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The Spokesman Conundrum: "Is It Good for the Jews?"

Aviam Soifer

WOEST, VICTORIA SAKER. 2012. *Henry Ford's War on the Jews and the Legal Battle Against Hate Speech.*

Battles concerning who legitimately speaks for minority groups pervade US history. The historically decentralized organization of American Jewry affords a prime example of this key leadership dilemma. Competing approaches to how to deal with Henry Ford's virulent anti-Semitism and extensive hate speech in the 1920s underscore the familiar, yet seldom carefully analyzed, tension between confrontation and negotiation that is often faced by outside groups and their spokesmen who seek change, wish to defend themselves, and/or hope for increased inclusion.

Is it good for the Jews? This core question has been a central query for a group that has been known over millennia for its questioning. Whether Jews are properly labeled as a race/religion/people/ethnicity/cultural aggregation or some other group identifier, the historic tendency of Jews to raise this central question is familiar enough to have become the punch line for countless jokes. Indeed, it is so familiar that often the question does not even have to be verbalized.

But can anyone predict or assess what is good for the Jews—and, if so, who gets to decide? Is assimilation or separation more desirable? Is it advisable to stand out or to acculturate, to let threats pass or to challenge them directly? And should any such analysis take into account the interests of the individuals directly involved and/or the best strategies for a specific group or for the many groups of Jews?

These are familiar questions, to be sure, and they seem prevalent within social change movements, particularly when litigation becomes an element within attempts to bring about change.[1] Even apparent triumphs such as *Brown v. Board of Education* (1954) are soon subjected to critical scrutiny and numerous second thoughts.[2] It seems not to matter whether the goal is to increase civil rights or civil liberties, to attack gender inequality or homophobia, to enhance economic rights or to remove the ongoing effects of past depredations. The much-noted recent debate

Aviam Soifer is the Dean and Professor of Law at the William S. Richardson School of Law, University of Hawai'i. He can be reached at soifer@hawaii.edu. He wishes to thank his fellow panelists at the 2013 Law & Society Meeting, as well as Marlene Booth, Jon Goldberg-Hiller, and Neal Milner; and Tom Michener for his research assistance.

1. See generally Sarat and Scheingold (2004, 2006).

2. Derek Bell may well have been the most eloquent critic of the *Brown* decision itself as well as the NAACP strategy leading up it and the implementation issues that followed. See, for example, Bell (1975–1976). But Bell was hardly alone, and recent historical work has underscored the costs that accompanied the strategic choices made by cause lawyers as well as government officials throughout their civil rights campaign. See, for example, Golobuff (2007). Sarat and Scheingold (2006) provide an illuminating guide to the issues in "What Cause Lawyers Do *For*, and *To*, Social Movements," their introduction to *Cause Lawyers*.

within the LGBT community about the salience of same-sex marriage and the appropriate role for lawyers in pursuing that specific cause within the LGBT community provides only the most recent example of the phenomenon.[3]

It may be that American Jews are among the most vociferous in disagreeing about who counts as a Jew and what would most benefit the group. City College of New York in the 1930s affords just one illustration of the Jewish penchant for internecine contestation: while Jewish young men imbibed the demanding, free, higher education offered, each student group had its own politically defined alcove.[4] A currently recycling old joke has it that a Jewish crew team lost all its races badly until one crew member announced that he had just discovered that "only *one* of us is supposed to be yelling; all the others are supposed to be rowing!"

Victoria Saker Woeste's book *Henry Ford's War on the Jews and the Legal Battle Against Hate Speech* (2012) digs deeply and yet subtly into the serious, basic tensions that surrounded Jewish identity and leadership in the United States of the 1920s. While her focus is on the struggle over whether and how best to respond to Henry Ford's notorious anti-Semitic campaign through his *Dearborn Independent*, her vivid portrait of the book's two main protagonists, Louis Marshall and Aaron Sapiro, is a contribution in itself.

Both Marshall and Sapiro were sons of immigrants who became noteworthy lawyers and community leaders not only through their striking intellectual abilities, but also through their remarkable ambition and hard work. The two could hardly have been more different in their political views, however, or in their lawyerly approaches. Louis Marshall is still remembered as one of—if not the—leading Jewish spokesman throughout the first three decades of the twentieth century. As Woeste (2012) puts it, Marshall was "the unquestioned leader of American Jewish civil rights activism" (Woeste 2012, 55).

