal in practice (relying on data that showed, for instance, that black schools received less money per pupil), the CLSA lawyers instead argued that separate was inherently unequal—even assuming identical facilities.⁶²⁷ If Nazis “compelled Jews to wear clothes of one given color while reserving another to the master race, it could not be said that Jews have received equal clothing facilities even if the physical qualities of the clothing were identical,” they argued,⁶²⁸ employing an analogy that recalled the yellow stars that Nazis forced Jews to wear on their clothing during the Holocaust.⁶²⁹ “The inferiority thus transmitted from

621. Brief for the American Jewish Congress as Amicus Curiae, *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (No. 11,310).

622. *Mendez*, 161 F.2d at 775-78.

623. E.g., BRILLIANT, *supra* note 36, at 59.

624. ROSALIND ROSENBERG, *JANE CROW: THE LIFE OF PAULI MURRAY* 168-69 (2017).

625. PATRICIA BELL-SCOTT, *THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE* 28, 33 (2016); ROSENBERG, *supra* note 624, at 63, 67, 69-70; see also GILMORE, *supra* note 45, at 254-55. On Murray’s later work, see MAYERI, *supra* note 36, 16-26.

626. See John P. Jackson, Jr., *The Triumph of the Segregationists? A Historiographical Inquiry into Psychology and the Brown Litigation*, 3 HIST. PSYCHOL. 239, 252 (2000) (identifying AJC’s *Mendez* brief as the originator of the psychological damage argument).

627. See JACKSON, *supra* note 603, at 83-89.

628. Brief for the American Jewish Congress as Amicus Curiae, *supra* note 621, at 6.

629. On this Nazi policy, see *Jewish Badge: During the Nazi Era*, U.S. HOLOCAUST MEMORIAL MUSEUM: HOLOCAUST ENCYCLOPEDIA, <https://perma.cc/NJW3-DY8U> (archived June 16, 2020). Rosalind Rosenberg suggests the CLSA lawyers’ repeated use of the term “humiliation” in conjunction with the clothing analogy was born from Pekelis’s thinking about how Nazis forced Jews to wear yellow stars on their clothing and

footnote continued on next page

the wearer to the garment destroys the genuine ‘equality’ of the furnished facilities.”⁶³⁰ This inequality, in turn, created a damaging “psychological environment.”⁶³¹ Citing social science studies throughout the brief, the CLSA lawyers declared:

Will any court today, in the light of the sociological and psychological findings made in the last fifty years, prove so lacking in candor and so blind to realities as to subscribe to the fiction of benevolent segregation on which *Plessy v. Ferguson* relies? That is the issue.⁶³²

Because the Ninth Circuit gave civil rights proponents a narrow win (tied to the interpretation of a California statute) and the school system did not appeal the decision to the Supreme Court, *Mendez* did not attract significant attention at the time.⁶³³ Nevertheless, historians have credited AJC’s brief and Murray’s subsequent work as influencing the NAACP’s later strategies.⁶³⁴

CLSA understood the Ninth Circuit’s narrow holding in *Mendez* as indicating they needed more social science research, focused specifically on segregation in education, to persuade courts to issue broader opinions.⁶³⁵ CLSA delegated this task to CCI.⁶³⁶ The month after *Mendez*, CCI psychologists Isidor Chein and Max Deutscher mailed a poll to social scientists across the country to ask their views on whether “enforced segregation ha[d] detrimental psychological effects on members of racial and religious groups . . . even if equal facilities were provided.”⁶³⁷ When they published the results in 1948, they explained on the first page of the article that “the purpose of the study was to gather material which would be relevant to a court decision.”⁶³⁸ CCI also

Murray’s thinking about women being forced to wear skirts. ROSENBERG, *supra* note 624, at 170-71.

630. Brief for the American Jewish Congress as Amicus Curiae, *supra* note 621, at 6.

631. *Id.* at 13.

632. *Id.* at 22. Murray emphasized the argument about the “damaging psychological and sociological effects of segregation” when sharing the amicus brief with others. See Letter from Pauli Murray to Charlotte Carr, Citizen’s Comm. on Children of N.Y. (Jan. 14, 1947), SP Papers, Box 10, Folder 9.

633. ROSENBERG, *supra* note 624, at 171.

634. See, e.g., *id.*

635. See Jackson, *supra* note 607, at 106.

636. *Id.*

637. *Id.* at 106-07, 107 n.48 (quoting the original survey). Chein had received his Ph.D. from Columbia in 1939, studying alongside fellow student Kenneth Clark. JACKSON, *supra* note 603, at 69.

638. Max Deutscher & Isidor Chein with Natalie Sadigur, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259, 259 (1948).

collaborated with the NAACP to develop other studies and identify expert witnesses.⁶³⁹

While cases challenging separate but equal in schools were gaining momentum, CLSA lawyers also turned their attention to litigation involving religion and public schools.⁶⁴⁰ In 1947, the U.S. Supreme Court held, in *Everson v. Board of Education*, that the Establishment Clause applied to the states and that even the “slightest breach” of the “wall between church and state” could not be tolerated.⁶⁴¹ Despite this language, *Everson* permitted reimbursement of some costs for busing children to private religious schools, which was the central issue in the case.⁶⁴² Scholars have contended that the opinion’s stark language about separation of church and state partly reflected the Justices’ fear and distrust of Catholics.⁶⁴³ No Jewish groups filed amicus briefs in *Everson* because they were cautious about intervening in this area of law, and because some accepted certain types of government-religious cooperation.⁶⁴⁴

Everson’s strong separation language led CLSA lawyers to believe the time was ripe to challenge released time.⁶⁴⁵ In the then-pending case of *Illinois ex rel. McCollum v. Board of Education*, the question was the constitutionality of an Illinois released-time law that permitted private groups to teach religion in school buildings during school hours.⁶⁴⁶ In practice, this type of released time required the school to separate children by religion.⁶⁴⁷ Leo Pfeffer (CLSA’s church-state expert, who was brought up in an Orthodox Jewish household

639. The NAACP lacked the funds or personnel to perform this type of work in-house. See Jackson, *supra* note 607, at 108-12.

640. At the state level, AJC was fighting against discrimination along racial and religious lines (including quotas) in colleges and professional schools. SVONKIN, *supra* note 13, at 90-91.

641. 330 U.S. 1, 14-16, 18 (1947).

642. *Id.* at 3-4, 17.

643. See Berg, *supra* note 54, at 127-32 (“The widespread distrust of Catholicism was almost certainly a factor, though not the only one, in how the justices of the Supreme Court decided the first modern Establishment Clause cases.”); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 58 (1997) (“These anti-Catholic attitudes plainly did not control the result in *Everson*, but they influenced the dissent and they may have influenced the majority’s no-aid rhetoric.”).

644. Leo Pfeffer, a CLSA staff attorney introduced below, recommended filing an amicus brief in *Everson*, but AJC leaders thought it would be politically unwise. IVERS, *supra* note 63, at 21; see also COHEN, *supra* note 63, at 140.

645. As discussed above, Jewish New Yorkers had a troubled history with released time, which New York adopted statewide in 1941. See *supra* note 454 and accompanying text; see also COHEN, *supra* note 63, at 139.

646. 333 U.S. 203, 204-05 (1948).

647. See *id.* at 208-09.

and was a devout Jew⁶⁴⁸) persuaded his counterparts in less litigation-oriented Jewish organizations to file a joint amicus brief in opposition to the policy.⁶⁴⁹ The resultant brief emphasized that it represented the views of an unprecedented coalition of “practically all American Jewish organizations, religious and lay.”⁶⁵⁰

The CLSA-organized *McCollum* amicus brief employed the psychological harm arguments CLSA had floated in the earlier racial segregation case, *Mendez*. Pfeffer and his coauthors explained that their primary concern was “the divisive effects of the [released-time] program.”⁶⁵¹ As in all circumstances in which “sectarianism enters the public school,” they claimed, the Illinois policy caused intolerance and discord that were “particularly harmful to children of minority faiths.”⁶⁵² Strategically quoting an “eminent Protestant,” they described how the practice “segregates Americans as Catholics, Lutherans, other Protestants[,] Jews,” and more.⁶⁵³ Though they also quoted a source that found the “disastrous harm” from such programs so clear that identifying it “needs no psychologist,”⁶⁵⁴ they nevertheless cited psychological studies.⁶⁵⁵

The Supreme Court agreed that the Illinois released-time law was an unconstitutional violation of separation of church and state,⁶⁵⁶ and several Justices were seemingly persuaded by the CLSA-led amicus brief. During oral argument, the Justices’ remarks indicated that they had considered the brief and were interested in how released time caused conflict.⁶⁵⁷ Though the

648. For more on Pfeffer’s background and extensive involvement in church-state cases, see J. David Holcomb, *Religion in Public Life: The “Pfefferian Inversion” Reconsidered*, 25 J.L. & RELIGION 57, 69 (2009-2010); and Joseph R. Preville, *Leo Pfeffer and the American Church-State Debate: A Confrontation with Catholicism*, 33 J. CHURCH & ST. 37, 39-41 (1991).

649. See COHEN, *supra* note 63, at 141-42; IVERS, *supra* note 63, at 71-80; see also Michael A. Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy*, 56 SAN DIEGO L. REV. 305, 321 (2019) (“The intervention of Jewish institutions in Supreme Court church-state litigation through the public filing of amicus briefs . . . [became] prolific in the 1940s.”).

650. Brief of the Synagogue Council of America & National Community Relations Advisory Council & Motion for Leave to File Brief as Amici Curiae at xiii, *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (No. 90), 1947 WL 44388.

651. *Id.* at 2-3.

652. *Id.* at 2.

653. *Id.* at 3 n.3 (emphasis added) (misattributing quotation from CONRAD H. MOEHLMAN, *THE CHURCH AS EDUCATOR* 106 (1947) to CONRAD HENRY MOEHLMAN, *SCHOOL AND CHURCH: THE AMERICAN WAY* (3d ed. 1944)).

654. *Id.* at 3-4 (quoting V.T.T., *Religion in Public Education*, 7 FRONTIERS DEMOCRACY 72, 72 (1940)).

655. See *id.* at vi-x (listing “Other Authorities Cited”); see also COHEN, *supra* note 63, at 142-43 (discussing argument about “divisiveness” and the use of social psychology studies).

656. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 210, 212 (1948).

