Special Article
THE LEGAL STATUS OF THE
AMERICAN JEWISH COMMUNITY

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JEWS AS JEWS DESPITE THEMSELVES • JEWS AS DEVIANT GROUP
IN AMERICAN SOCIETY • JEWRY AS "RELIGIOUS SOCIETY" •
JEWISH GROUPS AS VOLUNTARY ASSOCIATIONS • AMERICAN JEWS
AS PART OF LARGER JEWISH ENTITY • JEWRY AS SELF-POLICING
GROUP

Abstract

This study was undertaken to determine the distinctive legal status
which has been forged for American Jews as Jews, individually and as
a corporate body. We examined several component elements of this
status: the general statutory provisions governing voluntary religious,
charitable, and educational organizations, and their application to the
Jewish community; state and federal court decisions based on those
provisions, that further define the character, rights, and obligations of
particular institutions; the legally defined powers of Jewish clergy, par-
ticularly in matters concerning marriage, the family, and divorce, as
well as Sabbath and kashrut observance; state and federal court
decisions which have attempted to apply Jewish law or the principles
of Jewish jurisprudence to cases involving Jews and their institutions;
the Bet Din, its role, scope, and use, and the recognized decisions it
has handed down. The conclusion discusses the general principles gov-
erning the interaction between the American legal system and the
American Jewish community, which emerged from the analyses of the
specific topics. The Appendix briefly describes the post-World War II
legal status of other diaspora communities, to furnish a basis for com-
parison with American developments.

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PREFACE

Since the Emancipation, the Jews have existed with a minimum of formal recognition in the laws of the countries in which they found themselves. In the Old World, the post-Emancipation Jewish communities were given some clear legal status in all but the most totalitarian regimes, if only to accommodate elements remaining from the Jews' earlier corporate existence as a national community. In England and the New World, the Jews came to settle as individuals and never acquired special legal status as a nation. (The Appendix summarizes the legal status since World War II of the various types of existing Jewish communities.)

Nowhere was this more so than in the United States. Even as the Jewish communities of the British Empire and Latin America acquired quasi-legal standing as a result of local conditions, American Jews retained their clearly atomistic relationship to civil society—at least outwardly. As a result, those concerned with Jewish public affairs have come to accept the view that Jews, as a group, have no special legal status in post-Emancipation polities and that the entire question is now moot. In fact, new forms of legal definition and delineation of Jewry as an entity have been developing in the United States and other countries, if for no other reason than that Jews continue to function as a group for some purposes, and legally, as well as in other respects, "everybody has to be somewhere." More than that, American civil law has developed over time so as to support some of the efforts of the Jewish People to maintain its integrity as a community in certain ways. While these ways are new ones, adapted to the requirements of modern secular societies, they do lead to the development of new forms of legal status, which are no less real (if more limited) than the old.

This essay is devoted to an analysis of the current legal status of the American Jewish community, as reflected in statutory and case law "on the record" in the federal and state codes and courts of the United States. We begin with the recognition that, unlike the situation in other countries where Jewish communities have been autonomous, self-governing entities, the American legal system generally recognizes no corporate status of the community per se. The Jewish community in
America does not exist as an entity in a legal sense; nor is Jewish law recognized, in principle, as binding on Jews.

On the other hand, the Jews of the United States, who stand in every other respect as individual Americans before the law, are still Jews, among their other attributes, and thus have certain needs as Jews to which the legal system must respond. Jews also form voluntary associations, religious and secular, and the legal system must respond to these as well. Finally, even under the American system, the Jewish community constitutes somewhat of a political entity; Jews even engage in self-policing in ways that interact with the legal system, at times to be limited by the civil authorities and at times to be supported by them.

Thus, the study of the legal status of the American Jewish community is one of the interaction of the Jews, as individuals or as members of a group, with the American legal system. When one views this interaction, two things immediately become apparent: First, the American legal system almost universally views the Jew as a voluntary adherent to a creed, to certain patterns of observance, or to particular associations. Second, the preponderance of interaction between the Jew, as a Jew, and the American legal system lies in the area of religious practices; indeed, the emphasis is not simply on the religious, but also on the most traditionally religious.

Neither of these facts seems related to the inherent nature of the American Jewish community. For a large number of American Jews, being a Jew is not merely a voluntary act of adherence to creed, observance, or associations. Nor is the sole, or even primary, status of the American Jew one of religion; and it clearly is not one of traditional observance. Quite to the contrary, Jewish law regards those born Jews as members of the Jewish People from birth, whose right to separate themselves from their People is equivocal. Moreover, it is an all-embracing law that touches upon every aspect of life of those living under it. While no American Jew can live entirely within the framework of Jewish law, many Jews try to do so at least in the predominantly Jewish aspects of their lives.

1 The American legal system is a dual one, based on state and federal law, with state law primary (particularly in the areas under consideration here) and federal law operative interstitially, essentially where a federal interest has been expressed in the United States Constitution or by Congress through legislation. In the subject area of this study, the First Amendment to the United States Constitution is of particular importance, and federal and state court decisions based on it have become controlling in many fields.
The attributes of voluntariness and religiosity are related, therefore, not to the nature of the Jewish community, but to the nature of American law. Except for blacks and, later, Indians, the American legal system has traditionally considered American citizens as individuals who begin life with a clean slate regarding religious and ethnic or other group identity. Assumption of such identities by the individual is generally seen as voluntary. When it does take cognizance of such differences, the American legal system, again with the exception of blacks and Indians, has limited itself to a person's religious adherence, ignoring his ethnic or national identity. The First Amendment to the United States Constitution speaks of "an establishment of religion" and "free exercise thereof [religion]" (emphasis added). State constitutions have similar clauses referring to religion. No constitutional document contains generalized references to ethnic or national ties other than the basic American identity of all citizens.

The growing expression of ethnicity in American society today may produce a shift in this legal structure, so that individuals may come to be seen more as members of subgroups, even involuntarily. The emphasis on religious groupings, to the virtual exclusion of ethnic or national groups, may be lessened for the same reasons. At present, the major impact of American law on American Jewry remains on its voluntary religious aspects. But if these changes do take place, an understanding of American Jewry's legal status may become vital to an understanding of group recognition. American Jewry may provide the vital link between the two kinds of groupings, for it is at the same time a religious and an ethnic or national group; a community of voluntary adherents to a creed, observances, or associations, and an organic, involuntary community into which one is born.

Thus the legal status of the American Jewish community is shaped through the interaction of Jewish needs and American traditions. Jewish law (halakha), as such, is recognized in this process only obliquely, if at all, by legislatures and courts functioning within the framework of a legal system, whose spirit as well as substance is quite different from that of the halakha. In the following pages we will attempt to elucidate the ways in which contemporary Jewish communities can interact with a secular governmental system avowedly based on individualism and religious neutrality.
Jews as Jews Despite Themselves

As stated above, the American legal system almost invariably views Jews as voluntary adherents to creed, observance, or associations. The one major exception to this rule is the personal status of children, particularly in regard to guardianship and adoption.

Adoption and Guardianship

Although their exact terminology varies widely, the laws dealing with adoption or guardian statutes in the vast majority of states generally provide that the courts must, "when practicable" or "whenever practicable," approve adoptions or guardianships only if the adopting parents are of the same or like religious faith as the adopted child. A court will determine a young child's religion primarily by that of his parents, although it may rely on actions taken with regard to the child, such as baptism or circumcision. These statutes, of course, apply not only to Jews, but to Protestants, Catholics, and other religious groups. However, they may affect the Jewish community more than the other religious groups because relatively fewer Jewish children are available for adoption. In view of the minority status of Judaism, Jewish law concerning religious identity of children may also create special problems for secular judges who are more familiar with Christian concepts.

Obviously, someone must control the religious upbringing of a child, and it is natural that the law leaves that decision, along with others, to the parents. Thus, the law can be said to allow a child's parents to control his religious upbringing. The problems created by the law for partners in mixed marriages and in connection with compulsory schooling are discussed below.

There is, however, another level of involuntariness in adoption. If an infant child, identified as a Jew because he is born of Jewish parents, or, as will be discussed, because he has been ritually circumcised, may be adopted only by a Jewish family, the law does more than allow parents to raise their children as they see fit. It in fact limits who may adopt the child because the infant child is considered Jewish. In some cases there may be still a third level of involuntariness. The natural parent may be denied the right to assert that neither she nor the infant adheres to Judaism.
A well-known Massachusetts case exemplifies this extreme approach. In *Petition of Goldman* (331 Mass. 647, 121 N.E. 2d 843 [1954], *cert. denied*, 398 U.S. 942 [1955]), a Jewish couple sought to adopt two-year-old twin boys, who had been in their care since two weeks after birth. The twins’ natural mother, a divorcée, apparently had been raised as a Roman Catholic, as had their natural father. When the twins were two weeks old, the mother agreed to their adoption by Reuben and Sylvia Goldman. She stated in her written consent that she knew the Goldmans were Jewish and agreed to having the twins raised in the Jewish faith.

Two years later, at the adoption hearing, the children’s court-appointed guardian *ad litem* objected to the adoption even though the natural mother indicated that she was “interested only that the babies were in a good home.” He contended that the “when practicable” clause in the state’s religious protection statute required the court to deny the adoption. The relevant provision reads:

In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother. (Ann. Laws of Mass. 6B C210 §5B.)

The guardian *ad litem* added that there were many “Catholic couples of fine family life and excellent reputation who have filed applications with the Catholic Charities Bureau for the purpose of adopting Catholic children of the type of the twins, and are able to provide the twins with a material status equivalent to or better than that of the petitioners [the Goldmans]” (121 N.E. 2d 844–45).

The judge made three crucial findings of fact: (1) that the Goldmans were well equipped financially and physically to bring up the twins, but (2) that there were Catholic couples “ready and willing” to adopt the twins, and (3) that the natural mother and father were Catholics. He therefore concluded that “it would not be in the best interests of the twins to decree adoptions in these cases,” and dismissed the petition.

Through the first two findings of fact, the judge established that the determining factor in his decision would have to be religion. Because of the statute, the mother’s religion would be controlling. He found the mother’s religion to be Catholic and, though the children were never baptized, her religion was imputed to them.

How did the judge determine the mother’s religion? Basically, he found that the mother was “raised as a Catholic.” Does this mean that
the mother was a Catholic at the time of the adoption? Evidence was introduced to show that the mother had obtained a civil divorce, and that she had openly cohabited with at least one other man though her matrimonial bonds had not been dissolved in accordance with the Church. She had not baptized the twins and had consented to have them brought up in the Jewish faith. However, the appellate court, affirming the lower court decision, found that "the mother did not cease to be a Catholic, even if she failed to live up to the ideals of her religion" (121 N.E. 2d 844). This seems to treat her religion more as a matter of inborn status than as a set of religious beliefs, or even membership in a Church. It would indicate that, in the absence of affirmative withdrawal, the mother would always "be" a Catholic, even though she might "have" no religion. Accordingly, if she were to convert to Protestantism, the court would say that she would both "have" Protestant beliefs and "be" a Protestant.

The case was taken to the Massachusetts Supreme Court, which rejected the argument that the children were too young to have a religion:

We do not attempt to discuss the philosophy underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless may have a religion. We have no doubt that the statute was intended to apply to such children, and that in such instances the words "religious faith . . . of the child" mean the religious faith of the parents or in the case of "dispute" the faith of the mother.

The Court further stated that the children were to be "classified" according to the religion of their mother, despite the mother's desire otherwise and her apparent lack of religious concern. For an understanding of the court's "inborn status" approach, it is significant that the opinion specifically stated that the Goldmans "have dark complexions and dark hair. The twins are blond, with large blue eyes and flaxen hair."

The Goldman case has been severely criticized by a number of legal scholars. The view of religion as a status with which one is born has been attacked as being in violation of American constitutional premises embodied in the First Amendment's "establishment" and "free exercise of religion" clauses, according to which government must view religion

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only as a voluntary adherence to creed, observance, or church. It should be noted that this is a dynamic area of the law, in which the courts generally have shown increasing concern about governmental entanglement with, and support of, religious groups.

On the other hand, one can argue for the Goldman approach on the grounds that it prevents the use of adopting or custody agencies and courts as proselytizers which can separate children from the religion of their ancestry. It therefore can be said that it tends to protect mainly minority religions. Moreover, the Goldman approach does find support in the belief of many religions, including Judaism, that one is, indeed, born into a religious community, or is accepted into it, by the initiation rituals the child undergoes before he is old enough to exercise his own choice.

However, aside from its questionable constitutional validity, the Goldman decision represents only one line of approach to religious protection statutes. Other courts have given the religious factor less weight. In Wisconsin, for example, the courts have held that the religious requirement should be viewed within the broader standard of the general welfare of the child, and should be controlling only “if the temporal interests of the child will be as well taken care of when the child is placed in the custody of persons of the same faith as the parents” (State ex rel. Strachota v. Franz, 163 N.W. 191-92 [1917]).

New York’s law has been interpreted to provide that a child be placed with adoptive parents of the same religion where “practicable” and “so far as consistent with the best interests of the child.” (See Dickens v. Ernesto, 30 N.Y. 2d 61 [1972]). Further, the New York Court of Appeals, the highest court in the state, has interpreted the New York statutes in a way that does not require placing the child with adopting parents of the same religion, if its natural mother states that she, the mother, has no religious affiliation (In re Maxwell’s Adoption, 4 N.Y. 2d 429, 151 N.E. 2d 848 [1958]). Moreover, the New York religious protection statute also does not apply when the natural mother declares, as in Goldman, that she does not care if the child is adopted by a couple of another religious faith (see Matter of Krenkel, 278 App. Div. 573, 102 N.Y.S. 2d 456 [1951]). Thus construed, the New York provisions were recently upheld as constitutional by the New York Court of Appeals in the Dickens case.

However, this New York view has not eliminated problems of religious identification of children. The fascinating case of In re Glavas (121
N.Y.S. 2d 12 [1953]) shows how difficult the issues may be. In the proceeding, the court approved the placement in a foster home or agency of a four-year-old boy, who had been adjudicated "neglected" and taken away from his natural parents. A New York statute requires that such foster placements "must, when practicable, be with or in the custody of a person or persons of the same religious faith or persuasion as that of the child."

In this case, the child, born to a Jewish mother and a Greek Catholic father, had been circumcised in accordance with Jewish law. Four years later, however, his father had him baptized by a Roman Catholic priest. The boy's mother was in the hospital at the time and apparently had not consented to the baptism. The father gave the court no satisfactory explanation of why he had had the child baptized as a Roman Catholic, rather than a Greek Catholic. He testified that he had been then, and still was at the time of the court decision, a Greek Catholic (not the Greek Catholic rite of the Roman Catholic Church). He had, however, from time to time, attended Roman Catholic churches, and insisted that his son was a Roman Catholic and should be so placed.

The domestic relations court judge viewed these facts as creating the following legal situation: the boy became a Jew when he was ritually circumcised; the baptism could only change his status if it acted as a conversion; the baptism did not act as a conversion because the boy was not old enough to have the necessary judgment to convert, and even if parents could convert a child, this could not be done by one parent (in this case, the father) without the consent of the other parent; the boy was therefore a Jew.

The judge's approach in this case poses very serious problems. There was no reference to either Jewish or Roman Catholic law regarding the doctrinal points of the argument. According to Jewish law, the child was Jewish not because he was ritually circumcised, but because he was born of a Jewish mother. Yet this was considered irrelevant in the court's reasoning. Presumably, if the order of circumcision and baptism had been reversed, the child would have been regarded as a Catholic, with the baptism determining that status. The circumcision would not have effectuated a conversion for the same reason that the baptism did not so operate in this case. And what if the child had been a girl?

The whole concept of effectuating a religious status, and conversion therefrom, is inadequate for resolving this case. And, indeed, despite the fact that the court expressly based its decision on that concept, it appears
to have been influenced by other factors as well. There was the discrepancy between the father being a Greek Catholic and the child's baptism as a Roman Catholic. More significantly, the court indicated that it believed the mother and father had agreed on raising the child as a Jew, and the father tried to renege on this agreement by having the child baptized while his wife was in the hospital.

The adoption issue is further shaped by the fact that sectarian agencies handle a large percentage of all placements. While the role of these agencies varies from state to state, all states recognize them as instrumentalities for implementing legally mandated state functions in the adoption and child-welfare fields. Thus these agencies acquire a share of the state's police powers by delegation even though they are sponsored and funded by sectarian sources. Jewish family and child services are usually constituent agencies of the local Jewish welfare federations and, as such, are institutionally tied into the network of Jewish communal services. To the extent that they serve as intermediaries in adoption matters, they serve the interests of the Jewish People—by assuming that children born Jews are placed in Jewish homes—as much as they serve the interests of American society as a whole.

Jews as a Deviant Group in American Society

As already indicated, the minority deviant status of Jews in a country overwhelmingly populated by Christians has meant that the traditionally observant among them have had most contact with the legal system because their practices differ most from those of the dominant society. The relationship between the American legal system and the Jews as a deviant group focuses on three areas. The first is the interaction of American law and Jewish society: law, tradition, and practice regarding marriage, divorce, and child rearing. This area involves problems of exemption from general legal standards and of government acting in support of the Jewish community in concerns peculiar to it. The second deals with Jewish observances, principally the Sabbath, which require or make appropriate special exemptions from the secular rules that otherwise bind members of the American society. Finally, there is an area which involves active intervention by secular government on behalf of the Jewish community in problems peculiar to the community. The
principal, but not exclusive, area of concentration here is on government regulation of kosher food for the protection of the consumer of kosher food products from fraudulent or deceptive practices.

**Family, Marriage, and Divorce**

The major legal issues involving problems in the area of family relations, marriage, divorce, and child rearing, concern the enforcement of premarital, or antenuptial, agreements between husband and wife, having religious content or overtones; the ability of a spouse to use the aid of secular authorities to obtain a religious divorce, and parental control over the religious upbringing of children.

Conflicting religious views may not constitute grounds for divorce or separation. In *Gluckstern v. Gluckstern* (148 N.Y.S. 2d 391 [1955]), the husband, contesting his wife’s action for support, argued that her conversion to Christian Science constituted a violation of their marriage agreement, and thus she was not entitled to support. He contended that, “prior to and at the time of the marriage the parties agreed that they would maintain their home and conduct their lives in accordance with the tenets of the Jewish faith”; that “where two people of the Jewish religion are married by an orthodox rabbi, the change of religion by one of the spouses subsequent to the marriage constitutes a violation of the agreement.” The court rejected this argument: it found that “there is no basis in fact of civil law for any conclusion that there was any prenuptial agreement concerning plaintiff’s [Mrs. Gluckstern’s] religion. . . . If the defendant contends that such a contract is implied, then I hold that (with due deference to but) notwithstanding the Jewish or Hebraic or Mosaic law or tradition it is not the secular law in this or any other state in the Union.”

A recurrent legal problem concerns the situation where, prior to a civil marriage ceremony, a couple agrees to have a subsequent religious ceremony, but then one of the spouses refuses to do so, and the other seeks to have the marriage dissolved on this ground. A majority of the states will not annul the marriage under these circumstances. However, the New York courts take a minority position and will grant an annulment in such a case.

In the case of *Rutstein v. Rutstein* (222 N.Y.S. 688 [1927]), the husband, an Orthodox Jew, sued for an annulment on the grounds that his wife, an Episcopalian, had refused to honor her agreement to “em-
brace the Jewish religion and take up the faith and be married by a rabbi.” They were civilly married in New Jersey, but never cohabited. A New York lower court granted the annulment, holding the wife’s misrepresentation of fact an essential element in the husband’s consent to the contract of marriage. The court found that “[t]he decisions in this state have uniformly held that a marriage may be annulled for any fraud or deception which would invalidate or authorize the cancellation of any contract.”

Thus, the New York rule rests on the view that the antenuptial agreement to be married in a religious ceremony should be treated as a regular contract. The majority rule of nonenforcement is based on the view that secular courts should not force a party to engage in a religious act, i.e., a religious ceremony of marriage. One could support the New York view on the grounds that a religious marriage ceremony need not be considered a religious act for purposes of determining its contractual character.

Another basis for the New York position would be that the courts are not really forcing a spouse to have a religious ceremony; they are merely allowing the other spouse to dissolve the marriage if there is no such ceremony. By this approach, the courts that do not dissolve the marriage under these circumstances are no more neutral than courts that do so, for they continue a marriage which one of the spouses does not want because of a breach of promise. Neither courts force reluctant persons to have a religious marriage ceremony.

Enforcement or lack of enforcement of antenuptial agreements on religious matters is very significant to the Jewish community because of the widespread use of the ketubah (or marriage contract), the formal Jewish antenuptial agreement. The traditional purpose of the ketubah has been to assure the wife of the return of her dowry, should the husband terminate the marriage. In Goldstein v. Goldstein (101A 249 [1917]), the wife, who brought to the marriage a dowry of over $5,000, sued for the return of the money after the marriage terminated. The New Jersey lower court looked to the ketubah and found:

If we lay aside the terms, unusual to our ears, in which the documents are couched, we have what is familiar to English law under the name of marriage articles, and we have a case of the legal situation, which so often arises out of marriage articles, of an executory trust. . . .