Aaron Sapiro, on the other hand, has been virtually forgotten. Yet Woeste compellingly presents his story, an extraordinary personal variation on the beloved Horatio Alger trope—rising from abject poverty and life within a stingy orphanage to become a successful lawyer and the champion of the agricultural cooperative marketing movement.

The core of the book, however, concerns how Sapiro came to stand alone in his effort to bring Henry Ford to justice for defaming Sapiro himself specifically and

3. See, for example, Eskridge (1996, 51–62) for the history of the marriage debate within the LGBT community starting from the 1950s and Feldman (2014) stating that litigators David Boies and Ted Olson in California's Proposition 8 case, *Hollingsworth v. Perry* (2013), almost "cost the movement its crown jewel" because of their "headlong rush to personal glory." See also Andersen (2005) and Barclay and Chomsky (2014). Kenneth Mack provides a nuanced historical study of the dilemma of representation faced by African American lawyers in the era of segregation (Mack 2012).

4. Within the Conference of Presidents of Major Jewish Organizations, for example, which purports to be an umbrella organization representing American Jewish leadership across the spectrum, passionate internecine conflict easily can become the order of the day. The Conference's bitter debate and vote last year to continue to exclude the relatively liberal organization "J Street" because of J Street's comparatively dovish position with regard to Israel and its endorsement of a two-state solution is illustrative of current deep fissures within the contemporary American Jewish community (Paulson 2014a,b). According to the *New York Times*, the vote by twenty-two organizations against admission of J Street and seventeen in favor "broke down in large part along ideological and religious lines, with Orthodox and multiple Orthodox-affiliated organizations opposing J Street, and the non-Orthodox members supporting the group's application" (Paulson 2014b).

the Jewish people generally. By leading the reader to and through Sapiro's once nationally famous libel trial against Henry Ford in federal court in Detroit in 1927, Woeste plunges deeply into American Jewish history and successfully conveys the intense and intricate internal battles among key Jewish leaders who sought to speak for American Jewry. She also offers a telling, revisionist portrait of Henry Ford, neatly capturing his fear of testifying in court, his craftiness, and his willingness to use his henchmen and his vast resources to manipulate public opinion in ways that stretched far beyond the rantings of the *Dearborn Independent*.

The book's historical corrective regarding earlier, somewhat hagiographic, portraits of Henry Ford and Louis Marshall is significant in itself. In addition, Woeste successfully conveys the tangled milieu of the careers and leadership styles of these unlikely collaborators, and the astonishingly strange partners these two somewhat larger-than-life characters became once Marshall decided to torpedo Sapiro's lawsuit in exchange for a public apology from Ford (an apology, actually written by Marshall, that Ford signed apparently without ever considering its content).

Woeste manages to make the complicated story of the 1927 trial of Sapiro's libel action against Ford easy to follow, including the murky circumstances surrounding the mistrial declaration that ended the case. And Aaron Sapiro remains the (at least somewhat) tragic hero of the book.

Some years before the trial, Sapiro, in the wake of the collapse of farm prices worldwide after World War I, became the linchpin of a cooperative agricultural marketing effort that began in California and spread rapidly around the western United States and into Canada. By focusing on particular farm commodities rather than on localities, Sapiro's organizing and lawyering skills achieved noteworthy initial success. Indeed, some of the agricultural cooperatives he helped launch continue to thrive today.[5]

A reader may learn somewhat more about the prune and apricot growers than anticipated, but Woeste effectively conveys the sharp underlying contrast between Henry Ford's rosy nostalgia for mythical self-reliant American yeomen farmers and the responsiveness of Sapiro's new agricultural model to the multiple—and often crushing—pressures faced by small farmers in the twentieth century.

To Henry Ford and his minions, the central role played by a Jewish immigrant lawyer in a broad new agricultural movement afforded yet more evidence of the international Jewish conspiracy to manipulate markets and to dominate the world. Ford's *Dearborn Independent* said as much in an extended series of articles in 1924–1925, entitled *Jewish Exploitation of Farmers' Organizations* (Woeste 2012, 143–75).