657. COHEN, *supra* note 63, at 143.

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Court’s decision did not reflect this concern, Justice Frankfurter’s separate opinion (joined by three Justices) did.⁶⁵⁸ Characterizing public schools as the most important “symbol of our democracy and the most pervasive means for promoting our common destiny,” Frankfurter found it “vital to keep out divisive forces.”⁶⁵⁹ As in *Everson*, some of the Justices may have been influenced by anti-Catholic animus or at least suspicions about Catholic intentions regarding public education.⁶⁶⁰

By the late 1940s, CLSA lawyers were firmly convinced that the racial and religious separation of children, challenged in *Mendez* and *McCullum*, respectively, were parallel and that both could be defeated using the psychological harm argument. As Shad Polier detailed in his “Why Jews Must Fight for Minorities” press release, CLSA’s opposition to religion in schools was partially motivated by a general belief in the separation of church and state but “more concretely and particularly, it proceeds from our objection to the group divisiveness, both physical and psychological, which inevitably ensues when the wall of separation is breached.”⁶⁶¹ Polier recalled that the student in *McCullum* had been forced to sit in the hallway during his classmates’ religious training.⁶⁶² This arrangement was “nothing other than segregation based on religious rather than racial grounds,” he claimed.⁶⁶³ “The evil is the same whether it is made manifest in the assignment of Negroes to completely separate facilities or in the separation of children on the basis of their religion”⁶⁶⁴ Because of these similarities, “[t]he fight against segregation is but the obverse side of our long fight for the separation of church and state.”⁶⁶⁵

658. *McCullum*, 333 U.S. at 227-28 (opinion of Frankfurter, J.); see also COHEN, *supra* note 63, at 143.

659. *McCullum*, 333 U.S. at 231 (opinion of Frankfurter, J.). For further discussion, see FELDMAN, *DIVIDED BY GOD*, *supra* note 64, at 178. On how Justice Frankfurter’s background may have shaped his opinions, see *id.* at 154-55, 158. Later that year, Justice Frankfurter hired the Supreme Court’s first black law clerk. MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953*, at 260 (1997).

660. See James E. Zucker, Note, *Better a Catholic Than a Communist: Reexamining McCollum v. Board of Education and Zorach v. Clauson*, 93 VA. L. REV. 2069, 2073, 2086, 2089-92 (2007). Zucker also discusses how Justice Frankfurter’s identity as a Jew and Justice Frank Murphy’s as a Catholic mattered in their deliberations and decisions. *Id.* at 2084.

661. Polier, *supra* note 620, at 3.

662. *Id.* at 3-4.

663. *Id.* at 4.

664. *Id.*

665. *Id.* at 3.

D. The Cold War Divergence of Racial and Religious Civil Rights

Though CLSA and its allies made strides toward what they saw as racial and religious equality in the 1940s, the political milieu of the early 1950s caused these areas of legal reform to diverge. As scholars have detailed, Cold War politics led Americans to embrace public religiosity to combat “godless” communism.⁶⁶⁶ This turn brought significant consequences for religion-related legal advocacy, undermining efforts that could be cast as secular or atheistic. At the same time, as another group of scholars has shown, courts and society became increasingly open to racial civil rights because of demographic shifts, changing stances toward racial equality stemming from World War II,⁶⁶⁷ and efforts to improve the United States’s reputation abroad.⁶⁶⁸

Manifestations of public religiosity arose at the local through federal levels. For instance, in 1951, the New York Board of Regents, which oversaw public schools in the state, proposed that public schools begin the day with the recitation of a “nondenominational” prayer.⁶⁶⁹ Soon hundreds of local school officials adopted the Regents’ Prayer.⁶⁷⁰ The same year, (Catholic) U.S. Attorney General J. Howard McGrath publicly condemned Justice Black’s treatment of the wall of separation during an address to the National Catholic Educational Alliance. “If anything,” McGrath suggested, “the state and church must not have any fence between them.”⁶⁷¹

CLSA lawyers soon began to recognize that Cold War attitudes toward religion complicated their litigation strategies. Among the earliest signs was a series of defeats in their challenge to the New York City Board of Education’s *off-campus* released-time program.⁶⁷² New York judges deciding the case at several levels split along religious lines. As historian Naomi Cohen observed, of the thirteen judges who heard the case, “the two Jews voted against released time and the five Catholics and five of the six Protestants supported it.”⁶⁷³ (Similarly, the best predictor of whether a judge would uphold public assistance

666. See, e.g., COHEN, *supra* note 63, at 149-50; Zucker, *supra* note 660, at 2106.

667. See KLARMAN, *supra* note 138, at 174-96, 290-91.

668. See DUDZIAK, *supra* note 15, at 3-8, 11-12.

669. *Daily Prayer in All Schools Is Urged by State’s Regents*, N.Y. TIMES, Dec. 1, 1951, at 1. The Supreme Court struck down the practice as unconstitutional in *Engel v. Vitale*, 370 U.S. 421, 424, 436 (1962). See generally Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479 (2015) (providing a deep history of *Engel* and its consequences).

670. KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA 172, 175 (2015).

671. COHEN, *supra* note 63, at 151.

672. See *id.* at 146-49.

673. *Id.* at 150.

to parochial schools in these years was the judge’s religion.⁶⁷⁴) A New York trial court approved the state’s released-time policy, writing: “[h]istorically and inherently the people of our country are predominantly a religious people.”⁶⁷⁵

When New York City’s released-time policy appeared before the U.S. Supreme Court in *Zorach v. Clauson*, Pfeffer and his coauthors repeated claims from *McCullum* that released time “segregated” children by religion and was “divisive.”⁶⁷⁶ This time a majority of the Justices were unpersuaded. In the 1952 opinion, written by Justice Douglas, the Court found New York’s released-time program constitutional.⁶⁷⁷ Justice Douglas famously proclaimed (somewhat echoing the New York judges): “[w]e are a religious people whose institutions presuppose a Supreme Being.”⁶⁷⁸ In his careful analysis of this case, James Zucker concludes: “[w]hereas *McCullum* had been decided in a moment of widespread anti-Catholicism, *Zorach* was decided in a moment of widespread opposition to ‘Godless’ communism.”⁶⁷⁹

In regrouping after their *Zorach* loss, CLSA lawyers retained faith in the persuasiveness of psychological research. Much like their reaction after *Mendez*, they thought the solution was *more* studies. “We must build up a library of published information on the actual effects of sectarian intrusions upon the public school system,” Pfeffer suggested.⁶⁸⁰ “We know the divisiveness, the psychological problems, facing the lonely Jewish child when Christological practices are brought into the public school classroom Unfortunately, however, there is almost no published literature incorporating our individual knowledge.”⁶⁸¹ This explained why, he believed, the Supreme Court could not understand Jewish groups’ concerns. CLSA needed more studies, “so that when the Supreme Court again faces the issue it will know that our fears are neither imagined nor hysterical.”⁶⁸²

674. Klarman, *supra* note 30, at 60; see also Brian H. Bornstein & Monica K. Miller, *Does a Judge’s Religion Influence Decision Making?*, 45 CT. REV. 112, 112-15 (2009) (finding judges’ religions predictive in several contexts).

675. *Lewis v. Spaulding*, 85 N.Y.S.2d 682, 684, 689-90 (Sup. Ct. 1948). For a discussion about the case, see COHEN, *supra* note 63, at 155.

676. Brief for Appellants at 20-22, 70, *Zorach v. Clauson*, 343 U.S. 306 (1952) (No. 431), 1952 WL 82539.

677. *Zorach*, 343 U.S. at 312-15.

678. *Id.* at 313.

679. Zucker, *supra* note 660, at 2074.

680. Leo Pfeffer, *The Outlook in the Struggle for Church-State Separation*, Address Before the Institute on Religion and Public Education of the Central Conference of American Rabbis 6 (May 7, 1952), AJC Papers, Box 30, Folder 3.

681. *Id.*

682. *Id.*

Yet psychological data alone seemed unequal to the task as setbacks mounted, including in efforts Justine Polier and Shad Polier pursued in their roles outside AJC. In September 1951, a Catholic judge (who had replaced O’Brien⁶⁸³) proposed that the Domestic Relations Court’s Probation Department “be directed to recognize the importance of having the child adhere to the performance of his or her religious duties in accordance with the faith of the parents of said child.”⁶⁸⁴ The three Jewish judges remaining on the bench who had been appointed by Mayor La Guardia (Justices Polier, Panken, and Sicher) and the one black judge in attendance (Justice Delany) objected.⁶⁸⁵ Justice Polier condemned the proposal as a violation of the separation of church and state and the constitutional rights of parents.⁶⁸⁶ After Justice Delany left the meeting early, the vote was eight to three—Catholics, Protestants, and a Jewish justice who had not been present for the previous religion-related disagreements versus Justices Polier, Sicher, and Panken.⁶⁸⁷

The Poliers also lost constitutional challenges to religion-matching adoption laws they pursued after Justine became chair of her mother’s adoption agency and Shad its attorney.⁶⁸⁸ In lawsuits in New York and Massachusetts, Shad Polier and other CLSA lawyers represented the interests of Jewish would-be parents who were denied the ability to adopt children born

683. See *Walter McClancy Appointed Judge*, *supra* note 413.

684. Board of Justices Meeting Minutes (Sept. 12, 1951), at 1, JWP Papers, Box 29, Folder 360 (quoting the proposed resolution). This built on the earlier practice of Catholic probation officers contacting the parish priests of each child probationer. See *Our Catholic Charities: Protective Care*, TABLET (Brook.), May 3, 1941, at 13.

685. Board of Justices Meeting Minutes, *supra* note 684, at 1-3; Summary of Meeting of the Board of Justices, September 12, 1951, at 1-2 (1951), JWP Papers, Box 29, Folder 360. Catholic efforts to use family courts in furtherance of religion may have seemed particularly threatening in these years; in 1949, the Pope forbade Catholic judges worldwide from effectuating divorce laws, even when presiding over non-Catholic couples. Leo Pfeffer, CHURCH, STATE, AND FREEDOM 258-59 (rev. ed. 1967).

686. Board of Justices Meeting Minutes, *supra* note 684, at 2.

687. *Id.* at 1-2. For the religious identities of the justices appointed by Mayor La Guardia, see Appendix below. The newest Jewish justice was Louis Lorence. See *Louis Lorence, 78, Justice for 10 Years*, N.Y. TIMES, Sept. 7, 1966, at 41; *New Judges of the Domestic Relations Court*, N.Y. TIMES, Oct. 29, 1947, at 7. Justice Lorence did not explain his reasoning, so it is unclear why he differed from his Jewish colleagues on this issue. Summary of Meeting of the Board of Justices, September 12, 1951, *supra* note 685, at 1-3. Two other votes in favor came from Justices Patrick Fogarty and James Lanzetta, *id.*, both of whom were Catholic. On Justice Fogarty, see *Patrick Fogarty Is Dead at 80; Former Justice of Family Court*, N.Y. TIMES (Oct. 5, 1972), <https://perma.cc/HF97-9LNV>. On Justice Lanzetta, see 83 CONG. REC. app. at 2240 (1938) (listing James J. Lanzetta as one of the Catholic Congressmen who signed a petition); *James Lanzetta, Justice, 61, Dead*, N.Y. TIMES, Oct. 29, 1956, at 29 (showing that Justice Lanzetta was previously a member of Congress).

