"THE LAW KNOWS NO HERESY": JEWISH COMMUNAL AUTONOMY AND THE AMERICAN COURT SYSTEM

By

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On 15 April 1844, Judge David Lewis Wardlaw of Charleston, South Carolina's Court of Common Pleas presided over a trial between two factions of synagogue Kahal Kadosh Beth Elohim.[1] The so-called "Organ Congregation" represented the temple's more liberal group, which called for an abridged service, English sermon, and, most controversially, accompanying organ. The other group in the rift—the "Remnants"—was composed of the more traditional members of the congregation that ardently resisted these changes. The predominantly American-born reformers made the case that the more conservative congregation members were "intruders who had exercised the privileges of membership without right."[2] Although the in-fighting in Beth Elohim would later be recognized as paradigmatic of the tensions of Jewish life in America, it was hardly clear at the time that the rupture that had formed in the Charleston community was irreconcilable. Nor, as we shall see, was it a foregone conclusion that the resolution would be found in an American civil court.

The schism, between the "Organ Congregation" and the "Remnants", had developed several years before the court case in the 1840s.[3] After the destruction of their synagogue in the Great Fire of 1838, Charleston's Jews rebuilt Beth Elohim, laying the cornerstones in January

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[1] *State of South Carolina ex relatione Abraham Ottolengui et al. v. G.V. Ancker et al.* (1844), cited in James William Hagy, *This Happy Land: The Jews of Colonial and Antebellum Charleston* (Tuscaloosa: University of Alabama Press, 1993), 254.

[2] Ibid.

[3] On the Beth Elohim episode, see Hagy, *Happy Land,* 236-263; Michael Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (Oxford: Oxford University Press, 1988), 228-235; Allan Tarshish, "The Charleston Organ Case," *American Jewish Historical Quarterly* 54 (1964-1965): 1-40; Robert Liberles, "Conflict over Reforms: The Case of Congregation Beth Elohim, Charleston, South Carolina," in Jack Wertheimer, ed., *The American Synagogue: A Sanctuary Transformed* (New York: Cambridge University Press, 1987).

1840. Meanwhile, the temple's redesigned exterior reflected increased calls for transformations inside the congregation. Seven months later, a group of Beth Elohim members called for the implementation of an organ in the synagogue in an effort to increase attendance among the city's younger Jewish population. The rabbi (or *hazan*, as the spiritual leader was known in most colonial and early national synagogues, which followed the Sephardi, or Spanish-Portuguese, rite) of the congregation, Gustavus Poznanski, endorsed the organ proposal. By a narrow margin, the congregation voted to install the instrument; although in Germany there was precedent for the establishment of an organ, in America—and in traditional Judaism more generally—the organ represented a radical innovation in the synagogue.

The defeated minority, however, would not easily accept such a drastic modification. Those who had opposed the organ soon withdrew from Beth Elohim and organized a separate congregation called Shearith Israel. The defection of the more conservative members of Beth Elohim, however, did not put an end to the division of the congregation. New divisions emerged after Beth Elohim, under the leadership of Abraham Ottolengui, adopted further changes including making English prayers commonplace and altering the liturgy regarding the Messiah. Ottolengui and the reformers soon encountered resistance from older, more traditional members, led by Abraham Tobias. The traditionalists who had not left Beth Elohim lured back some of their brethren who had broken off to form Shearith Israel and were able to regain control of the board of Beth Elohim. The conservative coalition, which had a majority and control of the board, moved quickly to ban instrumental music in the temple. On 10 July 1843, tensions between the "orthodox" members who sought to maintain traditional rabbinic practice and the reformers climaxed when the synagogue board was locked out of the temple.[4]

[4] The exact sequence of events is somewhat difficult to piece together. I have attempted to do so using court records. Nevertheless, we do know the following. On 26 July 1840, the congregation voted 46-40 in favor of the organ. After this vote, a group of traditionalists broke off from the Kahal Kadosh Beth Elohim to start their

The struggle that had culminated when the board was locked out moved from the temple and into the courtroom. During the next three years, the two groups worshipped separately, alternating use of the Beth Elohim facility before and during the judicial proceedings. For the trial, both sides employed some of the most expensive lawyers in Charleston.[5] After four days, the jury decided in favor of the reformers by ruling that the readmission of the Shearith Israel members was illegal. Despite an appeal in January 1845, the traditionalists could not overturn the court's decision, as Judge A.P. Butler affirmed the ruling of the lower court. In Charleston's Beth Elohim, reformed service had won—demonstrating that the elasticity of tradition and the power of individual choice was consistent with, in the words of historian Michael Meyer, the "principle of American liberty."[6]

The fact that the schism in Charleston was eventually settled in an American court raises a host of interesting questions about Jewish life in the modern period, especially in the United States. First, why were Charleston's Jews unable to settle internal community problems on their

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own congregation, Shearith Israel. KKBE's reformers, now in control, moved to increase the size of the Board of Trustees to seven members, giving them a majority, and to grant the power of religious regulation to the Board. By 1843, the seven-member Board was split between reformers (Abraham Ottolengui, J.C. Levy, and Abraham Moise), traditionalists (Isaiah Moses and Isaac Woolf), and moderates (Solomon Moses and Abraham Tobias). A scandal, in early April 1843, pushed the moderates to support the traditionalist wing of the Board. It occurred when Poznanski delivered a sermon advocating halving the length of Jewish holidays. Even the reformers on the Board were taken aback. But more importantly, the moderate trustee Abraham Tobias began to fear that Poznanski had overstepped the permissible limits of reform. Two weeks later, Tobias attempted to pass a resolution that the synagogue service must adhere to rabbinic laws. After a congregational vote, the measure was defeated 27-24. Nevertheless, the traditionalists saw an opening; they realized that they might soon have enough votes to retake the congregation. On the last day of April 1843, the traditionalists within the congregation called meeting to curtail any further reforms. They also voted to reinstate the rabbinic worship service and to readmit the Shearith Israel members who had left KKBE. Later that day, the four traditionalists on the Board sent a letter to the synagogue president asking for a full Board meeting to cast new votes. The president Ottolengui, himself a reformer, knew that this new coalition could undo the synagogue's reforms by voting to readmit the defectors. He refused the calls for a Board meeting, instead calling for a full congregation meeting on May 2, in which he felt the reformers had a better chance of maintaining control. The traditionalists within the congregation withdrew from the May 2 meeting. The next day, the traditionalist wing of the Board again asked the president to call a full Board meeting; again, Ottolengui refused. On May 6, the four traditionalists called a meeting of the Board on their own (Ottolengui did not attend) and voted to readmit 32 members from Shearith Israel. They called a congregational meeting for May 15, during which the readmission of the former members was resolved. Now in control, the traditionalists refused to readmit the reformers on the Board. Locked out of the temple, the reformers initiated civil court proceedings to take back their congregation.

[5] Hagy, 254.

[6] Meyer, 234. What began as "reform" soon became part of a larger institutionalized, ideological movement called "Reform Judaism."

own? What does this say about the state of the Jewish "community" in modernity? Moreover, what is significant about the fact that Jews considered the local secular courts as binding arbitrators? How did Jews conceive of the borders of religious jurisdiction in a pluralistic civil society: which decisions would be made within the community and which would be left up to American courts? Finally, if Jewish issues were brought to American courts in cities other than antebellum Charleston, what can we infer about the nature of American Judaism?

American Jewish history has overwhelmingly focused on the history of Jewish institutions in the United States. Historians have devoted significant attention to synagogues, benevolent societies, and denominational rabbinates.[7] While these social and religious structures were certainly central to the American Jewish experience, the emphasis on these aspects of Jewish history has created an illusion of continuity and harmony that was not always the case.[8] When we look at American court cases a new picture of American Jewish history emerges. This essay utilizes stories of Jewish conflict and religious schism in American courts to demonstrate that the American Jewish past is more complex than the traditional institutional histories suggest.