The trial judge held that this part of the marriage agreement created an executory trust, which was binding on the groom, and that the wife had a civilly enforceable right to the $5,000.
The ketubah also provides that the bride and groom are "betrothed according to the Laws of Moses and Israel" and that the groom takes upon himself such obligations "as are prescribed by our religious statutes." In *Wener v. Wener* (301 N.Y.S. 2d 237 [1969]), the New York lower court judge found the defendant's marriage contract created a civilly enforceable obligation on his part to furnish support for a child, whom he and his wife had taken into their home but had never adopted. The judge treated the obligation as strictly contractual. He found that the husband, in signing the ketubah, entered into a binding agreement to adhere to the principles enunciated in the "Jerusalem Talmud" (*sic*), one such principle being: whoever brings up an orphan in his home, Scripture ascribes it to him as though he had begotten the child.

On appeal, the intermediate appellate court of New York upheld the decision, but on other grounds (35 A.D. 2d 50, 312 N.Y.S. 2d 815 [1970]). In so doing, it added, in dictum, that the ketubah basis of the lower court decision was erroneous. It stated:

New York cannot apply one law to its Jewish residents and another law to all others. If our law does not require a husband to support a child whom he has never agreed to adopt, the court cannot refuse to apply such law because the tenets of the parties' religion dictate otherwise. Application of religious law would raise grave constitutional problems of equal protection and separation of church and state.

This dictum, however, ignores the point that the lower court based its decision not on the fact that the parties were Jewish, but rather on the fact that they had signed the ketubah, which it viewed as a binding contract. It should also be noted that the courts in *Wener* and in *Goldstein* enforced ketubah obligations that were monetary rather than religious, in the usual American sense.

This leads to one of the most difficult issues regarding enforcement of the ketubah and one of the most difficult problems in this area for the Jewish community: whether a husband can be compelled by the secular courts to give his wife a *get*, or Jewish divorce. A marriage ceremony constitutes both a civil and religious act when performed by a rabbi, priest, or minister. However, there is no analogous act serving both civil and religious purposes in divorce. A civil divorce is obtained through the secular courts; a Jewish divorce is generally obtained through a *Bet Din*, or rabbinical court. In Jewish law, it is the husband who must take the initiative and grant the divorce. If he refuses, the marriage continues under Jewish law, even after a civil divorce.

For the traditionally observant Jewish woman, failure to obtain a
Jewish divorce precludes remarriage. Even if the woman, herself, is not observant, she could not marry an observant man without a Jewish divorce. Further, if a marriage does take place when one spouse is still married to another under Jewish law, the children of the second marriage are not deemed legitimate under Jewish law, a condition that affects their ability to marry under Jewish law.

In *Koeppel v. Koeppel* (138 N.Y.S. 2d 366 [1954]), the spouses executed a settlement agreement before the wife’s successful suit to annul their marriage. The agreement expressly provided:

> Upon the successful prosecution of the Wife's action for the dissolution of her marriage, the Husband and Wife covenant and agree that he and she will, whenever called upon, and if whenever the same shall become necessary, appear before a Rabbi or Rabbinate selected and designated by whomsoever of the parties who shall first demand the same, and execute any and all papers and documents required by and necessary to effectuate a dissolution of their marriage in accordance with the ecclesiastical laws of the Faith and Church of said parties.

After obtaining the annulment, the husband refused to give the *get*. The wife sued for specific performance, alleging insufficiency of money damages as compensation and the absence of an adequate remedy at law. A lower New York court rejected the husband’s contention that the agreement—one between husband and wife to get a divorce—violated public policy. The court found that “it cannot be said that the defendant husband was purchasing his freedom or that the agreement was promotive of a dissolution of the marriage.” It also found that:

> Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence. . . . His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.

The court held the agreement enforceable.

A decision handed down by a court in England suggests an alternative remedy for the woman caught between a civil and religious divorce. In *Brett v. Brett* (1 W.L.R. 487 [1969]), the 23-year-old wife sued for divorce on grounds of cruelty. The court granted the divorce and, in fixing the settlement, took into consideration the husband’s refusal to give a *get*. The court found that a divorcee with no prospects for remarriage was entitled to more support than one who could remarry. Consequently, the former husband was ordered to pay her £30,000 within two weeks, and £2,000 a year thereafter, until she remarried.
However, if he gave the *get* within three months, the lump sum due would be reduced to £25,000, and the yearly sum would be increased to £2,250. It is doubtful whether a United States court would ever hand down this kind of decision in view of American restrictive concepts concerning interference of secular courts in religious matters.

In an effort to aid a wife in obtaining a Jewish divorce, the Conservative movement amended its ketubah in 1955. The new provisions read as follows:

> And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: as evidence of our desire to enable each other to live in accordance with the Jewish Law of Marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this ketubah, and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish Law of Marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decisions.³ (Emphasis added)

The key to the change is the italicized text. The purpose of the new wording was to make it possible for the Bet Din to compel a recalcitrant husband to grant his wife a Jewish divorce, and to assess a monetary penalty against him if he refused to do so. However, the language does not clearly say so; it is unnecessarily broad in relation to this purpose. It has been suggested that the amended ketubah did not explicitly provide for a religious divorce because it would have been inappropriate to deal with divorce in a document to be signed by a soon-to-be husband and wife.

To the best of our knowledge, this ketubah provision has never been tested in court. However, in a monograph⁴ discussing its enforceability, Professor of Law A. Leo Levin and Rabbi Meyer Kramer, also a lecturer in law, conclude that it does not give the wife civilly enforceable rights to obtain a Jewish divorce or compensatory damages.⁵

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³ Apparently the Bet Din referred to was never constituted.
⁵ Their conclusion is based upon both general principles of contract law and constitutional issues of church-state relations. In both regards, they limit their conclusions to this specific ketubah provision which, as stated above, goes far beyond a simple obligation to give a *get*.
RELIGIOUS TRAINING OF CHILDREN

Our final concern here is with problems regarding the religious upbringing of children. According to judgments in early English cases, the father's wishes normally determined what kind of religious training his child was to receive. This precedent was followed even when the result was "to create a barrier between a widowed mother and her only child" (*Hawksworth v. Hawksworth*, L.R. 6 Ch 539–40 [1871]). This view was not accepted in the United States. Traditionally, the courts have followed the decision handed down by the New York Court of Appeals in *People ex rel. Sisson v. Sisson* (271 N.Y. 285, 2 N.E. 2d 660 [1936]), which stated:

Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. (2 N.E. 2d at 661.)

However, the courts are forced into this area in custody cases. The controlling factor in such disputes is the welfare of the child. Where the parents had an antenuptial agreement concerning the child's religious training, which they sought to enforce at custody proceedings, the majority of courts have held that the agreement has no binding effect.

This was the decision handed down by the New Jersey Superior Court in 1953, in the case of *Boerger v. Boerger* (26 N.J. Super. 90, 97 A. 2d 419 [1953]). The wife, who had been raised as a Lutheran, agreed before her marriage "that she wanted to be instructed in the faith, and to be baptized, confirmed and married in the Roman Catholic rite, and to raise any children of the marriage as Catholics." The Boergers had two daughters during ten years of marriage. Both filed suit for divorce in 1949, and the mother was awarded custody of the daughters; the father was given rights of custody each Sunday from 11 A.M. to 8 P.M. After her divorce, Mrs. Boerger returned to the Lutheran Church, and began taking her daughters to Sunday School. Mr. Boerger, who would pick them up at 11 A.M., took them to mass. In 1951 Mrs. Boerger applied for a restraining order to stop her former husband from "interfering with the religious training of the children." He responded by demanding an order specifying the religion in which the children were to be instructed and reared.
The Supreme Court rejected the husband's contention that the antenuptial agreement was binding on the grounds that to do so would be to disregard the overriding consideration of what is best for the children and to determine their future welfare by an act with which they had nothing to do. It would also deprive the mother of her right to change her mind—to choose a religion which apparently gives her greater spiritual comfort—and to inculcate her children with religious principles, which, for the time being, seem best to her.

Having rejected the antenuptial agreement, the court looked to three different indicators to determine what would be in the best interests of the children. First, the court privately examined the elder daughter and found:

Obviously, the child cannot, because of her immaturity, have any real capacity for forming an intelligent opinion on so complex a subject as the relative content and values of Lutheranism and Catholicism. Her reaction is to externalities. The most that can be said is that she is happier when she is in her mother's church, and that she finds her experience there personally more meaningful for the time being.

Second, the court suggested that it might not be psychologically desirable for the child to be exposed to the conflicting desires of her parents in so far as her religious training is concerned. Third, the court found that, all other things being equal, the determining factor should be custody: "To create a basic religious conflict in the mind of the child, and between it and its custodian, would be detrimental to its welfare." Thus having refused to enforce the antenuptial agreement, the court found that the happiness and welfare of the children would be served best by committing their religious training to the mother, their legally-designated custodian, without interference by the father.

However, other courts have held that antenuptial agreements should be enforced, except where to do so would adversely affect the child's welfare. In Gottlieb v. Gottlieb (31 Ill. App. 2d 120, 175 N.E. 2d 619 [1961]), husband and wife agreed to a divorce; the mother was given the custody of their two children. There also was an agreement, which was incorporated in the divorce decree, that "the plaintiff, Mary Jane Gottlieb, raise Diane Gottlieb and Steven Gottlieb, the children of the parties hereto, in the Jewish faith and the defendant, Jerry Robert Gottlieb, shall pay the annual temple dues."

Contrary to the agreement, Steven was raised as a Catholic. For two years the question of his religious upbringing was repeatedly brought
before the courts in one form or another by means of various petitions. Finally, the mother won permission to have the child-custody provision of the divorce decree modified; she now could enroll Steven in a parochial school. His father appealed.

The appellate court found "... a discernible design on plaintiff's [mother's] part to repudiate and breach the agreement and decree," and that, even though the decree granted plaintiff the care, custody, control, and education of the children, "the provision for their religious rearing was a determination that their well-being would be best served by raising them in the Jewish faith." It held "in the absence of clearly established circumstances indicating that the best interests of the child would be served by modification we do not feel that solemn agreements incorporated in a decree and sanctioned by the court should be so lightly cast aside. . . ."

A difference between the Boerger and Gottlieb cases is that Boerger involved an antenuptial agreement, while the agreement in the Gottlieb case was made at the time of the divorce and was incorporated into, and made part of, the divorce court's decree. Yet, despite this difference, the Gottlieb decision contains all the conflict problems the court was so anxious to avoid in Boerger. The distinction, therefore, lies as much in the differing positions of the two courts on the enforcement of agreements requiring a parent with custody to raise a child in a religion other than her own desire, as in the fact that Boerger involved an antenuptial agreement and Gottlieb a divorce decree.

A parent's right to control the education of his child has been subject to extensive legal analysis. The United States Supreme Court held in the well-known decision of Pierce v. Society of Sisters (268 U.S. 510 [1924]) that a state cannot force children to attend public schools; that parents have the constitutional right to send their children to private schools. However, the Court strongly indicated that a parent can be compelled to send his child to a school, and that the state can set reasonable curriculum, attendance, and other standards for private schools.

All states have compulsory education laws, except for Mississippi, South Carolina, and Virginia (local option) where they were repealed in 1955, apparently to make it possible for white parents to avoid sending their children to desegregated schools. In most states the compulsory school age is from 7 to 16. In some states attendance at a school, public or private, is required; in others, home instruction is sufficient.

Until recently the compulsory education laws have been uniformly
upheld, even over the religious objections of parents. For example, a New York court held that a Jewish parent's belief that all secular education was sinful and that a child should devote himself solely to the study of Torah did not exempt the parent from punishment for violating New York's compulsory school law (*People v. Donner*, 199 Misc. 643 [1950], affirmed without opinion, 278 App. Div. 705, affirmed without opinion, 302 N.Y. 857, dismissed for want of substantial federal question, 342 U.S. 884 [1951]). Similarly, it has been held that a Moslem parent could be prosecuted for keeping his child home from public school on Fridays (*Commonwealth v. Bey*, 166 Pa. Super. 136, 70A 2d 693 [1950]).

However, in the recent decision of *Wisconsin v. Yoder* (92 S.Ct. 1526 [1972]), the United States Supreme Court ruled that convicting Amish parents, who refuse to send their children to school after completion of the eighth grade, of violating the state's compulsory school law is an infringement of their constitutional right to the free exercise of their religion.

In so holding, the Supreme Court reaffirmed the general constitutionality of compulsory school laws, but held that, in the case of the Amish people, the compulsory school law must give way to their free exercise of religion. The Court stated:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationships of belief with their mode of life, the vital role which belief and daily conduct play in the continued survival of Old Survival Amish communities and their religious organization and the hazards presented by the State's enforcement of a statute generally valid to others.

The Supreme Court also emphasized the fact that the Amish were not objecting to formal schooling through eighth grade, and that informal vocational education was continued on the farm and in the home after eighth grade.

Thus limited, it is difficult to predict what effect the *Yoder* decision will have on education beyond the immediate situation of the Amish. The case, however, may even be more significant for the field of religion than for education. It represents a strong reaffirmation by the Supreme Court of the doctrine that generally valid statutes may not be invoked where the effect is to restrict the free exercise of religion, unless the state has a compelling interest in so doing. The doctrine is discussed at length in the section on Sabbath observance.
Also, the Yoder case manifests a clear recognition that, in some groups defined as "religious," religious faith is inextricably linked with styles and patterns of living, and that, where this exists, these styles and patterns of living are protected by the "free exercise of religion" clause of the First Amendment. The establishment of this principle, which is significant for the Amish, may be even more significant for the Jewish community. The court's description of the interrelationship between religious faith and life styles of the Amish community can be applied quite aptly to the Jewish community. Indeed, the Court at one point describes the control of the life patterns of the Amish by their religious faith as being akin to that of the Jews by the Talmud.

Sabbath Observance

The law concerning exemption of religious believers from generally binding laws of the country is relatively new and still in the process of development. Except for exemptions from military service on the ground of conscientious objection by members of pacifist sects, American law historically has not made special provision for deviant religious observances. Before this century, the predominant view had been that the "free exercise of religion" clause of the First Amendment, and analogous state constitutional provisions, protected religious belief but not religious acts. Thus, in the late 18th century, a Jew could be penalized for refusing to be sworn as a witness in court on the Sabbath. (See Stansbury v. Marks, 2 Dall. 213, 1 L. Ed. 353 [1793].)

Today, there is growing legal protection for deviant religious observances, both by legislation and by constitutional interpretation, particularly with regard to Jewish Sabbath observance and the enforcement of the Sunday closing laws. Today, in 41 states, as well as the District of Columbia and Puerto Rico, it is a crime to engage in at least certain work or business on Sunday. Of these 43 jurisdictions, eight

6 The states having no such restrictions are Alaska, Florida, Illinois, Iowa, Kansas, Nevada, New Mexico, North Dakota, and Washington.

7 Arizona, barbering and boxing; California, boxing and miscellaneous minor restrictions; Hawaii, entertainment during certain hours; Idaho, auto racing, pool, and billiards; Mississippi, miscellaneous minor restrictions; Montana and Oregon, barbering and pawnbroking, and the District of Columbia, liquor sales, street vending, and construction. Six other states which have major restrictions—Delaware, New Hampshire, North Carolina, Rhode Island, West Virginia, and Wyoming—permit option in certain localities not to have Sunday closing laws.
impose only minor restrictions.\(^7\) Altogether, 28 jurisdictions have significant statewide restrictions with no local option.\(^8\)

In the 1961 decisions of *McGowan v. Maryland* (366 U.S. 420 [1961]) and *Braunfeld v. Brown* (366 U.S. 599 [1961]), the United States Supreme Court refused to hold Sunday closing laws in violation of the U.S. Constitution, ruling instead that the decision to impose or not to impose such laws was a matter left to the states. It also decided that the First Amendment does not require states to grant exemption to persons, including Jews, who observe another day as the Sabbath. In upholding the general validity of the laws in *McGowan*, the Court acknowledged the original religious basis of the laws, but held that they now serve the valid secular purpose, and have the secular effect, of creating a uniform day of leisure. Therefore, the Court decided, they do not offend the First Amendment’s “establishment” clause.

In the *Braunfeld* case, the Supreme Court dealt directly with the question of an exemption from the Sunday closing laws for Orthodox Jews, who keep their businesses closed on the Jewish Sabbath. The majority of the Court held, over vigorous dissent, that, though religious belief required observant Jews not to work on Friday nights and Saturdays, they were not entitled to an exemption from the Sunday closing laws. In so deciding, the Court heavily relied on the fact that the Sunday closing laws did not require Sabbatarians to violate their religious beliefs, or to commit an act in violation of such beliefs; they only placed an economic burden on observers by forcing them to suspend work on two days, the Sabbath and Sunday.

The majority of the Court was concerned, too, that exemptions, which would give Sabbatarians the right to conduct business on Sundays, would

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The Sunday closing statutes are extremely complicated and have numerous exceptions, as various local business interests have lobbied successfully either to have the Sunday restrictions apply to them or to be exempted. The resulting patchwork nature of these laws has been one reason for making them the target of attack by legal commentators. The many exceptions and deviations are said to destroy even the asserted purpose of the laws—the creation of a uniform day of leisure. Aside from differences in content, the laws are also subject to wide variations in enforcement. The recent Knapp Commission investigation of New York City police corruption has exposed the potential for corruption in the enforcement of the Sunday closing laws.

\(^8\) Alabama, Arkansas, Connecticut, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Utah, Wyoming, Vermont, Virginia, and Wisconsin.
give them unfair advantage over non-Sabbatarians, who were forced to be closed. Added difficulties created by Sabbatarian exemption, the Court felt, would be the policing of the sincerity of Sabbath observers, as well as the intrusion on the concept of Sunday as a uniform day of rest.

Dissenting Justices William O. Douglas, William J. Brennan, and Potter Stewart pointed out that the Sunday closing laws already have so many exceptions that the granting of one more, for Sabbatarians, certainly would not destroy the present largely nonexistent concept of Sunday as a uniform day of leisure. Also, as Justice Brennan pointed out, a number of states already had granted Sabbatarian exemptions from their general Sunday closing laws, and there was no indication that such exemptions made Sundays in those states significantly different for the general community.

The dissenters also pointed out that the majority’s fears of competitive advantage and policing of Sabbatarian sincerity were more “fanciful than real” and had been rejected by the court in the analogous area of exemption from military service for conscientious objectors. In sum, Justice Stewart concluded in his dissent:

... Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. This is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something than can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.

Thus the states were not constitutionally required to grant Sabbatarian exemption from their Sunday closing laws under the federal constitution. However, two significant legal developments have occurred since Braunfeld. First, there has been a decisive trend in the states toward legislation exempting Sabbatarians from Sunday closing law restrictions, or even toward the repeal of such laws. Pennsylvania for one has since provided for Sabbatarian exemption by law as a result of Jewish lobbying efforts. Secondly, the theoretical basis of Braunfeld has been seriously undermined and the constitutional rights of Sabbatarians significantly expanded in the Supreme Court decision in Sherbert v. Verner (374 U.S. 398 [1963]).

Only 11 states of the 34 jurisdictions (33 states and Puerto Rico) having comprehensive Sunday closing laws do not have Sabbatarian
exemptions. Missouri, which had an exemption in 1961, has since revised its Sunday closing laws by significantly limiting their scope, but there no longer seems to be an exemption. However, this would appear to be an inadvertent legislative error. Of the 23 states that have some type of exemptions, Maryland, Michigan, Minnesota, Pennsylvania, and Utah adopted theirs since 1961. Massachusetts, which had a Sabbatarian exemption in 1961, has since broadened it significantly. Florida, Illinois, Kansas, New Mexico, North Dakota, and Washington have repealed their Sunday closing laws altogether since 1961, and Mississippi repealed most of its statewide restrictions.

SUNDAY CLOSING LAW EXEMPTIONS

The Sabbatarian exemption schemes adopted by different states vary greatly in extent and in the limitations imposed in them. These limitations are of two types: those applying to the Sabbatarian observance of one who seeks to be exempt, and those dealing with what the exempt Sabbatarian may do on Sunday. The following 12 criteria are found in one or more statutory schemes.

A. Limitations concerning the Sabbatarian’s religious practices:
1. Uniformity of observance of a day other than Sunday as the Sabbath. For example, Minnesota requires for exemption, *inter alia*, that the person “uniformly keeps another day of the week as holy time,” a limitation obviously aimed at an objective standard for determining that the person in question is a sincere Sabbatarian;
2. Observance of the entire day;
3. Devotion of time to worship on that day;
4. Certification of Sabbatarianism from a church group;
5. Limitation of exemption to members of an organized religious society;
6. Specific limitations of exemption to Jews and Seventh Day Adventists;
7. Specific limitation of the exemption to those who observe the Seventh Day or Saturday as their day of rest.

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9 Alabama, Delaware, Georgia, Louisiana, Missouri, New Hampshire, North Carolina, Puerto Rico, South Carolina, Tennessee and Wyoming.

10 Arkansas, Connecticut, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.
B. Common restrictions on what type of activity a Sabbatarian may perform on Sunday:

1. He cannot compel non-Sabbatarian employees to work on Sunday;
2. His work must not disturb others in the peace and tranquillity of Sunday;
3. He cannot do public selling;
4. The work must be necessary or of a charitable nature;
5. The business must not be too large, with size standards, usually based on the number of employees, set by statutes.

In light of the rejection by the Supreme Court, in *Braunfeld*, of the appeal for Sabbatarian exemption on the grounds of enforcement difficulties generally, and the problem of determining sincerity of Sabbatarian beliefs particularly, it should be noted that court decisions concerning Sabbatarian exemptions relate primarily to whether others were compelled to work (B1), whether the sales were public or not (B3), whether the work was necessary or charitable, or not (B4), and whether the business was sufficiently small (B5). All these issues involve relatively standard legal questions having no particular religious overtones. There is a conspicuous absence of court decisions delving into the religious practices of the Sabbatarians contained in the restrictions listed under A above.