688. Herman, *supra* note 164, at 62, 75.

to mothers who had been baptized Catholic.⁶⁸⁹ When CLSA and its allies appealed one of these cases to the U.S. Supreme Court, the Court declined to grant certiorari.⁶⁹⁰ In fact, the Supreme Court declined to accept a single First Amendment religion case from 1953 to 1961.⁶⁹¹

By 1955, CLSA lawyers regarded the First Amendment terrain as treacherous. In response to Maslow’s surprisingly naïve suggestion that CLSA draft “a model state constitutional provision on religious liberty and separation of church and state,” Pfeffer warned that the idea was “fraught with grave dangers.”⁶⁹² Summarizing recent developments in Congress, such as adding “under God” to the pledge of allegiance in 1954, Pfeffer suggested that “in the present religious atmosphere,” tampering with state constitutions was more likely to undermine separation of church and state.⁶⁹³ Shad Polier harshly concurred, writing: “I can imagine no more unwise a project.”⁶⁹⁴ Even though the CLSA lawyers continued to perceive released time as a system of segregation “no less real than the racial segregation imposed upon Negroes in the South,”⁶⁹⁵ they held off on further Establishment Clause litigation.

In the same years that CLSA suffered reversals in its Establishment Clause efforts, the NAACP (often joined by CLSA) celebrated numerous wins in race-related civil rights litigation.⁶⁹⁶ In many of these cases, the civil rights lawyers proffered psychological harm arguments.⁶⁹⁷ CLSA relied on psychological studies in its amicus briefs in *Shelley v. Kraemer* (1948)⁶⁹⁸ and *Henderson v. United*

689. See *Petitions of Goldman*, 121 N.E.2d 843, 843-44, 846 (Mass. 1954) (holding that Jewish parents could not adopt children they cared for from the age of two weeks because the children’s biological mother had been baptized Catholic); *In re Santos*, 105 N.Y.S.2d 716, 717-18 (Sup. Ct. App. Div. 1951) (per curiam) (holding that children baptized Catholic should not have been given to Jewish adoption agency for placement). For additional context, see Pfeffer, *supra* note 302, at 377-93 (critiquing *Goldman*).

690. *Goldman v. Fogarty*, 348 U.S. 942 (1955).

691. Lain, *supra* note 669, at 498.

692. Letter from Leo Pfeffer to Will Maslow (Aug. 3, 1955), SP Papers, Box 3, Folder 8.

693. *Id.*

694. Letter from Shad Polier to Will Maslow & Leo Pfeffer (Aug. 5, 1955), SP Papers, Box 3, Folder 8.

695. LEO PFEFFER & PHIL BAUM, COMM’N ON LAW & SOC. ACTION, PUBLIC SCHOOL SECTARIANISM AND THE JEWISH CHILD: A REPORT OF EXPERIENCES 18 (1957), AJC Papers, Box 584, Folder 17.

696. For a fuller treatment, see SVONKIN, *supra* note 13, at 95-97.

697. Mark Tushnet provides a similar account, but his blurring of sociological and psychological arguments somewhat obscures this point. Moreover, his account does not mention Jewish involvement. See MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 118-37 (2004 ed.).

698. Brief of the American Jewish Congress, Amicus Curiae at 24, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72 et al.), 1947 WL 44161. AJC’s brief repeatedly referred to both “racial and religious restrictive covenants.” *E.g., id.* at 21 (emphasis added).

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States (1950),⁶⁹⁹ and LDF did so in its briefs in *McGhee v. Sipes* (1947),⁷⁰⁰ *McLaurin v. Oklahoma State Regents for Higher Education* (1950),⁷⁰¹ and *Sweatt v. Painter* (1950).⁷⁰² By the time both organizations submitted briefs in *Brown* (the NAACP representing the plaintiffs, and CLSA in the role of amicus), they had perfected this point.⁷⁰³ This strategy famously culminated in the Supreme Court’s string cite to psychologists—including (Kenneth) Clark, Chein, and Deutscher—in *Brown*’s footnote eleven.⁷⁰⁴

Though the Cold War provided a boost to race-related civil rights litigation, it harmed civil rights organizations. Senator Joseph McCarthy’s fearmongering about Communists caused left-leaning organizations to distance themselves from possibly controversial efforts and people.⁷⁰⁵ Like many developments in national politics, this episode took a particular hold in New York City. One of the many prominent Catholics to support McCarthy was Cardinal Spellman, who suspected that the civil rights movement was backed by Communists.⁷⁰⁶ The NAACP and AJC were among the

699. Motion & Brief of American Jewish Congress as Amicus Curiae at 22, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25), 1949 WL 50334.

700. Brief for Petitioners at 61-62, *McGhee v. Sipes*, 334 U.S. 1 (1948) (No. 87), 1947 WL 30427. *McGhee* was decided alongside *Shelley*.

701. Brief for Appellant at 25-26, 25 n.29, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (No. 34), 1950 WL 78675.

702. Brief for Petitioner at 27 & n.32, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44), 1950 WL 78681.

703. See Brief for Appellants at 8-11, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), 1952 WL 47265; Brief of American Jewish Congress as Amicus Curiae at 16-19, *Brown*, 347 U.S. 483 (No. 1), 1952 WL 47254. The appellants’ brief in *Brown* included an appendix authored by Kenneth Clark, Isidor Chein, and Stuart Cook, and signed by thirty-two other experts, that summarized social science evidence about the psychological and other consequences of segregation. Brief for Appellants, *supra*, at app. Cook had taken over as the director of CCL. See JACKSON, *supra* note 603, at 99.

704. *Brown*, 347 U.S. at 494 n.11. According to Jackson, Clark is the psychologist most often remembered from footnote eleven because his doll studies received the most criticism after the case. See Jackson, *supra* note 626, at 240-49 (examining historical and contemporary criticism). Sanjay Mody offers the provocative claim that the Court’s brevity in footnote eleven indicates that the psychology studies did not meaningfully inform the Justices’ analysis. Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 810 (2002). It is also possible that the Justices did not feel the need to elaborate because they did not regard the psychological harm argument as novel by this point. (Further to this point, Feldman notes that the trial court relied on social sciences sources too. FELDMAN, *supra* note 137, at 479 n.68.) Some of Mody’s other evidence postdates the decision, Mody, *supra*, at 812-13, and could merely reflect law clerks’ and others’ surprise at the poor reception the footnote received.

705. See BIONDI, *supra* note 9, at 165-67; SVONKIN, *supra* note 13, at 132-33.

706. See JOHN COONEY, *THE AMERICAN POPE: THE LIFE AND TIMES OF FRANCIS CARDINAL SPELLMAN* 217-19, 282-84 (1984); Richard Gid Powers, *American Catholics and Catholic footnote continued on next page*

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organizations that moderated their advocacy and associations to avoid accusations of Communist sympathizing.⁷⁰⁷ As a result, Justice Bolin publicly condemned the NAACP for becoming “sterile and barren” and decided to resign (though she credited the LDF with doing a “superb job”).⁷⁰⁸ The Poliers and Justice Delany were accused of being Communist sympathizers because of their earlier membership in the IJA or the National Lawyers Guild (NLG) that absorbed it, as well as various other activities and associations.⁷⁰⁹ In response, the Poliers claimed that they cut Communists from AJC, though they also pushed back against McCarthyism.⁷¹⁰ For Justice Polier, the only official consequence was a brief withholding of her passport.⁷¹¹

Justice Delany suffered far worse for his alleged association with Communists. In 1955, Mayor Robert F. Wagner, who was Catholic,⁷¹² declined

Americans: The Rise and Fall of Catholic Anticommunism, U.S. CATH. HISTORIAN, Fall 2004, at 17, 28.

707. See BIONDI, *supra* note 9, at 164-67 (explaining how the “anticommunist crusade” undermined and restricted various black civil rights efforts); SVONKIN, *supra* note 13, at 169-70 (“Despite its stalwart dedication to civil liberties, the AJCongress participated in the campaign to remove communists and their supporters from Jewish communal life.”).
708. *Judge Jane Bolin Blasts NAACP, Quits Board*, L.A. SENTINEL, Mar. 16, 1950, § A, at 1 (quoting a lengthy letter from Justice Bolin alleging, for instance, that “[o]ur organization has blown the Communists up to such fantastic proportions that we give them more of our attention and time than we do the American Negro”). For more discussion of Justice Bolin’s public rift with the NAACP, see BIONDI, *supra* note 9, at 167-69; and MCLEOD, *supra* note 271, at 79-105. Meanwhile, Justice Delany remained heavily involved in the NAACP, which likely led to an interesting dynamic between the colleagues. For instance, in 1953, Delany was a member of the National Board of the NAACP and delivered remarks at an NAACP convention in which he condemned “leaders who put their faith in gradualism.” *NAACP Ends Meeting on Note of Optimism—Gradualism Is Attacked*, J. & GUIDE (Norfolk, Va.), Oct. 17, 1953, at 1.
709. On the accusations against the NLG (and how the IJA was absorbed into it), see H.R. REP. NO. 81-3123, at 1, 13, 19 (1950) (also noting Shad Polier’s involvement in IJA and Justice Delany’s membership on the executive board of NLG). The NLG’s original executive board included Shad Polier, Charles Hamilton Houston, and many other influential lawyers involved in race and labor law issues. See *Former Judge Heads New Lawyers’ Guild*, ST. LOUIS POST-DISPATCH, Feb. 23, 1937, § A, at 12.
710. See DOYLE, *supra* note 316, at 119; SVONKIN, *supra* note 13, at 133, 169-70 (describing AJC “anti-anticommunism”).
711. See Affidavit of Justine Wise Polier 1, 3-5, 8-11 (Mar. 6, 1954), SP Papers, Box 8, Folder 13 (disclaiming membership in or sympathy with the Communist Party, explaining involvement with IJA, describing AJC opposition to communism, and providing other related information in an affidavit completed to secure passport renewal).
712. Mayor Wagner was the son of Senator Wagner. Though Senator Wagner was Protestant until 1946, he and his wife raised their son in the wife’s religion of Catholicism. Huthmacher, *supra* note 375, at 333. For more detail on Mayor Wagner’s
- footnote continued on next page*

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to reappoint Justice Delany to the bench because of his “Left-Wing views.”⁷¹³ Some New Yorkers speculated that Catholic leaders had demanded this result because of Justice Delany’s involvement in black-Jewish efforts, including in the area of separation of church and state.⁷¹⁴ The NAACP and black community members were especially outraged.⁷¹⁵ The fact that the mayor replaced Justice Delany with another black male lawyer associated with the NAACP did not override condemnation of how the move seemed to punish and stifle outspoken civil rights advocacy.⁷¹⁶

political career, see James F. Clarity, *Robert Wagner, 80, Pivotal New York Mayor, Dies*, N.Y. TIMES (Feb. 13, 1991), <https://perma.cc/7229-FZVE>.