[7] The literature on these subjects is vast, but see, among many, Jonathan Sarna, *American Judaism: A History* (New Haven: Yale University Press, 2005); **Daniel Soyer,** *Jewish Immigrant Associations and American Identity in New York, 1880-1939 (C*ambridge: Harvard University Press, 1997); David Kaufman, *Shul with a Pool: The "Synagogue-Center" in American Jewish History* (Hanover: Brandeis University Press, 1999).

[8] We might think of this triumphalist institutional narrative as the "view from the center," a phrase Richard Bulliet, used to critique Islamic historiography. Bulliet proposes—and the method should be applied to the study of Jewish history if and when possible—a "view from the edge" that focuses on the peripheries of religion, where adherents of the faith are continuously crossing social boundaries. American Jewish historians have been reluctant to study those boundaries, for the most part neglecting issues such as conversion, radicalism, and community conflict. Richard Bulliet, *Islam: The View from the Edge* (New York: Columbia University Press, 1995).

Historians who have perpetuated the continuity narrative have done so because of an overwhelming reliance on a select body of sources.[9] Newspapers, especially Jewish newspapers such as *The Occident*, *The American Hebrew*, and *The American Israelite* have received significant attention. Synagogue minutes, philanthropic and defense agency records, and literature have also contributed to our understanding of the American Jewish experience. In addition, rabbinic responsa (replies to inquires related to Jewish law) have provided historians a window into the American Jewish past. While these sources differ to some extent and do not depict an entirely uniform picture of Jewish life, they all reflect a distinctly Jewish point of view—a view from the Jewish center. Internal, for the most part, to the Jewish community, these surviving documents overemphasize certain elements of the narrative, oftentimes ignoring less sanguine and more divisive or controversial occurrences, especially those at the Jewish edge. In order to examine other aspects of American Jewish history—especially those that distinguish it so greatly from centuries of life in Europe—it is necessary to look for alternative historical sources.

Judicial records of state and federal court cases that deal with Jewish issues provide additional sources on Judaism in the United States. Analyzing these judicial opinions enables us to reconstruct a social history of American Jewish life that does not shy away from issues of religious strife and schism. It is possible to create this "new picture" of Jewish life because the reasons for the appearance in court or judicial asides (called dicta) sometimes reveal a dimension of Jewish history that newspapers and responsa overlook. A 1916 patent case, for example, that appeared before New York District Judge Chatfield, and which arose between business partners

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[9] Among many, see Sarna, *American Judaism*; Hasia Diner, *The Jews of the United States, 1654-2000* (Berkeley: University of California Press, 2006); Marc Lee Raphael, ed., *The Columbia History of Jews and Judaism in America* (New York: Columbia University Press, 2008); Leon A. Jick, *The Americanization of the Synagogue, 1820–1870* (Hanover: Brandeis University Press, 1976); Karla Goldman, *Beyond the Synagogue Gallery: Finding a Place for Women in American Judaism* (Cambridge: Harvard University Press, 2001); Melvin I. Urofsky, *A Voice that Spoke for Justice: The Life and Times of Stephen S. Wise* (Albany: SUNY Press, 1982); Naomi W. Cohen, Not Free to Desist: The American Jewish Committee, *1906-1966* (Philadelphia: Jewish Publication Society of America, 1972): Jeffrey S. Gurock, *Orthodox Jews in America* (Bloomington: Indiana University Press, 2009).

who had met and conceived of a joint investment in early 1914 "while attending services at a synagogue in Brooklyn," provides insights on issues not discussed in more traditional Jewish sources. [10] Synagogues served not only as centers of worship, but also as meeting places for social solidarity and potential business ventures. While use of these court records raises important methodological considerations, a careful reading of them can help us reconstruct a social history of the Jews in America: how they lived, prayed, and even fought.

Of course, historians and legal scholars have long identified the importance and richness of the Jewish engagement with the American judiciary system.[11] However, these scholars have presented the Jewish community as a relatively monolithic group that challenged the idea of America as a "Christian nation." The fissure and fragmentation *within* the Jewish community has not been properly studied. First Amendment issues—especially those involving religion in public schools—have dominated the narratives, creating the impression that Jewish experience with American courts has been essentially constitutional. To a large extent, this is true: Jews, as a minority religion, have continually tested the boundaries and reaffirmed the core of the First Amendment's Establishment and Free Exercise clauses—a process Naomi Cohen has called the "pursuit of equality by way of separationism."[12] In addition, Robert T. Handy, Steven K. Green, and David Sehat have explored the influence of mass immigration of Jews to the United States in the late nineteenth century and their contribution (along with Catholics, and to some extent, Mormons) to the fall of the Protestant establishment.[13] But these studies do not fully appreciate

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[10] *Lande v. Sternberg*, 231 F. 201 (1916).

[11] Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (New York: Oxford University Press, 1992); Gregg Ivers, *To Build a Wall: American Jews and the Separation of Church and State* (Charlottesville: University of Virginia Press, 1995).

[12] Cohen, *Jews in Christian America*, 10.

[13] Robert T. Handy, *Undermined Establishment: Church-State Relations in America, 1880-1920* (Princeton: Princeton University Press, 1991); Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (New York: Oxford University Press, 2010); David Sehat, *The Myth of American Religious Freedom* (New York: Oxford University Press, 2011). See also Tracy Fessenden, *Culture and Redemption: Religion, the Secular, and American Literature* (Princeton: Princeton University Press, 2007).

the fact that Jews often appeared before American courts, engaged with them, and shaped their thinking in more practical and day-to-day ways. In order to understand the history of the American Jewish encounter with the law, we must shift our attention away from the Supreme Court and toward those instances in which "secular courts [were] called upon to apply and even to interpret laws established by religious bodies….in the specific context of Judaism."[14] By focusing less on theories of jurisprudence and more on the social implications of Jewish court cases, a new picture of Jewish life in America emerges.

This paper covers the period from the 1844 Charleston case through WWII. The reason is two-fold. First, this was the period before the First Amendment's free exercise and establishment clauses were "incorporated" to protect religious freedom at the state level; it was not until 1940 that the Court applied the First Amendment (through the Fourteenth) to the states in *Cantwell v. Connecticut*; seven years later, the Establishment Clause was similarly applied in *Everson v. Board of Education*.[15] During most of the period under consideration here, however, the American judiciary understood the First Amendment's religious clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof") as prohibitions on the federal government alone. Second, as a whole, one can say that American Jewry was born between the 1840s and the 1940s. In terms of law, before the 1840s, the relatively few Jews in the country rarely interacted with the nascent American legal apparatus. After WWII, the process of favoring American law over rabbinic jurisdiction had become

[14] "Enforceability of Religious Law in Secular Courts: It's Kosher, but Is It Constitutional?" *Michigan Law Review* 71, no. 8 (August 1973): 1641-1653. The majority of the extant scholarship in this area focuses on Orthodox Jews and the issues of kosher food and family law.

[15] 310 U. S. 296 (1940); 330 U.S. 1 (1947). See Bette Novit Evans, *Interpreting the Free Exercise of Religion: The Constitution and American Pluralism* (Chapel Hill: The University of North Carolina Press, 1997); Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (Cambridge: Belknap Press of Harvard University Press, 2010).

commonplace. During the century under consideration, though, such outcomes were hardly predetermined.

Using judicial opinions from state and federal court cases, this essay makes two distinct, though interrelated, arguments.[16] In the first section, I examine the relationship of the Jewish experience in the modern period to its medieval past. This essay proceeds from the premise that Jewish communal autonomy in medieval Europe existed but was not absolute. During the first two centuries of American Jewish life, whatever communal autonomy that had existed gave way to full social and political emancipation. Communal autonomy, as we shall see, included a Jewish judiciary system that, coupled with other modes of insular surveillance, judgment, and punishment, limited Jewish exposure to civil courts. When Jews were granted citizenship in the modern polity, they, by choice and by law, submitted to the jurisdiction of American courts. Previously internal Jewish matters, especially those that focused on cases of individual and group misconduct, were now answered in civil courts. Local state and federal court records both reveal and clearly illustrate the problems faced by Jewish communities in maintaining traditional Judaism. The challenge of modern Jewry, especially in America, was to strike a balance between what would fall under communal jurisdiction and what would be deferred to the state—and how to utilize the powers of the state to preserve communal coherence.