The following statutory texts deal with some typical Sabbatarian exemptions from Sunday closing laws:

**New York**

It is a sufficient defense to a prosecution for work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons observing the first day of the week as holy time. (McKinney's Cons. Laws of N.Y. Gen. Bus. Laws, Sec. 6); [A1, B2]

**Connecticut**

No person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, or who conscientiously believes that the Sabbath begins at sundown on Friday night and ends at sundown on Saturday night, and actually refrains from secular business and labors during said period, and who has filed written notice of such belief with the prosecuting attorney of the court having

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11 Numbers in brackets indicate type of limitation, according to above-stated categories.
jurisdiction, shall be liable to prosecution for performing secular business and labor on Sunday, provided he shall not disturb any other person who is attending public worship. (C.G.S.A. §53–303); [A7, B2]

Kentucky

Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven. (Baldwins Rev. Ky. Stat., Sec. 436, 160[2]); [A3]

Maine

No person conscientiously believing that the seventh day of the week ought to be observed as the Sabbath, and actually refraining from secular business and labor on that day, is liable to said penalties for doing such business or labor on the first day of the week, if he does not disturb other persons. (17 M.R.S.A., Sec. 3209 [1964]); [A7, B2, B5]

Minnesota

It shall be a sufficient defense to a prosecution for Sabbath breaking that the defendant uniformly keeps another day of the week as holy time and that the act complained of was done in such manner as not to disturb others in the observance of the Sabbath. (M.S.A., Sec. 624.03 [1969]); [A1, B2]

New Jersey

If any person charged with having labored or worked on Sunday shall prove to the satisfaction of the court that he uniformly keeps the seventh day of the week as the Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation, and devotes the day to the exercise of religious worship, and if the work or labor for which such person is informed against was done and performed in his dwelling house or workshop, or on his premises, and has not disturbed other persons in the observance of the first day of the week as the Sabbath, then the defendant shall be discharged. This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares, merchandise or other article or thing in the line of his business or occupation (N.J.S.A. 2A:171–4 [1971]); [A1, A3, A7, B3]

Ohio

This section [proscribing among other things common labor, keeping a place open for business] does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath and abstain thereon from doing things prohibited on Sunday. (Ohio Rev. Code Ann., Sec. 3773, 24 [1971]); [A7]

Rhode Island

Every professor of the Sabbatarian faith or of the Jewish religion; and such others as shall be owned or acknowledged by any church or society of said respective professions as members of or as belonging to such church or society, shall be permitted to labor in their respective professions or vocations on the first day of the week, but the exemption in this section contained shall not confer the liberty of opening shops or stores on the said day for the purpose of trade and merchandise, or loading or unloading or of fitting out of vessels, or of working at the Smiths business or any other mechanical trade in any
compact place. . . ; and in case any dispute shall arise respecting the person entitled to the benefit of this section, a certificate from a regular pastor or priest of any of the aforesaid churches or societies or from any three of the standing members of such church or society, declaring the person claiming the exemption aforesaid to be a member of or owned by or belonging to such church or society, shall be received as conclusive evidence of the fact. (Gen. Laws of R.I., Sec. 11–40–4 [1956, reenacted 1969]); [A4, A6, B3]

As indicated above, the theoretical basis of the decisions in McGowan and Braunfeld has been undermined not only by the state legislative responses to them but also by the 1963 decision in Sherbert v. Verner (374 U.S. 398 [1963]). In that case, the appellant, a Seventh Day Adventist, was denied unemployment compensation because her conscientious scruples forbade her to accept work on Saturday. The South Carolina Unemployment Compensation Act provides that to be eligible for benefits, a claimant must be "able to work and . . . [be] available for work" (S.C. Code, Tit. 68, §68–113 [3]); and that a claimant is ineligible for benefits "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer. . . ." (S.C. Code, Tit. 68, §68–114 [2]).

The South Carolina Supreme Court held that the appellant did not prove a good-cause exemption from the Act, and consequently denied appellant's claim for unemployment compensation. The United States Supreme Court reversed the decision, holding that the state law infringed her constitutional right of free exercise of religion, and that a "compelling state interest in the regulation of a subject within the State's power to regulate" was not demonstrated.

Justice Brennan, who had dissented in Braunfeld, wrote the majority opinion in Sherbert. He attempted to make a distinction between the Court's decisions in Braunfeld and Sherbert by stating that, in the former case, the need for Sunday as a uniform day of leisure was of sufficient magnitude to be a compelling state interest that permitted overriding the hardships on Sabbatarians; that "no such justifications underlie the determination of the state court that the appellant's religion makes her ineligible to receive benefits." Justices Stewart, John M. Harlan, and Byron R. White, however, could see no meaningful distinction between the state-created hardships on Sabbatarians by the lack of exemptions from Sunday closing laws upheld by the Court in Braunfeld and those created by the denial of unemployment compensation benefits, which the Court struck down in Sherbert, and thus they believed that Sherbert implicitly overruled Braunfeld. This view is most persuasive. Nevertheless, it was the view of the dissent and not that of the majority in Sherbert.
The majority did see a distinction between *Braunfeld* and *Sherbert*. Moreover, the Court's activities since the *Sherbert* decision have given no grounds for predicting that *Braunfeld* will be overruled as applied to Sunday closing laws.

On the other hand, *Sherbert v. Verner* now stands as the constitutional test for situations other than Sunday closing laws. It recently has been emphatically reaffirmed in *Wisconsin v. Yoder*, discussed earlier. As stated in *Sherbert*, if an otherwise valid state law imposes a substantial economic or other burden on an individual's free exercise of his religion, it cannot be applied to that individual unless there is a compelling state interest to do so. The Supreme Court, in *Sherbert*, decided that South Carolina's interest in preventing fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work, or in preventing the dilution of the unemployment compensation fund by the difficulty of real or feigned Sabbatarians in finding employment, was not compelling enough to override the burden on Sabbatarians of making them choose between work on the Sabbath or loss of unemployment compensation benefits.

The test used places the state's interest beside the individual's, and, depending on the strength of the competing interests, a result is reached in favor of one. Four considerations are weighed on the side of the state: How necessary to the state is the imposition of this burden on the individual? Can the state devise and substitute a less onerous burden to achieve its legislative objective? What would be the effect of an exemption on the regulatory scheme? What degree of harm will the state suffer if its legislative program is nullified? On the side of the individual, two relevant factors are observed: How important is the religious right, and how severe a burden would it impose on the state?

A crucial element of this test is that a state's purported compelling interest is not sufficient if it is merely a generalized interest; it must be particularized as to the specific individual or groups whose exercise of religion is burdened. For example, the case *In re Jenison* (120 N.W. 2d 515, 516 [1963]) involved the contempt conviction of a woman who refused to serve on a jury when called because she believed that to do so violated her religious belief—specifically the injunction, "Judge not, that ye be not judged" (*Matthew* 7:1). The Minnesota Supreme Court upheld her conviction on ground that the state had a very compelling need to secure jurors for maintaining its judicial processes. The case was pending in the United States Supreme Court at the time the decision was handed down in *Sherbert v. Verner*, and, the Court asked the
Minnesota court to reconsider its decision in the light of Sherbert (375 U.S. 14, *per curiam*, vacating, 265 Minn. 96, 120 N.W. 2d 515 [1963]). In this reconsideration, the Minnesota Supreme Court held that Mrs. Jenison could not be convicted of contempt. It stated:

In the absence of a present or prospective showing that the effectiveness of the jury system will be seriously jeopardized by excusing from duty jurors whose religious convictions prohibit them from serving, such persons shall hereafter be exempt (125 N.W. 2d 588, 589 [1963]).

In other words, the Minnesota court determined that Mrs. Jenison could not be punished for refusing to violate her religious principles and serve on a jury, for, although the state does have a compelling interest in obtaining jurors, the number who would refuse to serve on religious grounds is so small that the state has no compelling interest in having that group forced to serve. This rule appears to be paradoxical in that it gives constitutional protection to religious principles so long as their adherents constitute a small enough number to pose no danger to the general policies of the state, but diminishes that protection when their number becomes too large.

Yet, the rule may not really be paradoxical. Adherents to minority religious beliefs may require greater constitutional protection when they lack the political power to protect themselves through the legislative process, and the number of adherents to a belief involved may be very relevant in determining their political power. When the adherents to a deviant belief become so numerous that they can impede the efficiency of a governmental program or process not based on these beliefs, they also may be a more significant factor in the political arena, and thus in a better position to effect a change in their interests through the normal political processes.

In view of the minority status of Jews in the United States, and the even smaller minority of Jews who observe in traditional ways, the principle of requiring a state to particularize its compelling interest before placing the burden on deviant observance is most significant in setting the boundaries of the legal status of Jewish observance within American civil society. So, for example, *Sherbert v. Verner* has special meaning for Jews in the area of government employment of Sabbatarians. It has been argued that the *Sherbert* rationale precludes government employers from refusing to hire Sabbatarians, or otherwise penalizing them for refusing to work on the Sabbath, unless there is a particularized, compelling need that they work on that day.
This issue was confronted in the recent case of *Dawson v. Postmaster* (325 F. Supp. 511 [D.C. Va. 1971]), in which a lower federal court rejected a Seventh Day Adventist postal worker's claim that his constitutional rights had been violated by the post office when it fired him for refusing to work on Saturday. Work assignments were determined by seniority under the post office's union contract, and the plaintiff did not have sufficient seniority to enable him to choose not to work on Saturdays. Quite differently from *Sherbert*, the lower court in *Dawson* took note of the administrative difficulties involved in granting similar exemptions on a broad scale. The court, moreover, distinguished *Sherbert* on the basis of the postal department's compelling interest in effecting its seniority work-assignment schedule, and on the ground that the post office had not violated the plaintiff's rights, since it had not "discriminated" against him for his beliefs, but had merely failed to "accommodate" these beliefs. The lower court stated that the Constitution merely forbade discrimination against religious beliefs and practices, and did not require accommodation by government to deviant religious beliefs and practices.

Since this lower-court decision, however, a new federal civil service regulation requires all federal agencies to make "reasonable accommodations to the religious needs of applicants and employees" (Civ. Ser. Reg. §713.202 [Fed. Reg., Vol. 36, No. 104, effective Friday, May 28, 1971]).

**Civil Rights Act of 1964**

*Sherbert v. Verner* is a constitutional decision which places restrictions only on government and not on private employers, unless they are sufficiently connected with government to have their work be deemed "state action." However, through legislative and administrative action taken in recent years, the rights of Sabbatarians have also gained protection in private employment. The 1964 Civil Rights Act made it an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion. . . . (42 U.S.C. 2000e–2 [9])
The Equal Employment Opportunities Commission (EEOC) is charged with enforcement of this federal act. The issue of discrimination versus accommodation has also arisen in connection with the enforcement of the 1964 Civil Rights Act. In response to complaints filed by Sabbath observers with it, EEOC issued Religious Discrimination Guidelines for employers of Sabbatarians, which provided that an employer's duty not to discriminate on religious grounds "includes an obligation on the part of an employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." Moreover, the employer has "the burden of proving that an undue hardship renders the required accommodation to the religious needs of the employee unreasonable" (32 F.R. 10298, Tit. 29 Labor; Chapter XIV; Equal Employment Opportunity Commission ¶1605, Guideline on Discrimination Because of Religion). EEOC has applied these guidelines in a number of proceedings involving Sabbatarians.

Religious discrimination was found in the case of a Seventh Day Adventist, who was denied opportunities for overtime work on Sundays because of his refusal to work on Saturdays (EEOC No. 7–110, Case No. At 68–3–812E, 8/27/69, C.C.H.E.P.G. ¶6062, p. 4099). Both Saturday and Sunday were voluntary overtime work days. Under the company's stated policy, however, employers had to accept or reject both Saturday and Sunday overtime work as a package. The Commission noted that the employer had made no attempt to accommodate the complainant's religious needs. The Commission further noted that others, who were not Sabbatarians, and did sign up to work Saturdays and Sundays but did not appear one of the days, were allowed to work the other and get overtime pay, with only an absence noted on their work records.

In another case, that of an Orthodox Jew who sought permission to leave early on Fridays during the winter months, the employer, an insurance company, denied such permission on the ground that it had too many employees to permit individual exemptions. The employee testified before the Commission that she had offered to come in early and leave late on certain days to make up the lost time, and that her work did not require supervision. Upon the company's failure to demonstrate hardship, the Commission ruled in favor of the employee (EEOC, No. 70–71b, Case No. N.Y. 68–12–618E 4/23/70, 2 FEP Cases 684).
Cases of employees contesting alleged preferential treatment of religious differences have also come before EEOC. An employer who permitted a worker time off to attend a compulsory convention of the World Wide Church of God was accused by other employees of favoritism (EEOC, No. 71-463, 11/13/70, C.C.H.E.P.G. ¶6206, p. 4350). The Commission responded that an employer who makes reasonable efforts to accommodate religious beliefs does not by such favoritism discriminate against other employees. In such a case the employer has the burden of proving minimum impact on others, and of showing such necessity as to justify discriminatory effects on others. In the case in question the employer met his burden of proof, and continued time off for such conventions was sustained.

Similarly, a ruling of the Commission’s general counsel sustains leaves with pay to Jews of one or two days of religious holidays each year, even though Christians are granted only those religious holidays with pay, which are legal holidays for everyone, Christians and Jews alike (EEOC, No. 70-773, 5/7/70, C.C.H.E.P.G. ¶6206, p. 4350). The Commission feels such practices to be consistent with a policy requiring "substantial uniformity" in employment practices.

EEOC rulings have rejected complaints of religious discrimination where sufficient undue hardship has been shown. Where a position required one person to be on call for trouble-shooting 24 hours each day, seven days per week, EEOC rejected an Orthodox Jew's claim of religious discrimination (ibid., ¶6154, p. 4261). Similarly, a Seventh Day Adventist complainant not hired as a harvester for the harvest season was unsuccessful in his claims of religious discrimination because speed in harvesting was essential to a successful crop (EEOC, No. 70-99, 8/27/69, C.C.H.E.P.G. ¶6060, p. 4069).

The EEOE Guidelines and decisions have generally been quite favorable to Sabbatarians. Until quite recently, however, there was considerable doubt that the courts would uphold the EEOC position that the 1964 Civil Rights Act required an employer to make reasonable accommodations to his employees' religious needs. The Act did not expressly so state and only prohibited "discrimination." Indeed, in 1971, the Justices of the United States Supreme Court were evenly divided on a case that presented this issue (Dewey v. Reynolds Metals Company, 91 S.Ct. 2186 [1971]). The vote was 4 to 4, with Justice Harlan not participating.

In 1972, however, Congress amended the Civil Rights Act to make it clear that federal law requires employers to make reasonable ac-
commodations to their employee's religious needs. The amendment provides as follows:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.

Thus, the prior EEOC position is now clearly the congressionally-mandated federal law.

Fair Employment Practices Acts

Forty-two states, the District of Columbia, Puerto Rico, and the cities of New York, Philadelphia, and Pittsburgh have adopted their own fair employment practices acts prohibiting, inter alia, religious discrimination in employment, often many years before the federal legislation. The various state acts utilize substantially the same language as the 1964 Civil Rights Act, and enforcement commissions have issued antidiscrimination guidelines consistent with those of EEOC.

The state cases dealing with religious discrimination, and only a few have been reported, generally do not require as generous an accommodation of religious needs as does EEOC. In New York, an orthodox Muslim working for Greyhound Bus Lines was discharged for failure to shave his beard, which he refused to do for religious reasons. Greyhound defended the discharge by citing its requirement that all employees be neat in appearance, that hair be above the collar for men, and that faces be clean-shaven. The New York State Division of Human Rights did not find discrimination, and, on appeal, the court agreed, holding that the dress requirement was a reasonable means of promoting business; that the particular idiosyncracy of the employee need not be accommodated; that the beard affected the individual's ability to present the kind of public image Greyhound wished to create (Eastern Greyhound Lines v. N.Y. State Div. of Human Rights, 27 N.Y.S. 2d 279, 265 N.E. 2d 745 [1970]).

In a case, which disagrees with the EEOC general counsel’s opinion with respect to “substantial uniformity,” the New Jersey Supreme Court held that failure to charge time taken off by a Jewish policeman for holy days against his accumulated overtime was a discriminatory employment practice (Ebler v. City of Newark, 54 N.J. 487, 256 A. 2d 44 [1969]). The Connecticut Supreme Court has held that its state act does not require employers to make reasonable accommodations to the religious needs of their employees (Williams v. Commission on Civil Rights, State of Conn., 158 Conn. 622, 262 A. 2d 183 [1969]).

Kashrut Enforcement

Thus far, this study has dealt with the impact of American law on Jews, as individuals, in American society. In matters of kashrut enforcement, however, the law begins to get involved also with the Jewish community as a functioning entity as well.

Kosher Food Laws

Kashrut enforcement represents one of the most methodical systems of linkage between government and the Jewish community in the United States. In enacting legislation to prevent fraudulent or deceptive practices of slaughter, distribution, or sale of foods designated kosher, primarily meat and poultry, a number of states have sought to protect observant Jews as consumers of kosher food products. As of the time of this study, 18 states13 and the District of Columbia (which include 90 per cent of the estimated 5.9 million Jews in the United States) had enacted such statutes.

The earliest of these statutes were passed in New York, in 1881, and in Massachusetts shortly thereafter, in 1882. New York's statute was broadened in 1922; most of the other Eastern and Midwestern states that now have such statutes adopted them in the 1920s, California in 1931. The latest spate of kosher food regulatory legislation came after World War II: in Arkansas (1949), Virginia (1950), Arizona (1951), and Kentucky (1956). The New Jersey statute was significantly changed as late as 1966 in an effort to strengthen enforcement.

The New York statute became the prototype for most of the others. They generally prohibit the fraudulent sale, whether wholesale or retail, or in restaurants, of food represented as being kosher when it is not. They also require establishments selling both kosher and nonkosher products to clearly state that such is the case, so that customers, who know that some of the food for sale is kosher, will not be misled into thinking that this is true of all the food. The term "kosher" is generally defined as applying to food prepared "in accordance with the orthodox Hebrew religious requirements" (see, *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 [1924]). Violation of the statute is generally a misdemeanor punishable by a fine or short jail term, or both.

Since there is little recorded legislative history for these state statutes, it was difficult to obtain much data on the groups responsible for urging passage of the laws, except in New York, California, and New Jersey. In New York such information is available only since the reenactment and reinforcement of the statute in 1922. The 1922 statute was supported by Orthodox and Conservative synagogue and rabbinical groups, among them the New York branch of the United Synagogue of America, the Union of Orthodox Rabbis, and the Assembly of Orthodox Rabbis. The need felt by the kashrut-observant community for a strengthened law was expressed thus in a letter from the president of the New York branch of the (Conservative) United Synagogue of America to the governor of New York:

... of the million and one-half Jewish residents in greater New York, hundreds of thousands observe the Dietary Laws, which require the products to be what is known as "kosher." Unscrupulous dealers for years have practiced deception on these people by keeping both "Kosher and Non-Kosher" products, and by representing the latter to be the former.14

Nothing in the statute's legislative history indicates the position taken by Reform synagogues or rabbinic groups or by secular Jewish organizations. However, active opposition to the statute came from the Progressive Hebrew Butchers Protective Association of New York.

The legislative history of the California statute passed in 1931 shows no record of its proponents; but there is a letter of April 21, 1931, from Rudolph I. Coffee, president of a (Reform) First Hebrew Congregation,

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14 As quoted in letter to authors of this article, dated March 26, 1971, from Thomas G. Conway, counsel, Department of Agriculture and Markets, State of New York.

... I am unalterably opposed to this bill because Judaism need not call upon the State to settle its own internal affairs. We are starting a dangerous precedent in California which can only lead to evil consequences.

Four years ago you assisted in preventing an increase of "wine rabbis." The law relative to sacramental wine was properly surrounded, and California Jews do not suffer the disgrace which eastern brethren feel.

This will bring a "meat rabbi" into existence. New York state has this kosher law and yet it did not prevent the terrible scandal which was uncovered last month in New York City. Use your best influence to prevent it.

If Judaism has not enough inner resources to meet present day conditions, the sooner it passes away the better.

In 1966 New Jersey undertook to strengthen the enforcement of its statute at the instigation of the (Orthodox) Rabbinical Council of New Jersey.

RESPONSIBILITY FOR ENFORCEMENT

Enforcement of kashrut statutes is a matter of daily concern extending beyond mere enactment of legislation. The extent of enforcement of these statutes and the agency responsible for their enforcement are closely related. Nine of the states place responsibility for enforcement on central state officials, either alone or in conjunction with local officials; the others leave enforcement of this statute, as of other criminal statutes, to local county or municipal prosecuting attorneys, or to local boards of health. Among the latter, Pennsylvania, Arizona, Kentucky, Illinois, Virginia, Michigan, and Maryland leave enforcement to local prosecut-

15 The following discussions are based on documentary sources and responses to the following questionnaire, sent in connection with this study to the appropriate officials in each of the states having such statues:

(1) What group or groups were responsible for the passage of the law?
(2) How often has the statute been invoked?
(3) Who is responsible for its enforcement?
(4) What is the annual expenditure of funds used in enforcing the statute?
(5) What standard does the enforcement agency use in determining what the word "Kosher" means? In other words, how does the enforcing body determine what is meant by a reference to "Orthodox Jewish Tradition"?
(6) Does the enforcing body look to any outside agency or group to determine the meaning of "Kosher Food"?