Woeste shows how Henry Ford parlayed his staggering wealth and his extensive networks of employees and others beholden to him into becoming a major national figure with extensive political support. Despite Ford's legendary success as an industrialist, he sought to embody old-fashioned rural values. Nonetheless, he was hardly above manipulating judges and juries as well as the general public to advance his breathtakingly ambitious economic schemes or to defend his uninformed fixations and his outright bullying.

5. See generally Woeste (1998).

An early chapter offers a valuable description of how, in the name of freedom of the press, enterprising representatives of Henry Ford carefully and successfully challenged attempts in several cities in America's heartland to ban the *Dearborn Independent*. When Sapiro finally decided to sue Ford for $1 million for libel and had the temerity to bring his federal suit in Ford's Detroit hometown, Jewish spokesmen had very different views about the wisdom of Sapiro's action, which they perceived as either foolhardy or admirable, or as likely to provoke as to reduce anti-Semitism in America.

Rabbi Samuel Schulman, for example, leader of the Reform movement's prestigious Temple Emanu-El in New York City, said from his pulpit: "Israel does not seek vindication in Detroit" (Woeste 2012, 224). Schulman added that "the reputation of the Jew is safe" and he went on to assert that "neither the Jewish religion nor Israel as a community can accompany any individual Jew into any court house when he is making a fight for his rights on property and reputation. There he must stand alone" (Woeste 2012, 224).

In sharp contrast, Rabbi Stephen S. Wise, a prominent leader of the entire Reform movement, warmly defended Sapiro. And the *Detroit Jewish Chronicle* went even further and sharply condemned the "friendly neutrality" of American Jewry and its leaders asking, how long could American Jewry and its leaders not take a stand:

> [i]n this unequal contest between the world's richest anti-Semite, a breeder of race hatred, and a man, a Jew, who, at least, has never defamed a Gentile, has never attempted to sow the prolific seeds of race hatred, who, at least is willing to face his accuser in an open court of law and lay his whole life open before the eyes of the world. (Woeste 2012, 261)[6]

The rulings by Presiding Federal Judge Fred M. Raymond seemed to agree with Sapiro's many critics: the judge emphasized the distinction between group libel and individual libel and determined that he would allow only the individual libel issue to be tried. Judge Raymond decided that "Mr. Ford's ideas with regard to the Jewish race formed no part of the case built up by Mr. Sapiro" and he ordered that Sapiro would not be permitted to offer proof of attacks on either himself or "on his people" (Woeste 2012, 220).

Despite the judge's decision isolating Sapiro from the Jewish people he sought to vindicate, Sapiro and his lawyer enjoyed noteworthy success in court as well as in the national press, largely through their ability to blur the distinction between individual and group libel. And there is deep irony in the fact that Henry Ford's July 1927 apology to the Jews—written by Marshall and front-page news across the

6. Rabbi Leo M. Franklin of Detroit's Temple Beth-El considered himself a friend of Henry Ford and benefited directly from their close relationship. Initially, Rabbi Franklin consulted with and defended Ford. (In fact, Rabbi Franklin could almost be a model for Rabbi Bengelsdorf, the "Court Jew" who defended President Lindbergh in Philip Roth's *The Plot Against America* [2004].) Nonetheless, Ford's claims of an international Jewish financial conspiracy ultimately pushed even Rabbi Franklin into condemning Ford's anti-Semitism.

nation—announced the desire to make amends "for the one thing the trial had established that [Ford] would never lose on: group libel" (Woeste 2012, 283).

The distinction between group and individual libel can never be precise. At common law, for example, labeling someone as a member of a particular detested group—as a communist, an anarchist, or a negro, for example—was *per se* libelous because of the ill-repute of the particular group association triggered by the label.[7] The important contemporary debate surrounding hate speech and hate crimes underscores how significantly group identity still matters and how much group identity can exacerbate the harms that words can cause.[8]

Group identity is terribly important, yet the very concept remains difficult to capture or contain within Anglo-American law.[9] It is telling, for example, that Justice Felix Frankfurter described himself as "[o]ne who belongs to the most vilified and persecuted minority in history," even as he went on to protest that he was thus "not likely to be insensible to the freedoms guaranteed by our Constitution" (*West Virginia State Board of Education v. Barnette* 1943).[10] Frankfurter nonetheless embraced the notion that a state should be allowed to compel school children to salute the US flag. It hardly seems coincidental that Frankfurter later wrote for the majority in *Beauharnais v. Illinois* (1952),[11] in which he invoked the long history of bloody race riots in Illinois as a basis for upholding a law that criminalized group libel.