The second section takes the Beth Elohim case as its starting point and examines how reformers and traditionalists narrated and presented divergent histories of Judaism to bolster their legal cases. Rather than stagnant denominational categories, "reform" and "orthodox" versions of Judaism were given meaning and legitimated in the American courtroom. While internecine fighting had begun in the synagogue, state and federal courts offered spaces where reformers and traditionalists could resolve ideological tensions, and stood as sites where the

[16] Unless otherwise noted, all quotations are taken solely from the opinions themselves. If appropriate, I cite the holding of the case, but this is not my primary concern.

Jewish past and future were contested. In this discussion, as in the first section, I investigate the unique historical circumstances of modern America, which distinguished it from the pre-modern European Jewish community (known as the *kehilla*). In the *kehilla*, rabbis enjoyed what amounted to hegemonic control over dissent; in contrast, America's open environment allowed religion to flourish, but it also created conditions that encouraged religious reform and discouraged communal control. The social structures that allowed for heterodoxy to be labeled as "heresy" did not exist in America. Alternative versions of Judaism were given equal validity. Before an impartial, secular arbiter, the "orthodox" had trouble making the case that they were, in fact, the true heirs of the religious tradition. In an open, pluralistic society, both sides in a synagogue schism vied equally for legitimacy and supremacy. The reformers' claim to simply update minor elements of their religious practice held as much weight as the opposing claim to a long-standing adherence to "tradition."

Focusing on cases of schism in the Jewish community makes it possible to measure how different the American Jewish community was from the European autonomous Jewish community known as the *kehilla*. Social and religious issues that would previously have been settled internally were now, as in Charleston, brought before American courts. I call this shift a decline in rabbinic jurisdiction. Finally, an analysis of local court cases provides a window into Jews' perceptions of themselves. By understanding how Jews presented themselves in court, we can take note of how they conceived of their community and religion, as well as how they wanted to be received by their gentile neighbors and magistrates.

The reconstruction of a social history of Jewish schism using American court records also indirectly sheds light on a common misconception about the nature of American law and religion. The fact that American courts would agree to hear judgment in "church" cases, is interesting in and of itself, and belies any simplistic notion that the state refrains from interfering

in religious disputes. There is little evidence to support the idea that the American state simply abdicates its jurisdiction in religious matters. Famously, the Supreme Court saw no problem when it declared the Mormon practice of polygamy to be outside the scope of permissible religious activity, referring to the practice as a "crime by the laws of all civilized and Christian countries."[17] Similarly, the Court upheld the prerogative for Amish children to avoid compulsory high school education out of fear that attendance would "endanger their own salvation."[18] But beyond these well-known "prime-time" First Amendment cases, American courts have spent a great deal of time attempting to resolve religious disputes within communities, as in the Charleston case. These types of cases, as Kent Greenawalt has noted, "are not some detached fragment of constitutional law, remote from other doctrines."[19] American secular courts have time and again sought to investigate, as Paul G. Kauper points out, where "substantial departures from the fundamental doctrines" of a religion have taken place; more often than we have realized, a "civil court becomes the judge of religious doctrine."[20]

The Disintegration of Jewish Communal Autonomy?

From our vantage point, it may seem natural that disputes between people (Jewish or otherwise) be resolved in American civil courts. But, such an obvious proposition was hardly preordained. In order to appreciate the shift Jews experienced from managing their own affairs to relying on secular courts to settle disputes, we must first look back how the Jewish community operated during the medieval period.

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[17]*Reynolds v. U.S.,* 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890).

[18]*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[19]Kent Greenawalt, "Hands Off! Civil Court Involvement in Conflicts over Religious Property," *Columbia Law Review* 98, no. 8 (December 1998): 1843-1907, 1845.

[20]Paul G. Kauper, "Church Autonomy and the First Amendment: The Presbyterian Church Case," *The Supreme Court Review* 1969 (1969): 347-378, 352.

The notion that the Jewish community of the Middle Ages enjoyed "communal autonomy"—the right to exist as a separate corporation, to submit to rabbinic authority, to administer justice in its own courts, and to manage its own educational system—had been axiomatic . Recently, however, scholars have begun to question the hegemonic paradigm of Jewish self-government and juridical autonomy. The shift away from the perpetuation of the "communal autonomy" model has been more strongly felt in the history of Jews under Islam than under Christendom.[21] Part of the reason is the influence of the historian Jacob Katz, who maintained that the medieval European *kehilla* controlled, inter alia, "economic activity, relations with non-Jews, family and social matters, religion, and education."[22] But even if Katz is correct about its internal workings, the distribution of power in the medieval *kehilla* was not absolute: Jewish communal leaders were entirely unable to enforce their authority without turning to the power structures of the state. In this vein, Yosef Kaplan has shown that even the harshest demonstration of Jewish communal authority—the ban of excommunication known as the *herem*—was a relatively weak means of coercion.[23] In practice, the rabbinic and lay leaders of the

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[21] Marina Rustow, *Heresy and the Politics of Community: The Jews of the Fatimid Caliphate* (Ithaca: Cornell University Press, 2008), chapter 3; Joseph R. Hacker, "Jewish Autonomy in the Ottoman Empire: Its Scope and Limits. Jewish Courts from the Sixteenth to the Eighteenth Centuries," in Avigdor Levy, ed., *The Jews of the Ottoman Empire* (Princeton: Darwin Press, 1994), 153-187; Uriel Simonsohn, "Communal Boundaries Reconsidered: Jews and Christians Appealing to Muslim Authorities in the Medieval Near East," *Jewish Studies Quarterly* 14 (2007): 328-363.

[22] Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages* (New York: New York University Press, 1993), 76, 83. Katz strongly maintained that Jews were often dissuaded—or prohibited—from bringing suits to non-Jewish courts, and that his sources were descriptive, not prescriptive. See also *Jonathan Israel,European Jewry in the Age of Mercantilism, 1550*-1750 (New York: Oxford University Press, 1989); Jonathan Frankel and Steven Zipperstein, eds., *Assimilation and Community: The Jews in Nineteenth-Century Europe* (New York: Cambridge University Press, 1992). On pre-modern and early modern Jewish history, see Gershon David Hundert, *Jews in Poland-Lithuania in the Eighteenth Century: A Genealogy of Modernity* (Berkeley: University of California Press, 2004); Jay R. Berkovitz, *Rites and Passages: The Beginnings of Modern Jewish Culture in France, 1650-1860* (Philadelphia: University of Pennsylvania Press, 2004); David Ruderman, *Early Modern Jewry: A New Cultural History* (Princeton: Princeton University Press, 2010).

[23] Yosef Kaplan, "The Social Functions of the *Herem*" and "Deviance and Excommunication in the Eighteenth Century," in *An Alternative Path to Modernity: The Sephardi Diaspora in WesternEurope* (Brill Academic Publishers, 2000), 108-142, 143-154. Rabbinic authorities were sensitive about their waning influence, thus they utilized the *herem* more frequently. But rabbis were also aware that the *herem* held implicit limits: it could push

kehilla depended on the state for the disciplinary enforcement of its own authority; communal autonomy was hardly unconditional. Nevertheless, the medieval *kehilla* managed its own affairs, and even if it relied on the arm of the state for enforcement, lived by its own internal values.[24]

The argument that there was never a Jewish *kehilla* in America like its European counterpart has also become axiomatic, in conventional wisdom, if not in academic circles.[25] This is only partly true. The earliest Jewish communities in British North America utilized organizational frameworks not unlike those in Europe: synagogue-communities.[26] American synagogue-communities resembled the medieval Sephardic *kehilla*, in which internal politics of the community were highly regulated by a select group of elite powerbrokers. Furthermore, as Jonathan Sarna and Eli Faber have noted, the *herem* was utilized even in colonial America, as well as other forms of punishment, which paralleled church discipline, including fines, denial of synagogue honors, and threatened exclusion from Jewish cemeteries.[27] Over time, however, the communal structure of American Jewry began to disintegrate. One important reason for the

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Jewish community members to leave the community. Stronger punishments such as fines were sometimes used, but imprisonment and physical punishment were solely conducted by the state authorities. Recent works that challenge Katz's view of pre-modern communal autonomy include, Magda Teter, *Jews and Heretics in Catholic Poland: A Beleaguered Church in the Post-Reformation Era* (New York: Cambridge University Press, 2006); ChaeRan Y. Freeze, *Jewish Marriage and Divorce in Imperial Russia* (Hanover, NH: Brandeis University Press, 2002); Gershon David Hundert, *The Jews in a Polish Private Town: The Case of Opatow in the Eighteenth Century* (Baltimore: Johns Hopkins University Press, 1992).

