

CHRONOS

The History Journal of
Yeshiva University

2011 - 2012

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November 2011

Layout: Ezra Seligsohn

Printer: Advanced Copy Center

CHRONOS: The History Journal of Yeshiva University

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Dear Reader,

Welcome to the 2011-12 edition of *Chronos*, the undergraduate History Journal of Yeshiva University. We are pleased to present this publication for the first time since 2007, an accomplishment brought about through the efforts of the numerous people who contributed to its production.

We would like to thank the authors, who have worked diligently to compose and refine their articles for publication. We would also like to acknowledge the support and the generous funding provided by Deans Bacon and Orlian of Stern College, Deans Eichler and Sugarman of Yeshiva College, and the undergraduate Student Councils. We thank Ezra Seligsohn for his expert formatting work, as well as our printers for all their efforts in producing *Chronos*, complete, for the very first time, with illustrations. Finally, we would like to thank our faculty coordinator, Dr. Hadassah Kosak, and the History faculty at Yeshiva University for their advice and patience throughout the editing and publication process.

This edition's collection of essays comprises a broad range of topics in Jewish, American, and World history, from Jews in the Renaissance to our faculty contribution on Academic Freedom in the 1960s. We hope you will enjoy exploring these fascinating works of history as much as we have enjoyed bringing them to you!

Sincerely,

The Editors

Rachel Daniels

Elie Friedman

Tzachi Miodownik

Meirah Shedlo

CHRONOS

Jews in the Renaissance: A Persecuted By-Product of Christianity's War with Humanism

Rachel Renz

The Italian Renaissance was beautiful. A sudden burst of creative energy, the Renaissance sprouted artists, dancers, thinkers, and philosophers. Daring questions never before entertained were suddenly expected of the thinking human being and answers provided were now based on rationalism and reason. Yet along with the legacy of intellectual curiosity came another: ideological warfare. Religion's blind followers and Humanism's questioning thinkers were now in a fight to the death, the death of the spirit versus the death of the mind. Caught in the crossfire of Catholic doctrines and Humanistic inquiries were the Jews, a group founded on the very idea of religion and rationalism living in tandem. The ensuing persecution of the Jews throughout the Renaissance was primarily a by-product of the larger changes within the Catholic world which took place as Catholicism came to terms with Renaissance Humanism.

"Truth"

Humanism was a radical ideology for its time. It reshaped the perception of oneself, one's capabilities and one's goals, and it expected more from the individual citizen than from the authoritative, governing body. Because of Humanism's primary emphasis on education, culture, and rationalism, religion was generally not confronted in a direct way. This new-found focus and positivity towards man and his boundless opportunities drew skepticism from the Catholic Church which sought to maintain its authoritative, totalitarian religious hierarchy. Numerous issues became apparent, particularly in regards to the humanists' questioning of long-held "truths."¹ The debate became, "Is there a single truth, i.e. Christianity, or do there exist multiple other truths as well?" For the long-established Catholic Church, this sudden consideration of non-Christian beliefs and possible "truths" was perceived as an unprecedented threat. It should be under-

¹ Anna Sapir Abulafia, *Christians and Jews in the Twelfth-century Renaissance* (London: Routledge, 1995), 34.

stood that this type of questioning was not an attack on Christianity per se, but rather an attack on the *blind faith* expected by the Church, forcing it to address the challenges Humanism posed to religion as well as the appropriateness of such questions' "liberal arts" origins.²

Although the challenge of having secular thought and Catholic philosophy coexist was naturally controversial, it is reasonable to assume that the *lack* of theological trouble posed by Humanism to the Jewish community's beliefs was noticeable to the Christians. As Jews and Christians lived in close contact and saw each other in their respective garbs and practices, the Jewish contentment with Humanism overall, and with the concept of multiple truths simultaneously coexisting, could not avoid Christian awareness; Judaism is, by definition, a "non-totalitarian truth." It does not expect, nor does it desire, the entire world to believe and practice as it does. Therefore, the presence and continued existence of a minority that (seemingly) lacked enough conviction in its own faith was both bizarre and troubling to the Church. Additionally, the solution offered by individuals such as Leo de Modena³, who appreciated and reconciled Humanist culture with religious dogma, diametrically opposed the response of the Church. The Church's confrontation with Renaissance Humanism can be exemplified best by studying its reevaluation of the Eucharist, the doctrine of transubstantiation^{4,5}.

The Eucharist

⁶Circa 397 CE, Christian scholars solidified the concept of transubstantiation, believing that just as God created "יְשׁוּעָה," so too, He could change bread and wine to be the bread and blood of Jesus, the "son."⁷ Yet with the Renaissance's new respect for the sciences, Christianity was forced to ques-

² Abulafia, *Christians and Jews*, 35-36.

³ Modena was a Jewish scholar born in Venice. He was from a notable French family that had migrated to Italy after an expulsion of Jews from France.

⁴ The belief that certain wafers and wine can and do assume the literal flesh and blood of Jesus; eaten in Catholic ceremony.

⁵ Abulafia, *Christians and Jews*, 35-36.

⁶ It is important to note that the religious inner-turmoil soon to be discussed does not seem to have confronted the Jews of Renaissance Italy in any comparative way. This could very well be because of Judaism's emphasis on action, thereby only briefly entertaining questions of faith and its intersection with secular knowledge and instead focusing on behavioral compliance.

⁷ Abulafia, *Christians and Jews*, 36.

tion the nature of the Eucharist's transformation. The question now arose as to whether the transformation of the wafer and the wine was a physical one or a metaphysical, spiritual one.⁸⁹ This issue was raised throughout, primarily by the philosopher Descartes. Although Descartes maintained that the Eucharist had actual significance and was a metaphysical experience, he was not willing to say that the bread and wine became the actual physical body of Jesus, for he philosophically believed that bread and wine, things perceived only through sensory means, were "figments" of the "human mind."¹⁰ As Steven M. Nadler explains,

Descartes emptied the world of all physical qualities... leaving behind only 'shape, extension, and mobility.' Thus, the sensible appearances of the bread are just that--- appearances. They are not real properties of the external object but rather mental phenomena caused by matter in motion. ¹¹

Arnauld, a fellow philosopher and friend of Descartes', asked Descartes how his understanding of bodily limitations could be reconciled with "the Catholic faith, which obliges us to believe that the body of Christ is present in the holy sacrament without its local extension."¹² The issue raised is that Descartes believed that the body cannot be outside of its own extensions, meaning that the "mystery"¹³ of the Eucharist cannot actually be the physical transformation of the wafer into the body of Jesus. If the body and its dimensions, unique to Jesus, were to miraculously take on the appearance, taste, and texture of the wafer, Descartes believed this "body" of Jesus needed extensions, physical elements "which individuat[ed] it as Christ's body."¹⁴ This was impossible as the wafer's physical elements are not at all similar to the actual body of Jesus.¹⁵ This inconsistency with Christian phi-

⁸ Ibid, 37.

⁹ It is fascinating that a religion which had accused Judaism of being too literalist now struggled with its own extremely literalistic and physical interpretations; this irony can be speculated as an additional cause of anti-Semitism, as the rejection of Jewish law for allegorical interpretation seemed inconsistent with the theology of transubstantiation, magnifying the confusion of Christian theology.

¹⁰ Steven M. Nadler, "Arnauld, Descartes, and Transubstantiation," *Journal of the History of Ideas* 49, no. 2 (1988), 232.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

losophy was never fully solved by Descartes, but it did set in motion the application of rational, scientific questions to irrational religious beliefs, causing much debate within the Church.¹⁶

The pressure put on Christian laypeople to believe in such a physical manifestation of God as the Eucharist brought “god” closer and made him more tangible. As Abulafia writes, “On the one hand there was pious wonder, on the other there could be genuine dread at being so near to God.”¹⁷ The fear of God’s presence and the experience of having contact with divine reality was never a challenge within Judaism, as Jews have no concept (outside of Kabbalah, perhaps) of a God with any sort of tangible, physical dimensions. The deepest issue within the debate about transubstantiation stemmed from one of the most crucial divides between Jewish and Christian theologies: the issue of textual literalism. Jews have had less trouble than Christians in regards to a literalistic approach to the biblical text. Jews understand that there are always at least two dimensions to the text, פשוט and פשוט, literalism and allegory, as well as the possibility of myriad other interpretations at any given point in the text. As David Stern writes in “Midrash and Hermeneutics: Polysemy vs. Indeterminacy,”¹⁸

Polysemy¹⁹ in Midrash, then, is to be understood as a claim to textual stability rather than its opposite, an indeterminate state of endlessly deferred meanings and unresolved conflicts. In fact, midrashic polysemy suggests more than just textual stability; it points to a fantasy of social stability, of human community in complete harmony, where disagreement is either resolved agreeably or maintained peacefully.²⁰

Thus, the Jewish perspective is generally one of tolerance and appreciation for individuality.²¹ However, a dogma that preaches universal unifor-

¹⁶ Ibid.

¹⁷ Abulafia, *Christians and Jews*, 58.

¹⁸ David Stern, *Midrash and Theory: Ancient Jewish Exegetical and Contemporary Literary Studies (Rethinking Theory)* (Evanston: Northwestern University Press), 1998, 33-34.

¹⁹ The coexistence of multiple meanings for a single word or idea

²⁰ Ibid.

²¹ The irony is extreme and bizarre: although Judaism demands communal actions and seemingly identical expectations for each person, there exists an underlying understanding and respect for “מחלוקת,” for dispute and disagreement. Conversely, in Christianity, although there are few prescribed actions, there is little room for individual belief. This is another dimension of theological restraint, pressure, and fear which distinguished medieval Christological perspectives in juxtaposition with their

mity and compliance with religious doctrine is unable to accommodate deviation. With such basic Christian tenets being challenged by Humanism's sudden emphasis on curiosity and introspection, it is not surprising that the Church's reaction was one of radical conservatism and the implementation of numerous stringencies.²²

The Church's authoritarian and coercive identity began to take shape in the year 1059 with the papacy of Pope Nicholas II and his declaration that clergy could no longer marry.²³ This stringency was furthered throughout the reign of future popes, most obviously during the papacy of Gregory VII which began in 1075.