713. Charles G. Bennett, *Court Post Denied Delany; Mayor Critical of His Views*, N.Y. TIMES, Sept. 14, 1955, at 1.
714. BIONDI, *supra* note 9, at 179. The *Tablet* had been questioning Justice Delany’s position since at least 1952. See, e.g., *Disturbing Remarks*, TABLET (Brook.), Feb. 2, 1952, at 10 (“[W]e find it hard to believe that one who publicly stresses racial differences and attacks those who are attempting to fight the menace of Communism should be in the post.”).
715. Kenneth Clark resigned from the educational subcommittee of the Mayor’s Advisory Committee in protest. *Clark Resigns in Protest from Board*, N.Y. AMSTERDAM NEWS, Sept. 24, 1955, at 5. For representative coverage of the negative response, see Judith Crist, *Justice Delany Is Denied Reappointment by Mayor*, N.Y. HERALD TRIBUNE, Sept. 14, 1955, at 1; and *Groups Still Protesting Ouster of Judge Delaney [sic]*, ATLANTA DAILY WORLD, Oct. 4, 1955, at 2. In a letter to the mayor supporting Justice Delany’s reappointment, Justice Polier described Delany’s powerful stands against discrimination and specifically noted that “Judge Delany found the use of probation officers in our Court was on a segregated basis and it was through his courageous leadership that the Presiding Justice finally agreed that the assignment of probation officers on a racial basis should cease.” Letter from Justine Wise Polier to Robert Wagner, Mayor of New York City 1 (Sept. 1, 1955), JWP Papers, Box 41, Folder 502.
716. See Bennett, *supra* note 713. The replacement was Edward R. Dudley, who had worked for the NAACP legal team and had served as the first U.S. Ambassador to Liberia. Crist, *supra* note 715; Wolfgang Saxon, *Edward R. Dudley, 93, Civil Rights Advocate and Judge, Dies*, N.Y. TIMES (Feb. 11, 2005), <https://perma.cc/5WXB-4E8C>.

NAACP Officers of N.Y. Branch Installed



Judge Hubert Delany, right, installs new officers for New York branch of NAACP. Left to right, Mrs. Mildred Dennis, financial secretary; Mrs. Aretha McKinley, secretary; Lindsay White, president; Mrs. Aloncia Flood, treasurer; Edward W. Jacko; 1st vice president; Judge Jane Bolin, 2nd vice president.

Justice Delany (far right) installs New York NAACP officers, including Justice Bolin as Second Vice President (second from right).⁷¹⁷

Photo Credit: Courtesy of the *AFRO American Newspapers Archive*

E. The Failure of the Religion-Blind Argument

Though Establishment Clause litigation seemed precarious by the 1950s, the continued application of religion matching in the juvenile probation context offered CLSA lawyers another avenue to challenge the place of religion in public life: an employment discrimination suit. Presiding Justice Hill openly acknowledged that he limited the number of Jewish probation officers assigned to the Children's Court Division to 5% to reflect the Jewish community's share of the juvenile delinquent population.⁷¹⁸ (The Jewish population of the city remained around one-third,⁷¹⁹ and Jews disproportionately

717. *NAACP Officers of N.Y. Branch Installed*, *AFRO-AM*. (Balt.), Jan. 28, 1950, at 15. Later that year, Justice Bolin resigned from the National Board. See *supra* note 708 and accompanying text.

718. John Warren Hill, Letter to the Editor, *Choice of Probation Staff*, *N.Y. TIMES*, Nov. 3, 1955, at 30 (explaining that "the vast majority of probation officers in our Children's Court have to be Protestant and Catholic" because only 5% of juvenile delinquents were Jewish, but observing that 42% of probation officers in the Family Court Division were Jewish).

719. See *supra* note 74 and accompanying text.

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chose to pursue careers in social work.⁷²⁰) In addition to limiting Jewish social workers’ employment prospects, this policy resulted in de facto race matching. Most white Protestant social workers were able to get more lucrative jobs in private agencies, so in practice the Domestic Relations Court employed three categories of officers: Catholic, Jewish, and (African American) Protestant.⁷²¹ Using employment law to challenge religion matching could cut against this racial and religious segregation and also provide an attractive, albeit indirect, path to secure a win for separation of church and state.

In 1951, the employment discrimination consequences of probation matching were highlighted in a paper laced with Cold War rhetoric, titled “Racial and Religious Democracy: Its Effect on Correctional Work.”⁷²² Caroline Simon, a Jewish lawyer who had been one of the original four SCAD Commissioners,⁷²³ presented the paper to the National Probation and Parole Association (NPPA). Framing her discussion with remarks about how America needed to eliminate its “Achilles heel of undemocratic discrimination” in order to “fight against those ideologies competing against ours for supremacy,” Simon cast New York’s religion-matching laws as harmful employment discrimination that undermined rehabilitation.⁷²⁴ Nondiscrimination would increase the eligible candidate pool, she asserted, and would send an important message: “If our probationers and parolees come from a setting in which they have seen democracy function, they will more easily make adjustment to social living.”⁷²⁵

A civil rights challenge to religion matching also seemed politically viable because of fault lines revealed in an analogous dispute in 1952. When the state legislature considered a law that would grant the Children’s Court Division

720. It is unclear whether pertinent statistics exist on the social work profession in these years, but a study published in 1964 found that over 14% of social work students in the country were Jewish, while Jews comprised 4% of the population. Arnulf M. Pins, *The Jewish Social Work Student: Some Research Data About Him and Their Implications for the Shortage of Jewish Community Center Workers*, 41 J. JEWISH COMMUNAL SERV. 88, 92 (1964). Moreover, of personnel in the field of social welfare, 80% of workers in Jewish social service had completed professional social work education, whereas in the overall social service field only 20% of people had done so. *Id.* at 90-91.

721. Memorandum from Will Maslow to Shad Polier 3 (Dec. 16, 1954), Walter Gellhorn Papers 1930-1992, MS 1487 [hereinafter WG Papers], Box 20, Folder 44 (on file with the Rare Book & Manuscript Library, Columbia University).

722. Caroline K. Simon, *Racial and Religious Democracy: Its Effect on Correctional Work*, in THE COMMUNITY AND THE CORRECTIONAL PROCESS: 1951 YEARBOOK 205, 205 (Marjorie Bell ed., 1951).

723. Bruce Lambert, *Caroline K. Simon Is Dead at 92; Led Fight Against Discrimination*, N.Y. TIMES (July 30, 1993), <https://perma.cc/JY6M-MDJG>.

724. Simon, *supra* note 722, at 205-07, 217.

725. *Id.* at 209.

jurisdiction over children needing psychiatric care, one state senator introduced a bill that would require religion matching of children to court-ordered psychiatrists.⁷²⁶ Though it is unclear from newspaper coverage whether that senator was motivated by personal convictions or was lobbied by a particular group, the reaction was unambiguous. Jewish and Protestant groups, as well as medical organizations and individual psychiatrists, objected.⁷²⁷ Jewish leaders warned against religious quotas and saw a slippery slope toward consideration of religious affiliation for doctors, judges, legislators, and lawyers.⁷²⁸ Justice Panken published a column condemning the proposal as "un-American" and bemoaning that there was "already too much scattering of our child population into various groupings. Let us minimize it rather than spread it further."⁷²⁹

Most important for CLSA's later strategizing, the Chairman of the (Episcopalian) Inter-Diocesan Committee on Legislation cast the bill as "utterly unnecessary, unwise and mischievous."⁷³⁰ Emphasizing psychiatry's scientific grounding, he continued: "There is no such thing as Catholic, Jewish or Protestant psychiatry, any more than there is Catholic, Jewish or Protestant surgery."⁷³¹ The Cold War vision of tri-faith America shone through as the chairman forcefully condemned the proposal as "tend[ing] to further the cultural divisions that exist among us, to build up a veritable iron curtain between the three great faiths—and this at a time when America needs unity as never before in her history."⁷³² The psychiatrist religion-matching bill did not pass.

Studies published in the following years, likely geared toward persuading Presiding Justice Hill to voluntarily stop the religion-matching probation policy, also provided fodder for an employment discrimination claim. In 1953, the Citizens' Committee for Children of New York City—in which the Poliers, Justice Delany, and Justice Bolin were active members⁷³³—commissioned

726. Leland B. Henry, Letter to the Editor, *Psychiatric Care of Children*, N.Y. TIMES, Mar. 7, 1952, at 22 (describing the origin of the proposal).

727. Editorial, *A Bill That Needs Mending*, N.Y. TIMES, Mar. 15, 1952, at 12; *Child Aid Proviso Scored*, N.Y. TIMES, Mar. 8, 1952, at 19; Henry, *supra* note 726; Manfred Sakel, Letter to the Editor, *Psychiatry as a Science*, N.Y. TIMES, Mar. 29, 1952, at 14.

728. *Child Aid Proviso Scored*, *supra* note 727.

729. Jacob Panken, Letter to the Editor, *To Treat Disturbed Children*, N.Y. TIMES, Mar. 12, 1952, at 26.

730. Henry, *supra* note 726.

731. *Id.*

732. *Id.*

733. See Original Sponsors and Persons Suggested as Members of the Citizens' Committee (n.d.), JWP Papers, Box 30, Folder 390 (listing Justices Polier and Delany); see also Letter from Susan Harwig, Research Assoc., Citizens' Comm. for Children of N.Y.C., Inc. to Hon. Justine Polier, Justice, N.Y.C. Domestic Relations Court (Dec. 2, 1959), JWP
footnote continued on next page

Columbia University social work professor Alfred Kahn to study the Children’s Court.⁷³⁴ Kahn concluded that religion matching caused geographic inefficiencies, had no evidentiary basis, and was “a questionable practice under New York State’s antidiscrimination law and policy.”⁷³⁵ Another critical account followed the next year, when a Columbia Law School professor with ties to AJC⁷³⁶ expressed “grave concern” about the legality of the “religious census” of children this policy presupposed and the “quota basis” of employing probation officers.⁷³⁷

After these efforts failed to persuade Presiding Justice Hill to stop religion matching, CLSA filed a complaint with SCAD in January 1955.⁷³⁸ CLSA’s central claim was that Presiding Justice Hill’s practice was in flagrant violation of state laws against employment discrimination because he imposed a religion-based quota in hiring probation officers for the Children’s Court Division. This was religion-based “segregation,” Shad Polier, Maslow, and Pfeffer maintained in CLSA’s memorandum.⁷³⁹ Though the probation law required matching children to officers by religion “when practicable,” they acknowledged, this rule “simply” meant that the probation officer in charge should assign his already-hired colleagues by religion “to the extent that it is practicable.”⁷⁴⁰ The law did not dictate or permit consideration of religion at the appointment stage.⁷⁴¹ Moreover, they observed, Presiding Justice Hill had

Papers, Box 30, Folder 390 (listing on the Citizens Committee for Children of New York City’s letterhead Justice Polier as a Vice President; Justice Delany, Justice Bolin, and Shad Polier as Committee Members; and Kenneth Clark and Eleanor Roosevelt as members of the Board of Directors).

734. KAHN, *supra* note 353, at v (“This study was carried out under the auspices of the Citizens’ Committee on Children of New York City, Inc.”).