[24] Michael A. Meyer, *Judaism within Modernity: Essays on Jewish History and Religion* (Detroit: Wayne State University Press, 2001), chapter 1.

[25] In fact, an attempt to create an "ethnic" *kehilla* failed in Progressive era New York. Arthur Goren, *New York Jews and the Quest for Community: The Kehillah Experiment, 1908-1922* (New York: Columbia University Press, 1970); Eric L. Goldstein, "The Great Wave: Eastern European Jewish Immigration to the United States, 1880-1924," in Marc Lee Raphael, ed., *The Columbia History of Jews and Judaism in America* (New York: Columbia University Press, 2008), 70-92.

[26] Hasia Diner, *The Jews of the United States: 1654-2000* (Berkeley: University of California Press, 2004), 23-40; Jonathan Sarna, "'Facing the New World': What Portraits of Early American Jews Reveal and What They Obscure," in Barbara Kirshenblatt-Gimblett, ed., *Writing Modern Jewish History: Essays in Honor of Salo W. Baron* (New Haven: Yale University Press, 2006), 27-33. Recently, scholars have sought to counter the hegemonic interpretation of the synagogue community. Nevertheless, it remains the best explanatory framework for the colonial period. Holy Snyder, "Rethinking the Definition of 'Community' for a Migratory Age, 1654-1830," in Jack Wertheimer, *Imagining the American Jewish Community* (Waltham: Brandeis University Press, 2007), 3-27.

[27] Sarna, 30; Eli Faber, *A Time for Planting: The First Migration, 1654-1820* (Baltimore: Johns Hopkins University Press, 1992); see also William Pencak, *Jews and Gentiles in Early America, 1654-1800* (Ann Arbor: University of Michigan Press, 2005).

decline of Jewish communal insularity was ideological. In the modern world, freedom of conscience and the separation of church and state meant that Jews were no longer a separate entity with distinct judicial and policing mechanisms. Another reason was more practical, as the social isolation of Jews that had undergirded the threat of excommunication in Europe gave way to American acceptance and opportunity.

By the nineteenth century in the United States, as Jews mixed freely with non-Jews, issues that had traditionally been handled within the Jewish community were no longer solely internal. And yet, some of the same issues—synagogue disagreements, burial and inheritance procedures, and questionable *kashrut* (ritual dietary laws)—continued to challenge the Jewish communities in America. Now, though, the disputes were taken before secular judiciaries.[28] Individual deviance, which might have been resolved by a *bet din* (Jewish court) in the European *kehilla*—and punished by the state—was now under the jurisdiction of secular courts. A case of such deviant behavior appeared before the Supreme Court of Pennsylvania in 1916. In that case, *Ashinsky v. Levenson*, Rabbi Aaron M. Ashinsky of Beth Jacob Congregation in Pittsburgh sought an injunction (a restraining order) against an unruly congregant.[29] Ashinsky was born in Rajgrod, Poland. After his arrival in the United States in 1886, he led congregations in Brooklyn, Syracuse, and Detroit before coming to Pittsburgh.[30] It seems that at some point, Elias E. Levenson, a member of the synagogue, began to harass the rabbi. "On numerous occasions during several years prior," Justice Mestrezat wrote for the court, Levenson "entered the

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[28] Of course, during the expanse of Jewish history, arbitration by non-Jewish courts has occurred, but it has not been the norm. I have benefited from the documentary evidence of Amnon Cohen, *A World Within a World: Jewish Life as Reflected in Muslim Court Documents from the Sijill of Jerusalem (XVIth Century)* (Philadelphia: University of Pennsylvania Press, 1994) and Tamer el-Leithy, *Coptic Culture and Conversion in Medieval Cairo, 1293-1524 A.D.* (Ph.D. Dissertation, Princeton University, 2005), who deftly uses Cohen's sources.

[29] *Ashinsky v. Levenson*, 256 Pa. 14; 100 A. 491 (1917).

[30] Obituary, *New York Times*, 3 April 1954, 16. According to Justice Mestrezat, Beth Jacob was "a corporation for the purpose of the support of public worship according to the faith, doctrine and usage of the orthodox Jewish religion."

synagogue, called the rabbi vile names, caused great disorder, and created such disturbances during public worship as to seriously interfere therewith and to prevent religious services from being conducted." For their part, "Members of the congregation frequently requested him to behave himself properly in the synagogue," the opinion continued, "but their efforts were in vain. These and many other acts of like character, during the last three years at least, disclosed the intention of defendant, by his persistent and continuous illegal conduct, to prevent the plaintiff congregation from using their property for religious worship for which it was procured and is now held."[31]

Unable to control Levenson, Rabbi Ashinsky and the synagogue sought an injunction that would prevent Levenson "(1) from entering into the synagogue or premises of the Beth Jacob Congregation, and (2) from insulting, molesting, approaching, accosting, or in any way speaking to Rabbi A. M. Ashinsky." The court readily admitted that Rabbi Ashinsky's safety and mental health could not be assured "unless a chancellor protects [him]."[32] As a result, Justice Mestrezat explained, the court granted the injunction against Levenson, but the ruling was not absolute since the court could not prevent Levenson from "insulting or molesting the rabbi near the premises of the synagogue, or in the public streets."[33] If that happened, the rabbi would have to seek a remunerative remedy in court. The court reasoned that Levenson's "unlawful and scandalous conduct deprive the congregation of the use of the property for public worship," and that his behavior "thereby prevent[s] the officiating rabbi and the congregation from making use of it for that purpose."[34] In ruling against him, the court pointed out that his synagogue

[31] *Ashinsky v. Levenson*, 256 Pa. 14, 17.
[32] Ibid.
[33] *Ashinsky v. Levenson*, 256 Pa. 14, 18.
[34] Ibid.

membership "does not confer authority upon him to violate the laws of the church and of the Commonwealth."[35]

The fact that Levenson's deviant behavior could not be handled internally was one sign of the disintegration of Jewish communal authority. In eighteenth century London, for example, it was common practice for synagogues to impose penalties on congregants who "insulted the rabbi or other synagogue officials."[36] What is astonishing is the way in which American Jewish communal leaders realized that in order to preserve some semblance of control within the community, *they* needed to submit disputes to the courts and thus to the power and judicial structures of the state. Realizing that they lacked the power to enforce behavior, rabbis and lay leaders submitted to the authority of American courts. In this sense, the situation was not altogether different from the medieval *kehilla*: communal leaders still sought to impose their will through an appeal to state power. But unlike the corporate structure of the *kehilla*, Jewish communal leaders in the United States did not have a monopoly on access to state power. Communal leaders were not the only ones who sought to utilize the American court system to their advantage—and, at least in theory, Rabbi Ashinsky and Levenson had access to the court on a level playing field. Those, like Levenson, who protested the authority of the Jewish leadership, also recognized the importance of wielding the juridical power of the state. In his defense, Levenson argued before the court that Rabbi Ashinsky was in effect restoring medieval powers to the synagogue. The court, however, ultimately rejected Levenson's suggestion that the "decree enjoining him from entering the synagogue is, in effect, pronouncing a sentence of *excommunication*."[37]

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[35] *Ashinsky v. Levenson*, 256 Pa. 14, 18.