While the emphasis had previously been on faith and creed during the times of St. Augustine, there was now a transition to deed, deed towards the Church and compliance in all its demands.²⁴ Although the Church was supposed to preach of good deeds and acts of righteousness as the path to salvation, "'good works' consisted of mere external obedience to the church, and did not necessarily flow from a life of faith in Christ."²⁵

Original Sin

One of the most demanding actions prescribed by the Church were acts of penitence,²⁶ the seeking of "remission of sin"²⁷ playing a large part in Christian theology. Seeking penitence became complicated by the contradictory messages of the Church, as the question of man's capabilities began to arise. Christians were receiving mixed messages about the definition of Original Sin and the capability or incapability of achieving human perfection. While there was the explicit doctrine of Original Sin from St. Augustine in which "Adam and Eve's sinful transgression in paradise descends to all subsequent human generations as a literal inheritance,"²⁸ the Catholic Church, most likely as a means of control and not simply from a

contemporary Jewish beliefs.

²² Abulafia, *Christians and Jews*, 52.

²³ Ibid.

²⁴ Jack L. Arnold, "The Roman Catholic Church of the Middle Ages: Reformation, Men and Theology, Lesson 1," *Third Millennium Ministries*, 1 March 1999, www.thirdmill.org/newfiles/jac_arnold/CH.Arnold.RMT.1.html (accessed 12 May 2011).

²⁵ Ibid.

²⁶ Ibid.

²⁷ Abulafia, *Christians and Jews*, 56.

²⁸ Geoffrey Rees, "The Anxiety of Inheritance: Reinhold Niebuhr and the Literal Truth of Original Sin," *The Journal of Religious Ethics* 31, no. 1 (2003), 76.

theological motivation, preached that salvation could only be acquired through adherence and subjugation to the Church.²⁹ The contradiction in terms between a theology that assumed all people as inherently sinful and a Church that taught and expected “sinless perfectionism”³⁰ had extreme consequences for Christians in the life after death. The glorification of Mary and her “perfection” led to her characterization as a woman “born without sin”³¹ like her son. She became “the queen of heaven,”³² a miracle-worker. As stated in “The Great Issues of the Reformation” (*Present Truth*),

Rome held out to men the possibility of becoming pure and sinless saints, and those who attained this perfection reached sainthood and were qualified to enter heaven at the hour of death. Those who did not become perfect and absolutely sinless in the flesh would need to go to purgatory after death and thus be made completely just and qualified to enter heaven.³³

The stress to understand and balance a philosophy of perpetual sin *and* the expected ascent to perfection was a fearsome prospect.

The Humanist attitude towards sin and man’s (limited) potential was a perspective oppositional to that of the Church’s. Thomas C. Kishler, in an essay³⁴ concerning the philosophy of the aesthetician Hulme and his beliefs on Original Sin, illuminates the Humanist reality. “All philosophy from the Renaissance onward, Hulme asserted, was essentially the same. ‘It all rests on the same conception of man and exhibits the same inability to realise [sic] the meaning of the dogma of Original Sin.’”³⁵ Additionally, Hulme held that “the essence of romanticism [which Hulme believed to be an offshoot of Humanism]... was the belief that perfection is possible, that somewhere it can be realized. Because of the belief in the attain-

²⁹ Jack L. Arnold, “The Roman Catholic Church of the Middle Ages: Reformation, Men and Theology, Lesson 1,” *Third Millennium Ministries*, 1 March 1999, www.thirdmill.org/newfiles/jac_arnold/CH.Arnold.RMT.1.html (accessed 12 May 2011).

³⁰ *Ibid.*

³¹ Abulafia, *Christians and Jews*, 57-58.

³² *Ibid.*, 58.

³³ Quote from Jack L. Arnold, “The Roman Catholic Church of the Middle Ages: Reformation, Men and Theology, Lesson 1,” *Third Millennium Ministries*, 1 March 1999, www.thirdmill.org/newfiles/jac_arnold/CH.Arnold.RMT.1.html (accessed 12 May 2011).

³⁴ Thomas C. Kishler, “Original Sin and T.E. Hulme’s Aesthetics,” *Journal of Aesthetic Education* 10, no. 2 (April), 1976.

³⁵ *Ibid.*

Ioannes Reuchlin Phorcensis, praeceptor
suo Iacobo Iehiel Loans Iudaeo

שלום שלום לרחוק ולקרוב אדוני ר
יעקוב אלופי ומיודעי: ממני
המשתוקק והגכסה לראות פניך
הנעימים להתענג מזיו פניך המאירות
לשמוע למודד הטהור: ועתה באתי
במגלת ספר להודיעך כי שנה לאל
אחרי גסעי ממך הצלחתי בלמודי
והגעתי להשגה גדולה ידעתי
השמה ותגיל: אני יוחנן רוהליו
מפורצו הכותב ראש חדש כסלו
שנת הרסא ליד הגבנר ריעקוב
בכמר יהואל לואנש:

Latine sic.

Pax pax longinquo & propinquo, Domine mi magister Iacobe
dux meus & notus meus, a me qui desydero & concupisco cernere
uultum tuum suavissimum ad delectandum de splendore uultus tui
lucentis, audiendo doctrinam tuam purissimam, & nunc ueni episto
lio libello ut tibi notificem, q (laus deo) post recessum meum abs te
profeci in doctrina mea, & perueni ad consecutionem magnā, scio
Iretaberis & gaudebis. Ego Ioannes Reuchlin ex Phoreen, scribēs
Kalendis Nouembris Anno quinto millenario ducentesimo sexa-
gesimo primo. Ad manum honorabilis magistri Iacobi filij, ho-
nore excellentis magistri Iehiel Loans.

Alia epistola.

i iii

Johannes Reuchlin. Letter to Jacob ben Jehiel Loans, from
The Letters of Famous Men, circa 1514.

ment of perfection, romanticism confused the human and the divine.”³⁶ The upset caused by Humanism’s optimistic and empowering view of the *Durchschnittsmensch*, the everyman, forced the Church to take action. The Church’s attitude towards penitence, already serious and demanding, now implemented a rigorous set of rules and a bureaucratic hierarchy of people from whom penitence could be acquired.³⁷ Oftentimes, monks would be asked to pray on the sinners’ behalves, leading to the sinners’ indebtedness to the monks and causing them to help fund the monasteries or even join the monastic life.³⁸ Yet the acts of penitence affecting non-Christians were perhaps the most astonishing; as the emphasis on proselytizing was only heightened by the Christian desire to be freed of sin, making a “pilgrimage” or going on a crusade³⁹ was the golden mean. The first motivation for becoming a crusader was the prospect of bringing about the Second Coming.⁴⁰ In Renaissance Italy there came “a new trend in Franciscan apocalyptic literature in which the end was seen as dawning, and hope was held out for the conversion of Jews to Christianity,”⁴¹ a religious motivation concerning Christianity’s place in the world at large. The second motivation was an internal one. As Abulafia writes, “The invitation to become a soldier of Christ and in doing so win remission of sin was clearly irresistible to most,”⁴² leading to a renewed glorification of Christianity and a revival of Jew hatred.⁴³ It is evident through the consideration of Christian theology, Humanist philosophy, and the Church’s political and powerful agenda at the time of the Renaissance that the internal confusions and insecurities within the Christian world had an effect, though not its only one, on the Jewish world. By living as a distinguishable minority in a powerful and oppressive Christian world, the theological conflicts exclusive to Catholicism ultimately came to include all peoples in the vicinity.

Heresy

Included in a discussion of the theological trends in Renaissance Ca-

³⁶ Ibid.

³⁷ Abulafia, *Christians and Jews*, 56.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid., 57.

⁴¹ Steven J. McMichael and Susan E. Myers, *Friars and Jews in the Middle Ages and Renaissance*, (Leiden: Brill), 2004, viii.

⁴² Abulafia, *Christians and Jews*, 57.

⁴³ Ibid.

tholicism and their effects on both Christians and Jews, the Christian belief in a purely allegorical reading of the Hebrew Bible is crucial. Christianity believes that the legal, action-based commandments of the “Old Testament” mustn’t be taken as literal after the life and death of Jesus.⁴⁴ Because of this belief, one that has justified the Christian nonobservance of biblical law, Christians began seeing the Jews’ continued adherence to such laws as outright heresy.⁴⁵ Such adherence to “Old Testament” law “could be seen as a denial of Christ’s contribution to the understanding of the meaning of the text.”⁴⁶ The unacceptability of deviant beliefs was intolerable, as the interpretation of Jewish behavior was understood as denial, a self-acknowledged and independently-chosen ignorance.

It is once again evident that there was enormous pressure and fear in the Christian world, allowing for a poisonous demonization of the “heretic.” The advantage to accusing others of heresy was, among other things, a chance to prove to the Church one’s devotion to Jesus. Any questioning or lack of assurance on the Christians’ part would lead to social ostracizing at best, religious excommunication and persecution at worst. Therefore, Christians who were themselves unsure of their religious beliefs blamed the Jews because Jews *were* sure of their beliefs and their rejection of Christianity.

Confines of Allegory

Before leaving the topic of religious doctrine and its effects on Catholic-Jewish relations, there is a psychosocial consideration to be addressed. In terms of both text and faith, Jews seem to have had more “leeway” than Christians during the Renaissance.⁴⁷ Jews were comfortable with multiple branches of exegesis such as פשט and שרש. As discussed earlier, the acceptance of and respect for polysemy⁴⁸ was a uniquely Jewish position and one the Christians rejected. They confined themselves only to allegorical, non-literal understandings of the biblical text and they limited God by philosophically placing Him in the tangible, human body of Jesus. This theology, along with the added fear of punishment for heretical thoughts and questions, ironically turned the Christian claims of the Old Testa-

⁴⁴ Ibid, 63.