735. *Id.* at 300.

736. Robert McG. Thomas Jr., *Walter Gellhorn, Law Scholar and Professor, Dies at 89*, N.Y. TIMES (Dec. 11, 1995), <https://perma.cc/F424-UALK>. For evidence of Gellhorn’s ties to AJC, including candid discussion of the probation matching issue, see for example, Letter from Walter Gellhorn to Will Maslow, AJC (Jan. 3, 1955), WG Papers, Box 20, Folder: Family Law—Administration; and Letter from Will Maslow, AJC, to Walter Gellhorn, Professor, Columbia Law Sch. (Dec. 30, 1954), WG Papers, Box 20, Folder: Family Law—Administration.

737. Walter Gellhorn assisted by Jacob D. Hyman & Sidney H. Asch, *A Study on the Administration of Laws Relating to the Family in the City of New York*, in CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 118-23 (1954).

738. *A.J.C. Complains of Bias in Hiring Probation Aids*, N.Y. HERALD TRIB., Jan. 25, 1955, at 5.

739. Complainant’s Memorandum of Law at 5, *Am. Jewish Cong. v. Hill*, No. C-3734-55, (N.Y. State Comm’n Against Discrimination Apr. 28, 1955). Filings in this case were drawn from the Papers of Shad Polier, held by American Jewish Historical Society, and the official case file held by the New York State Archives in Albany, New York.

740. *Id.* at 2, 7 (quoting Domestic Relations Court Act, ch. 482, § 25, 1933 N.Y. Laws 1038, 1048 (1933)).

741. *Id.* at 7.

been inconsistent in his own interpretation of the statute because he had not employed a “religious quota” for the Family Court Division, despite similar statutory language enacted for that part in 1941.⁷⁴² The fact that Presiding Justice Hill hired Jewish officers for the Family Court Division did not undercut AJC’s antidiscrimination claims because the Family Court Division work was inferior. Family Court officers were basically child support debt collectors, whereas Children’s Court officers performed real social work.⁷⁴³

The CLSA trio also waded into complex and evolving constitutional law doctrine. Building from the proposition that the “principal victims” of Presiding Justice Hill’s “religious quota system” were the children “deprived of desperately needed competent probation service,”⁷⁴⁴ they also argued that protecting these children’s welfare was of sufficient importance to justify “infringement upon such important constitutional liberty as the free exercise of religion.”⁷⁴⁵ They discussed federal and state constitutional law on religious oaths, religious freedom, and separation of church and state, and claimed that the religion-matching practice constituted denial of equal protection of the laws and deprivation of liberty and property in violation of the Fourteenth Amendment.⁷⁴⁶

Presiding Justice Hill objected to CLSA’s characterization of his hiring practices as a matter of law and fact, though he did not engage on the constitutional claims. Hill’s primary defense was that the matching law dictated his hiring practices. He asserted that the views of groups and individuals who disapproved of his approach “have no weight in the face of the legislative statute which specifically directs assignment on this basis.”⁷⁴⁷ The legislature had demonstrated “its belief in the value of religion in child guidance and in the importance of religious identification in this respect” through a law that was “still on the books.”⁷⁴⁸ Furthermore, Hill pointed to the number of Jewish probation officers he hired for the Domestic Relations Court overall, rather than in just the Children’s Court Division, to argue he was not

742. *Id.* at 8-9.

743. *See id.* at 4-5; Gellhorn, *supra* note 737, at 165, 175, 177; *see also* Katz, *supra* note 141, at 1293-94.

744. Complainant’s Memorandum of Law, *supra* note 739, at 15.

745. *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944); and *People v. Donner*, 99 N.Y.S.2d 830 (N.Y.C. Dom. Rel. Ct. 1950), *aff’d*, 103 N.Y.S.2d 757 (App. Div.), *aff’d*, 100 N.E.2d 48 (N.Y. 1951)).

746. Complainant’s Memorandum of Law, *supra* note 739, at 16-21. For a draft with Justice Polier’s handwritten edits, see Draft of Complainant’s Memorandum of Law (n.d.), JWP Papers, Box 22, Folder 264.

747. Affidavit of Hon. John Warren Hill at 10, *Am. Jewish Cong. v. Hill*, No. C-3734-55 (N.Y. State Comm’n Against Discrimination Apr. 28, 1955).

748. *Id.*

discriminating.⁷⁴⁹ Outside the formal filings, Hill played on Cold War religiosity and echoed defenses that had been offered for race matching to defend his policy. In a column printed in the *New York Times*, he suggested that “religion is of value in the reclamation of a child, and . . . a probation officer of the same religious faith as that of the child’s parents can speak with greater acceptance and can secure better cooperation from the parents.”⁷⁵⁰

The SCAD matter proceeded slowly,⁷⁵¹ which rendered the religion-matching conflict a lightning rod for several rounds of press.⁷⁵² Shad Polier deliberately drummed up some of this coverage, writing to newspaper editors that the issue was “one of the most important controversies in the entire constitutional history of this country over religious freedom and separation of church and state.”⁷⁵³ Social work and religious leaders debated the constitutionality and practical consequences of the hiring practices in the *New York Times* and in public meetings. Like the earlier psychiatry dispute, participants discussed the significance of religion in treatment (with probation exercising a more tenuous claim on being scientific than psychiatry), the legitimacy of a public agency considering religious affiliation, and the practical consequences (some alleged the quota resulted in prolonged vacancies and hiring less qualified candidates).⁷⁵⁴

Meanwhile, the Poliers and their AJC colleagues attempted to win prominent organizations and leaders to their side in vain.⁷⁵⁵ Many groups rebuffed CLSA’s invitation to take a public stand, likely because they did not want to become entangled in a contentious sectarian divide. The NAACP was remarkably silent.⁷⁵⁶ The NPPA, the New York governor’s office, and the New

749. *Id.* at 3, 5.

750. Hill, *supra* note 718.

751. For a general summary of how the conflict unfolded, see Theodore Leskes, *Civil Rights*, 58 AM. JEWISH Y.B. 96, 126-27 (1957).

752. See, e.g., Peter Kihss, *Probation “Bias” to Be Restudied*, N.Y. TIMES, July 18, 1955, at 21; *Probation Unit Hit for Barring Public*, N.Y. TIMES, Nov. 2, 1955, at 71; *Religious Quota on Jobs Decried*, N.Y. TIMES, May 6, 1955, at 25.

753. Letter from Shad Polier, Am. Jewish Cong., to James Wechsler, N.Y. Post 1 (Nov. 1, 1955), SP Papers, Box 1, Folder 8.

754. E.g., Kenneth D. Johnson, Letter to the Editor, *Probation Staff Shortage*, N.Y. TIMES, Oct. 29, 1955, at 18 (identifying Johnson as the Dean of New York School of Social Work at Columbia University); Robert McC. Marsh, Letter to the Editor, *Choosing Probation Officers*, N.Y. TIMES, Dec. 28, 1955, at 22; *Religious Groups Debate Court Work*, N.Y. TIMES, Nov. 5, 1955, at 20.

755. See, e.g., Letter from Shad Polier, Chairman, Exec. Comm., AJC, to Walter P. Offutt, Jr., Protestant Council of the City of N.Y. (Sept. 23, 1955), SP Papers, Box 1, Folder 8.

756. It would be valuable to explore the NAACP’s stance in their own archives. Risa Goluboff found that the NAACP opposed proportional hiring by race in the late 1940s because it could have backfired and was “antithetical to the antidiscrimination ideal the lawyers embraced.” Goluboff, *supra* note 501, at 1456 n.314, 1482 n.417.

York City Bar offered weak excuses.⁷⁵⁷ Most disappointing to the Poliers, an African American leader they had supported in becoming a member of the Civil Service Commission suggested that the matter would be appropriately addressed through legislative reform.⁷⁵⁸

AJC and the Poliers also courted Protestant leaders unsuccessfully. One person they sought to persuade was Arthur Swift, Jr., a well-connected professor of church and community, who claimed insight into the views of the city's Protestant Council.⁷⁵⁹ As the issue was unfolding in the press, Swift published a letter in the *New York Times* arguing that the real "weakness, if one exists" in Presiding Justice Hill's policy was that it did not ensure officers were actually practicing the faith whose label they wore.⁷⁶⁰ In private correspondence, Justice Polier told Swift that she was greatly "disturbed" by his perspective.⁷⁶¹ Referencing the psychiatrist controversy as well as an effort that had been underway to allocate positions on the Board of Education by religion, Justice Polier suggested that Swift did not recognize "the increasing fractionalizing of public life that is being pressed by religious institutions, often, I feel, for reasons other than the strengthening of religion in its true sense."⁷⁶² Drawing from her twenty years on the bench, Justice Polier described finding sectarian groups woefully unavailable when the court sought their assistance on a voluntary basis. The court had been forced "to beg the various religious groups" to assist, she recalled, and Protestant treatment of black children was particularly poor.⁷⁶³ "I have reluctantly come to the conclusion," Justice Polier continued, "that too many of our religious

757. Letter from Jonathan B. Bingham, Sec'y to the Governor of N.Y., to Shad Polier, AJC (Oct. 11, 1955), SP Papers, Box 1, Folder 8; Letter from Allen T. Klots, President, Ass'n of the Bar of the City of N.Y., to Shad Polier, AJC (Jan. 5, 1956), SP Papers, Box 1, Folder 8; Letter from Will C. Turnbladh, Exec. Dir., Nat'l Prob. & Parole Ass'n, to Shad Polier, Polier, Midonick & Armstrong (Oct. 24, 1955), SP Papers, Box 1, Folder 8. The NPPA was in an awkward position on this matter because its Board of Trustees included Presiding Justice Hill and Caroline Simon. See Letter from Will C. Turnbladh, Exec. Dir., Nat'l Prob. & Parole Ass'n, to Walter Gellhorn, Professor, Columbia Univ. (Dec. 29, 1952), WG Papers, Box 20, Folder: Family Law—Administration (displaying NPPA trustees on letterhead).

758. See Shad Polier, AJC, to Kenneth Johnson, Dean, N.Y. Sch. for Soc. Work, 2-3 (Nov. 25, 1955), SP Papers, Box 1, Folder 5 (describing a conversation between Shad Polier and the member of the Civil Service Commission).

759. *Dr. Arthur L. Swift, Jr. Is Dead; Former Dean at New School*, 78, N.Y. TIMES (Sept. 11, 1970), <https://perma.cc/KKD5-8J9X>.

760. Arthur L. Swift, Jr., Letter to the Editor, *Religion in Rehabilitation*, N.Y. TIMES, Dec. 3, 1955, at 16.

761. Justine Wise Polier, to Arthur L. Swift, Jr., Professor, Union Theological Seminary 1 (Dec. 29, 1955), SP Papers, Box 1, Folder 5.