[36] Faber, 67.

[37] *Ashinsky v. Levenson*, 256 Pa. 14, 18 (my emphasis). Levenson's argument was also based on the fact that he was a paying member of the synagogue—a consumer—whose rights could not be abrogated unilaterally. This view of synagogue membership contrasts with the notion of synagogue membership in the *kehilla*, which was

Cognizant of the disintegration of communal autonomy and the need to seek justice in American courts, Jewish synagogue members who felt that their rights were abrogated turned to state authorities. In the nineteenth and early twentieth centuries, synagogue matters were often brought to local courts, and typically involved those very issues (such as disputes over pews) that would have been under communal, if not rabbinic, jurisdiction in the Old World.[38] In general, a major difference between Europe and America was the engagement of the state in matters pertaining to rabbinic leadership. Thus, faced with a growing inability to manage their own communal affairs, synagogues often found themselves pleading their cases before American judges. In 1866, Congregation B'nai Israel (Children of Israel) of Memphis faced off against its own *hazzan* (rabbinic community leader), Jacob J. Peres, in Tennessee's Supreme Court.[39] The specific issue before the court was a breach of contract but a close examination of the case reveals much about the religious tensions and power structures within the community. During his tenure as *hazzan*, the congregation had grown increasingly displeased with Peres, claiming that he had "forfeited his right to these offices, by reason of improper conduct." Soon thereafter, a "trial" was held in front of the synagogue leaders and Peres's fate was decided. On 18 April 1860—four months shy of the end of his contract—Peres "was unanimously dismissed, they having paid him up to the first of that month."[40] In court, Peres sought the rest of the salary he felt he was owed.

B'nai Israel congregants first grew concerned with Peres when he opened a grocery store in Memphis called Jacob J. Peres & Co. There were rumors that Peres "on occasion" told

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automatic and based on residence in the corporate society. In the United States, of course, synagogue and community membership was voluntary.

[38] *Samuels v. Congregation Kol Israel Anshi Poland*, 52 A.D. 287, 65 N.Y.S. 192 (1900); *Shecter v. Congregation Chevra Thilim*, 50 Pa. D. & C. 383 (1944). On pews as real estate, see *Adolph S. Deutsch v. Maurice C. Stone et al.*, 1891 Ohio Misc. 168; 11 Ohio Dec. Reprint 436 (1891).

[39] *The Congregation of the Children of Israel v. Jacob J. Peres*, 42 Tenn. 620; 1866 Tenn. 4 (1866).

[40] *Children of Israel v. Peres*, 42 Tenn. 620, 622.

congregation members that "he thought of quitting his place as *hazzan*, preacher and teacher; that he frequently, upon Saturday, which is the Jewish Sabbath, and upon other days, required by Jewish law to be kept sacred as holy days, transacted worldly business, by keeping open the said store."[41] According to Peres, he was "not really a member of the firm of Jacob J. Peres & Co."[42] The truth was, he explained, his brother Henry ran the store, but conducted business under Jacob's name because "he had failed in Milwaukie, and owed debts… [and] could not do business under his own name."[43] Despite his testimony, the court reasoned that Peres "was guilty of conduct offensive to his Church, and unbecoming a Jewish minister."[44] What difference could it make, the court asked, "if he had no interest in the store, if he yet aided and countenanced those who had, (and to whom he had loaned the use of his name,) in a desecration of the Sabbath, and other holy days of the Jews; and the more especially so, if he took a commission for so doing? Could it be expected that a Church, possessing any claim to purity, would retain such a preacher?"[45]

The interference of the court in the matter of Peres illustrated the decline of rabbinic power as well as some of the vestiges of communal autonomy; after all, it was a *bet din* (Jewish ecclesiastical court) of sorts that originally decided to rescind the *hazzan*'s contract.[46] The Memphis case also revealed how rumor worked within the community to report misconduct and how lay community leaders saw the need to use state power to carry out their will. In addition

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[41] *Children of Israel v. Peres*, 42 Tenn. 620, 624.

[42] Ibid., 625.

[43] Ibid.

[44] Ibid., 626.

[45] Ibid. The court relied heavily on the testimony of "The Rev. Mr. Tuska," who explicated "very plainly, the qualifications required of a Jewish Minister." In 1860, Simon Tuska was chosen as B'nai Israel's rabbi. Citing "books of the highest authority among the Jewish people," Tuska showed the court that "the minister must be fit for his office, by being free from the transgression of a positive law, and a loose reputation, so as to be agreeable to the people….and if witnesses testify that he has violated a positive law, the congregation shall discharge him."

[46] On the standard of deference which civil courts should apply in cases where religious body has already issued a decision, see Michael G. Weisberg, "Balancing Cultural Integrity against Individual Liberty: Civil Court Review of Ecclesiastical Judgments," *University of Michigan Journal of Law Reform* 25, nos. 3/4 (Spring/Summer 1992): 955-1008.

to demonstrating the inability of the autonomous Jewish community to resolve its own clergy issues, these cases also showcase some of the ways in which synagogue concerns were identical to church issues that appeared before American courts. Courts often heard from Catholic and Protestant groups regarding prayer disturbances,[47] the constitutionality of excommunication,[48] pew disputes,[49] and errant clergymen.[50] American secular courts were faced with an important question: if a religious body adjudicated a dispute between the members of a religious group, would the court interfere with the "decisions of those bodies made in accordance with those bodies' rules"?[51]

But the court's unwillingness to issue a ruling did not stop Jewish litigants from seeking redress in American courts—and seeking to wield state authority to their own advantage. American Jewry quickly recognized during the eighteenth and nineteenth centuries that issues that would have been traditionally handled by the *kehilla*—synagogue misbehavior,[52] divorce,[53] and burial[54]—were now tried and resolved in American courts. When Jacob Rothman, a fur dealer in New Jersey "made way with most [of the] merchandise on a Sabbath while his more orthodox and pious partner was at devotions in the synagogue," the deviant behavior was adjudicated by Justice Backes of the New Jersey Count of Chancery, not by the rabbi or the

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[47] *Owen v. Henman*, 1 Watts & Serg. 548 (1841); *Harrison v. The State*, 37 Ala. 154 (1861).

[48] *Servatius v. Pichel*, 34 Wis. 292 (1874*); Jonas Farnsworth & wife vs. Richard S. Storrs*, 59 Mass. 412 (1850).

[49] *Rudolph A. Witthaus v. St. Thomas' Church*, 161 A.D. 208; 146 N.Y.S. 279 (1914).

[50] *Travers v. Abbey*, 104 Tenn. 665; 58 S.W. 247 (1900); *Luther Sheldon versus The Congregational Parish in Easton*, 41 Mass. 281 (1833); *Herman Marks v. The Congregation Daruch Amuno*, 5 Daly 8 (1873).

[51] Justin K. Miller, "Damned If You Do, Damned If You Don't: Religious Shunning and the Free Exercise Clause," *University of Pennsylvania Law Review* 137, no. 1 (November 1988): 271-302. See also Richard W. Duesenberg, "Jurisdiction of Civil Courts over Religious Issues," *Ohio State Law Journal* 20, no. 3 (Summer 1959): 508-548; Kent S. Bernard, "Churches, Members, and the Role of the Courts: Toward a Contractual Analysis," *Notre Dame Lawyer* 51, no. 4 (April 1976): 545-573; Thomas W. Cunningham, "Constitutional Law—First Amendment—The Role of Civil Courts in Church Disputes," *Wisconsin Law Review* 1977, no. 3 (1977): 904-928;

[52] *L. Napoleon Levy v. Fischel David et al.*, 24 R.I. 249; 52 A. 1080 (1902).

[53] *David Saperstone v. Anna Saperstone*, 73 Misc. 631; 131 N.Y.S. 241 (1911); *Max Shilman, v. Lizza Shilman*, 105 Misc. 461; 174 N.Y.S. 385 (1918).