Responses were obtained from Arizona, Arkansas, California, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Virginia, and Wisconsin, as well as from New York City.
ing attorneys; the District of Columbia, Ohio, and Massachusetts leave it to local boards of health. While it is difficult to get data on local enforcement, the available information indicates that very few prosecutions have been brought under the statutes. This, however, does not necessarily mean that the statutes do not have an effect. Their mere existence may act as a deterrent and reduce the need to prosecute. There also are indications that investigation and threat of prosecution may be enough to correct offending conduct.

In the states where central state officials are charged with investigating and enforcing kosher food laws, either alone or in conjunction with local officials, the responsible agencies are the state agriculture department, or the state department of public health, or a specially designated official in the state attorney general’s office. New York, Wisconsin, Tennessee, and Minnesota place authority in their agriculture departments, and California, Connecticut, Arkansas, and Rhode Island in state departments of public health; New Jersey’s statute is enforced by the attorney general’s office, and that of the District of Columbia by the local United States attorney’s office.

Although the major aim of the 1966 amendment to the New Jersey statute was to secure stricter enforcement by shifting responsibility from local prosecuting attorneys to the office of the New Jersey attorney general, that office currently reports minimal enforcement. In general, official responsibility on the state plane does not necessarily mean more prosecutions. Indeed, most states with central enforcement responsibility report little or no prosecution. At the time of this writing, none of the state budgets allocated funds specifically for kosher food law enforcement. Of course here, as in states having local enforcement, the very existence of the statute may act as a deterrent, and investigations may correct abuses.

Only New York and California (which, it should be noted, together account for more than half the Jewish population in the United States) have reported significant numbers of prosecutions. New York reported routine enforcement of the statute, and a monthly average of six civil penalties for violations. This may reflect both the efficiency of the New York enforcing mechanism and the concentration of kashrut observing Jews in the state. While the New York law is enforced primarily by the state Department of Agriculture and Markets through a staff of special inspectors, in New York City the Department of Consumer Affairs acts jointly with the state department. Under Commissioner Bess Meyerson
Grant, the New York City department has been quite active in this field.

Despite the considerable details contained in the legislation, the New York agricultural department has supplemented the statutes with even more detailed regulations. These stipulate exactly how kosher-slaughtered meat and poultry must be labeled and attested to at the time of slaughtering and thereafter. The department also has adopted regulations concerning the use of "Kosher for Passover" designations.

A unique provision of the New York procedure is the statutorily-created nine-member Kosher Law Enforcement Advisory Board appointed by the Commission of Agriculture and Markets. The board is composed of six rabbis and three laymen. When a vacancy occurs on the board, the commissioner solicits recommendations for replacements from its members, as well as from rabbinical organizations and other religious and civic groups concerned with enforcement of the law.

According to statute, the board meets "at the call of the commissioner and at such other times as it may deem necessary" (N.Y. Agriculture & Markets Law, §26-a [3]). Usually, the board meets once a month subject to the normal changes in the scheduling on account of holidays, as well as to the call of the chairman or commissioner for special meetings. The board members receive no compensation for their services, but are reimbursed for travel and other expenses incurred in their work on the board. Although the board is expressly designated as "advisory" to the commissioner, its recommendations on kashrut enforcement are obviously given great weight.

California has had a far more checkered history of enforcement of its kosher food law. Although the law was adopted in 1931, responsibility for its enforcement was placed in the state Department of Public Health only in 1957. In that year, the legislature also appropriated $20,000 expressly for kosher-food law enforcement, the only case of specific legislative appropriation for this purpose in this country. Pursuant to the 1957 amendment, the post of kosher-food law representative was created in the Department of Public Health, to which an Orthodox rabbi was appointed on a full-time basis, with a salary of approximately $10,000.

The specific appropriation of $20,000 was eliminated in 1959; the kosher-food law representative was retained on salary until 1965, when the department proposed to the governor that the position be eliminated. Its stated reasons for the proposal were that enforcement of the law had been "difficult," that the department was "accomplishing little" in this
respect, and that this activity "does not make a major contribution to
the purposes and objectives of the Department of Public Health"
(Glasner v. Dept. of Public Health, 61 Cal. Rptr. 415-16 [1967]).

The governor accepted the recommendation, and his proposed budget,
as adopted by the legislature, eliminated the position of, and salary for,
the kosher-food law representative. The reason he gave in his budget
message was that enforcement of the kosher food law was not "an ap-
propriate public health responsibility," and he added that "legislation
will be introduced to relieve the Department of Public Health of this
responsibility." However, no such legislation has been enacted, and to
this day responsibility for enforcement of the California kosher food
law rests with this department, although it receives no specific appropria-
tion for its execution. The department, on its part, reports that "since
the employment of an Orthodox Rabbi was terminated in 1965 due
to action of the legislative on funding, the annual expenditure has been
minimal."¹⁶

Besides inadequate funding, the report continues, a deterrent to en-
forcement has been the fact that "actions have been clouded in many
instances due to the interpretation of the term kosher. There is a wide
divergence of opinion as to the meaning of this term among various
factions of the Jewish Community."

KASHRUT CERTIFICATION

The difficulties encountered by state officials in enforcing kashrut
legislation have inevitably led to heavy reliance on local rabbinic author-
ities, where no advisory board had been set up. (Dependence on rabbinic
interpretation was almost unanimously affirmed by the states responding
to our questionnaire.) This situation has been a factor in attempts by
local rabbinical associations to get exclusive control over kashrut certi-
fication, a problem that led to court action in New York and New Jersey.
In 1934 a series of meetings were called by the mayor of New York City
at the request of a committee of 50 Orthodox rabbis to discuss alleged
abuses in the slaughter and sale of kosher poultry and the need for
reform. The meetings were attended by the mayor or the president of the
Board of Aldermen, rabbis, Jewish laymen, shohatim (kosher meat and

¹⁶ Letter to authors, dated May 7, 1971, from R. Kenneth Buell, Chief, Bureau
of Food and Drugs, Dept. of Public Health, California.
poultry slaughterers), poultry farmers, and commission merchants. A lay mediator, appointed by the mayor, met with all groups and made a report.

The United Rabbinate, a loosely organized assembly of Greater New York rabbis then met, discussed the report, approved in principle an *issur* (prohibition in Jewish law) to control the kosher poultry business, and called for the appointment of a Bet Din (rabbinical court) to declare such an issur. A Bet Din of 23 Orthodox rabbis was appointed and, after extensive deliberation, issued the issur. Further discussion by market men and rabbis preceded the approval of the issur by the Rabbinical Board of Greater New York, the largest local association of rabbis, and, finally, its adoption at a meeting of 219 members of the United Rabbinate of the City of New York. At a publicly announced meeting in a New York City synagogue, to which a general invitation had been issued, the issur was declared in the following form:

> With the help of God, Monday, the 27th day of the month of Mar Cheschan, 5695 (November 5, 1934).
> Whereas, in the City of New York, there is, as is generally known, chaos in the matter of slaughtering of poultry for Jewish consumption, and
> Whereas, in many poultry slaughtering establishments and markets, there are manifold malpractices, in violation of the laws of the Torah, concerning “nevelah” and “trefah” (two classes of non-kosher food), and especially since investigations recently conducted have made it abundantly clear that the structure of Kashruth regarding poultry has collapsed, as was demonstrated by the facts brought out in these many investigations, which show how far Kashruth in the slaughtering of poultry has been defective and imperfect, thus casting upon such slaughtered poultry the suspicion of their being forbidden under the Biblical dietary laws (a situation which we deeply deplore) and
> Whereas, as rabbis, official guardians of our holy religion and the correct observance of its precepts, the laws of our sacred Torah place upon us specifically the responsibility of taking the necessary measures to keep our people from the consumption of forbidden food (and if at this juncture we should remain silent and inactive, we would be guilty of a serious breach of religious duty);
> Therefore, in view of the situation here set forth and the duty devolving upon us, we have reached the following decisions:

1. That the slaughter houses and the Schochtim must be placed under permanent and effective supervision, as approved by, and under the auspices of, the rabbis of the City of Greater New York, who are united in the Kashruth Association.

2. That each bird slaughtered as kosher must be marked with a “plumba” or a similar sign, such mark to be affixed by a person authorized by the rabbinate, . . . so that our coreligionists in New York City by purchasing only poultry which come from such slaughtering establishments as are under the proper supervision above described and which bear authorized tokens of Kashruth will be safeguarded from violation of the dietary laws.

3. And, therefore, in accordance with the authority specifically vested in
us by the holy Torah, for safeguarding the observance of its dietary laws, we
herewith do, with the full strength and severity of the law, solemnly declare,
pronounce, issue and publish an issur (religious prohibition), to go into effect
forthwith on poultry not slaughtered in accordance with the above regulations
or not bearing an authorized token, as above described, declaring that such
poultry is forbidden to be consumed by Jews. . . .

(4) And every Schochet who, in contravention of these regulations, will
slaughter birds without supervision or without a token of Kashruth being affixed,
as described above (unless the slaughtering is done in each case by express
permission of a qualified rabbi for the use of sick people), will lose his status
of reliability in regard to Kashruth, and as a violator of the Jewish Law will
henceforth become disqualified to act as Schochet.

We cherish confidence that no rabbi or scholar versed in Jewish Law will
attempt to diminish the force of this prohibition or rule to the contrary, and
thus rebel against and separate himself from the entire body of the Orthodox
Rabbinate of New York City in which case his ruling shall become null and
void as are the rulings of one who is a destroyer of the fence of the law (non-
conformist) (S.S. & B. Live Poultry Corp. v. Kashruth Ass’n., 285 N.Y.S. 879,
882 [1936]).

The very elaborate procedure of adoption underlines the seriousness
of the purpose of the issur. It also underlines its unique nature. The
religious life of American Jewry is organized on a congregational basis.
Not only is there no religious hierarchy in American Jewish life, there
also is no widely-accepted intercongregational authority that can act in
the name of the community in matters of Jewish law. Yet the New York
City Orthodox rabbinate purported to issue this issur as binding on all
Jews in the metropolitan area. They did so on the basis of traditional
principles of Jewish communal organization, which recognizes the
ordained rabbinical authorities in each local community as constituting
a body able to promulgate ordinances under Jewish law. The issue dealt
with a question of great importance, both religiously and economically.
Greater New York City Jewry was, and is, the largest Jewry and the
largest group of consumers of kosher food products in the United
States. In a lawsuit brought in 1936, a court-appointed expert estimated
that 1.25 million to 1.5 million Jews then bought kosher-killed poultry
in New York City.

Pursuant to the issur, the Kashruth Association of New York was
incorporated to certify kashrut. Although there apparently had been no
expressed objection to the issur when it was promulgated, some rabbis
and members of the kosher-poultry business resisted control by the
Kashruth Association. This situation led to the prosecution in People v.
Gordon (172 Misc. 543, 14 N.Y.S. 2d 333 [1939]), of a retail kosher
butcher for selling as kosher poultry that did not have the association’s
**plomba** (seal or tag). It was conceded that, except for this tag, the poultry was kosher. The defendant admitted that he knew of the issur and of the Kashruth Association, but argued that he did not use its **plomba** because this meant that he would have to pay for the certification, and he could not afford to do so.

The trial court held the defendant violated the New York kosher food law by calling his poultry kosher. The judge emphasized that the issur declared poultry not certified according to its requirements “forbidden to be consumed by Jews” (14 N.Y.S. 2d, at 335). Such poultry, the court stated, was not “sanctioned by Orthodox Hebrew religious requirements” within the meaning of the New York law. The appellate court reversed this judgment, stating it had not been proven “that the so-called Rabbinate was a tribunal clothed with power to act and to decree that a fowl not slaughtered according to the regulation specified in the Issur and not bearing a token, as above described, is not kosher, and, therefore, forbidden to be consumed by Jews” (16 N.Y.S. 2d at 834).

In effect, the appellate court refused to accept the authority of the New York rabbinical authorities to make binding decrees which add to, and become part of, the corpus of Jewish law for purposes of the state legislation. The court also would not accept the proposition that the certification requirements of the issur were part of the law of kashrut, rather than evidence of adherence to the law. This decision was affirmed without opinion by the highest court in the state. As a result, there seem to have been no other attempts at prosecution for a kosher food law violation based on refusal to comply with a local rabbinical association’s certification system. The issur remains in effect in Jewish law, but is essentially unenforceable as part of the state kosher food statutes.

The same problem arose in New Jersey and Boston, Mass., where rabbinical associations issued issurim similar to that of New York City. In Atlantic City, a major Jewish resort area with a number of kosher hotels, the Va’ad Ha-kashrut Association was formed in 1922 to supervise kashrut. As stated by the New Jersey court that later reviewed the history of kashrut in Atlantic City, the city’s “entire Jewish community” met in assembly and provided that poultry slaughtered for kosher consumption must be slaughtered in Atlantic City and bear the plomba of the Va’ad and the city’s “chief Orthodox rabbi.” On the same day, a Bet Din of three Orthodox rabbis, one from New York, one from Philadelphia, and one from Camden, N.J., sanctioned the community
(S.S. & B. Live Poultry Corp. v. Kashruth Association, 158 Misc. 358, 285 N.Y.S. 879 [1936]) upheld the New York City issur and Va'ad monopoly against a claim of restraint of trade. Its decision closely resembled that of the Massachusetts court. In contrast, the judgment of another lower New York court (Cohen v. Eisenberg, 173 Misc. 1089, 19 N.Y.S. 2d 678 [1940]), four years later, used language identical to that of the New Jersey decision charging restraint of trade. The second New York case was decided after Gordon, but did not rest its decision on the grounds that the Gordon case required this result. This lack of reliance on Gordon would seem to be correct. The fact that the Va'ad cannot enforce its kashrut certification by utilizing the penalties of New York law does not mean that its actions to obtain community enforcement are disallowed by the courts as libelous or restraints of trade.

RELIGIOUS OBSERVANCE OF PRODUCERS AND DEALERS

Another problem in kashrut enforcement is the question of whether or not, in addition to regulations applying to the actual slaughtering of animals and the handling of food, religious observance, particularly Sabbath observance, by people engaged in the production and sale of kosher food is relevant to the food's kosher status. Under Jewish law, it clearly is, since piety and observance are specifically required of those involved in all aspects of kashrut. The New York regulations have no such requirement, nor does the California statutory definition of "kosher." There also appear to have been no prosecutions for violations of the kosher food laws on grounds of selling kosher food on the Sabbath or nonobservance of the Sabbath by individual shohatim or butchers.

However, a 1964 New York case indicated that Sabbath observance of food handlers may be relevant. In People v. Johnson Kosher Meat Products (42 Misc. 534, 248 N.Y.S. 2d 429 [1964]), the question arose why the New York law requires certification of kashrut not only of the original slaughtering but of each subsequent handler of the meat or poultry. In responding to this, the court stated that kashrut required

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17 It should be noted that an earlier attempt to control the kosher meat and poultry market in New York City resulted in criminal indictments, in 1912, against the leaders of the New York Kehillah. The indictment was quashed only after the Kehillah leaders agreed to stop trying to organize the industry. For a discussion of this case, as well as other early incidents concerning the kosher food market in New York City, see Arthur A. Goren, New York Jews and the Quest for Community (New York: Columbia University Press, 1970), Chapter 4.
special processing after slaughtering, and that this processing included having the meat "drawn, soaked, salted and handled only by Sabbath observers" (emphasis added). This, however, may have been only a stray remark. It was clearly not essential to the decision in the case.

Sabbath observance by kosher meat dealers also was a factor in Massachusetts and California cases. In the 1931 Massachusetts case of Cohen v. Silver (178 N.E. 508 [1931]), plaintiff Cohen, a Springfield wholesale kosher butcher, sued when the local rabbinical certification association, the Va'ad Ha-kashrut, which had certified the partnership of Cohen and his brother, refused to certify Cohen after the partnership was terminated, and advised the shohatim not to sell to him. The Va'ad action was taken because Cohen, accused of publicly violating the Sabbath, also refused to respond to a summons to appear before the Bet Din in an action brought against him by his brother. Cohen stated in court that he did not respond to the Bet Din summons because he wanted the dispute with his brother resolved in a civil court.

The refusal of the shohatim to sell to Cohen moved him to bring suit against the Va'ad leaders for interfering with his business. A master appointed by the court to hear the testimony and make a report confirmed the Va'ad finding, and the court dismissed the case. While it recognized that the Va'ad action would force Cohen out of business, it accepted as binding the Jewish law that a man who publicly violates the law of the Sabbath, or is suspected of violating it, or does not accept the validity of the Talmud, or has eaten nonkosher food is not a proper person to sell food designated as kosher. The court stated that this was a religious question with which it would not interfere; that Cohen, by entering into a business of an intrinsically religious nature, had implicitly agreed to adhere to Jewish law, even in his personal life.

A Sabbath transgression was involved in a celebrated incident in Beverly Hills, Calif. in 1960, which received a great deal of publicity in the local press, especially the Anglo-Jewish press, and on radio and television. An employee of a distributor of kosher fowl delivered to the Beverly Hilton Hotel on a Saturday afternoon 1,120 "kosher" chicken breasts for an Israel Bond dinner to be held that night. There were also rumors questioning the kashrut of the chicken. After investigation by the Orthodox rabbi, who then served as California's kosher food law representative, and on his recommendation, the distributor was charged with violating California's kosher food law. The record is not clear on this point, but the charge, at least in part, seems to have been based on the Sabbath violation. The case came to trial in California, and the state
court, in an unreported decision, found the distributor not guilty. There was therefore no written opinion on whether or not the Sabbath transgression was considered a violation of the kosher food law.

After his acquittal, the distributor brought libel action in a California court against a rabbi (not the state kosher-food law representative), who had been very active in denouncing him and had widely circulated handbills against him (Erlich v. Etner, 36 Cal. Rptr. 256 [1964]). In an opinion that is quite confusing in its reasoning, the court dismissed the lawsuit on a narrow, technical ground concerning the drafting of the complaint, although it conceded the general merits of the plaintiff's case. Again, there was no discussion of the Sabbath violation.

If kosher food laws provided that Sabbath transgression by the dealer made certified kosher food nonkosher, these laws would not only affect kosher butchers but perhaps also supermarkets, which sell packaged kosher food and which are open on Friday nights and Saturdays. This would not seem to be the intent of the statute, and no one, to the best of our knowledge, has even suggested that it is. Although the vast majority of retail kosher butcher shops are closed on the Sabbath, a state law making this mandatory would be troublesome. Even more difficult would be the enforcement of kosher food laws which tried to control the personal religious behavior of handlers of kosher food. However, the absence of such provisions does not necessarily mean that courts will rule in favor of kosher food dealers and against rabbinical associations which, without recourse to law, seek to discourage trading with stores that do business on the Sabbath.

CONSTITUTIONALITY OF KOSHER FOOD LAWS

Finally, there are the challenges to the constitutionality of the kosher food laws themselves. The New York statute was tested in the United States Supreme Court as early as 1925 in Hygrade Provision Co. v. Sherman (266 U.S. 497 [1925]), wherein it was argued that the New York statute was unconstitutional because the terms "kosher" and "orthodox Hebrew religious requirements" were too vague to be used as legal standards. It was also contended that the statute's failure to give proper notice of what constitutes a violation—which causes difficulties in determining what is or is not kosher and arouses fear that a judge or jury could find products to have been improperly designated as kosher—would deter people from dealing in kosher food products.
The Supreme Court rejected these arguments, emphasizing that conviction under the statute was possible only for a knowing and purposeful violation. Therefore, the statute punishes only fraudulent intent; and a dealer who honestly believes a food product he sells to be kosher may not be prosecuted even though he was mistaken and the food was actually not kosher. This standard minimizes the effect of the vagueness in American law of the terms “kosher" and “orthodox Hebrew religious requirements.”

The *Hygrade Provision* decision, however, did not consider the argument that the kosher food laws violate the First Amendment restrictions on “establishment” or “free exercise of religion”; nor has this issue been extensively explored by legal scholars. Professor Leo Pfeffer, in his leading work on church-state relations,\(^{18}\) considers the laws unconstitutional as violative of the First Amendment because, he argues, they involve secular courts in deciding religious questions in ways that unconstitutionally entangle church and state. It might also be argued that the kosher food laws unconstitutionally serve to enforce religious law.

On the other hand, the laws protect the consumer, and thus deal with a matter of traditional governmental interest. Viewed in this light, they do not enforce religious determinations, but protect consumers of kosher food from fraudulent mislabeling. As discussed above, the trend of decisions is properly to avoid using the laws to accomplish ends other than consumer protection. As a result, neither the reported decisions nor responses to the inquiries conducted for this study have indicated that the courts or other secular authorities encounter major problems of having to deal with esoteric Jewish doctrinal issues other than those discussed above.

**SHEHITAH**

Relatively recently, an additional interrelationship between the American legal system and kashrut has developed with regard to humane slaughter statutes and *shehitah*, Jewish ritual slaughter. In 1958, at the instigation of groups concerned with preventing the needless suffering of animals, Congress passed the Humane Methods of Livestock Slaughter Act (7 U.S.C. §§1901–1906) providing that it was “the policy of the United States that the slaughtering of livestock and the handling of live-

stock in connection with slaughter shall be carried out only by humane methods." The Act further provides that the federal government shall not purchase any livestock products not humanely slaughtered.