⁴⁵ Ibid.

⁴⁶ Ibid., 64.

⁴⁷ Ibid.

⁴⁸ David Stern, *Midrash and Theory*, 33-34.

ment's "wrathful God" on its head. While Christianity used this wrathful interpretation as ammunition against Judaism, it was the Church, an enormously centralized body of political power, which was wrathful, making the Christian experience an extremely unpleasant one. The belief in God as tangible and close (and ultimately more fearsome and threatening),⁴⁹ and the outright rejection of this close-minded and definitive view of God on the part of the Jews,⁵⁰ were certainly added motivations for the Christian values of guilt and penitence through crusading,⁵¹ leading to continued persecution of the Jews.

Paupertas

The theology of Christianity at the time of the Renaissance, particularly that of the newly-founded Franciscan Order, preached and demanded the unique doctrine of *paupertas*, the elevation and glorification of poverty.⁵² The Franciscan movement as a whole originated in Florence, Italy in the year 1209.⁵³ Franciscans equated poverty with religious fidelity,⁵⁴ as they believed that Jesus' value of poverty made *paupertas* a paradigm of Christian society. It has been expressed that "Franciscan economics is understandable as the beginning of Christian economics."⁵⁵ The Humanistic curiosity and questioning of social and economic norms, such as the value and grandeur associated with wealth, were being challenged and reworked by the Franciscan Order and, ultimately, by the entire Catholic Church. Therefore, in keeping with the understanding that a by-product of this inner turmoil was the persecution of the Jews, it is important to look at the religious objections Franciscans had towards Jewish "heretical" economics⁵⁶ like money-lending.

Franciscans discussed the Jews in three different contexts:⁵⁷ the stereotypical enemy of Franciscan poverty, the stereotype of usury, and the overall "effective lenders and usurers, dangerous from the Christian moral and

⁴⁹ Abulafia, *Christians and Jews*, 58.

⁵⁰ *Ibid.*, 63.

⁵¹ *Ibid.*, 57.

⁵² McMichael and Myers, *Friars and Jews*, 110.

⁵³ *Ibid.*, 100.

⁵⁴ *Ibid.*, 105.

⁵⁵ *Ibid.*, 111.

⁵⁶ *Ibid.*, 105.

⁵⁷ *Ibid.*, 102.

economic order.”⁵⁸ Jews were represented in the Franciscan ideology by the notoriously selfish and deceitful character of Judas Iscariot, thus becoming labeled as a greedy and self-interested people.⁵⁹ The issue of usury itself posed additional problems. For example, besides the Christians’ contrary understanding of the money lending prohibition in Deuteronomy chapter twenty-three, they also believed money lending was bad because it was not “charitable” to charge interest. Christians began to understand the lending phenomenon as the Jews’ manipulation of the biblical verse’s true meaning in order to make “a justification of Jewish credit economy.”⁶⁰ Naturally, Christianity found a way to justify *Christian* money lending through the Monti di Pieta institutions, claiming *this* was honest and charitable lending. This phenomenon is summarized as follows:

It makes possible an accurate distinction between ethical, socially profitable contracts whose prototype is commerce, and deceiving, socially deleterious contracts whose prototype is usury. In this perspective, the *lucrum* and Christian wealth in general can be the product of a correct Christian lifestyle in as much as this wealth is the affluence of the city under the guide of Christian charismatic leaders.⁶¹

The Church could justify its own wealth as being in the spirit of Christian charity as this wealth was not in the hands of one greedy individual, but rather in the hands of the communal leadership for the community’s benefit. The fact that the wealth therefore remained beyond the hands of Christian laypeople did nothing to help foster feelings of goodwill towards the Jews. The financial inequality between a group of people not permitted to acquire wealth and a group of “heretics” who did not have the same limitations on the acquisition of money only encouraged Catholic resentment, enmity, and the ultimate expulsion of Jewish money lenders from their midst.

The separation of the Church’s wealth and the Christian laypeople’s poverty became noticeable as Christians began to accuse one another of lacking in charity,⁶² resulting from the poverty forced upon them by Church taxes. It has been documented that a certain Friar Michele Carcano, living

⁵⁸ Ibid.

⁵⁹ Ibid., 106.

⁶⁰ Ibid., 108.

⁶¹ Ibid., 109.

⁶² Ibid., 244.

in Italy during the Renaissance, “accused many members of the local ‘patriciate’ and commercial banks of having clandestinely invested their capital in Jewish banks so as to derive illicit profits which were forbidden by Christian law.”⁶³ This inner turmoil, caused originally by a reexamination of the institution of wealth during the onset of Humanist ideology, led to a circuitous fraternization and subsequent disengagement with the local Jews. For, even when there was a *Monti di Pieta* established in a nearby place, Christians were often still in contact with Jews for the purpose of receiving presumably cheaper loans!⁶⁴ Pope Sixtus IV della Rovere even recommended that, when Christians could not afford to pay their mandatory taxes to the Church, the Jews should open loan banks from which the Christians should borrow money;⁶⁵ the irony is dumbfounding. Dr. Ariel Toaff goes so far as to maintain that “The Holy See...was another of the ‘silent partners’ in the Jewish banks, at least from the middle of the thirteenth century.”⁶⁶ The corruption throughout Catholic aristocracy and the confusing expectations internalized by its constituent population were troubling on both practical and spiritual levels, ultimately leading to the abuse of, and prejudice towards the Jew. Even more, the fact that Christians became indebted to Jewish loan bankers in order to pay their own Christian taxes raised the question as to whether the Church could *survive* without non-Christian money lenders, a question surely too daunting and iconoclastic to be addressed straightforwardly.

Hebrew

One of Humanism’s goals was to foster a “return to the authentic,” a search for the “Ur Text” of all sources. This required the ability to read books in their original languages, an expectation in keeping with the Humanist values of reason and speech. As part of Catholicism’s missionary effort, it was imperative that Christians learn Hebrew in order to properly debate with Jews regarding the meaning of various biblical verses. Having gone from the Hebrew Bible to the “New Testament,” written in Greek and subsequently translated into Latin by Jerome in the 4th century, the distance between the Hebrew text and Jerome’s “Vetus Latina” was substantial. This culminated in the employment of many Jews in order to help

⁶³ Ibid.

⁶⁴ Ibid., 245, 248.

⁶⁵ Ibid.

⁶⁶ Ibid., 247.

Christians understand the original Hebrew Bible. Christians became curious as the Humanists would have it, and even “made its study fashionable even among royal courtiers.”⁶⁷

As a result of Christian interest in the Hebrew of the “Old Testament,” topics of dispute were no longer exclusive to “reason (philosophy), morals and history...,”⁶⁸ but rather were expanded to include the common “battle ground” of *Tanach*.⁶⁹ Although the joint study of Hebrew between Christians and Jews may have fostered a version of camaraderie, the position of learning the Bible from a “heretic” in order that one might prove to the very same “heretic” the Jewish misinterpretations was bizarre. Jews had gained a small position of power, once again leading to Christian indebtedness to Jews. This time, however, it was for “lending” the knowledge of Hebrew, something uniquely Jewish, instead of money.

Crusades

To begin making conclusions, a return to the beginning of the discussion is needed. While many things throughout medieval Christendom encouraged and led to anti-Semitism, the most outright and large-scale manifestation of this discrimination was the Crusades, the massive killings, pillages, and conversions of non-Christians in an attempt to prove the “truth” and superiority of Christianity. Once again, Christian pride was challenged by the persistent existence of Jews, with the addition of discovering Muslim countries in which Christians now became the *minority*. Humanism’s values of curiosity and introspection were suddenly brought to a new level, and in doing so, the consequences once again negatively affected the Jews. In a fascinating statement concerning this “shaking” of Christian faith,

Nachmanides argues that the Bible refers to the power of the Messiah. Certainly in his lifetime Jesus had no power, since he was incapable of preventing his own crucifixion. After his death, Jesus still did not have any rule, ‘for the power of Rome is not because of him. Even before they believed in Jesus, the city of Rome was ruling over most of the world, and after they adopted faith in him, they lost many provinces; and now the worshippers of Mohammed have greater power than they.’⁷⁰

⁶⁷ Frank E. Manuel, “Christendom’s Rediscovery of Judaism,” *Bulletin of the American Academy of Arts and Sciences* 40, no. 7 (April, 1987), 16.

⁶⁸ McMichael and Myers, *Friars and Jews*, 199.

⁶⁹ *Ibid.*, 198.

⁷⁰ Daniel J. Lasker, “The Impact of the Crusades on the Jewish-Christian Debate,” *Jew-*

The Jewish minority present in Italy during the Renaissance and the Muslim majority present during the Crusades did nothing to assist Christians in gaining assurance of their faith's veracity, ultimately resulting in the tragic by-product of Jewish persecution and death.

Persecution of the Jews was rampant. The sense of inferiority, chaos and crisis felt by the Catholic world meant, among many things, the harming of the Jew. It meant the demise of the noncompliant, the ones who stood idly by while the Christian world went up in flames. The questions raised by Humanist philosophy regarding the concept of "truths," Church authority, Original Sin, the Eucharist, the study of Hebrew, and the Crusades eventually birthed the Christian intellect, the dare to reform as Martin Luther did circa 1517. The pain felt throughout the Jewish world as Christianity's internal issues were demonized as the conniving plan of the Jews began to endanger Jewish survival and resulted in the conversions and deaths of thousands of Jews. This was the tragic price paid for the gift of the intellect, the gift of Humanism.