[54] *Beth Hammidrash Hagodol Ub'nay Congregation v. The Oakwoods Cemetery Association*, cited in *Reports of Cases at Law and in Chancery Argued and Determined in the Supreme Court of Illinois* (State of Illinois: Illinois Supreme Court, 1903); *In the Matter of the Estate of Israel Kladneve*, 133 Misc. 766; 234 N.Y.S. 246 (1929).

leadership of the community.[55] Thus, these court records shed light on a Jewish past not impervious to internal deviance and dissent. The court records offer a glimpse into a less harmonious Jewish social history than the triumphalist or internalist narrative one might read in the pages of the Jewish press or the responsa of rabbis. The questions of conduct that brought Jews into the courthouse would have been internal community matters in the European *kehilla*. In the modern, especially American, milieu, freedom of religion offered the opportunity for Jews to break out of the corporate structure of medieval Europe. However, that openness came at a cost because American Jewish communities were forced to an unprecedented degree to submit to the jurisdiction of American courts. Those who tried to preserve communal power needed to learn how to utilize the juridical functions of the state.

"Two factions within the synagogue": Orthodox and Reform Cases

Dissent has been central to the history of rabbinic Judaism.[56] But until the modern period, the structure of the Jewish community—both internal and external relative to the state—allowed traditional rabbinic Judaism to label dissent as deviant. Heterodoxy was, because of historical power distributions, labeled as heresy. Although the Jewish community could not enforce complete control over dissidents, any attempt to deviate from normative rabbinic practice was quickly branded as heretical—the very act itself a form of social control. The modern period was markedly different. When the reformers of Charleston's Beth Elohim synagogue proposed the implementation of a musical instrument contrary to traditional *halakhic* (Jewish law) practice, they were not once branded as "heretics." The reason they were not denounced as deviants was not semantic. Internally, as we saw in the first section, the

[55] *Abraham Kaufer v. Jacob Rothman*, 98 N.J. Eq. 467; 131 A. 581; 1926 N.J. Ch. 206; 13 B Stockton 467 (1926).

[56] Daniel Frank and Matt Goldish, eds., *Rabbinic Culture and its Critics: Jewish Authority, Dissent, and Heresy in Medieval and Early Modern Times* (Detroit: Wayne State University Press, 2008), 1-52.

community lacked the structural mechanisms to enforce normative practice. The external milieu also precluded the emergence of "heresy." America's religious landscape did not allow for any centralized group to accuse a band of co-religionists of heresy; in the land of pluralism, no "orthodoxy" could make legitimate claims against alternative forms of religious practice.[57] Meaningful rabbinic authority "could not endure the dual assault from within and without."[58]

But pluralism was not always harmonious. Schism, both practical and ideological, has been at the center of American Jewish life. The fact that no dominant group could label heterodoxy as heretical meant that all groups vied equally for legitimacy and supremacy. Dissenting opinions within the community were all, *prima facie*, of equal validity. Those who called for an organ during services were no longer at a disadvantage; their claim to "reform" what was in their eyes outmoded held as much weight as the opposing claim to "tradition." Dissenting groups—the title "sects" undoes the equal validity each group enjoyed—disagreed fundamentally about how to order Judaism in the free American environment.[59] Dissent, often centered on a desire to define the Jewish past and future, led to conflicts that were brought before, and decided by, American jurists and not by rabbis. [60] In this section, I investigate cases of group schism and demonstrate how Americans courts offered an unbiased space for mediation. I also examine how Jews presented and represented the schisms between the two

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[57] The only exception came in 1945, when a group of Orthodox rabbis issued a *herem* against "heretic" Mordecai Kaplan, founder of Reconstructionist Judaism. Diner, *Jews of the United States*, 255; Jeffrey Gurock and Jacob Schachter, *A Modern Heretic and a Traditional Community: Mordecai M. Kaplan, Orthodoxy, and American Judaism* (New York: Columbia University Press, 1998). On the *herem* in modernity, see Kenneth Hart Green, "Moses Mendelssohn's Opposition to the *Herem*: The First Step Toward Denominationalism?" *Modern Judaism* 12 (1992): 39-60.

[58] Frank and Goldish, *Rabbinic Culture*, 39; see also Jacob Katz, *A House Divided: Orthodoxy and Schism in Nineteenth-Century Central European Jewry* (Waltham: Brandeis University Press, 1998); David Ellenson, *Rabbi Esriel Hildesheimer and the Creation of a Modern Jewish Orthodoxy* (Tuscaloosa: University of Alabama Press, 1990); Naomi Cohen, *Encounter with Emancipation: The German Jews in the United States, 1830-1914* (Philadelphia: JPS, 1984).

[59] On the problematics of the term "sect," I have benefited from the work of Rustow, *Heresy and the Politics of Community*.

[60] Jews were not the only religious group to seek justice over group schism in American courts. On the Norwegian Evangelical Lutheran congregation, see *Nelson v. Benson*, 69 Ill. 27 (1873); cf. *The West Koshkonong Congregation and Others, v. Ottesen*, 80 Wis. 62 (1891).

factions and how American courts were often hesitant to overstep their jurisdiction in religious disputes.

Just as Charleston's Kahal Kadosh Beth Elohim was winding down its dramatic internal struggle, another South Carolina judge ruled in an 1846 church dispute that the "civil tribunal possesses no authority whatever to determine on ecclesiastical matters-on a question of heresy, or as to what is orthodox, or unorthodox, in matters of belief."[61] When questions about ecclesiastical affairs reached American courts in the early 1800s—usually in the form of church property disputes—judges (especially outside New England) followed the "implied trust" doctrine, which awarded control to the group deemed faithful to the original trust. In cases involving "hierarchical churches," secular courts resolved the property disputes by following the procedures of the highest religious authorities. But in "congregational churches," like Jewish synagogues, courts relied most heavily on the implied trust rule because there was no ultimate religious arbiter.[62]

As Giovan Venable has written, "American courts have stated consistently that they cannot resolve disputes of religious doctrine. Yet it is impossible for courts completely to avoid decisions bearing on theological views of competing church factions when they adjudicate cases

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[61] *Wilson v. Presbyterian Church of John's Island*, 2 Rich.Eq. 192, 198 (S.C. 1846).

[62] Paul G. Kauper, "Church Autonomy and the First Amendment: The Presbyterian Church Case," *The Supreme Court Review* 1969 (1969): 347-378; Giovan H. Venable, "Courts Examine Congregationalism," *Stanford Law Review* 41, no. 3 (February 1989): 719-74. On this topic, see also William Stringfellow, "Law, Polity, and the Reunion of the Church: The Emerging Conflict between Law and Theology in America," *Ohio State Law Journal* 20, no. 3 (Summer 1959): 412-436; "Judicial Intervention in Disputes over the Use of Church Property," *Harvard Law Review* 75, no. 6 (April 1962): 1142-1186; Robert C. Casad, "The Establishment Clause and the Ecumenical Movement," *Michigan Law Review* 62, no. 3 (January 1964): 419-464; "Judicial Intervention in Church Property Disputes: Some Constitutional Considerations," *The Yale Law Journal* 74, no. 6 (May 1965): 1113-1139; Robert C. Casad, "Church Property Litigation: A Comment on the Hull Church Case," *Washington & Lee Law Review* 27, no. 1 (Spring 1970): 44-69; Louis J. Sirico, Jr., "The Constitutional Dimensions of Church Property Disputes," *Washington University Law Quarterly* 59, no. 1 (1981): 1-80; Louis J. Sirico, Jr., "Church Property Disputes: Churches as Secular and Alien Institutions," *Fordham Law Review* 55, 3 (1986): 335-362; William G. Ross, "The Need for an Exclusive and Uniform Application of 'Neutral Principles' in the Adjudication of Church Property Disputes," *St. Louis University Law Journal* 32, no. 2 (Winter 1987): 263-316.