762. *Id.*

763. *Id.* at 1-2.

institutions and agencies . . . are seeking short cuts through which those in need may be forced to comply with religious obligations as a condition to receiving human service.”⁷⁶⁴

Catholic leaders also publicized their perspective. The National Catholic Welfare Council News Service, which was charged with disseminating stories for use in Catholic publications, was one avenue.⁷⁶⁵ In November 1955, it included a piece that relied heavily on remarks from the head of the Catholic Charities Guidance Institute.⁷⁶⁶ That Catholic leader, described as a “priest-sociologist,” deemed the religion-matching practice “reasonable and proper in all respects.”⁷⁶⁷ Shared religious faith, he observed, helped the probation officer understand “the child’s environment and personality,” which was useful for “overcoming initial resistance and hostility and in developing a basic case work relationship.”⁷⁶⁸

By the end of 1955, the battle lines were drawn and, as a *New York Times* journalist observed: “The primary line of cleavage is between Catholic and Jewish Groups.”⁷⁶⁹ The Roman Catholic Archdiocese of New York supported Presiding Justice Hill’s position, as did the Protestant Council despite “disagreeing in some details.”⁷⁷⁰ Those in opposition included AJC, the Citizens’ Committee on Children of New York City, the Department of Christian Social Relations, the New York Board of Rabbis, and the Dean of the New York School of Social Work.⁷⁷¹ Many other city stakeholders as well as “a number” of Presiding Justice Hill’s colleagues splintered in opinions they were only willing to voice privately⁷⁷² (which was unsurprising coming shortly

764. *Id.* at 2.

765. On the history and purpose of this news service, see Maria Mazzenga, *The Archivist’s Nook: YOU Should Read the Catholic Press—Why?*, CATH. U. AM.: U. LIBR. (Apr. 19, 2018), <https://perma.cc/5UAA-Y6LU>.

766. *Commission Told Appointment of Probation Officer of Same Religion as Child Is “Sound,”* NCWC NEWS SERV., Nov. 7, 1955.

767. *Id.*

768. *Id.* A few days later, the *Tablet* incorporated parts of this piece into its own similar coverage of the probation controversy. See *Religious Issue Stirs Hearings*, TABLET (Brook.), Nov. 12, 1955, at 1.

769. Harrison E. Salisbury, *Concern Deepens in Probation Rift*, N.Y. TIMES, Dec. 18, 1955, § 1, at 1; see also *Religious Groups Debate Court Work*, *supra* note 754.

770. Salisbury, *supra* note 769.

771. *Religious Groups Debate Court Work*, *supra* note 754; Salisbury, *supra* note 769.

772. Salisbury, *supra* note 769.

after Justice Delany was denied reappointment for political reasons⁷⁷³). Groups such as the NPPA "stayed aloof."⁷⁷⁴

Against this contentious backdrop, SCAD searched for a compromise. The assigned Commissioner's first move was to attempt conciliation. In this process, Presiding Justice Hill agreed to stop asking about candidates' religious affiliation before hiring them.⁷⁷⁵ He insisted, however, that he could still consider their religion when assigning them to either the Family Court or Children's Court Divisions.⁷⁷⁶ (Indeed, he even went further, urging the chief probation officer to select for the Children's Court "only those persons for whom their religion has a real significance."⁷⁷⁷) The Commissioner concluded that Presiding Justice Hill's revised practice of asking about religious affiliation only after hiring officers was lawful, and he therefore considered the issue resolved.⁷⁷⁸

Although some news coverage characterized the SCAD decision as an AJC victory,⁷⁷⁹ CLSA did not consider it a win.⁷⁸⁰ In November 1956, CLSA filed a

773. On Justice Delany not being reappointed, see notes 712-16 above and accompanying text.

774. Salisbury, *supra* note 769. In response to this article, the chairman of the Department of Christian Social Relations of the Protestant Council of the City of New York submitted a letter to the *New York Times*, in which he claimed the coverage had been "unbalance[d]" in failing to give sufficient weight to legal and practical arguments and had introduced unnecessary "bitterness" to the issue. Marsh, *supra* note 754. In response to this letter, former Justice Sicher, who upon retiring from the Domestic Relations bench had been appointed to CLSA's Executive Committee, joined the fray. He challenged the letter writer on the law and facts and concluded that he shared the regret over the bitterness aroused by the topic but such was "commonly one of the sorry consequences of any deviation from the fundamental principle of the separation of church and state." Dudley F. Sicher, Letter to the Editor, *Hiring Probation Officers*, N.Y. TIMES, Jan. 17, 1956, at 32. For references to Sicher's membership and position, see Press Release, Am. Jewish Cong. (Mar. 7, 1954), AJC Papers, Box 33, Folder 4.

775. See Memorandum from J. Edward Conway, Comm'r, N.Y. State Comm'n Against Discrimination, to John Sullivan, Am. Jewish Cong. v. Hill, No. C-3734-55 (N.Y. State Comm'n Against Discrimination June 28, 1956).

776. Letter from Hon. John Warren Hill, Presiding Justice, N.Y.C. Domestic Relations Court, to Clarence Leeds, Chief Prob. Officer, N.Y.C. Domestic Relations Court (June 27, 1956), New York State Division of Human Rights Discrimination Case Files (on file with the N.Y. State Archives).

777. *Id.*

778. Decision & Determination After Investigation & Conference at 13-14, *Am. Jewish Cong.*, No. C-3734-55 (N.Y. State Comm'n Against Discrimination Apr. 28, 1955).

779. *E.g.*, Milton Bracker, *Religion Barred as Test in Hiring Probation Aides*, N.Y. TIMES, July 10, 1956, at 1.

780. See Justine Wise Polier, Letter to the Editor, *Assigning Probation Work*, N.Y. TIMES, Aug. 6, 1956, at 17 (alleging, inter alia, that Jewish social workers could not get Children's Court posts regardless of merit, while Catholics could serve provisionally
footnote continued on next page

motion for reconsideration that departed from the religion-heavy arguments of its first brief and instead analogized to racial civil rights.⁷⁸¹ Evoking their amicus brief in *Mendez*, CLSA lawyers argued that *even if* the Family Court and Children's Court Divisions were identical, the practice of assigning officers by religion was unlawful. Citing *Brown*, they declared: "The law condemns discrimination not merely when it means loss of benefits but generally when it means that the treatment of individuals depends on their race or religion."⁷⁸² But they reasoned from race too late to prevail. The SCAD Chairman concluded that there was no reason to reopen the case.⁷⁸³ CLSA's superficial victory before SCAD provided minimal precedential or publicity value for their other challenges to religious discrimination, instead serving as a sign of difficulties to come.⁷⁸⁴ Though religion matching in probation likely ended with Presiding Justice Hill's retirement in 1959,⁷⁸⁵ the law remains on the books.⁷⁸⁶

Conclusion

In discussing their careers after their retirements in the 1970s, Justices Bolin and Polier recalled each other and Justices Delany and Sicher as their

even if they lacked educational requirements). For a direct response, see John Warren Hill, Letter to the Editor, *City's Probation Officers*, N.Y. TIMES, Aug. 25, 1956, at 14.

781. Memorandum of Law on Application for Reconsideration at 43-44, *Am. Jewish Cong.*, No. C-3734-55 (N.Y. State Comm'n Against Discrimination Nov. 1956).

782. *Id.* at 43.

783. Disposition on Application for Reconsideration to the Chairman at 2-3, *Am. Jewish Cong.*, No. C-3734-55 (N.Y. State Comm. Against Discrimination n.d.).

784. When the Supreme Court began granting certiorari in religion cases again in the 1960s, CLSA returned to its psychological harm arguments and achieved some wins. In *Engel v. Vitale* (a school prayer case), Pfeffer and Shad Polier participated in drafting an amicus brief that cited Chein to argue that the minority-religion children were pressured to conform lest they "be something of an outcast and a pariah." Brief of Synagogue Council of America & National Community Relations Advisory Council as Amici Curiae at 22, *Engel v. Vitale*, 370 U.S. 421 (1962) (No. 468), 1962 WL 115801 (quoting *Tudor v. Bd. of Educ.*, 100 A.2d 857, 867 (N.J. 1953)).

785. I am grateful to Pace Law School Professor Merrill Sobie, an expert on New York family law, for confirming that the family court no longer applies religion matching. Email from Merrill Sobie, Professor of Law, Elizabeth Haub Sch. of Law at Pace Univ., to Elizabeth D. Katz, Assoc. Professor of Law, Wash. Univ. in St. Louis Sch. of Law (Feb. 21, 2018, 2:28 PM) (on file with author). On Presiding Justice Hill's retirement date, see *Justice John Hill, 96, Believer in Discipline*, N.Y. TIMES (Sept. 7, 1985), <https://perma.cc/ZJY9-BLEU>.

786. The current version reads: "When there is a sufficient number of probation officers of the same religious faith as that of a child to be placed on probation," the religious faiths should be matched. N.Y. FAM. CT. ACT § 252(c) (McKinney 2019).

dear friends during their decades on the Domestic Relations Court bench.⁷⁸⁷ “We became close allies in fighting religious bigotry and opposing institutional racism, before that term gained currency,” Justice Polier reflected.⁷⁸⁸ “With them, although we were often in a minority at meetings of the Board of Justices, there was no thought of giving up.”⁷⁸⁹ In Justice Bolin’s recollection, this team of judges scored “two major victories”: requiring that private (religious) childcare agencies that received public funding not consider race in admissions and stopping race and religion matching in probation.⁷⁹⁰

The judges’ self-identified triumphs raise complex questions about the meanings of racial and religious identity. Somewhat paradoxically, the black and Jewish judges celebrated reducing racial and religious considerations in court-related services, even though their own racial and religious identities seemed essential to their selection and advocacy efforts. It was only after the black and Jewish judges constituted a significant portion of the bench that they were able to chip away at the court’s consideration of race and, to a lesser extent, religion. Several possible framings could render their stances consistent and logical, though it is unclear which these judges would view as correct. Did racial and religious identities become less important over time? Is there a minimum amount of minority representation that makes subsequent consideration of these identity facets unnecessary or even illegitimate? Or is the distinction contextual—that proportional representation is valuable for those in positions of authority but not for their subordinates and everyday people?

It is more difficult to recover the perspectives of the Domestic Relations Court’s white Christian judges because they did not donate their papers to archives, write autobiographies, or participate in oral histories.⁷⁹¹ Still, based on the available records, it seems likely that Justices O’Brien and Jackson, and likeminded colleagues, were distressed by the growing opposition to religion-based considerations in the court’s work. These judges consistently and

787. See POLIER, *supra* note 317, at xvii; see Bolin Interview, *supra* note 555, at 55-56. Unlike Polier, Bolin did not include Delany in her list of colleagues with whom she was “close friends” or whom she “really admired,” Bolin Interview, *supra* note 555, at 55-56, perhaps because of their differing views on the NAACP during the 1950s, see *supra* note 708 and accompanying text.