The Act expressly states that "either of the following two methods of slaughtering and handling are hereby found to be humane":

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or
(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.\(^1^9\)

The Act further provides, perhaps unnecessarily in light of the inclusion of shehitah within its definition of humane handling and slaughtering, that "[n]othing in this chapter shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this chapter in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter."

Since 1958 Arizona, California, Illinois, Iowa, Kansas, Maryland, Minnesota, New Hampshire, and Pennsylvania have adopted humane slaughter acts generally patterned after the federal statute. All the state statutes follow the federal act in declaring that the actual slaughtering method of shehitah is humane. They are not, however, as consistent in declaring humane the usual methods of kosher slaughterers of preparing an animal for slaughtering by shackling and hoisting it while it is conscious.

The humane slaughter acts of Arizona, California, Iowa, and Maryland do include this preparation and handling of the animal for shehitah within their definitions of humane-slaughtering methods. Although Maryland includes as humane only the slaughtering itself, it specifically exempts the preparation and handling of the animal for shehitah from the statute's requirements that the animal be rendered insensitive to pain prior to shackling, hoisting, etc.

\(^1^9\) Id., § 1902. For a full discussion of the humane nature of shehitah, as well as attempts to restrict shehitah in Europe, particularly during the Nazi period, see I. Lewin, Religious Freedom: The Right to Practice Shehitah (New York, 1966).
On the other hand, there has been considerable controversy in recent years over whether or not the usual kosher-slaughtering methods of preparing the conscious animal for slaughter are required by Jewish law. It has also been asserted that, even if they are not required, other methods would be impractical or prohibitively expensive. Illinois, Pennsylvania, and New Hampshire, in their humane slaughter acts, have expressly responded to this controversy.

Illinois, like the other states, declares the actual slaughtering of shehitah to be humane (Ill. Stat. Ann., Tit. 8, §229.54). It also prohibits the shackling and hoisting or handling of any animal while conscious in the preparation for slaughter. This last prohibition, however, is stated not to “apply to calves and sheep and cattle where ritually acceptable and practical methods are unavailable for positioning livestock for purposes of slaughter in accordance with the requirements of any religious faith.”

The Illinois statute thus leaves open, and for later consideration, the issue of whether there are in Jewish law permissible and practical alternatives to the positioning of conscious animals for ritual slaughtering. New Hampshire achieves the same result as Illinois by defining both the slaughtering and preparation of shehitah as humane, “provided that the method used in bringing the animal into position for slaughter causes no injury or pain which can be avoided without interfering with the requirements of ritualistic slaughter or without imposing unreasonable economic hardships” (N.H. Rev. Stat. Ann. 575–A: 1 III [b]).

Pennsylvania follows the Illinois model, although its exemption from the prohibition of shackling or hoisting conscious animals is more complex. This exemption allows commercial establishments to slaughter no more than 20 conscious beef animals per week. There is no limit on the number of calves and sheep that can be prepared for slaughter while conscious, but this exemption applies only until one year after the Pennsylvania secretary of agriculture “finds that there is available at reasonable cost a ritually acceptable, practicable and humane method of handling or otherwise preparing conscious calves and sheep for slaughter” (3 Purd. Pa. Stat. 451.52).

In matters concerning Jews as a deviant group in American society, two patterns can be noted. First, there are significant differences among the states in the way they have shaped a place in the law for Jewish deviation and its needs. New York, with the largest concentration of Jews of any state, both absolutely and proportionately, leads in develop-
ment of legal forms and the administrative apparatus to enforce them. New Jersey, with the second largest concentration proportionately follows closely. In both states, however, the pattern has been to treat Jewish needs as the private needs of what happens to be a large segment of their populations, very much within the American tradition of not allowing religion to interfere with the free flow of commerce or the right of contract, as it is generally fixed in American law. Massachusetts, on the other hand, has followed its own traditional patterns, first formed by the Puritan Yankees and reenforced by a subsequent Irish Catholic majority, which give religious authorities a greater role in shaping the legal status of institutions with religious import, and, in this way, has also strengthened Jewish authorities. California, with the second largest absolute number of Jews, has been legally responsive, but has developed more lenient enforcement standards in light of the highly individualistic character of its society.

The second pattern is a trend toward greater protection of the rights of individual Jews to deviate for religious purposes, while fully participating in other facets of American society. This trend, particularly noticeable in the employment field, has been encouraged by the federal and state governments in legislation and court decisions over the past fifteen years. This, in itself, is a reversal of earlier patterns.

While both patterns function to protect Jews as individuals, the American framework in which both have perforce developed often makes them unresponsive to Jewish communal needs. Thus kashrut-enforcement laws protect individual consumers from fraud. At the same time, they do not support traditional methods of Jewish communal enforcement of kashrut standards, thereby opening the market to virtually all comers and allowing them to charge what the traffic will bear, regardless of the community's over-all interests. This seems to be a necessary concomitant of the American legal system's commitment to recognize, first and foremost, the individual and his needs in the market place which, in itself, is contrary to the communal spirit of Jewish law.

**JEWRY AS "RELIGIOUS SOCIETY"**

In matters of synagogue membership, property, and observance, Jews have a choice of either bringing their disputes before civil courts or adjudicating them within the Jewish community. Given the reluctance
of Jews, even in America, to take internal matters to the civil courts, the legal status of the community in such matters is based on relatively few cases.

**Synagogue Membership and Property**

The law regarding synagogue membership and property is the secular law that applies to all church groups as voluntary organizations and religious societies. However, it does have peculiar applications to Jews in two interrelated ways: Where doctrinal or theological issues are involved, the fact that Jews are a deviant minority in a predominantly Christian country may pose greater difficulties for civil courts than would matters involving majority churches. Also, the congregational, nonhierarchical structure of Jewish synagogue organization compounds the difficulty by not providing an authoritative spokesman to whom the secular authorities can look for an answer to complex doctrinal issues.

Two major areas of legal concern regarding synagogues have been addressed by the courts in recent years: the authority of a synagogue to dispose of its property or consolidate with another synagogue, and the question of who should be in control of a synagogue in disputes arising from doctrinal schisms.

The law of churches, or "religious societies" as the law often designates them, varies from state to state. More significantly, state laws generally provide that the powers and duties of officers or directors of a given religious society are generally controlled by the specific provisions of its charter or bylaws. Thus, in any legal issue involving, for example, authority to dispose of synagogue property, it is necessary for an attorney to determine the synagogue's exact position on the basis of both the applicable state law and the synagogue's charter or bylaws.

A synagogue's ultimate authority generally resides in its members. Major decisions, such as selling the synagogue building and moving to a new location, require the vote of the membership in a properly convened meeting, with adequate notice given to all members. The same is true of decisions to merge or consolidate with another congregation. Although the members of a synagogue are, in a sense, the owners of synagogue property, they generally are not free to dispose of all property, dissolve the synagogue, and distribute the assets among themselves. In essence, the law recognizes that religious societies are devoted to higher purposes
and that proprietary rights extend beyond their immediate membership. If the assets of a dissolved synagogue are not transferred to another congregation when it merges or consolidates, a court usually will order that those assets be distributed in a way that will permit the continuation of its basic purpose as a religious society.

Intrasynagogue Schisms

It is not surprising that the legal system's approach to the resolution of intrachurch or intrasynagogue doctrinal disputes involving tension between two principles has, at times, been confused and erratic. Some of these disputes present classic situations for which we have courts. Groups of congregants competing for the control of a religious society raise basic questions of property rights which, if not for ultimate resolution by the courts, might be settled by socially undesirable ways. The legal system also serves to protect the legitimate expectations of donors and contracting parties, which may be thwarted by the use of society property contrary to their expectations.

However, intrachurch disputes also may involve courts, including judges and lay juries, in resolving esoteric doctrinal differences. This may be especially true where such differences arise in a synagogue because of the minority status of Judaism in this country. Resolution of such disputes also may involve secular courts in entanglements with religious doctrine and religious authorities in ways that offend the values contained in the First Amendment "establishment" and "free exercise of religion" clauses.

As with so many areas in American law, the law here had its origin in the decisions of English courts. In disputes between rival factions of a church for the control of its property and functions, English law, as it developed in the early 19th century, favored the group adhering most closely to the original church doctrine. The early English decisions apparently did not recognize the practical difficulties secular courts would have in construing church doctrines to determine which contending group was deviant. Perhaps it was because the early cases involved clear doctrinal deviations. The problem of construing church doctrine, as well as a peculiarly American sensitivity regarding entanglements between church and state, caused American law in this area to diverge from the English.

The first major American case, *Watson v. Jones* (13 Wall. 679 [1871]), which was decided by the United States Supreme Court in
1871, involved an antebellum dispute over slavery that had split a Southern Presbyterian church. In determining which church faction had the right to control the local church, the Supreme Court rejected the English rule that the court should determine which faction adhered to the true church doctrine. Instead, it promulgated the following three rules:

1. In a congregational church, the right to control the use of property lay either with the numerical majority of the members or of the duly elected officers, depending on which group, under local law and the church charter, was vested with ultimate power to govern the church body.

2. In a hierarchically-organized church, intrachurch disputes were to be settled by the proper church governing body, and courts would follow their decisions.

3. Where the church property in dispute had been expressly given by the donor for stated specific religious uses, the court would enforce the donor's will, even against the decision of the majority of the congregation or of the hierarchy.

Obviously, these three points do not really overcome all problems of court decision-making and entanglements with religion. The first two points still require the courts to determine whether a church is independently congregational or is part of a hierarchical body. Such decisions might involve complex church-law issues. However, they usually allow the courts to avoid resolution of complex doctrinal matters. Once having determined that a church is congregationally or hierarchically organized, a court also would have to locate the decision-making body of that church. This, too, may be difficult, but would not usually involve esoteric theological issues.

The third point, however, could be very troublesome. It constitutes the exception to rules one and two and, if read broadly, could vitiate them. Conforming to the donors' intent could become, in effect, the English rule that required adherence by churches to original doctrine. The United States Supreme Court was mindful of this and explicitly stated that a bequest to a given church, e.g., an Orthodox synagogue, did not by that fact alone specify religious intent within rule three. To come within rule three, apparently, the donor's request would have to be specific as to details of doctrine: a specific written requirement that the synagogue retain separate seating, for example. In the absence of such stipulations, the first two rules would be applicable.

The Watson decision and the three rules stated therein were not
specifically based on First Amendment provisions and thus not specifically binding on state courts. However, it was clear that the rules had constitutional overtones, and it therefore was not surprising that, in a 1952 decision, the Supreme Court held that the *Watson* rules were required by the First Amendment and thus binding on all state and federal courts (*Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 [1952]).

Thus far, all Supreme Court decisions in this area have involved hierarchical churches. So, although *Watson* also set down a rule for congregational churches, the judicial decisions involving them have been less consistent. Intrasynagogue disputes, in particular, have been very troublesome. As we have noted above, under *Watson*, it must first be determined whether a synagogue is congregationally organized or is part of a hierarchical grouping. Synagogues in this country are independent congregational bodies. True, many of them are affiliated with such national bodies as the Union of American Hebrew Congregations, United Synagogue, and Union of Orthodox Jewish Congregations; but it never has been argued that these are hierarchical organizations. At best, they are intercongregational confederations, whose primary function is to provide synagogues with technical assistance.

It therefore would seem that, under the *Watson* rule, the disposition of intrasynagogue disputes should be governed by the majority of the synagogue membership or board of directors, depending on where such responsibility is placed by local law and the synagogue’s charter or bylaws. Of course, this rule does not remove all difficulties. Determining whether, according to charter or bylaws, the decision in question rests with the board or the membership; who the members are; who is entitled to vote; whether a membership or directors meeting was properly convened, and whether there was a quorum are some of the troublesome questions that remain. Yet, secular courts regularly deal with such questions in connection with nonreligious institutions (e.g., business corporations), and answering them generally would not involve them in determining Jewish doctrinal issues.

This, indeed, was the approach in the first intrasynagogue dispute case, *Saltman v. Nesson* (201 Mass. 534, 88 N.E. 3 [1909]), tried in a Massachusetts court in 1909. Suit was brought by the minority faction in a synagogue, which sought to prevent the majority from changing the ritual in violation of the synagogue’s bylaw providing that the original ritual could only be changed by unanimous consent of the members. The court did not indicate the nature of the change, but it appears to
have been within the framework of traditional Jewish worship—perhaps from the Southeast European version of the Sephardi ritual to a “straight” Ashkenazi ritual common in Northern Europe. The court conceded that the bylaws required unanimous consent for this change; but it held the bylaws invalid as violating the Massachusetts legal principle of the right of the majority of a voluntary organization’s membership to control that organization’s affairs.

Although the decision sustaining majority control was consistent with a rule set down in \textit{Watson}, the court did not invoke it. In this way it sidestepped any possible problems of determining whether the change actually constituted a departure from the original ritual. On the other hand, a bylaw of the synagogue explicitly stated the condition for such a change, which might have made operative the \textit{Watson} exception for explicit provisions. Notice, however, that the decision here probably affected the interest of the congregational minority to a lesser degree than the judgments in some of the later cases, discussed below. The members of that group did not assert that the ritual change made it religiously impossible for them to remain in the congregation. And, if indeed, the change only involved different rituals within the framework of traditional Jewish worship, it would not have made the service unacceptable from an Orthodox perspective, strictly speaking.

In contrast, in the case of \textit{Katz} \textit{v. Waldman} (33 Ohio App. 150, 168 N.E. 736 [1929]), the congregational minority brought suit asserting that the majority, in violation of the fundamental purposes of the synagogue, changed the rituals to an extent that made them no longer consistent with “traditional or orthodox” Judaism. This change, they asserted, made continued participation in the synagogue religiously unacceptable to them. The court dismissed the case without hearing any testimony. In doing so, it relied on the majority control rule of \textit{Watson}. The court stated:

\textit{To promote the cause of traditional or orthodox Judaism is not a definite religious doctrine based upon any principle so stationary in its character that a court would be warranted in defining the exact course to pursue or in granting the prayer of the petition in this respect. It is plain from the record that there is such a multitudinous variety of opinions in regard to orthodoxy and traditional doctrine that it would be impossible to grant any relief that would not be confusing and chaotic in its character, and thus is made apparent the impossibility of definitely defining a course; and, especially, when an appeal is made to a judicial instead of an ecclesiastical tribunal, does it appear inevitable that to define a distinct course of conduct is beyond the bounds of possibility and reason.}
The prayer for this court to adopt a rule by which the congregation in question shall abandon its present administration and conform to the doctrine of traditional Judaism and orthodoxy, even if this legal tribunal had the right to interfere in religious matters, for which provision has been made as to control within the church itself, is incapable of being granted for the reason that every member of the congregation of the church in question might have a different view as to what this doctrine is in all its various phases, and with these conflicting opinions it would be impossible to lay down a rule which a board of trustees could follow, because in order to do so the religion would have to be as definite as a science; and, even with respect to a science, it would be impossible to do so, because of the diverging opinions that exist among scientific men upon scientific principles. Certainly this court would not define Jewish orthodoxy and traditional Judaism except from the testimony of experts, and it is an inevitable fact that such an inquiry would result in multiplying dissension, instead of eliminating it. We are content to follow the universal rule that, where the remedy is within the church itself, a judicial tribunal cannot interfere in matters that form the prayer of this petition (168 N.E., at 765-67).

The Ohio court's opinion does not state what practices the synagogue minority asserted were inconsistent with an Orthodox congregation. It merely says, without further explanation:

In the instant case we find that the complaints of plaintiffs are not of such a nature that they apply to the fundamental and doctrinal belief in such way as will create an implied trust and result in the conclusion that there has been a perversion of the original purpose. Even if all the complaints of the plaintiffs are well founded, it still remains as an insurmountable fact that the congregation, resulting from the merger of the two churches named as defendants, is well founded on the Jewish faith and rests upon the general tenets of the Jewish religion. There must be, in order to grant the relief prayed for, such a perversion and diversion of the original principles and purposes upon which the church was founded as would either partially or totally destroy the institution as a Jewish identity, and while all points of orthodoxy and traditional Judaism may not be carried out according to a unanimity of opinion, yet, so long as the primal elements of these doctrines remain undisturbed as tenets and principles of the Jewish faith, a minority differing upon this point is ineffectual. If this were not true, the differences of opinion as to administration in many churches and many religions would be the destruction of the institutions themselves, for it is a matter of common knowledge that difference in opinion in different religious bodies as to the administration of the rules of the church is no uncommon occurrence. The remedy, if the majority power exists, is in the reelection of successors that may conform, or the discharge of leaders whose acts and conduct within the church are not in accord with the dissenting opinion. This rule runs through all organizations, whether civil or religious, and is the underlying principle by which institutions are held together.

This paragraph poses a number of questions. Since the practices objected to are not stated, it is impossible to know why the court did not consider them "fundamental." Although the court did not so state, is there an implication that if they were fundamental the minority would
prevail? If so, what of the majority-control rule? The court apparently considered as "fundamental" deviations that "would either partially or totally destroy the institution as a Jewish identity." Although the opinion does not specifically so state, the synagogue majority appears to have asserted that the changed practices were consistent with Orthodox Judaism and that the synagogue thus remained Orthodox. At the other extreme, it is clear that the court would have decided the case differently if the majority had changed the synagogue into a Christian church.

Despite some very broad language in the opinion that seems to consider all Judaism to be the same "faith," it is not clear that the court would have allowed the majority to have affiliated the synagogue with the Conservative or Reform Jewish movements. Such a situation was not before the court. On the facts, as the court saw them, this case involved only a dispute between two factions as to whether the practices objected to were consistent with Orthodox Judaism. On that basis, it followed *Watson* and held for a majority rule.

In *Davis v. Scher* (356 Mich. 291, 97 N.W. 2d 137 [1959]), however, the Michigan Supreme Court did not allow the majority to prevail. The facts in that case were as follows: When the majority of an Orthodox congregation membership instituted mixed seating, the opposing faction brought suit alleging that separate seating of men and women was a fundamental doctrine of Orthodox belief. At the trial, the minority submitted lay testimony that the synagogue was built with a balcony for women and had always had separate seating. Also, the honorary president of the (Orthodox) Rabbinical Council of America testified that the law prohibiting mixed seating of the sexes during prayer is a fundamental law of the Jewish religion; that the Council had condemned the mixed seating in this congregation; that an Orthodox Jew could not worship in a synagogue which had mixed seating. The testimony of a second rabbi was similar. The defendants, the congregational majority, presented no evidence at all, but relied on the *Watson* doctrine of majority rule. The trial court agreed with the majority, and dismissed the case. However, the Michigan Supreme Court reversed this decision. The Court did not discuss *Watson*: it stated the rule that "the majority faction of a local congregation or society, being one part of a large church unit, however regular its action or procedure in other respects, may not, as against a faithful minority, divert the property of the society to another denomination or to the support of doctrines fundamentally opposed to the characteristic doctrines of the society. . . ."
The second part of that statement is virtually identical to the old English rule favoring doctrinal continuity over majority rule. It seems inconsistent with *Watson*; yet it responds to a felt need to protect the legitimate interests of a minority in preventing newcomers to their synagogue from changing its character. While such a ruling may involve the court in doctrinal disputes, the Michigan court evaded it in *Davis* by stating that the majority's failure to offer evidence on the Orthodox view of mixed seating made it unnecessary for the court to resolve a doctrinal issue.

If the Michigan rule truly is to protect minorities against change in their synagogues, however, it has to be effective also in cases where the majority does not make the tactical mistake of not introducing its evidence. This was the situation facing a Louisiana court in *Katz v. Singerman* in 1960 (120 So. 2d. 670, reversed, 241 La. 103, 127 So. 2d), which also involved a mixed-seating dispute in an Orthodox congregation. Unlike *Davis*, however, there was conflicting testimony in *Katz* on whether mixed seating was contrary to fundamental doctrines of Orthodox Judaism. At the trial, four Orthodox rabbis—the current and a past president of the Rabbinical Council of America, a past president of the Union of Orthodox Rabbis of the United States and Canada, and the executive vice president of the Union of Orthodox Jewish Congregations—testified that it was. Affidavits from 75 other rabbis were to the same effect.

The majority of the congregation submitted contrary testimony by two rabbis. However, both the trial court and the intermediate appellate court felt that their testimony was entitled to less credence, since one was Conservative and the other, "while claiming to be 'orthodox,' meaning 'right thinking,'" pointed out specifically that he spells the word orthodox with a small 'o' rather than with a capital 'O.'" The court opinions do not state whether or not the second rabbi had *semikhah* (Orthodox ordination).

The trial court and intermediate appellate court also seem to have been impressed by the organizational positions held by the rabbis who testified for the plaintiffs. However, their organizational positions were used only as evidence of the validity of their opinions; they were not considered to be decision-makers in a hierarchical church structure, whose decisions would be binding on the courts. The trial court found mixed seating to be fundamental and decided in favor of the minority; the appellate court affirmed this decision.

The Louisiana Supreme Court reversed the decisions of the lower courts for reasons that are most difficult to understand. The opinion first
discusses at length, and with approval, the majority control doctrine of *Watson*. Though this might be sufficient to decide the case, the court does not end its discussion at that point. It also reviews the testimony at trial and sees it much differently than did the lower courts. It nowhere discusses the qualifications of the plaintiffs’ four rabbis; indeed, it hardly touches on the content of their testimony.