involving church property disputes."[63] This was certainly true in cases involving the Jewish faith. In 1875, New York's Court of Common Pleas issued a ruling in the case of *Solomon v. The Congregation B'nai Jeshurun*.[64] Chief Justice Richard Larremore explained that Mr. Solomon sought an injunction against the synagogue "changing pews and arranging for family worship." The court eventually ruled in favor of the synagogue because "the trustees and a majority of the members proceeded in a regular, just and legal manner." Although the court appeared to do very little in the case, its decision in favor of the implied trust was, in fact, an affirmation of the "reformed" style of worship. As the legal scholar William G. Ross has written, "Recognizing that a strict application of the implied trust rule would inhibit the doctrinal evolution of churches, many courts declared that only a radical or fundamental doctrinal departure would cause a forfeiture of property. This adjustment of the implied trust rule, however, created the obvious difficulty of defining a fundamental departure."[65]

The end of Larremore's opinion offers us a window into how divided Jews were about the proper way to construct their synagogue, and the lack of rabbinic authority in the community. "If the separation of the sexes during divine worship be a cardinal principle of the faith professed by this society," Larremore explained, "then a goodly portion of its membership

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[63] Giovan H. Venable, "Courts Examine Congregationalism," *Stanford Law Review* 41, no. 3 (February 1989): 719-749. In 1871, the Supreme Court finally weighed in on the subject. The case before the Court, *Watson v. Jones*, involved a Presbyterian church in Louisville, Kentucky, a majority of whose members supported slavery. However, the national judicatory body of the hierarchical Presbyterian order supported the antislavery faction. Although the federal ruling was not binding on the states, the court's ruling in favor of deference to the religious authority of the church set national precedent: "whenever the questions of discipline, or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and binding on them, in their application of the case before them," the Court explained. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871).

[64] *Solomon v. The Congregation B'nai Jeshurun*, 49 Howard's Practice 263 (1875). See Jonathan Sarna, "The Debate over Mixed Seating in the American Synagogue," in Jack Wertheimer, ed., *The American Synagogue: A Sanctuary Transformed* (New York: Cambridge University Press, 2003), 273-290, who cites this case as "one of comparatively few such cases" to reach civil court.

[65] William G. Ross, "The Need for an Exclusive and Uniform Application of 'Neutral Principles' in the Adjudication of Church Property Disputes," *St. Louis University Law Journal* 32, no. 2 (Winter 1987): 263-316, 270.

have sanctioned a grievous error." But, he wrote, "such a conclusion is not possible in view of the opposing affidavits by which it appears that the question of faith involved is at least one of doubt."[66] The two groups within B'nai Jeshurun that disagreed over the synagogue's seating arrangement—a central issue in the debate between reformers and traditionalists—sought resolution before an impartial American jurist. Although the court considered rabbinic advice during the case, the entire affair demonstrates how each group attempted to marshal the power of state authorities in the schism.

Another case that pitted Jewish "reformers" against traditionalists appeared before Chief Justice Pleasants of the Texas Court of Appeals in 1913.[67] *Endelsohn et al. v. Gordon et al.* involved the "right to the possession, use, and control of a synagogue building, schoolhouse, cemetery, and other property belonging to the Congregation AdathYeshurun." Endelsohn represented the more traditional faction of the synagogue. In his view, AdathYeshurun was responsible to the "support of religious services according to well-defined doctrines of faith and practice and in accordance with certain rites and ceremonies set forth." According to Endelsohn and company, the reformers—here represented by Gordon—"had changed and abrogated the doctrines of faith and practice and the rites and ceremonies…and were attempting to set up and maintain in the synagogue of said congregation certain other and fundamental different religious doctrines of faith and practice and different rites and ceremonies." It was alleged that Gordon and his group "were using, and attempting to use, the property of said congregation for the support and

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[66] Albert M. Friedenberg, "Calendar of American Jewish Cases," *Publications of the American Jewish Historical Society* 12 (1904): 93. The court left the issue "where it properly belongs, to the judicature of the church." See also *The Congregation Dorshe Tov Anshe Poland v. The Congregation Bnai David OhaveZedek et al.,* 300 Ill. 115; 133 N.E. 48 (1921). A schism emerged in the congregation in January 1917, when the temple "engaged a rabbi who persisted in being clean-shaven, who permitted young girls to sing in the choir, who permitted the women of the congregation to sit with the men on certain holidays, and who permitted a piano to be placed in the synagogue." The court noted that these things "were regarded by the orthodox element of the congregation as profane and much controversy and dissension arose." See also *Katz v. Goldman*, 33 Ohio App. 150, 168 N.E. 763 (1929), in which the court held that congregation in Orthodox synagogue is the highest judicatory and has authority to determine what is orthodox.

[67] *Endelsohn et al. v. Gordon et al.,* 156 S.W. 1149; 1913 Tex. App. 53 (1913).

maintenance of said new and different doctrines of faith and practice and rites and ceremonies, and were thus diverting said property and the use thereof from that for which it was originally purchased, acquired, and dedicated." It was further alleged that Gordon et al., "who were officers of said Congregation Adath Yeshurun, were threatening to expel" the traditionalists "as members of said congregation and to misapply and misappropriate the funds and property thereof and to take into said organization new members for the purpose of aiding them in the misappropriation and diversion of the property and funds."

In the case, Endelsohn sought an injunction to restrain the reformers "from thus diverting the property and funds of said congregation" or using the synagogue for new purposes. Furthermore, the traditionalists asked for an injunction "restoring and recognizing the doctrines of faith and practice and the religious rites and ceremonies originally designed" by Adath Yeshurun. If that solution could not be reached, Endelsohn was also comfortable with "the dissolution of the corporation and a partition of its property."[68] Thus, Endelsohn and the traditionalists attempted to utilize the neutral space of the secular court—and its juridical power—to retake the synagogue. Ideological divisions had led to practical disagreements, but resolutions were no longer internal. Unable to label the reformers as heretics before a rabbinic tribunal, Endelsohn was forced to compete on an equal footing before an American judge.

As much as resolving disputes, the courts served as sites of articulating and (often reinterpreting) the history and relationship of Jewish "orthodoxy" and "reform." The Supreme Court of Virginia decided in 1937 on the burial procedures that were to be conducted for Benjamin Goldman.[69] According to Justice Holt, Benjamin Goldman was throughout his life an

[68] In the lower court in 1911, the judge had granted the injunction, restraining Gordon from implementing any expulsions "as members of said congregation, and from taking in new members or paying out the funds of the corporation, except for the purpose of paying the salaries of its officers, and also from holding any business meeting or transacting any of the business of said congregation."

[69] *Isaac H. Goldman et al. v. Meyer Mollen et al.,* 168 Va. 345; 191 S.E. 627 (1937).

orthodox Jew and a long-time member Sir Moses Montefiori Congregation. Goldman had come to Richmond in March 1910. After years in the congregation, "he and a small group of his associates became dissatisfied and thereafter worshipped in a rented room on West Broad Street." The court noted that because he was rabbinically trained, Goldman was "charged with and did perform certain of the ritualistic duties imposed upon him by his faith." After his death in 1922, Goldman was buried in a family plot in Montefiori Cemetery. When his widow, Mrs. Goldman, died in 1934, she was buried in the cemetery of Beth Ahabah Congregation, "a house of reformed Jewish worship of which it was an affiliate." The dispute before the court arose when the Goldman children "sought to remove their father's body from the cemetery in which he lay that they might place it by the body of their mother" but were refused by the trustees of Montefiori.

In the end, the court ruled that Goldman "was buried where he wanted to be buried." But the most astonishing aspect of the case was the way in which the two sides in the case presented Judaism to the court—and how Justice Holt interpreted and ruled on those representations. The court heard from several expert witnesses on the religious issues the case raised. Rabbi Max Forman of Petersburg explained to the court the very limited conditions under which Jewish bodies could be disinterred. He quoted at length from "the Shulchan Arukh which had not been changed since the 17th century [sic] and rests upon the Talmud, which, in turn, is based upon the Bible."[70] Next, Rabbi Charles Podbelevitz similarly quoted the *Shulchan Arukh*, or Jewish Code of Law, in making the case for the Montefiori trustees. For the Goldman children, Dr. Edward N. Calisch, "a distinguished representative of his faith," offered the court "an interesting history of Jewish law." Calisch explained to the Virginia court:

Now the Shulchan Arukh continued to be, as I say, the law for those who chose to obey

[70] The *Shulchan Arukh* was codified in the 16th century.