Oppressing the “Other:” Treatment of Jews and Witches by the Spanish Inquisition

Sarah Snider

The Spanish Inquisition stands out as one of the many dark institutions in world history; it functioned as a system of fear and paranoia for hundreds of years. Thousands of people were convicted and put to death by the Inquisition from the end of the 15th century through the beginning of the 19th century. While the Inquisition worked to hunt down and punish heretics of all sorts, including witches, it was famous for its persecutions of Crypto-Jews. Heresy seemed to be the outward focus of the Inquisition’s investigations, but it was certainly not the only impetus for the Inquisitorial system. Distinct from one another in many aspects of the Inquisition, such as the manner of harm they could potentially cause people, the viability of their confessions, and the methods of investing the charges against them, Jews and witches are similar in that they both serve as the proverbial scapegoat. Tying these two types of heretics together was their shared status of “other,” which was the inner motivation for the Inquisition’s persecution of Jews and witches. In fact, the punishments of the Inquisition themselves served to further the “otherizing” process. However, while both Jews and witches functioned as the “other,” these two groups were not the same in their manifestation of “otherness,” as Jews were able to be given a group status more easily and for a more practical purpose than witches. Regardless of these differences, the forcing of Jews and witches into the status of “other” demonstrates the sinister need of a repressive society to legitimize itself through the scapegoating of various groups.

The Inquisition

The Spanish Inquisition’s stated aim was to protect Christians by rooting out and destroying heresy, although that was not its total objective. As Isidro G. Bango explains, “The Spanish Inquisition was established...to protect the Catholic faith from the proponents of heterodox ideas, within the same faith, that might endanger it.”¹ However, he continues on to note

¹ Isidro G. Bango, *Remembering Sepharad: Jewish Culture in Medieval Spain* (Madrid:

that despite the outward purely anti-heretical goal, “the persecution of Judaism is for many researchers the root cause of the Inquisition.”² Lu Ann Homza takes this idea for granted in her collection of Inquisitorial sources, maintaining that “the Spanish Inquisition was founded to investigate, punish, and reconcile *conversos* who continued to practice Judaism,” referring to these *conversos* as “the Inquisition’s first targets.”³ Thus, although it began with a broad statement against heresy, the specific heresy in mind at the end of the 15th century was that of Judaism. This is not to say, however, that crushing Judaism ended up to be the only project of the Inquisition; by its end, many other groups, including witches, had been targeted. Also interesting to note is the fact that E. N. Adler brings up that the Inquisition was “a political rather than religious institution,” a “merciless tribunal constituted under Ferdinand and Isabella with the grudging assent of the Pope.”⁴ Thus, although it purportedly had a religious function, the fact that the Inquisition “derived its authority from the Catholic king”⁵ and not the official religious authorities, lends itself to the idea that the deeper motives of the Inquisition remain less than unequivocally religious.

Although the Inquisition may have initially formed in order to persecute Judaism, it nevertheless remained in search of heresies of all sorts, and worked to hunt out and punish witches, among other heretical groups. Marvin Lunenfeld writes that “prior to 1500 two thousand [Crypto-Jews] went to the flames throughout the kingdom.”⁶ However, “by the early sixteenth century, there had been so thorough a sweep that investigations virtually ceased, as the New Christians blended quietly into the general body of believers, and many went on to the highest careers.”⁷ The accusations of Crypto-Judaism did not totally disappear; however, they did greatly die down; it seems that there was not as much of a need for them anymore in terms of heretical practices. Nevertheless, the Inquisition lived on, searching out new targets. Witches were a notable heretical group that received

State Corporation for Spanish Cultural Action Abroad, 2003), 213.

² *Ibid.*, 213.

³ Lu Ann Homza, *The Spanish Inquisition, 1478-1614: An Anthology of Sources* (Indianapolis: Hackett Publishing Company, Inc., 2006), 13.

⁴ E.N. Adler, “Auto de Fe and Jew.” *The Jewish Quarterly Review* 13.3 (1901): 393.

⁵ *Ibid.*, 393.

⁶ Marvin Lunenfeld, “Pedagogy of Fear: Making the Secret-Jew Visible at the Public Auto de fe of the Spanish Royal Inquisition,” *Shofar: An Interdisciplinary Journal of Jewish Studies* 18.3 (2000): 82.

⁷ *Ibid.*, 82.

attention during the following centuries. Although he focuses on the trials taking place in the Italian areas of Aquileia and Concordia instead of Spanish territory, Pier Cesare Ioly Zorattini demonstrates the Holy Office's concern with witchcraft. Having searched through the trial records for instances of Jewish persecution, Zorattini notes that "the crimes that kept the Holy Office judges busiest from the second half of the 17th century to the end of the 18th, were those of witchcraft and other kinds related to the magic arts."⁸ One of the only trials around this time period that mentions a Jew, Iuseppo, is itself a witchcraft trial, as he and two other men were accused of plotting to use magic in order to "cure an ill cow."⁹ This case represents a shift from the suspicion of Jewish practices to those of witches.

The Trials

Crypto-Jews and witches both received persecution and punishment from the Inquisition; however, their trials differed in the nature of court judgment. These variations were based on the types of heresies in which each group was suspected to have engaged. Crypto-Jews were accused of crimes that included "renouncing their new faith and...reverting 'to the law of Moses and the Jews,'" as well as "committing transgressions against the precepts of the Catholic Church."¹⁰ Witchcraft involved "explicit or implicit pacts with demons, and magic that was intended to harm."¹¹ The demonic pacts represented pure heresy; however, harmful magic fell under the jurisdiction of the secular court system.¹² Thus, witches who were convicted of committing murder were not fully prosecuted by the Inquisition. This is evidenced by the Inquisitorial document from Granada in 1526, "Deliberations on the Reality and Heresy of Witchcraft," included in Homza's *The Spanish Inquisition, 1478-1614: An Anthology of Sources*. This document discusses whether murderous witches "must be exiled or relaxed [to the secular arm], or handed over to a secular court after their reconciliation [to the Church], so they may be struck with worthy penalties for their actions."¹³ The Inquisition did not have as complete control over

⁸ Pier Cesare Ioly Zorattini, "The Jews and the Inquisition of Aquileia and Concordia." *Jews and Conversos: Studies in Society and the Inquisition*. Ed. Yosef Kaplan. Jerusalem: Daf Chen Press, (1985), 228.

⁹ *Ibid.*, 230.

¹⁰ Bango, *Remembering Sepharad: Jewish Culture in Medieval Spain*, 215.

¹¹ Homza, *The Spanish Inquisition, 1478-1614: An Anthology of Source*, 153.

¹² *Ibid.*, 153.

¹³ *Ibid.*, 154-5.

witches as it did Jews, although it must be noted that, as in the case of the accused Crypto-Jew Isabel, wife of *bachiller* Lope de le Higuera, Jews might be relaxed to the secular courts, which actually carried out the death penalty.¹⁴ Even so, Jews still fell more fully under the jurisdiction of the Inquisition than witches.

Beyond their actual prosecutions, Jewish and witches also diverged in terms of their confessions. As a baseline, the general methods of the Inquisition included “denunciation, guaranteeing the anonymity of the accuser; the use of torture as a method for interrogating those who had partially confessed; and punishment, including the death penalty.”¹⁵ Accused Crypto-Jews sometimes refused to admit that they were engaging in Jewish practices, and were then tortured and convicted anyway. This was unfortunately the case with Marina Gonzalez, tried in 1494, who was charged with heresy and apostasy for her alleged relapsed Judaizing (she had confessed and then renounced her Jewish practices during an Edict of Grace period, so that she could receive a penance and be reconciled to the Church without punishment).¹⁶ According to the Inquisition’s records, insisting that she was a good Christian, Gonzalez was “stripped of her old skirts and put on the rack, and her arms and legs were tied tightly with cords...they started to pour water down her nose and throat.”¹⁷ Although she declined to confess despite continued torture, Gonzalez was found guilty; insistence upon innocence was often ignored in cases of Judaizing. Witches, on the other hand, could confess to their sins and the Inquisition would still fail to believe their own testimonies against themselves. One of the issues discussed in the aforementioned “Deliberations on the Reality and Heresy of Witchcraft” was “Whether the witches reviewed in this case really and truly commit the crimes they have confessed or whether in fact they are fooled.”¹⁸ This question stemmed from the Inquisitors’ “realization that the witches’ imagination could play a role in confessions.”¹⁹ Witchcraft was not as concrete as Judaizing in the view of the Inquisition, as Crypto-Judaism involves taking certain actions, while witchcraft may occur solely in one’s mind. This highlights the disparity of the Crypto-Jew’s trial versus

¹⁴ Ibid., 16.

¹⁵ Bango, *Remembering Sepharad: Jewish Culture in Medieval Spain*, 215.

¹⁶ Homza, *The Spanish Inquisition, 1478-1614: An Anthology of Source*27.

¹⁷ Ibid., 45.

¹⁸ Ibid., 155.

¹⁹ Ibid., 153.

that of the witch, as well as demonstrating the arbitrariness of the Inquisition's belief in personal confessions.

Another way in which the investigation of Judaizing and the pursuit of witches differed was in the collection of evidence. As noted above, Crypto-Judaism involved a level of Jewish practice that includes concrete action. It is possible to find witnesses that will testify against a Crypto-Jew for keeping Shabbat and Kashrut, not eating pork, fasting on a fast day, etc. It is also feasible to discover objects that point to Jewish practices. People also testified against others for witchcraft, and there were certain objects such as magical ointments that may be found in the possession of a witch.²⁰ However, there was another method of uncovering this strain of heresy that was not available when attempting to find out Crypto-Jews; the medical knowledge of the time was used to discern if one was actually possessed by the devil. As Andrew Keitt explains "it was widely accepted that Satanic forces wielded a powerful influence on the human body," and thus "demonic agency necessarily had a place in early modern medical theory."²¹ Keitt brings the case of Eugenia de la Torre, who was accused of falsifying her spiritual visions and being possessed by demons. As evidence of this, "it was reported that Eugenia suffered from a hugely swollen abdomen that lasted a number of months until it was relieved in a torrent of blood from her vagina," indicating that "Eugenia had been impregnated by evil spirits."²² Medicine was connected to the discovery of Eugenia's evil possession; there was no such medical involvement in cases of Judaizing.