A central irony emerging from Woeste's project is that to identify a Jewish leader was and remains a moving target, at least in part because Jewish religious practice is mostly radically decentralized. A core traditional religious belief, for example, is that each person is entitled (or obliged) to "choose [his or her] own rabbi." In the United States, for example, in which the Reform, Conservative, Orthodox, and Reconstructionist movements have all established schools to train their rabbis, it has remained impossible to ascertain what constitutes core belief even within each movement. And there is insight within the many jokes suggesting that no two Jews can ever agree on what to believe or even what can be gleaned from memory, reality, or prediction. This helps explain the parochialism

7. See, for example, *Spanel v. Pegler* (1955), communist; *Von Gerichten v. Seitz* (1904), anarchist; *Collins v. Oklahoma State Hosp.* (1916), negro.

8. See, for example, Lawrence (1999) and Matsuda et al. (1993). But see *R.A.V. v. City of St. Paul*, (1992), which invalidated, on First Amendment grounds, a municipal ordinance making it a misdemeanor to place a burning cross in a black family's yard if known to "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender," and *Virginia v. Black* (2003), which invalidated a state statute treating any cross burning as prima facie evidence of an intent to intimidate.

9. See generally Soifer (1995).

10. Frankfurter seems to protest too much in the course of his contentious historical claim, made with a heavy-handed double negative meant to indicate that the law gave him no choice in the matter. Frankfurter emphatically would have followed the opinion he wrote for the Court in *Minersville School Dist. v. Gobitis* (1940), which Justice Jackson's *Barnette* majority opinion eloquently rejected while invalidating a compulsory public school flag salute and pledge. Frankfurter stressed in his dissent in *Barnette* that he must and could put his personal views aside because "as judges, we are neither Jew nor Gentile, neither Catholic nor agnostic." (*West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647). Ironically, when Frankfurter had been "a Harvard Law School professor who happened to be a Jew," he later recalled, "I know I exacted higher standards from Jews than from other people, and perhaps that was on the whole a good thing for Jews who have any capacity" (Soifer 1995, 153).

11. Ironically, this group libel decision has not been overruled despite major changes in First Amendment doctrine that call its rationale into serious question.

intertwined with anarchic humor in the recurrent inquiry by Jews of all kinds: "Is it good for the Jews?"

The Talmudic tradition requires that dissenting views be preserved for future study, in case the dissent is later adopted, and the more traditional Jews often fight bitterly among themselves as to what ought to be Orthodox orthodoxy. Because Judaism in the United States always has been and remains radically nonhierarchical, it is difficult for many Americans—and certainly for many Jews—to grasp that there really is no "Jewish position" on the major issues of the day. Furthermore, identifying oneself as being Jewish certainly does not require being religious in any way, and those who have oppressed Jews have seldom been choosy in picking their targets. In the end, the perennial questions "Who is a Jew?" and "Who speaks for the Jews?" remain entirely unresolved.

A few illustrations regarding this knotty matter underscore its importance. They also serve to emphasize the further mushiness in determining who—if anyone—legitimately might be thought to speak on behalf of the Jews. Further, they suggest a more general and important recurring tension within movements for social justice: Can or should there be a symbiotic relationship between those within a group who wish to confront power and those willing to compromise; between those spokesmen who challenge and those who seek to work from within established channels?

In many ways, these multilayered issues seem particularly jagged for people who define themselves as "movement lawyers." Neither the parameters of the minority group's identity nor the appropriate role of lawyers as the spokesmen for them can be readily discerned. Nonetheless, the problematic role of leadership within the classic us/they dichotomy seems particularly weighty within minority groups. Two group-defining conflicts from recent Jewish history may serve to illustrate.