> it, but with the emancipation of the Jewish people, there grew, so to speak, what we call a reform movement, and this reform movement felt that it had a right to interpret for itself If I might compare it, I would say it is very much like the Protestant religion in which the right of individual judgment and individual conscience in interpretation of the Bible was insisted upon, and the reform movement among the Jews was in a sense the same thing. And as the reform movement grew, it began in Germany early in the 19th Century—they discarded many of the things that were insisted upon by the Shulchan Arukh. Now, therefore, insofar as Jewish Law is concerned, the law is the law for those who choose to accept it. I mean, the orthodox law, the Shulchan Arukh. It is repudiated by a very large body of the Jewish people.

In Calisch's narrative, reform had emerged much like Protestantism, espousing individual judgment and interpretation. The analogy resonated with Holt, who argued, "We do not doubt that a devout Catholic would wish to be buried in consecrated ground and would object to his body being taken from such a place and put in a Protestant cemetery." Goldman, an "orthodox Jew" was correctly buried "in [the] orthodox cemetery where he wished to be buried." The children, Holt claimed, "because they are of *another faith,* would place their father in what to him is unhallowed ground."[71] Holt's understanding of Reform Judaism as "another faith" was a result of the discursive arguments he had heard during the trial.[72] Appearing before an impartial (though clearly personally devout) American judge, dissenting groups utilized whatever arguments they could to harness the power of the state in their favor.

Secular courts served as the sites where the history of Jewish denominationalism was expounded. Jewish factions representing the "orthodox" and "reformed" positions vied, in

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[71] Emphasis added. Holt concluded, "Schisms in churches are too often the source of unending feuds….It is for this reason that we who are always orthodox pray to be delivered from all false doctrines, heresy and schisms." Holt also interestingly argued against those who believe "evidence of Jewish law should not be received. Jewish law, as such, is no more to be followed in Virginia than is Chinese law, but it may be both competent and important to show the custom and wishes of those who observe its mandates, and this is particularly true when they believe that they are in part divine."

[72] Not surprisingly, cemetery disputes often brought out the harshest condemnations of rival religious factions For a non-Jewish cemetery dispute, see *In re Donn*, 14 N.Y.S. 189 (1891).

Kent Greenawalt's words, "to represent the true faith."[73] By explaining to the impartial arbiter how different (or similar) American Judaism was from its ancient origins, Jews sought to stake out their own religious—and legal—claims. In 1933, for instance, Justice Senn of the Supreme Court of New York heard a case between two "incorporated Jewish religious societies" in Ithaca, New York: Agoodash Achim and the Chevro Kadisho.[74] A decade earlier, a "movement was inaugurated having in view a consolidation of the two societies." The merger went ahead and "all the property and paraphernalia of each society would be turned over to the consolidated corporation," incorporated as Temple Beth-El. However, disagreement—the court referred to it as a "controversy"—soon arose, owing to the fact that "among those who profess the Jewish faith there are two schools of religious thought and practice; the orthodox, and the modern or reformed." The court explained that the "orthodox Jew insists on a rigid adherence to the ancient forms and tenets of worship, such as covering the head while in prayer, women not allowed to approach the altar to read the scroll, etc., and holds it to be a sin not to observe such rules." In contrast, wrote Justice Senn, the "so-called modern or reformed Jew does not disapprove those ancient customs, but holds that their observance is a matter of decorum and propriety, and that their reasonable relaxation is not a sin."

The New York court noted the decline of rabbinic authority, explaining, "The ancient Sanhedrin has long since ceased to exist, and there is to-day no superior body of Jewish ecclesiastical authority to which such questions can be referred for decision, so that resort must be had to the Bible and Jewish writings and authorities." Although the court acknowledged that it could not legitimately intervene on theological issues, it did present a distinct version of the history of denominationalism. "With the wealth of Jewish history, literature and tradition,"

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[73] Kent Greenawalt, "Hands Off! Civil Court Involvement in Conflicts over Religious Property," *Columbia Law Review* 98, no. 8 (Dec. 1998): 1843.

[74] *Agoodash Achim of Ithaca, N. Y., Inc. v. Temple Beth-El, Inc.,* 147 Misc. 405; 263 N.Y.S. 81 (1933).

explained the court, "it is not strange that, in this age of freedom of thought, learned rabbis should differ in their views and interpretations." In the end, the court ruled in favor of Agoodash Achim, claiming, "The fact that there is a growing tendency among Jews to get away from ancient customs and tenets cannot affect the rights of those who choose to adhere to them." Thus, in America, it was in secular courts that disputes between reform and traditional factions were resolved. Practical and ideological dissent had led to schism, a common occurrence in American Jewish life, but the social structure of the community and the nation precluded an internal resolution.

As the twentieth century progressed, the Supreme Court became more involved in internal church disputes.[75] Scholars also became more cognizant of Jewish cases in American courts.[76] To be sure, the number of cases involving synagogue disputes has been miniscule in American legal history. Far more battles over disputed church property, whether a minister should be fired, or the expulsion of wayward members have been waged in the history of the First Amendment. Yet despite the fact that, as legal scholar Ira Mark Ellman has noted, a "surprising number" of litigated church disputes have arisen, the focus of historical and legal academic attention has been on a handful of First Amendment cases—those that are decided by

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[75] See, inter alia, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). See also Julius B. Poppinga, "Constitutional Law: Freedom of Religion: Judicial Intervention in Disputes within Independent Church Bodies," *Michigan Law Review* 54, no. 1 (Nov. 1955): 102-111; Arlin M. Adams and William R. Hanlon, "*Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment," *University of Pennsylvania Law Review* 128, no. 6 (June 1980): 1291-1339; Michael William Galligan, "Judicial Resolution of Intrachurch Disputes," *Columbia Law Review* 83, no. 8 (December 1983): 2007-2038; David J. Young and Steven W. Tigges, "Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes," *Ohio State Law Journal* 47 (1986): 475-499; Daniel O. Conkle, "Toward a General Theory of the Establishment Clause," *Northwestern University Law Review* 82, no. 4 (1988): 1113-1194; Patty Gerstenblith, "Civil Court Resolution of Property Disputes Among Religious Organizations," *American University Law Review 39* (1989-1990): 513-572.

[76] See, for instance, *Davis v. Scher*, 356 Mich. 291, 97 N.W.2d 137 (1959); *Katz v. Singerman*, 127 So. 2d 515 (1961); *Park Slope Jewish Center v. Stern*, 491 N.Y.S.2d 958 (1985).

the Supreme Court and generate public discussion.[77] This paper has focused on the period before the Supreme Court became heavily invested in such disputes; similarly, it has looked at cases involving Jewish congregations because American Judaism has never had a hierarchical national body. In some senses, the cases examined here might be termed pre-denominational.

A central argument in this paper has been the relationship between the modern, American Jewish community and the *kehilla*. By the nineteenth century, Jews, like all religious groups, submitted to the jurisdiction of American courts. The disintegration of communal autonomy meant that rabbinic and lay leaders lacked the power to compel proper behavior and adjudicate internal disputes. American Jewry, for its part, recognized the limits of its communal power, and attempted to utilize the secular juridical apparatus for its benefit. The Jewish community, moreover, also lacked the structures to resolve group schism in America internally. Disputes about the future (and past) of Judaism were placed on an equal footing before American magistrates. The social history gleaned from the opinions offered in American court cases involving religion not only debunks the absolute wall of separation between church and state, but also provides a more nuanced history of American Judaism. For historians, the complex story of schism in American Jewish life is worth telling.

[77] Ira Mark Ellman, "Driven from the Tribunal: Judicial Resolution of Internal Church Disputes," *California Law Review* 69, no. 5 (September 1981): 1378-1444.