The court cases themselves were distinct for Crypto-Jews and for witches, but, more importantly for larger society, what was at stake for each crime was also divergent. Obviously, Jews and witches could both harm Christians through their heretical beliefs. The Edict of Expulsion that forced all Jews to leave Spain supported this decree through its claim that "there were some wicked Christians who Judaized and apostatized from our holy Catholic faith, the great cause of which was interaction between the Jews and these Christians."²³ Similarly, Crypto-Jews could neg-

²⁰ Jacqueline Simpson, "Reviewed work: *The Witches' Advocate: Basque Witchcraft and the Spanish Inquisition (1609-1614)* by Gustav Henningsen," *Folklore* 93.2 (1982): 233.

²¹ Andrew Keitt, "The Miraculous Body of Evidence: Visionary Experience, Medical Discourse, and the Inquisition in Seventeenth-Century Spain." *The Sixteenth Century Journal* 36.1 (2005): 82.

²² *Ibid.*, 79.

²³ "The Edict of Expulsion." Foundation for the Advancement of Sephardic Studies and Culture, (2004).

actively influence good Christians, as could those that interacted with or were possessed by the devil, who would lead Christians astray through falsifying spiritual visions, as noted above, or merely seducing them over to evil. Witches, however, presented a whole different level of threat than just acting as a bad influence; they actually had the ability to harm others. In the aforementioned "Deliberations on the Reality and Heresy of Witchcraft," the Inquisitors discussed what to do with "the witches who really commit murders."²⁴ These witches were engaging in "harmful magic or *maleficia*...which could result in the illness or death of people or animals, as well as the destruction of property."²⁵ While Crypto-Jews could hurt only Christians spiritually, witches could nefariously cause both spiritual and physical destruction.

Jews and Witches as "Other"

Deeper than the desire to wipe out heresy lay the hidden thought process that placed the Jew and the witch as "other." This shared outsider status links the two heretical groups together. Stephen Haliczer, quoted by Olga Lucia Valbuena, argues that for a long time in Spain, "the converted Jew substituted for the witch as a pariah, reflecting through antithesis and projections society's most ingrained fears and repressed longings."²⁶ In a nutshell, Jews functioned as the "other" instead of witches for a certain period, acting as the object of the same sort of societal "projections" and serving as the "antithesis" to Spanish society. This explains the Inquisition's shift to witch-hunting after the mid-16th century, when it felt that it had done a sufficient job of wiping out Crypto-Judaism and needed a different target upon which to force the role of "other." As both groups were seen as "nefarious" and "treacherous," "the popular imagination could conflate the threat of the secretive Jew, [and] the diabolically empowered witch."²⁷ Jews and witches blended together somewhat in the collective mind of Spanish society, and this marks the easy transition from persecution of the Jew to persecution of the witch.

In fact, not only do they both serve to exert the same sort of negative power pertaining to heresy, the actual imagery of the Jew and that of the

²⁴ Homza, *The Spanish Inquisition, 1478-1614: An Anthology of Source*, 154.

²⁵ *Ibid.*, 153.

²⁶ Olga Lucia Valbuena, "Sorceresses, Love Magic, and the Inquisition of Linguistic Sorcery in *Celestina*," *PMLA* 109.2 (1994): 208.

²⁷ *Ibid.*, 208.



Francisco de Goya's *The Tribunal of the Inquisition*, circa 1816. Beginning in the Middle Ages the Church had prescribed the conical hat as a distinguishing mark for Jews. Jewish conversos were a principal concern of the Spanish Inquisition.

witch parallel one another. In a manuscript from 14th century Barcelona there appears a picture of a Jew drawn by Bishop Solomon Vidal; the Jew is hunched over with a hooked nose and a pointed hat.²⁸ This sort of image of the suspicious-looking Jew “became widespread from the thirteenth century onwards.”²⁹ Francisco Bethencourt prints a strikingly similar image of a witch on a broomstick drawn by Anton van Dyck around 1625. In the picture, the witch has an analogously hooked nose and is sporting the same manner of pointed hat; even the hunchback posture is the same as that of the Jew. These two “others” share not only negative internal qualities, but even look the same to Spanish society, strengthening their common outsider status.

²⁸ Bango, *Remembering Sepharad: Jewish Culture in Medieval Spain*, 190.

²⁹ *Ibid.*, 190.

If their similarly suspicious body types were not enough to mark the Jew and the witch as “other,” the fact that they were both forced to wear specially marked clothing when caught out by the Inquisition ensured that everyone was aware of their “other” category. Not only did these garments mark them as physically “other,” but also as ethically different, since “in the early modern period...one’s body was thought to express the moral state of its occupant’s soul.”³⁰ Clothes were an extension of the body, and therefore, by wearing different clothes, Jews and witches were known by larger society to be evil and separate groups, in addition to the fact that their unattractive bodies themselves were proof of their immorality. Interestingly enough, when the Inquisitors were discussing the punishment of witches in their “Deliberations on the Reality and Heresy of Witchcraft,” there was a dispute over whether witches should be compelled to wear *sanbenitos*, or penitential tunics. This disagreement arose because, as Dr. Micer May argued, “*Sanbenitos* are imposed only on Jews, by general custom of the Inquisition; and if Jews saw *sanbenitos* on witches, the Crypto-Jews could say they had not Judaized, but rather had been witches.”³¹ This implies that although Jews and witches were both “other,” it was actually worse to be a Jew than a witch, since, apparently, Judaizers would rather be known as witches than as those who followed the Law of Moses. This seems to have been resolved by Jews and witches wearing distinct penitential garments, differently decorated dunce caps.³² Their clothes signified their despicable deeds as well as designating them as “other.”

The ultimate punishment of the Judaizer and the witch, being burnt to death in the *Auto de Fe*, was an extremely effective way of both forming as well as concretizing their “other” status. Bango notes that the “principal goal [of the *Auto de Fe*] was to serve as an example.”³³ Lunenfeld supports this idea, insisting that “Inquisitors were well aware of the educational purpose of their public ceremonies.”³⁴ In fact, “their most definitive handbook declares: ‘The end of the trial and execution is not the salvation of the soul of the accused, but it is to achieve the public good by terrorizing the

³⁰ Lunenfeld, “Pedagogy of Fear: Making the Secret-Jew Visible at the Public *Auto de fe* of the Spanish Royal Inquisition,” 88.

³¹ Homza, *The Spanish Inquisition, 1478-1614: An Anthology of Source*, 162.

³² Lunenfeld, “Pedagogy of Fear: Making the Secret-Jew Visible at the Public *Auto de fe* of the Spanish Royal Inquisition,” 90.

³³ Bango, *Remembering Sepharad: Jewish Culture in Medieval Spain* 218.

³⁴ Lunenfeld, “Pedagogy of Fear: Making the Secret-Jew Visible at the Public *Auto de fe* of the Spanish Royal Inquisition,” 80.

people.”³⁵ However, beyond ensuring onlookers’ good behavior by establishing the final, fiery position of one who goes against the Inquisition, the Auto de Fe clearly demarcates its victims as “other.” This process serves to instill within society hatred towards the “other” as well as the fear of being or becoming “other.” Indeed, the Auto de Fe manifests itself as the process of actually engulfing the “other” in flames and incinerating it, erasing it from society completely. In this way, the Jew and the witch are further separated from the norm and demonized.

Aside from acting as a public example of what not to be, the “other” performs an even greater, albeit more subconscious, service as an essential part of the process of state-building. In the 15th century, Spaniards innovatively redefined Jews as a racial group instead of a religious one through their new focus on the need for “pure blood” of Christians.³⁶ Thoroughly “otherizing” these racial Jews, the Spanish took the first step towards state-building, since “the modern nation, then and now, perpetuates its forced unity by excluding such designated groups.”³⁷ In other words, through its rejection of Jews, Spain reinforced itself as a nation. In fact, Lunenfeld maintains that Spain was the “earliest [nation] to attempt state-formation by designing an omni-purpose “other.”³⁸ It is not surprising, therefore, that “whenever tensions damaging to the state were high, verbal and visual stratagems were mustered to bring into view during some great public spectacle the Secret-Jew.”³⁹ Using the Jew as a scapegoat was a quick and dirty way for the Spanish rulers to gain support for their modern state. However, it is important to note that while Jews as “other” were able to serve this purpose as a discrete racial faction, witches were not, as they had a different sort of group status. There is no witch nation in the same sense that there is a Jewish nation; one can banish Jews as a group, as evidenced by Spain’s expulsion of the Jews in 1492, but cannot, in the same sense, banish witches. As witchcraft has the potential to pop up just about anywhere and witches are not born into specific communities and a particular religion in the same manner as are Jews, they cannot be considered a fully equivalent “other,” nor can they play the same sort of part in the process of state-building.

³⁵ Ibid., 80.

³⁶ Ibid., 78-9.

³⁷ Ibid., 79.