788. POLIER, *supra* note 317, at xvii.

789. *Id.* Similarly, Justice Delany described how “my dear friend and colleague, Justine Wise Polier, stood firmly by my side throughout this fight [regarding his reappointment]—as we have stood side by side in defense of the rights of children since I have been a member of the Court.” Letter from Hubert T. Delany to Dr. John Haynes Holmes, Minister Emeritus, Cmty. Church (Sept. 29, 1954), JWP Papers, Box 41, Folder 502.

790. Klemesrud, *supra* note 278.

791. One exception is Justice Dunham, whose papers are at the Rockefeller Archive Center. The Author reviewed these papers and did not find relevant material.

straightforwardly proclaimed that religious identity mattered—for judges, probation officers, and juvenile delinquents. Indeed, they attempted to extend the reach of religious influence in their court.⁷⁹² In their view, such endeavors were a legitimate way to protect religious observance, not a troubling example of harmful discrimination.

The importance and influence of judges’ identities and backgrounds is still contested today.⁷⁹³ Some discussants trumpet the importance of particular types of judicial diversity, especially based on sex and race.⁷⁹⁴ News coverage similarly praises the appointment of racial minority and women judges.⁷⁹⁵ Demonstrating the power of this perspective, in March 2020, Democratic Presidential candidate Joe Biden pledged that if he is elected, he will nominate a black woman to the U.S. Supreme Court.⁷⁹⁶ At the same time, the relevance and potential influence of certain identity-related facets, such as religious faith, are perceived by some as taboo or off-limits in both the selection of judges and probing of candidates’ judicial philosophies.⁷⁹⁷ This Article calls for candid and nuanced consideration of the significance of judges’ identities historically and today.

Relatedly, this Article encourages deeper and more sustained analysis of intersections between racial and religious discrimination and legal protections. At first blush, the disparate treatment of racial and religious identity under U.S.

792. See *supra* Parts IV.A, .D.

793. As Tomiko Brown-Nagin has discussed in her illuminating review of scholarship on judicial diversity and analysis of the life experiences and jurisprudence of Judge Constance Baker Motley (the first black woman appointed to a federal judgeship), “identity can be a double-edged sword.” Tomiko Brown-Nagin, *Identity Matters: The Case of Judge Constance Baker Motley*, 117 COLUM. L. REV. 1691, 1697 (2017). While a judicial candidate’s race, religion, gender, or sexual orientation can be symbolic or empowering, it can also undermine the person’s authority in the eyes of some or cause her to feel constrained or otherwise negatively impact judging. *Id.* at 1692-97, 1734.

794. See, e.g., Amber Fricke & Angela Onwuachi-Willig, *Do Female “Firsts” Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529, 1529-31; Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Judicial Diversity in the Trump Years*, 2017 WIS. L. REV. 345, 351-52; Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1209-10 (2006).

795. E.g., Sharon Otterman, *Judge Ruchie, The Hasidic Superwoman of Night Court*, N.Y. TIMES (Nov. 17, 2017), <https://perma.cc/56GP-9AKJ>; Andrew Schneider, *Meet “Black Girl Magic,” the 19 African-American Women Elected as Judges in Texas*, NPR (Jan. 16, 2019, 4:17 PM ET), <https://perma.cc/L4AQ-LX8L>.

796. Joan Biskupic, *Joe Biden’s Pledge Could Change the Look of the Supreme Court*, CNN: Pol. (updated Mar. 16, 2020, 1:36 PM ET), <https://perma.cc/Q3W4-SDP8>.

797. See Laurie Goodstein, *Some Worry About Judicial Nominee’s Ties to a Religious Group*, N.Y. TIMES (Sept. 28, 2017), <https://perma.cc/TA42-QX2P> (noting the Trump Administration’s recommendation that judicial candidates not list their religious affiliations on Senate questionnaires).

law seems to be obviously rooted in the legacies of slavery and Jim Crow, as well as the interrelated fact that the constitutional protections for race and religion are not parallel. Certainly, these factors are highly relevant. But the history presented in this Article indicates that some of the divergence between race and religion is rooted in the political and legal world of the 1950s. Civil rights lawyers and other leaders saw racial and religious identity as analogous and sometimes intertwined in ways that now feel foreign. In their early efforts, Jewish groups such as AJC envisioned a kind of First Amendment civil rights. As Americans embraced tri-faith religiosity to counter "godless" communism during the Cold War, however, Establishment Clause litigation no longer seemed promising. Unlike racial discrimination, it remained acceptable to vocally support distinctions along religious lines beyond the 1950s. What some New Yorkers saw as religious (and resultant de facto racial) segregation, others saw as legal and desirable protection of religious identity.

Similar issues remain pressing today in a wide range of contexts. Perhaps most relevant to the history recounted in this Article, religious groups still exercise substantial control over foster care, adoption, and similar child welfare practices,⁷⁹⁸ despite strong opposition from those who view religion-based provision of these services as discriminatory.⁷⁹⁹ Christian-affiliated adoption and foster care organizations cite their faith in litigating and lobbying for the right to exclude same-sex couples⁸⁰⁰ and Jewish, Muslim, and atheist would-be parents, even while relying on public funding.⁸⁰¹ In February 2020, the U.S. Supreme Court granted certiorari in a case on this issue.⁸⁰² Religious groups also, often controversially, provide services to their

798. See Joseph R. Ganahl, Note, *Fostering Free Exercise*, 88 NOTRE DAME L. REV. 457, 457-59 (2012); Gregory A. Horowitz, Note, *Accommodation and Neutrality Under the Establishment Clause: The Foster Care Challenge*, 98 YALE L.J. 617, 617-19 (1989). Scholars have devoted more attention to race matching in adoption. See, e.g., Banks, *supra* note 597, at 877-86; Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA L. REV. 537, 538-45 (2014); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1417-19 (2006).

799. See, e.g., Adam Liptak, *Supreme Court Stays Out of Case on Gay Rights and Foster Care*, N.Y. TIMES (Aug. 30, 2018), <https://perma.cc/4659-YW6U>. On the consequences for LGBTQ youth, see generally Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343 (2019).

800. See, e.g., Alexandra Hutzler, *Trump Prayer Breakfast Speech Defends Faith-Based Adoption Agencies That Reject Same-Sex Couples*, NEWSWEEK (Feb. 7, 2019, 11:23 AM EST), <https://perma.cc/G2PZ-F36L>; Matt Rehbein, *Texas Bill Would Let Adoption Agencies Refuse Parents on Religious Grounds*, CNN (updated May 8, 2017, 12:59 AM ET), <https://perma.cc/6R8S-TCSN>.

801. See, e.g., Mark Joseph Stern, *The Trump Administration Will Let Adoption Agencies Turn Away Jews and Same-Sex Couples. Thanks SCOTUS.*, SLATE (Jan. 24, 2019, 4:56 PM) <https://perma.cc/GNH6-SMQS>.

802. *Fulton v. Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

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coreligionists in penal settings, producing inequalities in opportunities for better treatment and services.⁸⁰³ In both the childcare and penal contexts, what religious groups perceive as a way to protect and honor the faith of their coreligionists operates in a discriminatory fashion from the perspective of those in minority religious groups (which often still correlate with race⁸⁰⁴). How to balance these competing perspectives—politically, socially, and legally—is one of the most difficult questions facing American society today.

803. See Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 780-93, 812 (2012); Phillip Grudzina, Comment, *Secular Dissent: Protecting Non-Believers from Coercive Religious Parole Programs*, 106 J. CRIM. L. & CRIMINOLOGY 565, 570-74 (2016); Daniel W. Sack, Note, *Guardians as Gatekeepers and Other Issues of the Establishment Clause and Parole*, 50 COLUM. J.L. & SOC. PROBS. 379, 401-06 (2017).

804. See Grace Yukich, *Religion, Race, and Immigration in Contemporary America*, in THE OXFORD HANDBOOK OF RELIGION AND RACE IN AMERICAN HISTORY, *supra* note 40, at 562, 562-63 (discussing how racial diversity varies by religion, with many large denominations in the United States remaining primarily white).

Appendix

The following list of Domestic Relations Court justices and their tenures was developed through review of the Domestic Relations Court’s annual report,⁸⁰⁵ supplemented by newspaper coverage. The justices’ religious affiliations were discerned through research in archives and digitized newspaper databases. Some justices’ religious affiliations were identified in straightforward descriptions. For others, it was necessary to consider their membership in organizations, the location of their weddings and funerals, their attendance at religiously affiliated schools, and other circumstantial evidence. When circumstantial evidence was the best available (which was most common for Protestants), the Author conducted an extensive search and sought multiple points of information to determine the most likely religious group. The cited sources are representative of the available information and are not exhaustive.⁸⁰⁶

Table
Religious Affiliations of the Original Justices of the New York City Domestic Relations Court and Mayor La Guardia’s Appointees, 1933-1945

Name	Years of Service	Religious Affiliation
<i>Original Justices (Inherited from Children’s Court)</i>		
Edward F. Boyle ⁸⁰⁷	1933-1934	Catholic
William Young ⁸⁰⁸	1933-1934	Protestant

805. See, e.g., 1933 ANNUAL REPORT, *supra* note 143, at 3 (listing the first justices to serve on the Domestic Relations Court).

806. This list omits individuals Mayor La Guardia appointed as justices for only temporary terms (typically thirty, sixty, or ninety days), as substitutes for justices who were ill, serving in World War II, on maternity leave, or absent for similar short-term reasons. See Domestic Relations Court Act, ch. 482, § 8, 1933 N.Y. Laws 1038, 1042 (1933) (authorizing the mayor to appoint temporary justices). Records indicate that the temporary justices did not participate in Board of Justices meetings or votes, so their involvement is not directly relevant to this account.

807. See *Communion and Breakfasts*, BROOK. TABLET, May 12, 1934, at 14 (announcing Justice Boyle’s presence as a speaker at a breakfast following Mass); *E.F. Boyle Is Named to Head New Court*, N.Y. TIMES, Sept. 29, 1933, at 21; *Edu. F. Boyle Dies; Ex-Borough Head*, N.Y. TIMES, Dec. 15, 1943, at 27.

808. See *Two to Quit Bench in Domestic Court*, N.Y. TIMES, Sept. 13, 1934, at 7; *William Young, 66, Ex-Jurist, Is Dead*, N.Y. TIMES, June 15, 1936, at 21 (providing support for Young’s likely religious affiliation by noting that he attended public schools and studied at Dickinson Seminary and by omitting any reference to membership in Catholic organizations).

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Name	Years of Service	Religious Affiliation
Samuel D. Levy ⁸⁰⁹	1933-1935	Jewish
John F. Hylan ⁸¹⁰	1933-1936	Catholic
Peter B. Hanson ⁸¹¹	1933-1937	Protestant
Thomas C. Brown ⁸¹²	1933-1938	Catholic
Charles J. Brandt, Jr. ⁸¹³	1933-1939	Protestant
Joseph F. Maguire ⁸¹⁴	1933-1953	Catholic
<i>La Guardia's Appointees</i>		
Stephen S. Jackson ⁸¹⁵	1934-1944	Catholic
Jacob Panken ⁸¹⁶	1934-1955	Jewish

809. See *Justice S. D. Levy Will Retire Today*, N.Y. TIMES, Aug. 31, 1935, at 14; *Levy Reappointed Justice by Mayor*, N.Y. TIMES, Sept. 16, 1934, § 2, at 1; *Notables Mourn Ex-Justice Levy*, N.Y. TIMES, Dec. 30, 1940, at 17 (noting Justice Levy’s funeral was held at a synagogue).