MODERN EXCOMMUNICATION

Mordecai Kaplan was the founder of the Reconstructionist movement in Judaism in the first half of the twentieth century. He was a leading, albeit quite controversial, teacher and scholar at the Jewish Theological Seminary in New York, affiliated with the Conservative movement, and he produced alternative versions of traditional prayer books in which he made substantial changes that reflected his frequently quoted view that "the past has a vote, but it does not have a veto."[12] In June 1945, the Union of Orthodox Rabbis of the United States and Canada (Agudat HaRabbanim) held a large-scale public meeting at the huge Hotel McAlpin in Herald Square at which they excommunicated Kaplan (Silver 2010).[13] Because

12. Apparently Kaplan originally wrote that "*halakha* [Jewish law] should have a vote, but not a veto" (quoted in Diner 2004).

13. Mel Scult, Kaplan's generally reliable biographer, minimizes the event and even suggests that it was a fire that broke out accidentally in the back of the room (Scult 1993, 420), but Silver's more recent detailed analysis and his discussion of the excommunication and its context is convincing and consistent with the "oral tradition" that has surrounded the event (Silver 2010). The Orthodox rabbinical organization involved had vehemently opposed Kaplan for decades, viewing him as "a wolf in sheep's clothing who, because of his position, was much more dangerous than any Reform or secular Jew" (Scult 1993, 190).

excommunication has long been exceedingly rare within the Jewish religion—with the noteworthy exception of the excommunication of Baruch Spinoza in Amsterdam in 1656[14]—this was a newsworthy event. Its extraordinary, if not shocking, character, however, became clear when these Orthodox rabbis publicly burned Kaplan's prayer book: to do so within a month of the Allies' victory in Europe, and despite the association of book burning, and far worse, with the Nazi scourge, was remarkable.

Though one kosher storeowner refused to sell challah bread used for the Sabbath to Kaplan's daughter and a secretary reportedly stopped working for Kaplan because of his excommunication, the Orthodox rabbis almost surely did Kaplan and his movement more good than harm with their action. Even many of Kaplan's harshest critics found it necessary to defend his pluralistic views, though some made it emphatically clear that they wished it to be known that Kaplan did not speak for most Jews.

THE US SUPREME COURT CONSIDERS ARAB AND JEWISH ANCESTRY

A basic issue sometimes has been whether it is the perception by Jews of their own identity that should be determinative, or whether the perception of them by non-Jews should matter. This knotty question actually reached the US Supreme Court in the 1970s. Perhaps displaying a bit of antic humor, the Court decided companion cases that involved, on the one hand, "whether a person of Arabian ancestry" (*Saint Francis College v. Al-Khazarji*, 481 U.S. 604, 607) could sue a Catholic college for alleged employment discrimination and, on the other, whether a Jewish congregation could sue those who wrote graffiti on their synagogue under 42 U.S.C. Section 1981, which bars many forms of private discrimination based on race (*Shaare Tefila Congregation v. Cobb*, 481 U.S. 615). The core issue, according to Justice White, writing for the unanimous Court, was whether Arabs and Jews were considered to be races in the dictionaries and encyclopedias of the mid-nineteenth century when Congress passed original statutory language as part of the Civil Rights Act of 1866. The Court found from the old sources "that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics" (*Saint Francis College v. Al-Khazarji*, 481 U.S. 604, 613).

Another Orthodox rabbi complained that Kaplan and his followers sought to reduce Jews to the level of "Eskimos, Poles and Magyars" (Scult 1993, 191) and a popular witticism in the 1930s proclaimed: "There is no God and Kaplan is his prophet" (Scult 1993, 343).

14. See generally Nadler (1999). Nadler offers an intriguing account of the basic insecurity—and lack of religious sophistication—of Amsterdam's Jewish community at the time. Strikingly, the same Talmud Torah congregation that excommunicated Spinoza also excommunicated thirty-nine men and one woman during the period from 1622 to 1683, such as someone who had patronized an Ashkenazic kosher butcher instead of a Sephardic kosher butcher (Nadler 1999, 126). (This account relies generally on Kaplan [1984]). With the exception of Spinoza, those excommunicated almost always did some form of prescribed penance and then were reintegrated. Spinoza apparently simply walked away from the Jewish community.