³⁸ Ibid.,

³⁹ Ibid.,

Beyond consisting of a basic separate group, the “other” actually specifically presents itself as a gendered role; being “other” involved being a woman. In a section titled “The Inquisition of the Jew and the Woman, Valbuena explains that Christians “viewed women in general, and accused witches in particular, as treacherous and deceitful enough to drive men to madness or perdition”; so to, they “perceived the ‘converso as a nefarious dissembler and secret enemy of Christianity” . Indeed, “many of old Christians distrusted the authenticity of the recently converted, tending to associate them with the suspicious gender (and with witches), in keeping with Catholic anti-feminine tradition” . Crypto-Jews are seen as connected to the feminine, and therefore evil. This manifests itself in the overall percentage of women accused of Judaizing versus men charged with the same crime. In “the sex ratio of converse defendants during the first forty years of the Inquisition’s existence...female defendants apparently outnumbered male ones by a large proportion.” Homza attributes this numerical disparity to the nature of the Judaizing crimes for which the Inquisition searched, which primarily consisted of those centered on the household, such as the keeping of dietary restrictions and lighting Shabbat candles. Even if this is the case, however, it does not sufficiently explain the over-focus on female Judaizers. For instance, Isabel, wife of *bachiller* Lope de la Higuera was accused of “withdraw[ing] to pray, sometimes alone and sometimes with other women” on Saturdays,⁴⁰ something that is unconnected to the household. Prayer is not specific to female Jews; in fact, it is actually more of a communal feature of male Jews, who must gather together to pray in a group of ten men. It is more likely that the numbers of accused women are boosted because, based on the theory of the gendered “other,” the Jewish woman is doubly “other” because she is Jewish and she is woman; she is “other” in both religion and gender.

Through “otherizing” the Jew and the witch, the Spanish Inquisition both reaffirmed its purpose for existence and validated its persecution of these groups. Outwardly established to combat heresy and built on anti-Jewish sentiment underneath the surface, the Inquisition shifted from hunting down Jews to searching out all sorts of heresies, including witchcraft. Distinct in the nature of their trials in terms of the specific court that handled their crimes and punishments, the acceptance of confessions, the sorts of evidence that were available, and the harmfulness of their offenses,

⁴⁰ Ibid., 15.

Jews and witches were both seen as “other” to mainstream Spanish society. Their evil tendencies manifested themselves through their suspicious physical appearance as well as their carefully marked form of dress, which confirmed that they were, in fact, “other.” The Auto de Fe also proved to the people that these groups were “other” and therefore warranted destruction. Nevertheless, Jews and witches do not belong to the exact same category of “other.” Witchcraft was not as negative as Judaizing, and also did not serve the same purpose of state-building through the rejection of the “other.” Furthermore, woman is always more “other” than man, and thus females were more likely to be persecuted than males, as Jews or as witches (who were primarily female). Either group, regardless of its utility in terms of state-building or otherwise, allowed the members of mainstream Spanish society to validate its own self-worth in the face of the “other.” The tendency to raise oneself up through the repression of another, the “other,” can unfortunately be noticed as a trend in both interpersonal as well as societal relationships. Taking note of the dangers of “otherizing” is therefore central to the betterment of our own society. The lack of proper respect for and acceptance of another group can lead to terrible consequences; this is the fundamental lesson of the Spanish Inquisition.

Dr. Max Lilienthal and His Attempts at Jewish Educational Reform in Czarist Russia, 1842-1845

Adam Rosenberg

The arrival of the Age of Enlightenment in the early 1700s triggered rapid and drastic changes in the world's definition of human values. The rise of democracy, which had been popularized by the ideas of John Locke in the late 1600s, deeply influenced the way humanity felt about the importance of individual rights and liberties. These new ideas of equality and democracy had particularly powerful effects on the understanding of the nature of Judaism. This was most notable in Germany, where the Jews were partially emancipated.

The emergence of these innovative and enlightened credos engendered confusion from German Jews, some of whom questioned the importance of religion in an emancipated society. While many Jews dropped their Judaism for the socially acceptable options of Christianity and Deism, others decided that the most viable method of conserving the Jewish religion was to reform its "outdated" practices. Dr. Max Lilienthal (1815-1882), who later emerged as a founder of the American Reform Movement was one such visionary. In the early 1840s, Lilienthal, who had received both a traditional and secular education, attempted to expose Russian Jewry to the new ideas of the Enlightenment. After Lilienthal immigrated to America in 1845, he published his recollections of his European endeavors in the American Jewish newspaper *The Israelite* as, "My Travels in Russia."¹ These memoirs, published between 1855 and 1857, provide an invaluable account of the confrontation between the western and eastern European Jews of that time. This essay seeks to explore the suspicious reactions of most Russian Jews towards Lilienthal's progressive ideas, Lilienthal's personal attitudes towards Russian Jews as is described in his writings, and the questionable historical reliability of his published memoirs.

Dr. Max Lilienthal was born in 1815 in Munich, to an upper-middle class family descended from *hoff juden* (court Jews) and wealthy merchants².

¹ David Philipson and Max Lilienthal, *Max Lilienthal: American Rabbi. Life and Writings* (New York: Bloch Publishing Company, 1915), 159.

² Bruce L. Ruben, *Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Cen-*



Dr. Max Lienthal, 1815-1882

Perhaps because of this moderate wealth and urban lifestyle, the Lilienthal family understood the importance of secular education well before most German Jews. Coming from a religiously observant family, Lilienthal studied in the yeshiva of Rabbi Wolf Hamburger in Fürth,³ and received his semikha⁴ from Rabbi Hirsch Aub of Munich.⁵ Complementing his yeshiva education was the university education he received from the University of Munich⁶, where he completed his doctoral dissertation, entitled “Ueber den Ursprung der jüdisch-alexandrischen Religiophilosophie (The Origins of Jewish-Alexandrian Religious Philosophy)” in 1837⁷. Lilienthal was offered employment with the German civil service upon finishing his doctoral studies, but quickly turned it down when it became known that he would have to convert to Catholicism to accept the position. Because the views he espoused were still considered to be too liberal for a position in the Bavarian rabbinate, Lilienthal worked as an independent researcher of Hebrew manuscripts at the Royal Library of Munich, and published “Bibliographical Notices on the Hebrew Manuscripts at the Royal Library of

tury America (City University of New York), 1.

³ Hamburger was a staunch opponent to Reform; in 1821 Hamburger sent for his former student, Rabbi Moses Sofer, a staunch opponent of the Reform Movement, to return to Fürth and assume the position as its chief rabbi. Despite Hamburger’s requests for assistance thwarting the efforts of the Reformers to take over rabbinic leadership, Sofer refused. It is noteworthy that among Hamburger’s other notable students besides Lilienthal and Sofer were the major Reform Rabbis David Einhorn, Leopold Stein, and Joseph Aub, along with other major Orthodox fighters of the Reform Movement, Rabbis Seligmann Baer Bamberger and Abraham Isaac Rice. Philipson and Lilienthal, Max Lilienthal, 8f.

⁴ The Lilienthal family tradition was that at eleven years old, Max promised his mother Dina on her deathbed that he would become a rabbi. See Frederic Gordon O’Neill, Ernest Reuben Lilienthal and His Family (Palo Alto: Stanford University Press, 1949), 9 as quoted in Ruben, Max Lilienthal: Rabbi, Educator and Reformer in Nineteenth-Century America, 27.

⁵ Aub’s views were moderate, falling somewhere between Reform and Orthodoxy. See Frederic Gordon O’Neill, *Ernest Reuben Lilienthal And His Family. Prepared From Family Histories, Documents and Interviews.* (Palo Alto: Stanford University Press, 1949).

⁶ It was at the University of Munich where Lilienthal was exposed to the approach of Wissenschaft, an idea of the German enlightenment that is similar to the Hegelian philosophies of Bildung; (see footnote 10). O’Neill, *ibid*, 29ff.

⁷ This dissertation was more like a modern term paper than a doctoral thesis, and contained only twenty-two pages, offering a few quotations of Greek philosophy and some footnotes. Despite its lack of innovative ideas, this paper is notable in that it shows Lilienthal’s proficiency in the ideas of Wissenschaft, which he developed during his formative years studying at the University of Munich. O’Neill, *ibid*, 38.

Munich" in the newspaper, *Algemeine Zeitung des Judenthums* between 1838 and 1839. Lilienthal's articles caught the attention of the newspaper's editor, Ludwig Philippson, who recommended in 1839 that Lilienthal take a position as principal at a new Germanized school in Riga, Latvia.⁸ In 1841, after hearing about the successes of the Riga school, Russian Deputy Minister of Education Sergey Uvarov summoned Lilienthal to St. Petersburg for his help in understanding "the general affairs of the Jews in the Russian Empire."⁹ Lilienthal's educational background and philosophical outlook made him a perfect candidate to execute the task of acculturating the Jews of Russia. Lilienthal derived his educational viewpoints from the Hegelian idea of *Bildung*, which is "a process of enculturation"¹⁰ that emphasizes the formative self-development of the mind and spirit through laborious experience and exposure to science. Another important tenet of this philosophy, which was especially applicable to the Russian Jews, is that anybody, regardless of religion or social status, is able to attain literacy.¹¹ With *Bildung* as his guiding light, Lilienthal went to Russia to revolutionize Jewish education.

Until the beginning of the nineteenth century, The Jews of Europe lived a relatively self-autonomous existence, with most civic activities being governed by members of the local *kahal* (community council). While the *kahal* "strengthened the social organization of the Jews...it curbed at the same time the personal liberty of its members to a greater extent than was demanded by even the strictest social discipline."¹² For almost a millennium, the Ashkenazic Jewish communities functioned with little change in education; as a result of this insularity, when enlightenment leaders proposed plans to reform the preexisting system, global Jewry reacted in different ways. In Germany, Moses Mendelssohn's successful synthesis of German society with Judaism inspired many of his compatriots to embark on similar paths of acculturation. However, in most of the Pale of Settlement, Mendelssohn's ideas were shunned for the heretical nature of their philosophical precepts, allowing for the Hassidic movement and the *Mitnagdic-*

⁸ *Ibid.*, ff.

⁹ *Ibid.*, 244.