However, the opinion quotes extensively from the defendants’ witness, “Conservative” Rabbi Jacob Agus, but does not designate him Conservative. It rather cites the fact that he received ordination from the (Orthodox) Rabbi Isaac Elchanan Theological Seminary of Yeshiva University. It also lists his many other distinguished credentials, and quotes him extensively on the heterogeneity of Orthodox Judaism, particularly on mixed seating. The court also seemed influenced by the fact that the Orthodox rabbi of the congregation in question went along with the mixed seating and testified that he still considered the congregation to be Orthodox. These findings moved the Louisiana Supreme Court to uphold the mixed seating instituted by the congregation’s majority.

A comparison of the printed opinions in this case makes it almost impossible to believe that the three courts are interpreting the same trial transcript. The Louisiana Supreme Court opinion is striking in its extremely one-sided presentation of the evidence. Indeed, an impartial expert would have little hesitation in stating that, on the basis of the testimony presented, the Supreme Court was clearly wrong in reversing the lower courts, if the issue before it was whether or not mixed seating was contrary to fundamental Orthodox doctrine.

But this is not really what the court decided. Although it unnecessarily overstated the evidence in favor of mixed seating as consistent with Orthodox doctrine and understated the evidence against this proposition, its ultimate conclusion was that, at the very least, the issue was open to possible debate. Under such circumstances, the will of the majority should prevail; and the minority would prevail only if it was beyond dispute that the majority violated fundamental doctrine.

While these are all the major intrasynagogue dispute cases which have entered the record, there have been other legal developments in this area. In 1969 the United States Supreme Court decided *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church* (393 U.S. 440 [1969]), a case involving a schism in which a majority in two local Presbyterian churches tried to withdraw from the synod (the hierarchical church organization), which had made substantial changes in traditional Presbyterian doctrine. The synod brought suit in a Georgia state court
to regain control of the local churches, but the Georgia court decided in favor of the dissident churches on the grounds that certain earlier synod actions had been a substantial departure from church doctrine, thus entitling the local churches to withdraw from the synod and constitute themselves independently as the “true” church. The United States Supreme Court reversed, restating *Watson* in the strongest terms and adding that under no circumstances could a court decide against the hierarchical authority on the grounds of deviation from doctrine. To do so, said the Court, would violate the First Amendment by creating hazards of “inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.” An exception from hierarchical control, the court added, was permissible only where the hierarchy’s action was infected by “fraud, collusion, or arbitrariness.”

Although this case involved a hierarchical, not a congregational, church, there is nothing in the Court’s reasoning or logic that would make it inapplicable to congregational churches, the only difference being, of course, that the congregational church would be governed by its majority rather than by a hierarchy. And, indeed, that is how a court in Michigan, the state where *Davis* was decided, recently interpreted it (*Berkaw v. Mayflower Congregational Church*, 18 Mich. App. 245, 170 N.W. 2d 905 [1969]). It held that the *Mary Elizabeth* case precludes a decision against majority rule in a congregational church on the basis of doctrinal departures by the majority, unless both sides agree that there has been a change in doctrine.

This was, in effect, the Louisiana Supreme Court’s decision in *Katz*, and seems to be the least the *Mary Elizabeth* ruling requires. However, the implications of *Mary Elizabeth* are even wider. Suppose, for example, there was agreement that mixed seating constituted a deviation from Orthodox belief but that an attempt was made to overcome the majority rule by raising the question of whether or not the deviation was fundamental. *Mary Elizabeth* seems to preclude court resolution of this issue.

Yet, it would be highly unlikely that a court would permit a synagogue majority, over the dissent of a minority, officially to become a Christian church. Nor would it be likely that a court would allow this to happen by asserting that a Jewish congregation’s decision to adopt a Christian mass as its ritual was not a fundamental deviation from Jewish doctrine, even if the majority could find a witness to so testify.

However, greater difficulty would arise if, for example, an Orthodox Jewish congregation were to affiliate with the Reform or Conservative
movements. It is not clear whether or not, under *Mary Elizabeth*, a court could or would intervene at the request of a dissenting minority. Note that the Ohio court in *Katz v. Goldman* talked of deviations that made a synagogue no longer Jewish. On the other hand, the divisions among the three major Jewish denominations may well be such that they ought to be considered different sects (from the perspective of American law, that is); that clear differences of ritual or doctrine ought to be considered fundamental and upheld by secular courts against the will of the majority.

Finally, even if courts were able to avoid all doctrinal decisions in intrasynagogue disputes by always acceding to majority rule, the same issues may come up in other contexts which require judicial resolution. In *Fisher v. Congregation B'nai Yitzhok* (177 Pa. Super. 359, 110 A 2d 881 [1955]), a Pennsylvania court was faced with the following situation: An Orthodox rabbi agreed to officiate on the High Holy Days in an Orthodox synagogue. At the time the contract was signed, the synagogue had separate seating, but its members voted over the summer to institute mixed seating. The rabbi refused to officiate because of the change and, when the congregation refused to pay him, brought suit for his fee, alleging that the institution of mixed seating constituted a breach of contract.

Three rabbis testified that Orthodoxy required separate seating and that an Orthodox rabbi could not conscientiously officiate in a synagogue having mixed seating in violation of Jewish law. The court accepted this testimony and decided that, in shifting to mixed seating, the Orthodox congregation breached an implied condition of their contract with the rabbi that they remain Orthodox.

There apparently was no testimony on whether or not Orthodox ritual required separate seating. Had this question been raised, the court would not have been able to avoid deciding the issue. No neutral principle, such as majority rule, could have been used. The rabbi was not a member of the congregation, and therefore was not bound by its majority vote. He was the other party to a contract with the congregation. Had the court refused to hear the case because it involved a theological question, it would have abandoned its role of deciding a basic contract dispute over money, and left the parties to self-help. Of course, the roles of plaintiff and defendant could have been reversed here if the rabbi had been paid in advance, and the congregation sued to recover the money on grounds that he breached the contract by refusing to officiate. In this type of contract case, it would seem that the courts have no choice but to decide doctrinal issues, even closely contested
ones, although this may pose difficult problems for them, and although there is justified aversion among many to having secular courts decide theological issues.

Despite their efforts to avoid doing so, the courts have had to make decisions that effectively rule on the Jewish equivalent of doctrinal matters. Over-all, judicial activity in this field has served to limit the application of Jewish law in intercongregational disputes in favor of American doctrines.

VOLUNTARY JEWISH ASSOCIATIONS

Aside from synagogues, Jews form many other voluntary associations, such as benevolent and fraternal associations, social-service agencies, fund-raising groups, and others, whose operations are affected by both the benefits and restrictions of American law. The basic legal principles concerning voluntary associations have been set forth in the discussion of Jewry as a religious society (pp. 5–6). However, two other issues are pertinent: the law concerning charitable gifts and the enforceability of charitable pledges, and the availability of, and restrictions on, governmental subsidization of Jewish communal activities.

Charitable Gifts and Pledge Enforcement

The law views a charitable contribution as a gift, which is defined as a voluntary transfer of real or personal property without any consideration or compensation. There are *inter vivos* and testamentary gifts. An *inter vivos* gift is a gift between the living, immediate and irrevocable on delivery. Its essentials are donative intent, delivery, and acceptance. To establish intent, it must be shown that the donor clearly and unmistakably understood the nature and consequences of his act. A gift must go into immediate and present effect and must be fully executed. Mere intention is not enough: there must be a complete and unconditional delivery. A promise or executory agreement to make a gift is not enforceable. A delivery is essential to the validity of a gift. There are three types of delivery: actual, constructive, and symbolic, and each must vest the donee with control and dominion over the property.

A testamentary gift, or bequest, is given at the time of the donor's death; there is no delivery by the testator. The various states have detailed
restrictions concerning the requirement of a valid testamentary gift. Generally, the will must be in writing, signed by a legally competent testator, and witnessed by two or more persons. Since a will does not take effect until death, it may be changed before such time.

Traditionally, a promise of a charitable contribution was considered an unenforceable promise of a future gift. It was not valid as a present gift, and could not be enforced as a contract. In modern times, however, the trend has been to hold that charitable pledges are enforceable agreements, and now charitable pledges are almost universally enforced by the civil courts.

It has been suggested that enforcing charitable pledges as contracts is not logically consistent with traditional contract theory that requires "consideration" to support a contract, but is an example of law responding to the generally-felt public interest (Corbin on Contracts, 1A, §198 at 204 [1963]). Legal theory, then, has been employed to rationalize the result. The three predominant legal theories so employed are:

1. A pledge should be enforced because the charitable organization relies on it in planning general program.
2. There may be an implied promise of the organization to use the pledged money for a specific purpose, and thus benefit the giver by having his purpose fulfilled.
3. A person's pledge is given in consideration of pledges by others, and these mutual pledges support the enforceability of each.

The last theory is the most commonly used; it explains the usual wording on pledge cards that the donor pledges "in consideration" of pledges by others. Despite the legal enforceability of such pledges, charitable organizations have a natural reluctance to bring court actions against donors. This general reluctance is reinforced by Jewish law. While Jewish law provides for the legal enforcement of pledges in Jewish courts, Jewish legal principles discourage a Jewish charitable association from bringing suit in a non-Jewish court to recover a pledge that may be recognized as binding by a civil court.

*Congregation B'nai Shalom v. Martin* (382 Mich. 659, 173 N.W. 2d 504 [1969]) dramatically illustrates this point. B'nai Shalom embarked on a building campaign of which the defendant was building committee chairman. Shortly after the beginning of the campaign, the defendant gave to the fund raiser one pledge card in his own name and three others in the names of members of his family. As is usually the case, the cards
stated that the pledge was made "in consideration of the gifts of others." The amounts of the pledges were not filled in, but a separate sheet of paper attached to all four cards stated, "total donation, $25,000."

Friction later developed between the defendant and the synagogue; the pledges were not paid, and the synagogue brought suit. The lower Michigan court ruled for the plaintiff on the grounds that charitable contributions are legally enforceable under Michigan law. In doing so, the court refused to consider the defendant's argument that Jewish law and custom prohibited a synagogue from bringing suit against a member in a non-Jewish court to enforce a pledge. In reversing this decision, the Michigan Supreme Court emphatically stated that, under Michigan law, charitable contributions were ordinarily legally enforceable. However, it went on to say, this applied only when the parties intended to enter into a contract that was legally enforceable in the secular courts.

According to the court, it was not clear from the documents in this case that the parties had intended the pledges to be legally enforceable in secular courts. The court based this conclusion on the facts that the amounts were not filled in on the pledge cards, and that the printed portion did not specifically commit the giver to promise to pay. The court further held that, since the parties' intent was not clear on the face of the documents, Jewish custom would be used to determine their intent.

The Michigan Supreme Court therefore ordered the trial court to determine whether or not the defendant was correct in arguing that Jewish law and custom prohibited a synagogue from bringing suit in a non-Jewish court to enforce a pledge against a member. It indicated that if this were so, it would determine the parties' intent in this case, and thus the synagogue could not bring this action in a Michigan court.

In support of his argument to the trial court that Jewish law and custom prohibited bringing this suit in a civil court, the defendant submitted an affidavit of a rabbi, which stated that:

1) the Conservative movement, to which the synagogue in question belonged, accepted the binding effect of the Shulchan Aruch (the 16th-century codification of Jewish law by Joseph Caro which traditional Jews consider binding) on issues other than ritual; and that

2) ... The Shulchan Aruch, as well as the custom and tradition for more than a thousand years, prohibits the bringing of a suit in the civil courts of any state by a synagogue against any of its members or vice versa and is contrary to Jewish law and is prohibited; that any such civil controversy must be first brought before the Jewish religious court known as the Beth Din (a Jewish rabbinical court); that under Jewish law, matters of charity to the synagogue go to the heart of the Jewish religion; that a charitable contribution to a syna-
A synagogue is considered a religious matter by and between the synagogue and the member; that for a synagogue to file a suit against one of its members upon an alleged charitable contribution without submitting it to a Beth Din is what is known in Jewish law as a "Chillul Hashem" which is a profanation of God's name and such action is such a grave sin in Jewish law, that it warrants excommunication; that historically, pledges to a synagogue were always considered and are still considered as moral obligations and not the subject of a law suit; that since Jewish law does not even permit one Jewish member of a synagogue to sue another Jewish member on civil matters unless it is first submitted to a Beth Din, a fortiori, in case of a purely religious controversy that is involved in this case, it is even a greater violation of Jewish law; indeed it has been uniformly held that to take a case of this character involving Jewish charity, Jewish religion and the integrity of the synagogue and its members before a civil court is scandalous and disgraceful and subjects the moving party to excommunication (Responsa of Rabbi Jacob Tam, Eleventh century, grandson of the famous Talmudic authority Rashi, Responsa of Rabbi Mayer of Ruttenberg [14th century] and all Rabbinic Responsa to Jewish history) (173 N.W. 2d at 507).

The affidavit goes on to state that Jewish law forbids even two individual Jews from submitting a case involving religious or Jewish community matters to a non-Jewish court. As already noted, Jews are reluctant to bring cases involving intrasyangogue disputes before civil courts. Civil courts, for their part, are trying to avoid having to rule on purely religious issues. However, the principle of American law is that taking a dispute before the Bet Din rather than to a civil court is purely voluntary, and requires prior agreement of the parties involved. Therefore the Michigan Supreme Court’s decision was unusual in that it appeared to preclude a synagogue from bringing a civil lawsuit by remitting it to the Bet Din for decision, although there was no prior agreement between the parties to submit the dispute to a Bet Din. Yet, the court recognized that this was not an ordinary litigation because it involved a synagogue. It also relied on the incompleteness of the pledge card in this particular case.

Voluntary associations are affected by the American legal system in other ways, too. Most Jewish voluntary associations are "religious," "charitable," or "educational" within the terms of the Internal Revenue Code. The breadth of these terms has allowed the Jewish community to create a network of organizations serving as wide a range of functions as any Jewish community in history, though, in some cases, in more limited ways because the community is not autonomous, as were the communities in the past. Not only are these organizations generally exempt from local property taxes, as well as state and federal income taxes, but (and this is most important) contributions to these organizations are deducti-
ble from federal and state income taxes, and are exempt from estate and gift taxes.

A major limitation on the deductibility of charitable contributions is that gifts to an organization, which otherwise meets the above definition, are not deductible if a "substantial part of the activities [of the organization] is carrying on propaganda, or otherwise attempting to influence legislation" (26 U.S.C. §170 [c] [2] [D]). The United States Supreme Court has held that exemption from taxation for religious institutions, including churches and synagogues, is constitutional (Walz v. Tax Commission, 397 U.S. 664 [1970]). This decision also applies to deductions for contributions to synagogues.

**Government Aid to Charitable Institutions**

Charitable deductions and exemptions from taxation are, of course, a means of indirectly subsidizing charitable organizations by encouraging voluntary support for them. Besides these negative means, however, there increasingly has been a tendency for government—local, state, and federal—to subsidize organizations defined as charitable directly through grants for specific programs or projects.

It has long been common practice for government to subsidize private hospitals, orphanages, homes for the aged, and other welfare institutions, including those under sectarian religious control, provided their services are offered on a nonsectarian basis. A few state constitutions specifically bar state government appropriations for the "use, benefit, or support" of sectarian-controlled charitable institutions. However, in those states, too, courts have at times avoided these provisions and upheld grants to sectarian organizations on the grounds that the grant is not for the "use, benefit, or support" of the institution if the state subsidy is less than the amount the state would have to spend to support the same service by a public institution.

Besides state constitutional restrictions on grants to sectarian hospitals, orphanages, and the like, there is the question of whether such grants violate the federal Constitution's "establishment of religion" clause. The United States Supreme Court held that they do not in the 1899 case of Bradfield v. Roberts (175 U.S. 291 [1899]). Bradfield involved an arrangement whereby the federal government had agreed to erect a building on the property of the Providence Hospital in Washington, D.C., and to pay the hospital a certain amount of money for each poor patient
they treated at the request of the city. The Supreme Court unanimously upheld the validity of this arrangement although all the stockholders of the corporation that owned the hospital were Catholic Sisters of Charity. The Court looked upon the hospital corporation as a separate entity from its stockholders and therefore as secular and nonsectarian. The Court stated further:

Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence.

There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists.

Although this distinction between the hospital corporation and its stockholders has been called highly artificial, it remains the law and is the basis for the Hill-Burton Act under which extensive federal assistance is given to private hospitals, including those under sectarian or denominational control.

Professor Leo Pfeffer points to the fact that those organized Protestant and Jewish groups which have generally opposed government aid to religious schools, have not opposed government subsidies to sectarian hospitals. Regarding Jewish opinion on this issue, he reports:

Jewish hospital organizations, too, have availed themselves of the benefits of the Hill-Burton Act. Representatives of Jewish organizations have argued that their action is not inconsistent with their opposition to government funds for denominational schools. A Jewish hospital is such only by reason of the fact that it is financially maintained primarily by contributions from Jews and Jewish community chests. Jewish hospitals have no congregational affiliation; they are operated by lay directorates completely free of rabbinic control, and only a small percentage are Jewish. On the other hand, it is also true that Jewish hospitals usually serve kosher food prepared under the supervision of a rabbi, paid for out of hospital funds. They frequently have a rabbi on their staff, also paid out of hospital funds, to minister to the religious wants of the patient; and likewise frequently maintain a Jewish chapel for religious services.
Thus, though a Jewish hospital cannot be said to be sectarian in the same sense as one owned and operated by an order of nuns who owe complete fealty to their ecclesiastical superiors, it would seem to be no less sectarian than a Methodist or Baptist affiliated hospital.\(^{20}\)

While American tradition has allowed sectarian-managed institutions to receive government and other public assistance as long as their services were provided on a nonsectarian basis, more recently federal agencies (and, in some cases, local United Funds) have begun to foster what might be described as “positive nonsectarianism”: not only no discrimination in service policies, but positive efforts to seek clients on a nonsectarian basis and to give the groups from which those clients are drawn representation on the institutions’ governing bodies. This has begun to present problems for some institutions operated by the Jewish community on a nonsectarian basis within the older meaning of the concept.

The problem of “nonsectarianism” is peculiar to the United States. Other countries with substantial welfare programs, including those that separate church and state, have government subsidization of health and welfare institutions without requiring nonsectarianism in their management or choice of clientele. In both England and Australia, for example, the Jewish communities (as well as all others) construct housing for the Jewish aged with government funds without having to make apartments available to non-Jews. Government subsidies for Jewish schools are common in most countries of the Western world outside of the Soviet bloc and even in some (Hungary and Bulgaria) within it.

**Government Aid to Religious Education**

The most controversial issue of government funding is aid to religious, or religiously related schools. Here again, many state constitutions contain provisions explicitly barring state grants to religious schools. The best known of these is New York’s Blaine Amendment, which—with an exception for government support of student transportation later added by amendment to the amendment—provides that neither the state government nor any locality “shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly, or in part under the

control or direction of any religious denomination, or in which any denominational text or doctrine is taught" (McKinney's Const. Art II, § 3).

The Blaine Amendment and similar provisions in other states clearly prohibit direct grants to religious schools. The state supreme courts, however, are divided on whether such "indirect aid" as transportation subsidies or the provision of secular textbooks to students should be prohibited.

The major judicial decisions involving government aid to religious schools are United States Supreme Court decisions concerning the First Amendment's prohibition of "establishment of religion." In the well-known 1947 decision of Everson v. Board of Education (330 U.S. 1 [1947]), the Supreme Court, by a 5 to 4 vote, upheld the constitutionality of state subsidization of transportation of religious-school pupils. Justice Hugo L. Black, writing for the majority, stated that the aid here was on the edge of the state's power under the First Amendment, but did not exceed it. The purpose, he said, was not to aid religious schools, but to enable children to "ride in public buses to and from schools rather than run the risk of traffic and other hazards incident to walking or hitchhiking." Justice Black analogized this service to that of providing religious schools with police and fire protection, sanitation facilities, etc. Moreover, Justice Black continued, the religious schools are providing secular education, which the state compels students to have, and for this reason the state could subsidize the transportation of religious-school students to help them get this state-required compulsory education.

The dissenters disagreed that bus transportation was analogous to police protection, fire-fighting, and other general services, or that the purpose of the state statute in question was safety. In their view the purpose was to help the religious school attract and hold students by providing a service that otherwise would have to be paid by school or parents. The dissenters also disagreed with the concept suggested in the majority opinion that one can differentiate secular and religious components in religious school curricula. They argued that the entire purpose of such schools is to have religion permeate the curriculum.

The United States Supreme Court in Board of Education v. Allen (392 U.S. 236 [1968]) upheld by a 6 to 3 vote a New York law that provided secular textbooks to students attending religious and other private schools, as well as public schools. Justice White, writing the majority opinion, stated that the test of the constitutionality of a law
is that it must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion" (392 U.S. at 243, quoting Abington School District v. Schempf 374 U.S. at 222). The Court held that the statute met this test. Its legislative purpose was found to be the secular one of aiding the education of the young, and its primary effect could not be predicted to be contrary to this secular purpose. The Court emphasized that, technically, the books are lent to students not to schools, and that title to the books remains with the state. The Court conceded that books have a greater ideological component than do the school buses in Everson. But, it argued, the statute required the books to be secular and, although the books lent to students of religious schools are those required by the religious schools in their courses, all the books must be approved by the public school authorities. Since the system had not yet gone into operation, the Court was not willing to assume that this scheme to protect the secular nature of the books would not work out in practice. The Court also heavily relied on its judgment that "religious schools pursue two goals, religious instruction and secular education."