810. See *Ex-Mayor Hylan Dies Suddenly of Heart Attack*, *supra* note 207.

811. See *Hanson Named Justice in Children’s Court*, *supra* note 145; *Peter Hanson, 87, a Retired Judge*, N.Y. TIMES, Apr. 16, 1965, at 29. Articles do not list Justice Hanson’s religious affiliation, instead typically emphasizing his birth in Sweden and participation in Swedish groups. See, e.g., *Wendell Hanmer, Former Jurist Still Serves Cause of Child Welfare*, BROOK. EAGLE, Mar. 26, 1950, at 25. Hanson immigrated to New York City in the late nineteenth century as a child. See *id.* During that period, 97% of Swedish immigrants to New York City were Protestant. ROSENWAIKE, *supra* note 70, at 123 tbl.58. One article notes Justice Hanson explaining “with eyes twinkling” that he was permitted to join the St. Patrick’s Society because his daughters married Irish men. Hanmer, *supra*. These details together point toward Hanson being Protestant.

812. See *Judge T. C. Brown, on Bench 33 Years*, N.Y. TIMES, June 3, 1938, at 21; *Thomas C. Brown, 62, Retired Judge*, BROOK. DAILY EAGLE, June 2, 1938, at 13 (noting that Brown’s funeral would be held “with a solemn requiem mass in St. Mary’s R. C. Church, Port Richmond”).

813. See *C.J. Brandt Jr., 81, Jurist, Succumbs*, N.Y. TIMES, Oct. 8, 1950, § 1, at 104. Though Justice Brandt’s religious affiliation is not noted, several details collectively indicate that he was Protestant. Brandt attended public school and was a member of many cultural and political groups (often with German affiliations, such as the Steuben Society), yet none of these had Catholic ties. *Id.* Moreover, though Brandt was born in New York, *id.*, it may be probative that most German-born residents of New York City of his generation were Protestant, see ROSENWAIKE, *supra* note 70, at 123 tbl.58, 126 tbl.60.

814. See *Joseph F. Maguire*, EVENING SUN (Hanover, Pa.), Sept. 12, 1959, at 4; *Mayor Names a Justice and 2 Magistrates*, DAILY NEWS (N.Y.C.), Mar. 19, 1953, at 12.

815. See *La Guardia Names Three Justices*, *supra* note 154; *Stephen S. Jackson Dies; Official with Pentagon*, WASH. POST, Apr. 23, 1981, § B, at 9.

816. See *Justice Jacob Panken Retires From Bench*, WIS. JEWISH CHRON. (Milwaukee), Jan. 7, 1955, at 8; sources cited *supra* notes 155-56.

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Name	Years of Service	Religious Affiliation
John Warren Hill ⁸¹⁷	1934-1959	Protestant
Rosalie Loew Whitney ⁸¹⁸	1935-1939	Jewish/Protestant
Lawrence B. Dunham ⁸¹⁹	1935-1942	Unitarian (Protestant)
Justine Wise (Tulin) Polier ⁸²⁰	1935-1973	Jewish
Herbert A. O'Brien ⁸²¹	1936-1946	Catholic
Juvenal Marchisio ⁸²²	1937-1970	Catholic

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817. See Panken Dinner, *supra* note 153, at 10; *Justice Hill Gets Full 10-Year Term*, *supra* note 152; *Justice John Hill, 96, Believer in Discipline*, *supra* note 785.
818. Batlan describes how in “a somewhat surprising twist,” Jewish-raised Loew “seemed to have adopted her husband’s Episcopalism” after her marriage in 1903. By the late 1910s, “all traces of her parents, her ethnicity, and her Judaism disappeared.” Batlan, *supra* note 202, at 139, 149-52; *see also Mayor Appoints 14 to High City Posts; 2 Women on List*, *supra* note 202; *Rosalie Whitney, Jurist, Dies at 66*, N.Y. TIMES, Sept. 4, 1939, at 19.
819. See Lawrence Boardman Dunham, *supra* note 201, at 430; *L.B. Dunham Dead; Ex-Justice Here*, N.Y. TIMES, Aug. 9, 1959, § 1, at 88. In tallies of the justices’ votes, Dunham is counted as Protestant because that is the closest fit with Unitarianism. Twentieth-century Unitarianism has received only “modest scholarly attention,” Daniel McKanan, “Unitarianism, Universalism, and Unitarian Universalism,” 7 RELIGION COMPASS, 15 18 (2013), making its categorization difficult. Still, because it evolved out of Protestant denominations and is most productively understood by comparison to mainline Protestantism, *see id.* at 16-17, 19, it seems reasonable to place it under the Protestant umbrella for purposes of this Article. Notably, Unitarians were “overrepresented in more radical movements, including . . . the early civil rights activism of the National Association for the Advancement of Colored People.” *Id.* at 18. In the late 1940s, the American Unitarian Association passed resolutions in favor of the separation of church and state and against racial discrimination and quotas. *Unitarian Body Condemns “Anti-Communist” Measure*, BOS. DAILY GLOBE, May 28, 1948, at 1. These stances may be relevant to Justice Dunham’s decision to break ranks with the other white Christian justices in the 1941 Board of Justices vote regarding the extension of religion matching. *See supra* text accompanying notes 544-45.
820. See Cogan, *supra* note 12; Edward Hudson, *Justine Wise Polier Is Dead; A Judge and Child Advocate*, N.Y. TIMES (Aug. 2, 1987), <https://perma.cc/ATP6-G3QV>.
821. See Hylan’s Successor Sworn In by Mayor, *supra* note 210; *Justice O’Brien Says He “Could Strangle Mayor,” supra* note 1; *Term Run Out, Justice O’Brien Returns to His Law Practice*, *supra* note 413; *Walter McClancy Appointed Judge*, *supra* note 413.
822. See *Isaacs Is Sworn in as Family Watches*, *supra* note 226; *Judge Juvenal Marchisio Dies; Aided Victims of War in Italy*, N.Y. TIMES (Oct. 8, 1973), <https://perma.cc/PP7S-K8RC>; *New 30-Day Judge Named*, *supra* note 225.

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Name	Years of Service	Religious Affiliation
W. Bruce Cobb ⁸²³	1938-1948	Protestant
Dudley F. Sicher ⁸²⁴	1939-1953	Jewish
Jane M. Bolin ⁸²⁵	1939-1978	Protestant
Isaac Siegel ⁸²⁶	1940-1947	Jewish
Theodore Stitt ⁸²⁷	1942-1952	Protestant
Hubert T. Delany ⁸²⁸	(1942-1945) 1945-1955	Protestant
Edmund L. Palmieri ⁸²⁹	1944-1945	Catholic

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823. See *Mayor Names Cobb to Jurist's Post*, *supra* note 203; *W. Bruce Cobb, 81, Retired Justice*, *supra* note 561. The most helpful evidence of Justice Cobb's religion is that his marriage was performed at the South Congregational Church in Hartford, Connecticut, which is Protestant. *Weddings of a Day*, HARTFORD DAILY COURANT, May 15, 1908, at 6; *The History of South Church Hartford*, SOUTHCHURCH, <https://perma.cc/JG59-LPSM> (archived June 16, 2020).
824. See *Dudley F. Sicher, Ex-Justice, Dies*, *supra* note 294. Sicher sat for a sixty-day term in 1937 to fill in for a sick justice, but this chart emphasizes his longer-term appointment in 1939 to complete the six years remaining in Justice Whitney's term following her death. See *Appointed Temporarily to Fill City Bench Post*, N.Y. TIMES, Sept. 8, 1939 (explaining the 1937 and 1939 appointments).
825. See MCLEOD, *supra* note 271, at 12, 40-42; Klemesrud, *supra* note 278.
826. See *Isaac Siegel Promoted to Family Court Bench*, *supra* note 295; *Justice Siegel Dies in 9-Story Plunge*, *supra* note 295.
827. See *Justice Stitt Dies; La Guardia Choice*, N.Y. TIMES, Aug. 24, 1952, § 1, at 89; *Justice Theodore Stitt III*, N.Y. TIMES, Sept. 10, 1949, at 18; *Stitt and Delaney [sic] Sworn to Family Court Bench*, *supra* note 468.
828. Delany first began sitting for temporary terms in 1942, ultimately totaling more than three years, before Mayor La Guardia appointed him for a full ten-year term in September 1945. Bennett, *supra* note 713; *Justice Delany Named for Full Term on Bench*, *supra* note 468; *Stitt and Delaney [sic] Sworn to Family Court Bench*, *supra* note 468; *Two Justices Sworn In, Justice Theodore Stitt III*, N.Y. TIMES, Aug. 1, 1941, at 30.
829. Palmieri never actually served on the bench. At the time of his appointment, he was overseas as a major in the Army. *La Guardia Admits "Blacklist" Policy*, *supra* note 510 (explaining that Palmieri would fill Justice Jackson's position after Palmieri returned from the armed forces). La Guardia appointed a temporary substitute for Palmieri twice. *Justice Callagy Reappointed*, N.Y. TIMES, July 8, 1945, § 1, at 9. Before the substitute's time expired, Palmieri resigned from the post. *Palmieri Resigns as Court Justice*, N.Y. TIMES, Dec. 23, 1945, § 1, at 2. On his religion, see Glenn Fowler, *E.L. Palmieri, Federal Judge, Is Dead at 82*, N.Y. TIMES (June 16, 1989), <https://perma.cc/4N2M-6AQE> (reporting Judge Palmieri's funeral Mass was to be held at a Catholic church).

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Name	Years of Service	Religious Affiliation
James V. Mulholland ⁸³⁰	1944-1954	Catholic
Matthew J. Diserio ⁸³¹	1945-1955	Catholic

830. See *James V. Mulholland, Ex-Justice, Dies; Assistant to City Labor Commissioner*, N.Y. TIMES, May 8, 1958, at 29; *Mulholland Named to Children’s Court*, N.Y. TIMES, Mar. 7, 1944, at 19.

831. See *2 Get Posts on Bench*, N.Y. TIMES, Dec. 27, 1945, at 21; *Communion Breakfasts*, TABLET (Brook.), May 10, 1941, at 20 (noting Justice Diserio’s attendance at the Catholic employees of the Department of Markets of the City of New York’s annual communion breakfast); *Matthew Diserio, City Aide, 66, Dies*, N.Y. TIMES, July 16, 1960, at 19; *Matthew J. Diserio*, DAILY NEWS (N.Y.C.), July 16, 1960, at 18 (announcing requiem Mass for Justice Diserio).