¹⁰ Kenneth Westphal, *The Blackwell Guide to Hegel's Phenomenology of Spirit* (UK: Blackwell Publishing Ltd., 2009), 286.

¹¹ Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century America, 1f.

¹² Simon Dubnow, *History of the Jews in Russia and Poland* (Philadelphia: The Jewish Publication Society of America, 1918), 91.

run Yeshiva to become popular amongst the Eastern European Jews. Despite opposition, enlightened German Jews still attempted to impart their Mendelsohnian philosophies on their “culturally illiterate”¹³ brethren living in Russian-ruled Poland and Lithuania. A bellicose example of a clash between these two factions occurred upon Lilienthal’s arrival in Vilna in the winter of 1842¹⁴ where amidst attempts to define his confusing and controversial agenda, each communal faction received him differently,

The adherents of the Haskalah, a nascent movement in Russia at the time, were ecstatic to hear of Lilienthal’s innovative agenda. This excitement was specifically due to the influence of Isaac Baer Levinsohn, often referred to as “The Russian Mendelssohn,” who appealed to establish a system of enlightened schools under the aegis of the government as early as 1823.¹⁵ This overall excitement was best exclaimed by the early Maskil Benjamin Mandelstamm, who recalled: “He [Lilienthal] was in my eyes virtually like a new Moses through whom God had chosen to aid his people.”¹⁶ The younger generation of Vilna Jews, who were “imbued with the progressive spirit and well versed in Hebrew, Russian, German, and partly French languages,”¹⁷ looked towards Lilienthal as a demigod and “hoped to see their greatest joys and dreams fulfilled at last.”¹⁸ Upon his arrival, Vilna’s youth jubilantly proclaimed:

Now the time has come in which a German book will no longer be called a פסול טריפה [pasul treifah: an unclean, forbidden item], and its students ignominious heretics. A better morning has come: the Schubetze [a silk caftan] will be done away with; we will support the propositions of the doctor enthusiastically; we will accept and uphold them without any conditions whatsoever.¹⁹

¹³ Lilienthal referred to the general population of Lithuanian Jews as “eminent masters in Talmud and rabbinic literature, but totally ignorant of all sciences and worldly affairs, full of prejudices and superstitions and sunk into the fathomless abyss of wild, unintelligible yea incredible beliefs.” Lilienthal, *My Travels in Russia in Philipson and Lilienthal*, Max Lilienthal, 259.

¹⁴ *Ibid.*, 258.

¹⁵ Dubnow, *A History of the Jews in Russia and Poland*, 263.

¹⁶ Israel Zinberg. *A History of Jewish Literature*, vol. 11: *The Haskalah Movement in Russia* (Cincinnati: Hebrew Union College Press), 83.

¹⁷ Lilienthal. *My Travels in Russia in Philipson and Lilienthal*, Max Lilienthal, 264.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

While the youth of Vilna looked upon Lilienthal's attempts as a harbinger for an era of opportunity, the older generation felt more pessimistically about his proposed innovations. The attitude of the general elements of Eastern-European Jewish society looked at Lilienthal and his ideals with fear and suspicion. Lilienthal wrote that: "They consider a German book פסול טריפה [sic], they regard the products of civilization as incompatible with and dangerous to religion."²⁰ Most rabbinic leaders were strongly opposed to the establishment of Haskalah schools under the auspices of the government. The traditional elements of Jewish society feared that these schools would ultimately be used for proselytizing, stating that: "the course pursued by all denominations but the Greeks proves clearly that the government intends to have but one church in the whole empire."²¹ Lilienthal originally hypothesized that these feelings of distrust were due to his German origins, ignorance of Russian politics, and youthful naiveté (At the time, Lilienthal was in his mid-twenties, making him the perfect candidate to execute a czarist political ploy).²² However, it is evident from the interactions between Lilienthal and the unnamed Maggid Meisharim of Vilna, that Lilienthal was outspoken about the purposes of his travels. He felt that the reason his system would be effective was because it had managed to enlighten the Jews of Germany, a land where:

No one dreams anymore of such an opposition as the Russian Jews make to the establishment of better schools; and having quenched our thirsts at the fountains of universal science and knowledge, we feel ourselves as good Jews, as do you, who are still frightened of the aspect of a פסול טריפה [sic].²³

From the subsequent comments of the Maggid, who "studied too frequently the works of Maimonides, Ibn Esra and their successors not to be impressed with the importance, usefulness and necessity of acquiring the knowledge of profane literature,"²⁴ it appears that the true rationale behind his coolness towards Lilienthal's attempts are based upon conjectures heard from "our merchants in Leipsic [sic.] that your brethren in Germany deal very slightly with religion, and that the religious commands are not as

²⁰ Ibid., 287

²¹ Ibid., 264

²² Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century America, 57.

²³ Lilienthal, *My Travels in Russia* in Philipson and Lilienthal, *Max Lilienthal*, 259ff.

²⁴ Op. cit

strictly observed as in this country,"²⁵ and observations of the religious downfall of Mendelssohn's followers who had converted to Christianity. As the conversation became more heated, their exchange became more emotional. Particularly important are the Maggid's views on the state of Judaism, and Lilienthal's rebuttal. The Maggid felt that the Jewish people "are ashes, all ashes; as soon as anyone touches us, the whole edifice will crumble to pieces,"²⁶ a premonition that was only strengthened upon hearing of the religious tendencies of Lilienthal's fellow German Jews. Lilienthal challenged the Maggid's pessimistic views, believing that:

You confound the eternal truth contained in our doctrines with outworn and antiquated ceremonies! They, indeed, are ashes, and whether we touch them or not, time will destroy them, as in Western Europe it has already destroyed a great deal of them. Put those ashes away, and the jewel of our creed shall shine forth in all its brilliancy. We and all mankind will be benefited by the removal of these, your ashes.²⁷

Lilienthal continued to describe the proceedings with the Maggid, which carried on in a similar way until the Maggid needed to go to sleep. Lilienthal tried to present his plans in a way that was most optimistic for the Orthodox, emphasizing:

If men of your stamp would take the subject into your own hands, men whose orthodoxy no one dares to doubt...the people, fully confiding in your integrity, will gladly abide by your decisions...While your present system is unable to stop the wheels of human progress, the course I propose to you will enable you to direct its motions and become the benefactors of your people.²⁸

However, the Maggid remained reluctant in his approval of Lilienthal's arguments, ascertaining that: "into His hands I shall confide the future of my brethren. He knows best how to accomplish His end."²⁹ ultimately God

²⁵ Ibid. The city of Leipzig Germany was home to a well-known trade fair that hosted many Jewish merchants from all around Europe. For more information on Jewish activity in this fair, see Wilhelm Harmelin, "Jews in the Leipzig Fur Industry," *Leo Baeck Institute Yearbook* 9, no. 1 (September 1, 1964), 239-66.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

would only be able to decide the correct path for humanity. The Maggid's could serve as a paradigm of the majority of Russian rabbinic leadership, who were likewise reluctant and fearful towards supporting Lilienthal's aspirations of reform.

Opposition to these innovations also took place because of community responsibilities; for the closure of the traditional heder would cause the melamdim [teachers] to be unemployed. While the melamdim, who "having been informed [of Lilienthal's visit]...were dressed in their Sabbath attire,"³⁰ initially acted with fearful reverence towards the government-backed Lilienthal, as his intent to discard their teaching positions became public knowledge, they quickly initiated a smear-campaign geared towards Lilienthal and his motives. Sure enough, this issue was discussed by Lilienthal, who felt that widespread opposition to his ideas was due to these hateful diatribes delivered to people by the melamdim of Minsk who: "were over busy in formulating this tumultuous spirit; false rumors were spread all over the city; all kinds of calumnies were related."³¹ Lilienthal's unpleasant experiences in Minsk even carried over to the more liberalized environment of Vilna, where upon his return, his second meeting with the leaders of the community was so violently protested that the fire department had to be called in to end the chaos³². It seems that this violence happened because:

The melamdim faithfully copied the example of their fellow teachers of Minsk; instigated by letters they had received from their friends in that city, they used the most inflammatory language, exciting all passions, exhorting the doubtful, encouraging the intimidated and infuriating the fanatics.³³

Upon his return, Lilienthal also ascertained that the city rabbis and Beth Din: "remained neutral; fearing for their offices they lacked the moral courage of taking my part openly, neither could they join the party of the opposition."³⁴ Later on in his reflections, Lilienthal continued his diatribe against the communal rabbis. He felt that the rabbis failed to take a stance on this issue, and that this shortcoming reflected itself in the communities'

³⁰ Ibid., 284

³¹ Ibid., 309

³² Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century America, 57.

³³ Ibid., 314

³⁴ Ibid.

response to their ambiguity:

But the hourly increasing number of the opponents did not care very much for their support; relying upon the strength they preferred to act for themselves to being checked by the precaution and circumspection likely to be exercised by the Jewish officials.³⁵

However, it is important to contrast the majority of traditional Jewry's zealous feelings towards reforming education alongside the more moderate views of Rabbi Yitzhak ben Hayyim (colloquially referred to by the masses as "Reb Itzele Volozhiner"), head of the Yeshiva of Volozhin, whom Lilienthal met in the fall of 1842. Lilienthal described Volozhiner and his son-in-law Rabbi Naftali Zvi Yehudah Berlin ("Reb Lebele")³⁶ in a much more respectful light than in his other descriptions of rabbinical personalities. Lilienthal's general tone portrays Volozhiner as "uneasy about the fate that might befall his Yeshivah when these reforms would be carried out, he never hesitated to recommend a reform of the education system."³⁷ Volozhiner's fears were rooted in the fact that the desire to attend the government-run schools would considerably reduce the amount of students attending the Yeshiva. He was also seriously concerned that unorthodox ideologies propagated by the Haskalah movement would acutely wound the effectiveness of traditional Jewish educational methods, which would reduce the output of erudite and pious Russian rabbinic scholars. This hesitancy was directly communicated to Lilienthal during Volozhiner's sermon from the night of Yom Kippur. There are two fragmental depictions of what happened on that Yom Kippur eve: those recollections of Lilienthal who described the sermon, and those of Volozhiner's son-in-law, Rabbi Naftali Zvi Yehudah Berlin (as transcribed by his nephew, Rabbi Barukh Epstein) who described Lilienthal's reactions to Volozhiner's words. According to Lilienthal, Volozhiner, after narrating a parable to prove his point, passionately emphasized:

It is with men; on the holiest Day of Atonement they appear in the House of

³⁵ Ibid.