The dissenters disagreed primarily with this last judgment and restated the view in the Everson dissent that religion permeated the entire curriculum of religious schools, and that they therefore did not believe the scheme could guarantee that the books lent for courses required by religious schools would be secular.

What was the role of the Jewish community in this controversy? The issue of government aid to religious schools has long been seen as almost entirely an issue of aid to Catholic day schools. Indeed, writing in 1967, Professor Pfeffer stated:

The issue of state aid to religious education in the United States is almost entirely the issue of state aid to Catholic parochial schools. Parochial schools or their equivalent are conducted to a limited extent by Protestant and Jews; but, aside from tax exemption, there has been no discernible demand from Protestants or, except among the Orthodox, from Jews for financial aid from government in sustaining their school system.\(^\text{21}\)

Today, if not before, the total Catholic focus is not completely true. In recent years, the Jewish community has witnessed the rapid expansion of the day-school movement. As of this writing some 70,000 pupils attend Jewish day schools on the elementary and high-school levels. This movement is also not limited to the Orthodox. Although more than 80

\(^{21}\)Ibid., p. 509.
per cent of the Jewish day schools are Orthodox-oriented, there is a growing trend toward Conservative-sponsored day schools, and even the Reform movement has expressed interest in the day-school approach.

This development in the day-school movement has shattered the former consensus of the organized Jewish community against government financing of religious schools. The major secular Jewish community-relations organizations, like the American Jewish Congress, Anti-Defamation League, and American Jewish Committee, have continued to oppose direct aid to religious schools and supported the litigation in the Supreme Court opposing it. But a brief in favor of federal aid was filed before the Supreme Court by the National Jewish Commission on Law and Public Affairs (COLPA), an Orthodox organization established to articulate that position in opposition to the Jewish "establishment." Moreover, the American Jewish Committee has spoken favorably of shared time for religious education.

The *Allen* decision set the stage for the most dramatic attempt to give direct aid to nonpublic schools, including religious ones. Encouraged by this decision, legislation was passed in a number of states providing direct aid to private schools, including religious schools, through the mechanism of state "purchase of secular educational services" from nonpublic schools. The Pennsylvania statute, passed in 1968, was the first of these and provided the model for others. Under the Pennsylvania statute, the state directly reimbursed nonpublic schools for their actual expenditures for teachers' salaries, textbooks, and instructional materials connected with their secular education programs. A school seeking reimbursement had to maintain prescribed accounting procedures that identified the "separate" cost of the "secular educational service." These accounts were subject to state audit. The statute was financed by a portion of the state taxes on cigarettes and horse racing.

There were a number of other restrictions in the Pennsylvania statute. Reimbursement was limited "solely" to the following "secular" courses: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instructional materials included in the program had to be approved by the state superintendent of public instruction. The statute specifically prohibited reimbursement for any course that contained "any subject matter expressing religious teaching, or the morals or form of worship of any sect" (P.S.A. 24 §§ 5601–5609 [Supp. 1971]).

The United States Supreme Court, in the 1971 decision of *Lemon* v.
Kurtzman (403 U.S. 602 [1971]), held, by a vote of 8 to 1 (Justice White dissenting), that this statute violated the First Amendment. Chief Justice Warren E. Burger, who wrote the majority opinion, quoted the secular legislative purpose and primary effect text of Allen and applied it to this statute. He determined that here, as in Allen, the purpose was secular, to aid secular education. The Court stated that it need not decide whether the statute restricts the principal or primary effects of the aid programs "to the point where they do not offend the religious clauses" because it concluded that "the cumulative impact of the entire relationship arising under the . . . [statute] involves excessive entanglement between government and religion."

The avoidance of entanglements between government and religion had been developed in the 1970 decision of Walz v. Tax Commission (397 U.S. 664 [1970]) as a basis for upholding tax exemptions for real property owned by religious institutions. In Lemon, however, this entanglement doctrine was employed to invalidate government aid to religious schools. There were basically two types of entanglements that concerned the Supreme Court in Lemon: one involved the supervision by the state to ensure that the government funds would be spent only for secular purposes; the second was continuing political pressure and divisive debate among religious groups competing for increased state funding of their schools.

Mr. Justice White, who wrote the majority opinion in Allen, dissented in Lemon. He pointed out the paradoxical effect of the first part of the court's entanglement argument: the more a state attempts to prevent diversion of funds to religious education by monitoring religious schools to make sure teachers receiving state funds were not teaching religion or money was not otherwise spent for religious purposes, the greater the entanglement defect. Justice White also noted that the degree of entanglement noted by the Court in Lemon did not seem any greater to him than those involved in the New York textbook statute which was upheld in Allen.

ALTERNATIVE FUNDING PLANS

Since the Lemon decision, various groups, including Jewish groups, have sought means of government funding that would be consistent with that decision. One is the use of tuition-vouchers. Tuition-voucher plans vary greatly in the methods of financing and restrictions they impose on
recipient schools. The basic principle, however, is that of giving funds to parents, which they can use at a school of their choice to pay for their children's education. An examination of whether such plans are consistent with Lemon reveals the difficulties arising from the decision in that case. All plans have mechanisms to insure that the vouchers are not used to purchase religious education. It seems that such mechanisms would be required by the First Amendment. Yet, they would seem to have the same entanglement effects as the Pennsylvania statute, which was invalidated in Lemon, for there appears to be no basic difference in those effects between direct grants and tuition vouchers. On the other hand, the Court stated in Lemon, in response to Mr. Justice White's dissent comparing Lemon with Allen, that direct government grants create greater dangers of government entanglement with religion than do government payments to parents and students. On that basis, the Court may find that tuition-voucher plans, despite the entanglement effects of their mechanisms to prevent use of vouchers to purchase religious education, are valid under Lemon.

Another proposed financing alternative is the dual enrollment, or shared time, plans now operative in a number of states. Under it, public and religious school pupils share a child's day: he attends public school for "secular" subjects, and a religious school for "nonsecular" or "religiously-permeated" subjects. The religious-school attendance is not "after school," but a part of the student's normal school day. Religious-school pupils would be expected to take such subjects as science and mathematics in a nearby public school, and religious subjects in their religious school.

The United States Supreme Court in the 1952 decision of Zorach v. Clauson (343 U.S. 306 [1952]) upheld a released-time plan providing for the early release of students from public schools to attend religious schools, and most legal scholars believe that shared time is constitutional. It should be noted, however, that shared time involves collaboration between public school and religious school authorities in a way that is not completely free from entanglement, and that the Supreme Court had held "released time" unconstitutional where the religious classes had been held on public-school premises (McCollum v. Board of Education, 333 U.S. 203 [1968]).

Shared time is used more widely in Utah, where the Mormon Church has developed an extensive program of religious education within a shared-time framework. In many Utah communities, Mormon schools
are built adjacent to public schools to permit students to move back and forth between the two with ease.

The use of shared or released time in Jewish education has not been very extensive. The program, confined mainly to New York City, gives an hour of religious education a week to several thousand Jewish youngsters, sometimes on the school premises and sometimes elsewhere during the school day. As a general rule, it is peripheral to the thrust of Jewish education in the United States.

There are also several forms of government aid to religiously-oriented colleges and universities. Most states have some scholarship aid to students, which can be used in religiously-oriented colleges. Some also have direct aid and tax-free bond programs. In addition, the federal government has a number of programs to aid higher education, among them student grants and loans. They also include aid for certain designated purposes, such as construction grants for colleges and university facilities provided by the Higher Education Act of 1963. However, the Act expressly excludes from receiving grant funds "any facility used or to be used for sectarian instruction or as a place for religious worship, or any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity . . ." (20 U.S.C. § 701-758, 751 [a] [2]). On the other hand, individuals can use their G.I. Bill education assistance allowance to attend religious educational institutions, and a number of Jewish schools have benefited accordingly.

On the day Lemon was decided, the Supreme Court upheld by a 5 to 4 vote the validity of grants under the 1963 act to religiously-controlled colleges in Tilton v. Richardson (403 U.S. 672 [1971]). The five-man majority consisted of Justice White, who dissented in Lemon, and four members of the Lemon majority. The latter four saw the distinction between Tilton and Lemon in the following factors: 1) Higher education under religious control offers less possibility of religion permeating the whole curriculum than does primary and secondary education, since college students are less impressionable than younger students and higher education is less concerned with indoctrination than is education on a lower level. 2) The construction grants in Tilton were aid of a non-ideological nature, compared to aid for teaching services in Lemon. 3) The construction grants were found to create less entanglement between church and state, for they were one-time, single-purpose construction grants, while the state aid in Lemon was a continuing salary-supplement program.
AMERICAN JEWS AS PART OF LARGER JEWISH ENTITY

The American legal system does not recognize the Jews as a national group, nor does it recognize any political loyalty of Jews qua Jews to any entity beyond the United States. However, the system does recognize two significant facts: Jews have deep and extensive non-political ties to other Jews throughout the world; a number of American Jews have dual nationality, primarily American and Israeli.

Aid to Jews Abroad

The charitable contribution deduction discussed earlier is available to individual Jews, as well as all other Americans, who contribute funds to American charitable organizations, even though some of the funds are expended overseas. This, of course, aids the American Jewish community in helping Jews abroad, including the state of Israel. While this tax deduction for charitable contributions used overseas is widely used by all groups in American society and is not peculiar to the Jewish community, the Jews use it in a special way, reflecting the special relationship between American Jewry and Israel.

The major restriction on the use of such funds overseas is that they must be used for purposes that are tax deductible under the Internal Revenue Code of the United States (see above) and must be administered by an American agency. Thus, the UJA funds raised for Israel are received by an American agency which is responsible for administering those funds for development and social purposes in Israel.

Dual Citizenship

The question of dual citizenship, which also is not peculiar to the American Jewish community, has been problematical in American law. On the one hand, the American authorities have objected to assertions by other countries that American citizens are also their nationals, particularly where such assertions have been based on ancestral origin. On the other hand, the United States has recognized the fact that dual citizenship does exist, and has developed legal doctrines to deal with their situation. These affect American Jews who also become Israeli citizens. The Nationality Act provides that an American citizen, by birth or naturalization, shall
lose his citizenship under certain conditions, specifically defined by the act. These are, among others: obtaining naturalization in a foreign state; pledging allegiance to a foreign state; serving in the army of a foreign state; holding government office in a foreign state of which he has become a national; voting in elections or plebiscites of a foreign state or territory; formally renouncing his American citizenship. These provisions of the act read as follows:

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person;

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: Provided, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; ... (8 U.C.S. §1481 [a] [5] 1964).

Under the Israeli Law of Return, a Jew immigrating to Israel does not have to apply for citizenship nor take an oath or affirmation of allegiance to Israel in order to become an Israeli citizen. Thus, an American Jew who became an Israeli citizen under the Law of Return does not lose his American citizenship under provisions 1 and 2.

Before 1967, however, it was believed that those having both American and Israeli citizenship would lose their American citizenship by doing any one of the other prohibited acts stated above. In that year, the Supreme Court decided the well-known case of *Afroyim v. Rusk* (387 U.S. 253 [1967]). Afroyim, a Jew born in Poland in 1893, immigrated to the United States in 1912 and became a naturalized American citizen
in 1926. He moved to Israel in 1950, becoming a citizen under the Law of Return, and voluntarily voted in the 1951 Knesset election. In 1960, when he applied for renewal of his United States passport, the State Department refused to do so on the grounds that he had lost his American citizenship under the Nationality Act of 1940 by “voting in a political election in a foreign state.”

The United States Supreme Court, by a 5 to 4 vote, ruled that provision of the Nationality Act unconstitutional. In so ruling, the Court held that Congress cannot constitutionally strip an American of his citizenship unless he has either voluntarily renounced it or given it up. It would thus appear that the rationale of Afroyim applies not only to voting (provision 5), but also to service in the armed forces or holding a government position (provisions 3 and 4).

The underlying arguments in Afroyim have been put in some doubt by the 1971 Supreme Court decision in Rogers v. Bellei (401 U.S. 815 [1971]), in which a divided Court upheld as constitutional a section of the Immigration and Nationality Act of 1952, providing that one who acquires American citizenship by virtue of being born abroad to a parent who is an American citizen and who has met certain residence requirements, shall lose his citizenship unless he resides in the United States continuously for five years between the ages of 14 and 28.

The minority opinion in Rogers contended that this decision conflicted with Afroyim. However, the majority of the Court held that the situation of one born abroad of American parents was different from that of one born in the United States or naturalized as an American citizen. Having made this distinction, the Court in Rogers stated that Afroyim continued to be the law governing naturalized citizens or native Americans. Thus, as of this writing, it would appear that these two categories of citizens cannot constitutionally lose their citizenship except by voluntary renunciation.

One of the recurring problems of dual citizens is military service obligations. Under United States law, all male American citizens are subject to military service obligations, with no exceptions for dual citizens. However, in 1930 the United States, along with a number of other countries, ratified a multilateral agreement on military obligations in certain cases of dual citizenship, providing that where a person of such status habitually resides in one of the two countries, the other country will not seek to subject him to military service. But this treaty is only effective where both of the dual citizen’s countries have ratified it, and
only a small minority of states have done so. Israel is not among them, and the treaty therefore does not apply to an Israeli dual citizen.

The United States also has a number of bilateral treaties concerning the military service of dual citizens, but here, too, none with Israel, so that a person having both American and Israeli citizenship could be subjected to military service by both countries. If an American-Israeli citizen is drafted into the Israeli army, he does not lose his American citizenship by the terms of the Nationality Act of 1940, as interpreted by the courts. If he volunteers for Israeli military service, he may lose his citizenship under this act, although the principle underlying the *Afroyim* decision may preclude the loss of his American citizenship.

Under Israeli law, an Israeli citizen may relinquish his citizenship only with the permission of the Minister of the Interior. Children of Israeli nationals are Israeli citizens even if born abroad. Thus, Israelis who have become American citizens, without having relinquished Israeli citizenship with governmental permission, and their children are obligated under Israeli law to fulfill all the duties of Israeli citizens, ranging from military service obligation to the payment of Israeli travel taxes upon entering or leaving the country.

Under Israeli law, all Jews born in the country are Israeli citizens regardless of the status of their parents. They accordingly are subject to the rights and obligations of Israeli citizenship from birth. Jews born in Israel of American parents are also American citizens, with the full rights and obligations of American citizens, subject to the provisions of American law upheld in the *Rogers* case that they lose American citizenship unless they reside in the United States continuously for five years between the ages of 14 and 28.\(^\text{22}\)

In sum, the ties of American Jews to Jews in other countries are treated ambiguously in American law which is, itself, in the process of redefinition to accommodate situations arising in a world that is far more integrated today than it was in the formative years of American jurisprudence. The situation of the Jews is not unique in this regard. Americans of every religious and ethnic background are now found living abroad in great numbers for long periods of time, and for many different reasons. Others have ties abroad that are no less enduring. For example, United States residents having both French and American citizenship

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are entitled to vote in French elections for special members of the French parliament representing Frenchmen living outside French territory. At least one such dual citizen residing in New York City has actually been elected a member of the French legislature under this provision of the French constitution.

In an era of "permanent" international economic and military "communities," such as the North Atlantic Treaty Organization (NATO), General Agreement on Tarriffs and Trade (GATT), the European economic Community (EEC) and the United Nations, and great international corporations, these ties are going to increase, not decrease. This is one reason why Congress and the U.S. Supreme Court have been so active in building a new legal framework to accommodate them. The Jews have benefited from all this because of their special "international" concerns. In a few cases, they have even pioneered in the development of new legal arrangements, usually with the clear, if tacit, support of the American governmental authorities involved. But in this they are by no means alone.

JEWS AS SELF-POLICING GROUP

We have already discussed the role of rabbinical courts in kashrut disputes and family matters. However, because of the all-encompassing character of Jewish law, a rabbinical court, or Bet Din, may also have a dispute-settling role in affairs which under American law are not ordinarily considered religious in nature. Traditionally, the interweaving of religious and civil duties established a single foundation for Jewish law: a common moral concept shared by all in the community.

Jewish law interweaves both religious and national elements. After the Jewish people were dispersed, the drive to retain and protect their national character motivated them to stay within the confines of halakhah, a system that embraces ritual, civil and criminal law. The authority of all rabbinical courts is grounded in Jewish law as thus understood. To a large extent, rabbinical courts in the United States derive their power from the willingness of Jews, who are committed to the principles of Jewish law, to accept the courts' jurisdiction.

The structure and tradition of Jewish courts can be traced to the Bible. Moses was the first judge of the Jews. According to biblical account, he sat, from morning till night, in judgment over the Israelites, as they wandered in the wilderness after fleeing from Egypt. He soon recognized the need to expand the judicial system, and he added a number of new judges, who were integrated into the political system of the tribal confederacy. By the time the monarchy was established in Israel, there were judges in every city.

The multi-judge system became formalized during the Second Commonwealth. This highly structured system relied on three tiers of courts. The Bet Din of three judges, appointed in each city, handled civil disputes locally. The Bet Din of Twenty-three, the Little Sanhedrin, heard religious and criminal cases, as well as appeals from the three-man courts. The Bet Din ha-Gadol, or Great Sanhedrin, was the highest court. It not only interpreted biblical laws but, in effect, enacted new legislation by interpreting the Bible freely. Besides hearing appeals from the Little Sanhedrin, it had complete authority over the Jewish calendar, religious holidays, marriage, and divorce. Originally, this court also had jurisdiction over cases concerning the head of state or the High Priest. The members of the Great Sanhedrin had to have special ordination delegating authority to interpret the law and judge which, according to tradition, had passed from generation to generation from the time of Moses.

During the long years of dispersion, the Jews lived under their own legal system as a nation-in-exile, insulating themselves to the extent possible from the judicial systems of the Gentile communities in which they found themselves. As part of the effort to maintain the Jewish community as an organized polity as fully as possible, rabbinical courts heard religious, civil, and criminal cases. Talmudic law was followed in ritual and most civil matters. Where allowed, the Jewish courts exercised jurisdiction in criminal matters as well. Since Emancipation in Europe and the Middle East, the Jewish communities in those regions have lost their internal legal power, but have generally survived as organized entities (kehillot) which encompass the range of Jewish communal activities, including religious courts of varying jurisdictional scope.

Rabbinical Courts

In the United States, however, Jewish life had not been structured on a kehillah, or total community-organization, basis. Rather, American Jewish communities have been divided along denominational, congrega-
tional, and secular-organizational lines. Thus, there has not developed a system of rabbinic courts with acknowledged jurisdiction over all Jews residing in a given geographic area.

At the same time, rabbinical courts and other Jewish tribunals have developed to serve segments of the community. An example of a well-organized Jewish subcommunity in the United States is that of the Orthodox German Jewish community of Washington Heights, a neighborhood in Manhattan (the Breuer community), which is organized on the kehillah model. The essential ingredients of that organization's success can be found in the freely accepted religious commitment of its members. It has a Bet Din for both divorce and business cases. In business cases, the litigants are permitted to choose between din (strict law) or pesharah (compromise or arbitration). One commentator suggests that the vast majority choose the latter, because with pesharah the judges can look more closely at the equities of the case; and it is a greater religious sin not to obey the law than merely to disregard an arbitration decision.\(^4\)

The Orthodox and Conservative movements in the United States have established standing rabbinical courts, country-wide and locally. The existence of such courts in this country goes back to the 18th century, when Congregation Shearith Israel of New York (the first Jewish congregation in the United States) established one to supervise kashrut. In the 19th century other such courts were established to deal also with different matters.

Perhaps the largest and best known of the rabbinical courts today is the national Bet Din of the (Orthodox) Rabbinical Council of America (RCA). The Conservative movement has a National Bet Din (NBT) located in the Jewish Theological Seminary. Local Orthodox rabbinical courts affiliated with the RCA exist in Boston, Chicago, and Philadelphia. The Conservative NBT has no officially affiliated standing rabbinical courts, but Conservative rabbis have established such courts in Chicago, Los Angeles, and Philadelphia. The national rabbinical courts have their seat in New York City, and operate as local courts for that area as well.

In addition to the standing rabbinical courts, in the United States and elsewhere, ad hoc rabbinical courts may be formed at the request of the disputants to resolve issues of personal status. Each side may choose

one rabbi and the two rabbis select a third, or both sides may agree on a single rabbi who would decide the case alone, or with two colleagues chosen by him. Also, any three rabbis or, depending on the kind of issue, one rabbi assisted by two laymen, may convene themselves as an ad hoc Bet Din. These ad hoc rabbinical courts proceed in the same manner as do the standing rabbinical courts.

Most of the disputes brought before these rabbinical courts are handled locally; only very difficult issues are referred to the national courts. The RCA Bet Din will refer very difficult questions within its jurisdiction to a Bet Din Zedek, a panel of three highly qualified and distinguished rabbis, for final decision.

Most matters before rabbinical courts concern marriage, divorce, conversion and other issues of personal status. These courts, or special rabbinical courts maintained for the purpose, regularly decide issues concerning kashrut. In addition, the rabbinical courts at times also decide disputes concerning business relations or purely civil matters in terms of American law. Rabbinical courts in New York and Boston have been particularly active in such types of disputes. As will be noted below, the Boston court has attracted national attention through its efforts to play an active role in dealing with current social problems.