Along the way, however, the Court made the important point that modern biology and anthropology indicate that "racial classifications" are, for the most part, "sociopolitical, rather than biological, in nature" (*Saint Francis College v. Al-Khazarji*, 481 U.S. 604, 610).[15] In addition, the Court paid little attention to a further paradox that was raised by the Jewish plaintiffs, who informed the Court that "Jews are not a racially distinct group," yet the statute should protect them because those who spray-painted their synagogue "viewed Jews as racially distinct and were motivated by racial prejudice" (*Shaare Tefila Congregation v. Cobb*, 481 U.S. 616).

REMEMBERING LOUIS MARSHALL AND AARON SAPIRO

Within its historical context, the self-made rise of Louis Marshall as a spokesman for American Jews is a remarkable, complex story it itself. Marshall's role in the founding of the American Jewish Committee, and his lengthy dominance of that organization, certainly afforded Marshall the stature and the bully pulpit to accomplish many things on behalf of Jews within the United States and, on a number of occasions, beyond America's borders as well. Nonetheless, the Establishment-insider approach that Marshall embodied not only triggered the founding of a competing national organization, the American Jewish Congress, but his positions also became a handy target that helped give voice and a following to those Jewish leaders who decried Marshall's views in the course of seemingly endless meetings, picket lines, and Yiddish press stories and columns. Intense differences among Jews at times proved sufficiently passionate to provoke lifelong feuds, boycotts, and occasional fisticuffs.

Aaron Sapiro's accomplishments on behalf of farmers set him apart in many ways, but his decision to confront the most powerful, outspoken anti-Semite of the period in court was unique. That Louis Marshall secretly intervened and undercut Sapiro's efforts was almost surely well-intentioned. Yet not until Woeste coaxed forth this story did we understand the profound clash of values and style between these two spokesmen for the Jews. She makes a compelling case against Ford and his machinations, but Louis Marshall does not escape unscathed.

The importance of remembrance in Judaism can hardly be overstated. Woeste's compelling, quite sad, final forty pages extend her story beyond the trial and the Henry Ford-Louis Marshall agreement. She deftly analyzes the role of pyrrhic victories. To many readers, Woeste may seem to betray too much faith in legal enforcement as she emphasizes, by contrast, how unenforceable Marshall's agreement with Ford turned out to be. Yet her descriptions of how Ford received the Cross of the Supreme Order of the German Eagle, the highest award that Hitler's government could bestow on a foreigner, and of how Sapiro first worked with the famous leftist labor leader Harry Bridges but then testified against Bridges provide a poignant denouement. As Woeste neatly summarizes, "Sapiro took one for the team, but only the team got atonement" (Woeste 2012, 331).

15. White added that if the plaintiff's claim of discrimination had been based "solely on the place or nation of his origin," the statute would not have protected him (*Saint Francis College v. Al-Khazarji*, 481 U.S. 604, 613).

In her conclusion, Woeste notes that Sapiro was not bitter and that he was too good an attorney to believe that the law could have made him whole. Although Woeste interviewed a source who told her that "Sapiro never rode in Ford cars and was upset when anyone he knew bought a Ford" (Woeste 2012, 395), she reports that Sapiro liked to joke that "the only car he enjoyed riding in was his son's Thunderbird" (Woeste 2012, 330).

EPILOGUE: REMEMBRANCE

I am of the generation in which many Jewish parents continued to boycott Ford cars as well as German products. My late father finally bought a big green Ford station wagon in 1957, however, and many years later I thought I should tell him that I was contemplating buying a Volkswagen Passat—it seemed the right affordable car for our teenagers to learn to drive and to navigate the crowded streets of Cambridge and Boston, Massachusetts.

When I finally caught up with my father, who had long since retired but who remained very busy with meetings of Jewish and community groups, he said over the phone that he certainly understood, though he still would not himself buy such a car. And then my father said, "Let me tell you a story."

He and my mother loved to travel and they had planned a trip to Spain several years after Franco was really, finally dead.[16] One of my great uncles took my father aside and asked how he could do such a thing. When my father pointed out that Franco's repressive hold was no longer in full force, my great uncle replied, "Oh no, it's not Franco. It's the Inquisition!"

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16. News bulletins about the death of Franco, including the catch phrase "Generalissimo Francisco Franco is still dead," became a running gag during the first year of "Saturday Night Live."

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