However, because of the individualistic nature of the American Jewish community, standing rabbinical courts do not have the same regularized status in dispute resolution as do, for example, rabbinical courts in the British Commonwealth. In contrast to the situation in the United States, in the British Commonwealth Orthodoxy has remained the dominant form of Jewish communal expression despite declining levels of personal observance in many quarters. As a result, the voluntary adherents to the Jewish community in the Commonwealth accept the authority of Orthodox rabbinical courts, which therefore have a much more prominent place in the life of the total Jewish community. For example, in Sydney, Australia, the Jewish community building has a special courtroom for the Bet Din, having all the accoutrements of a government courtroom. The court meets regularly twice or three times a week, and has regularized procedures for dealing with different kinds of cases and handing down decisions.

The Reform movement in the United States does not have any organized rabbinical courts, nationally or locally, reflecting its specific rejection of the binding character of Jewish law and its general antinomian outlook. However, both the Central Conference of American
Rabbis (the national rabbinical organization of the Reform movement) and the Union of American Hebrew Congregations have arbitration committees for the resolution of disputes between rabbis and their congregations.

A number of Jewish organizations also operate conciliation and arbitration boards outside the traditional rabbinical court system, such as the Jewish Conciliation Board (JCB) of New York, founded in the 1920s. JCB is a court of arbitration for Orthodox, Conservative, and Reform alike. While its primary focus has been on family and marital problems, it also has decided a number of cases concerning Jewish fraternal associations, particularly burial societies, as well as disputes between Jewish businessmen and miscellaneous problems between individuals. In many instances, JCB can resolve problems by sympathetic listening and referral to an appropriate social service agency. Generally, it attempts to resolve as many disputes as possible by conciliation and mediation to reach a settlement between the parties. Cases are submitted to a formal trial and binding decision only as a last resort—on the average less than 10 per cent of the disputes that come before JCB.

When a case has to be submitted to trial, the parties sign an arbitration agreement and the matter is brought before a board consisting of a rabbi, a businessman, and a lawyer, chosen by JCB’s executive secretary. Where necessary, a psychiatrist is chosen as the fourth panel member. The hearing before this panel is quite informal, with the parties presenting their evidence and the lawyer-judge handling the necessary legal issues. Witnesses are informally questioned by the judges. However, a full record of the testimony is made, and retained in the JCB files. After all the witnesses have been heard, the judges discuss and decide the case, and the lawyer-judge then writes an opinion, which is read to the parties.

Local Jewish education bodies also maintain nonrabbinical Jewish arbitration boards, such as the Board of Review of the Jewish Educational Committee of New York, to resolve disputes concerning Jewish educational matters and personnel. Such boards follow procedures similar to that of JCB, particularly in their emphasis on resolving the dispute by agreement between the parties and submitting it to actual trial only as a last resort.

Most of the decisions by rabbinical courts and Jewish arbitration boards are enforced through religious obedience to Jewishly recognized authority, moral suasion, and community pressure, without resort to
civil courts. Where civil court action becomes necessary, the court generally enforces the decision of the Jewish court or arbitration body as a type of arbitration.

The settlement of controversies by arbitration is a legally favored contractual proceeding in Anglo-American law. The basic principle is that parties to a dispute may agree to have that dispute settled by a body other than a civil court, and when this is done, a civil court will enforce the decision in the absence of fraud, corruption or other misconduct on the part of the arbitrators. At times civil-court judges also may suggest to litigants before them that they try to have their disputes settled by a local Jewish court, such as the Jewish Conciliation Board.

Under common law rules, an agreement to submit a dispute to arbitration need not be in writing. However, in a number of states including New York, statutes require that such agreement be in writing in order for the decision to be later enforced in civil court. For this reason, Jewish courts and boards usually require parties to sign a submission agreement before proceeding with a determination.

In contrast to civil-court enforcement of rabbinical-court decisions in kashrut matters (p. 35), which involve both the civil interests of individuals (in terms of American law) as well as religious matters (in terms of American law), a decision of a rabbinical court in matters of a purely secular nature (in terms of American law), such as a business dispute between individuals, is treated like a decision of any other arbitration body.

The use of Jewish courts today is, of course, a continuation of their traditional use in the resolution of Jewish disputes. But there are other reasons for preferring them to civil courts. In most major cities today, the court backlog is so large that it may take four or more years for a case to reach trial. On the other hand, decisions of Jewish courts are often arrived at in a matter of weeks or months, at most. Also, litigation in a Jewish court is much less expensive than in a civil court. Finally, the less formal procedure and the availability of judges rooted in the community may produce results which are perceived to be, and indeed may be, more fair and just than those reached by the civil courts.

Because of its relative speed, low cost, and fairness, Bet Din arbitration procedures recently have been put to new and creative use in Boston, Mass., where, in 1968, the Rabbinical Court of Justice of the Associated Synagogues of Massachusetts adjudicated disputes between a group of black and Puerto Rican tenants and a Jewish landlord family.
After a number of extensive sessions, in which both sides were heard, the matter was resolved through the Bet Din by the parties entering into an agreement setting forth the continuing rights and duties of both tenants and landlord. The agreement further provided for a five-member board of arbitration—two to be selected by the landlord and two by the Tenants Council, and, one acting as chairman, to be appointed by the Rabbinical Court—which was to hear all tenant and landlord complaints, and administer the agreement. It was empowered to sue and hold rents in escrow, or apply them to emergency repairs. The agreement also provided for a board of review, to be designated by the Rabbinical Court, to which either party might appeal any decision of the board of arbitration, and whose decision would be final. This board, in fact, did later adjudicate a dispute arising out of the agreement. The *Jewish Advocate*, in its August 8, 1968 issue, commented: "It is the first time in U.S. history that a Rabbinical Court . . . has undertaken to deal with such a profound social issue."

**CONCLUSION**

A dominant theme of this essay has been the tension inherent in a legal system committed to secularism and universalism, which, at the same time, must deal with a pluralistic society made up of individuals and groups that are at least in part sectarian and particularist. The legal system is also committed to the freedom of individuals and groups to express their sectarianism and particularism, or to choose not to do so. Thus, there is continuing tension between a concern that the secular society neither hinder nor promote religious or ethnic groups and the need to accommodate the interests of different groups when they merge with, or deviate from, the general norms of the society. We have seen this tension operating in many areas of this study: custody and adoption; marriage, divorce and child raising; the Sabbatarian issue; kashrut enforcement; religious societies as voluntary associations, and the recognition of the Jewish courts.

Some accommodation of this tension is to be found in the resolution of these issues. Sometimes the accommodation appears to have been reached at the expense of the interests of protecting and fostering sectarianism and particularism; at other times, at the expense of the principles of secularism and universalism.

Another recurring issue in this study has been the problem of the con-
ception, determination, and effect of Jewish law on the American courts. Jewish law has generally been held to be significant for those who voluntarily submit to it: the more traditional members of the Jewish community or Jews who have been functioning in a particularly Jewish context. American courts have viewed Jewish law as "religious" law and applied it primarily in deciding ritual issues and such matters as marriage and divorce, which are generally considered to be determined by religious considerations. Except in enforcement of Bet Din decrees, the American legal system has not recognized Jewish law as applying to "nonreligious" matters, thus refusing to acknowledge the all-encompassing nature of Jewish law. A notable exception to this is the Michigan decision on synagogue contributions (pp. 65–67).

When they do employ Jewish law, American courts have had great difficulties because of their inability to obtain authoritative halakhic determinations. The rise of denominations in Judaism and the often competing subgroups in American Jewish life have aggravated these difficulties. Divisions and differences on specific issues even among the Orthodox have created problems for American courts.

Finally, when employing Jewish law, the American legal system has applied it primarily to the public, external aspects of Jewish life; it has been most reluctant to apply halakhah to the private activity of persons who have not clearly and expressly agreed to come under its authority. In doing so, the American courts may have truncated Jewish law; but they have done so in recognition of the American legal system's basic understanding that adherence to "religious" or other non-American law generally is a matter of voluntary choice, not of inherent status.

The legal status of American Jewry, like that of any other group distinguished from other Americans by biocultural uniqueness rather than territorial proximity, is shaped by an environment traditionally hostile to the very elements of "group-ness" that generate the need for special consideration in the area of law in the first place. Thus any legal accommodations to the existence of such groups are developed within a territorially-structured legal system. They therefore frequently vary from state to state in form, and from locality to locality in application.

The territorial federalism of the United States serves as a fixed framework within which all law serving the needs of biocultural groups must fit, limiting both the scope of the law and the uniformity of its development. At the same time, the very existence of territorial federalism has allowed particular biocultural groups concentrated within particular
states and localities to gain greater legal recognition and status than American society as a whole would have allowed them. The United States Supreme Court’s record in these matters, when contrasted to that of states like New York and Massachusetts, attests to that.

American Jewry is an exemplary beneficiary of this situation. The concentration of Jews in the State of New York and, more particularly, in New York City, where they make up nearly 14 and 25 per cent, respectively, of the populations, has meant that some legal accommodations to Jewish needs had to be developed. Nor is it an accident that California, with the second largest Jewish population among the states, has gone as far as it has to accommodate the group needs of the Jews through positive action, despite the radical individualism of that state’s culture.

The dual legal system of the United States also has aided American Jewry. In a system where two sets of laws already exist and are intertwined in such a way as to require state courts to interpret and apply federal law, and federal courts to interpret and apply state law as a matter of course, the presence of still another law is more easily accepted. The virtual incorporation of the Jewish laws of kashrut into state statutes by reference; the acceptance of Jewish principles of congregational governance in resolving intercongregational disputes; the recognition of the decisions of Jewish courts in a few limited areas, all involve some effort to live with another system of law worked into an American context.

Today, with a resurgence of group identification across the United States, it may well be that we are just at the beginning of the development of a body of law designed to give those groups appropriate status. American Jewry is not the only group to have gained some recognition in that connection. But it is in the forefront of these developments, and may well be pioneering new accommodations to diversity in American civil society.
APPENDIX

LEGAL STATUS OF DIASPORA JEWISH COMMUNITIES SINCE WORLD WAR II

In Europe and the Middle East, there are still some Jewish communities which are officially recognized as such in the public law of their host countries. They are commonly known as kehillot or, in German, Kultesgemeinden (see Table 1, p. 91). These communities are distinguished by their very clear-cut formal structure officially established by special legislation. In Italy, for example, legislation adopted under Mussolini and still in force provides for the automatic enrollment of all Jews as Jews in their local communities, which also are specified by law. The activities of these communities are carried on within a legal framework that recognizes their right to undertake certain religious, educational, and social functions in the name of the country’s Jews, and to utilize state funds to do so.

State-recognized communities are essentially survivals from an earlier era. The six traditional kehillot, in the Middle East, acquired their basic communal structures before the modern era. The 12 modern kehillot, in Central Europe or areas influenced by Central European culture before World War I, were granted their structures as a result of 19th century efforts to adapt them to the new conditions of Emancipation in countries where the commitment to the structured integration of minority groups into the body politics was of first importance.

More recently, the legal status of these communities has undergone basic changes; that of the traditional kehillot in response to the modernization movements in their respective host countries, and that of the modern communities in keeping with the drastic changes wrought by two world wars. In Iran, for example, Jews are still linked to the larger polity through the Jewish community; they vote as Jews for the single Jewish representative to the Majlis (parliament). Matters of personal status, including the inheritance of property, are decided by the community’s religious courts (as is the case in Iran’s other religious communities), with the Bet Din in Teheran—the only Jewish court in the country—responsible for such matters. The major change in this arrangement was the introduction of civil divorce, in an effort to overcome difficulties in Muslim law. All Iranians, including Jews, now have a choice between religious and civil divorce.

By and large, the modern communities have lost their power to compel all Jews to become members; they must now build their organization on voluntary membership. In Sweden, for example, until 1952 all persons had to belong to some religious community. Since then, affiliation has been voluntary. There, as in most other countries with state-recognized communities,
TABLE 1. COUNTRIES WITH STATE RECOGNIZED COMMUNAL STRUCTURES (Kehillot) AND JEWISH POPULATIONS

<table>
<thead>
<tr>
<th>Traditional</th>
<th>Modern</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Countrywide</strong></td>
<td><strong>Local</strong></td>
</tr>
<tr>
<td>Ethiopia (13,000)</td>
<td>Austria (8,000)</td>
</tr>
<tr>
<td>Iran (80,000)</td>
<td>Czechoslovakia (14,000)</td>
</tr>
<tr>
<td>Lebanon (3,000)</td>
<td>German Federal Republic (30,000)</td>
</tr>
<tr>
<td>Morocco (45,000)</td>
<td>Greece (6,500)</td>
</tr>
<tr>
<td>Tunisia (10,000)</td>
<td>Hungary (80,000)</td>
</tr>
<tr>
<td>Turkey (39,000)</td>
<td>Italy (35,000)</td>
</tr>
<tr>
<td></td>
<td>Switzerland (20,000)</td>
</tr>
<tr>
<td></td>
<td>Yugoslavia (7,000)</td>
</tr>
</tbody>
</table>

members are taxed by the state for the support of their religious communities. This means that all known Jews are automatically listed on the community's rolls, but they have the right to opt out if they choose to do so. In some countries the tax for the support of religious communities is levied in addition to the regular income tax; in others, a certain percentage of each individual's income tax is rebated to the Jewish community.

Structurally, the kehillah communities remain neat and all-embracing. All legitimate institutions or organizations function within their over-all framework, except where the state has recognized secessionist groups as separate communities having equally comprehensive powers—a concession to the internal ideological divisions in modern Jewry.

The modern countrywide kehillot are generally organized along conventional federal lines, with "national" and "local" bodies, or "national," "provincial," and "local" bodies. The individual communal organizations are chosen in formal (and usually partisan) elections and are constitutionally linked to one another. There is relatively clear division of powers. A prime example, the German-Jewish community, has a countrywide Gemeinde, a Landesgemeinde covering a particular Land, or state (or several Länder if there are too few Jews for separate Landesgemeinden), and local Gemeinden within the Länder. Authority remains in the local community, perhaps with some loose confederal relationship uniting the various localities. A slightly modified version of this pattern exists in Sweden, where the Jewish community of Stockholm is by far the largest of the organized communities and represents the two other, smaller, communities in legal matters. Their greatest source of strength lies in their power to tax or automatically to receive a portion of their members' income taxes from the authorities.

The state-recognized community, once the basis of post-Emancipation Jewish life, is becoming smaller and less important in the Jewish world at the same time as it is losing its compulsory character. All are declining com-
munities reduced by war, emigration, or assimilation and, in many cases, afflicted by serious discrimination on the part of the governmental authorities.

A second pattern of community organization that has survived from the 19th century is the state-recognized religious structure, a highly centralized arrangement usually known by its French name, *consistoire* (see Table 2). It, too, has undergone substantial changes since World War II and is presently under severe structural and ideological stress. The original *consistoire* was essentially a Napoleonic innovation designed to encompass "Frenchmen of the Jewish faith" within a structure that could be held accountable to the French government, as were all groups and institutions in centralized France. The *consistoire* pattern spread, with some variations, to those European and African countries which were under the influence of French culture.

Today the *consistoire* has certain legal status as a religious body, and its officials are often supported by government funds. Affiliation is entirely voluntary. It is further distinguished from the state-recognized communal structure in two fundamental ways: by its even greater emphasis on the exclusively religious nature of Judaism and by its centralized structure. The *Gemeinde* idea, for all its modern development, implicitly recognizes the existence of the extra- or supra-religious components of Jewish life, which the *consistoire* idea rather explicitly avoids or rejects.

In France, the *consistoire* lost its status as an arm of the state after the turn of the century, but it remains the state-recognized representative body of French Jewry. Belgium Jewry has the *consistoire* most true to the original character of the institution. All its religious functionaries are paid by the state, as if they were members of the Belgian civil service. Bulgaria and Rumania adopted the *consistoire* model in the 19th century, when their political systems were reorganized according to the French model. The structure has remained the same to this day, and is under even closer state control because it is useful to the Communist regimes in these countries. Its centralized character gives the state greater ease of control, while its limitation to religious matters suits Communist ideology.

The *consistoire* has become a casualty of the growing pluralism in the Western Jewish communities. The growth of secularism among the new generation of Jews has made identification with a state-recognized religious

| Countries with State-Recognized Religious Structures (Consistoire) and Jewish Populations |
|---------------------------------|-------------------------------|
| Belgium (40,500)                | Bulgaria (7,000)              |
| Congo (Lubumbashi) (300)       | France (550,000)              |
| Luxembourg (1,000)             | Netherlands (30,000)          |
| Rumania (100,000)              |                               |
structure increasingly incongruous. At the same time, the new ultra-Orthodox congregations created by certain refugees to West European consistoire countries cannot tolerate the laxity of the official "orthodoxy" of the state-recognized structures. In France, this has led to the development of splinter communities. In Belgium, with two local communities of equal size, the older community of Brussels remains under the consistoire, while the refugee community of Antwerp has its own Orthodox "communities." Finally, the rise of Israel generated demands for the mobilization of diaspora resources that went beyond the capabilities of the consistoire, leading to the creation of central fund-raising bodies, which have far more de facto power and influence than the consistoire itself. In a larger sense, the times themselves have conspired against the old system, as concerned Jews the world over rediscovered the national-political aspects of Jewish existence with all that they mean.

The transplantation of Jews with Eastern and Central European backgrounds to Latin America, mainly in the 20th century, has given rise to a replica of the European kehillah that does not enjoy the same official status, but is tacitly recognized both by the state and the Jews as the organized Jewish community (see Table 3). While these communities have a distinct public character, their direct recognition in public law is limited to extending certain privileges to their officers or constituent organizations.

In the last analysis, these communities must rely entirely on voluntary affiliation, which is stimulated in part by an environment that somewhat retards assimilation. Characteristically, these communities have emphasized the secular, rather than the religious, side of Jewish life. Founded, in the main, by men who considered themselves secularists (regardless of the level of their personal religious observance), they were built in the mold of secular diaspora nationalism, a powerful ideology at the time of their creation. This means that their internal political life is often well developed,

### TABLE 3. COUNTRIES WITH TACITLY RECOGNIZED COMMUNITY STRUCTURES (QUASI Kehillot) AND JEWISH POPULATIONS

<table>
<thead>
<tr>
<th>Argentina (500,000)</th>
<th>Mexico (35,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bolivia (3,000)</td>
<td>Monaco (600)</td>
</tr>
<tr>
<td>Brazil (150,000)</td>
<td>Nicaragua (200)</td>
</tr>
<tr>
<td>Chile (35,000)</td>
<td>Panama (2,000)</td>
</tr>
<tr>
<td>Colombia (10,000)</td>
<td>Paraguay (1,200)</td>
</tr>
<tr>
<td>Costa Rica (1,500)</td>
<td>Peru (5,300)</td>
</tr>
<tr>
<td>Curacao (700)</td>
<td>Portugal (600)</td>
</tr>
<tr>
<td>Dominican Republic (350)</td>
<td>Spain (9,000)</td>
</tr>
<tr>
<td>Ecuador (2,000)</td>
<td>Surinam (500)</td>
</tr>
<tr>
<td>El Salvador (300)</td>
<td>Trinidad and Tobago (300)</td>
</tr>
<tr>
<td>Guatemala (1,900)</td>
<td>Uruguay (50,000)</td>
</tr>
<tr>
<td>Honduras (150)</td>
<td>Venezuela (12,000)</td>
</tr>
</tbody>
</table>
with public elections and even political-party competition. Orthodoxy is the "official" religion of the community, and Jewish courts are extensively used by a population that has little confidence in the general courts.

While there are variations among them, the Jewish communities of the English-speaking world have certain common organizational and ideological characteristics. In all these communities, Jews acquire their primary legal status as individual citizens and their group status more or less in the manner described for American Jewry in the body of this study. Thus, the communities themselves have no special status in public law (see Table 4). At most, their "roof" organizations, if any, are accepted as the "address" of the Jewish community for certain limited purposes, some of them written into law; their subsidiary institutions increasingly are given government support, along with other, non-Jewish institutions, for specific functions. Nor do these communities have any strong tradition of communal self-government. All are entirely products of the modern era, founded either by past-Emancipation Jews, or by Jews seeking the benefits of Emancipation and desirous of throwing off the burdens of an all-encompassing corporate Jewish life.

TABLE 4. COUNTRIES WITH VOLUNTARY COMMUNAL STRUCTURES AND JEWISH POPULATIONS

<table>
<thead>
<tr>
<th>Representative Boards</th>
<th>American Pluralistic</th>
<th>Local Congregations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia (72,000)</td>
<td>United States (5,870,000)</td>
<td>Aruba (130)</td>
</tr>
<tr>
<td>Canada (280,000)</td>
<td></td>
<td>Barbados (75)</td>
</tr>
<tr>
<td>Gibraltar (600)</td>
<td></td>
<td>Hong Kong (200)</td>
</tr>
<tr>
<td>India (15,000)</td>
<td></td>
<td>Jamaica (600)</td>
</tr>
<tr>
<td>Ireland (5,400)</td>
<td></td>
<td>Japan (500)</td>
</tr>
<tr>
<td>Kenya (200)</td>
<td></td>
<td>Malta (50)</td>
</tr>
<tr>
<td>Rhodesia (5,200)</td>
<td></td>
<td>New Zealand (5,000)</td>
</tr>
<tr>
<td>Singapore (600)</td>
<td></td>
<td>Philippines (500)</td>
</tr>
<tr>
<td>South Africa (119,900)</td>
<td></td>
<td>Ryukyu Islands (250)</td>
</tr>
<tr>
<td>United Kingdom (410,000)</td>
<td></td>
<td>South-West Africa (540)</td>
</tr>
<tr>
<td>Zambia (400)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>