³⁶ Lilienthal, *My Travels in Russia* in Philipson Max Lilienthal p. 344. Rabbi Berlin later relayed his recollections of Lilienthal's visit to his nephew, Barukh Epstein, who published them in his autobiography, *Mekor Barukh*. On the historical relevance of Rabbi Berlin's presence throughout Lilienthal's stay in Volozhin (see footnote 58).

³⁷ Ibid., 345.

God with the intention of beating their breasts, without shedding the tears of sincere repentance. This beating, brethren, is of no avail. The flames of your sins will consume your soul; nor will tears extinguish the wild fire of lust and transgression that devours your passionate hearts.³⁸

As mentioned before, Volozhiner's message was supposed to be a catalyst for Lilienthal to change his wayward intentions of reforming the Jewish education system, and repent. Lilienthal's personal transcription of what happened does not describe his own feelings towards Volozhiner's ethical rhetoric. In contrast, Berlin recalled that upon the completion of the sermon, Lilienthal, who had been sitting "with his tallit over his head...crying softly,"³⁹ hysterically proclaimed:

You may be suspicious of my ideas and deeds. However, I swear (Lilienthal then went on to take out a Torah scroll) by God and by this scroll that my intentions are for the sake of heaven and for the good of the people of Israel... I also swear that if I will be convinced that I have erred and will see in the minister's deeds any affront against our holy religion, I will remove myself from the entire matter.⁴⁰

There is not a historical conflict between the differences of these reports, for Berlin continued to recall the events from the point where Lilienthal stopped his own description. What is important about this episode is that after Yom Kippur, perhaps because of what happened according to Berlin, Volozhiner agreed to accept the role as the Mitnagdic delegate to the committee convened by Uvarov for the purposes of discussing the state of Jewish education⁴¹. To somewhat cool the communal criticisms directed to-

³⁸ Ibid., 353. The historical ramifications of these differences will be discussed later.

³⁹ Barukh Epstein, *Mekor Barukh* (Vilna: Romm Press, 1905), 538.

⁴⁰ Nathan Kamenetsky, *Making of a Godol* (New York: Hamesorah Publishing, 2002), 209.

⁴¹ The other members of this committee, which met in St. Petersburg from May 6 to August 27 1843, were Rabbi Menahem Mendel Schneerson (see footnote 45) of Lubavitch, Bezalel Stern (director of the Odessa modern school, see footnote 43), financier Israel Halperin of Berditchev, education minister Sergey Uvarov and Maskil Leon Mandelstamm (younger brother to the aforementioned Benjamin Mandelstamm, who ultimately succeeded Lilienthal as principal of the school upon his emigration to the United States in 1845). Lilienthal also invited Adolph Cremieux and Sir Moses Montefiore, but they declined. Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century *America*, 59.

wards Lilienthal, Volozhiner sent a letter to Lithuanian Jewry which asserted his personal rabbinical involvement with the government's actions.⁴² He arranged to send "messengers to instruct the cities on his [Lilienthal's] itinerary that he was to be received cordially."⁴³ This request ultimately proved to be successful, for upon Lilienthal's return to Minsk for the Sukkot holiday, he was "invited to be godfather of more than thirty children, all of whom were name for me."⁴⁴ Even more notable was Lilienthal's established contact with the (Habad-Lubavitch)⁴⁵ Hassidic community, who had "heretofore abstained from any contact...at last came forward to participate in the general demonstration."⁴⁶ Apparent acceptance of Lilienthal within Habad circles is even more evident from his recollections of Simhat Torah, where Lilienthal was awoken early by the leaders of the Hassidic who stated that they were: "deputed by our members to beg you to accept the Mitzvah of Chatan-Torah in our Stuebel [sic]."⁴⁷ Upon the completion of the day's festivities, the Hassidim: "assembled before the house en masse, and in honor of their Chatan Torah, began to sing and dance, to shout and to enjoy themselves in their own fashion...they departed highly pleased with their Datsch-Rebbi [German rabbi], who had treated and entertained them with so much courtesy."⁴⁸ By the fall of 1843, Lilienthal had much more communal support than he did upon his arrival, gaining even more ground when he published his polemical tract, entitled *Maggid Yeshuah*. In this pamphlet, he explained that Czar Nicholas I intended to uplift

⁴² However, some historians argue that Volozhiner's agreement was in a large part due to extreme threats concerning the consequences for noncooperation. See Michael Stanislawski, *Czar Nicholas I and the Jews: The Transformation of Jewish Society in Russia, 1825-1855*. (Philadelphia: The Jewish Publication Society of America, 1983.) 78 as quoted in Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century America, 58.

⁴³ Epstein, *Mekor Barukh*, 539.

⁴⁴ Lilienthal, *My Travels in Russia* in Philipson and Lilienthal, Max Lilienthal, 354.

⁴⁵ Rabbi Menahem Mendel Schneerson of Lubavitch (1789-1866), commonly referred to by the title of his Halakhic compendium *Tzemah Tzedek*, was the other rabbinical leader appointed to Uvarov's committee. Until this point, Schneerson and his followers refrained from having any contact with Lilienthal. See Kamenetsky, *Making of a Godol*, 215f.

⁴⁶ Lilienthal, *My Travels in Russia* in Philipson and Lilienthal, Max Lilienthal, *op. cit.*

⁴⁷ A "shtiebel" is the idiomatic title for a Hassidic synagogue. *ibid.*

⁴⁸ *Ibid.*, 358. Although Lilienthal's memoir has the Lubavitcher Hassidim as supporting Lilienthal, Schneerson was quoted after the St. Petersburg Conference of 1843 criticizing: "the intentions of the 'Berlintchikes' to poison Jewish youth with the venom of heresy." Schneerson, *The Tzemach Tzedek and the Haskalah Movement*, 57.

the Jews by improving on their education without infringing on any Jewish beliefs or laws, but stressing that the safety of the Jews depended on their cooperation with him and the rest of the commission.⁴⁹ Thus, Lilienthal's second attempts at dialogue with the local Jews proved to be much more effective than his initial endeavors.

While Lilienthal's arrival into the Pale of Settlement engendered mostly vitriolic reactions from the local residents, he himself harbored similar feelings of disdain towards his eastern-European brethren. While Lilienthal felt hopeful about the potential of future of the Russian Jews, stating that "Ben Jacob of Vilna, the editor of some very valuable books...are among but a few examples of those highly gifted men amongst our Russian brethren who, with proper training, would astonish the world by their discoveries and observations;"⁵⁰ he nevertheless referred to the more traditionally inclined Russian Maskilim, as "dirty bearded Jews who are barely touched by the rays of enlightenment," in a letter to Uvarov. This negative description led many of the Russian Maskilim to complain that one of their own compatriots would be better equipped to carry out their mission of enlightening the Jewish masses.⁵¹ The Maskilim felt that they were contemptuously overlooked by Lilienthal, who seemed to focus most of his attention on winning over the Hassidim and the Mitnagdim. These sentiments were stated clearly by the aforementioned Benjamin Mandelstamm, who was infuriated by Lilienthal's inclusion of Rabbis Volozhiner and Schneerson in Uvarov's committee. He angrily wrote:

I will tell you great things about salvations shortly to come that our fathers have not seen and our grandfathers have not heard of. Are these the salvations? Wherewith can the rabbis-these mute idols, void of every knowledge and science, help us? Perhaps they will add a seventh order to the six orders of the Mishnah, or add a fifth fringe to the four fringes on the garment now

⁴⁹ Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century America, 58.

⁵⁰ Ibid., 291.

⁵¹ Among those who felt this way were the Maskilim Benjamin Mandelstamm and Mordecai Aaron Günzburg. Günzburg, who anonymously published a pamphlet called *Maggid Emet* in response to Lilienthal's *Maggid Yeshuah*, asserted that: "among the Russian Maskilim, there is a more suitable candidate than Max Lilienthal to serve as a mediator between the government and the Jewish people, and this candidate is the director of the modern school of Odessa, Bezalel Stern." Zinberg, *A History of Jewish Literature*, vol. 11: *The Haskalah Movement in Russia*, 83ff.

ritually prescribed?⁵²

The Maskilic sensitivities were likewise offended when it became clear that Lilienthal planned to hire German teachers as staff for his school, for the Russian Maskilim believed that they would be the first to receive teaching positions⁵³. However, Lilienthal's feelings towards ghetto life were very multifaceted. From Lilienthal's first impressions of Russian Jewish life, it seems that he entered the Pale of Settlement with confused feelings; a tumultuous mixture of smugness and reverence, towards the eastern European Jews and their traditional rites. Lilienthal's feelings of ambivalence were articulated upon his entrance to Vilna, when he stated that, "I did not know what to make out of this swarming beehive of Jews...It seemed to me that I were the god Janus of old, endowed with two faces, one looking forth into our civilized age, the other looking back to the remote centuries of the Middle Ages."⁵⁴ However, Lilienthal's descriptions of various ritual moments, for example, the recollections of his first Shabbat in the ghetto of Vilna are especially poignant; Lilienthal felt: "For the first time in my life I had an idea of how a Sabbath as celebrated by our ancestors in the holy land in times of yore."⁵⁵ From Lilienthal's writings, it can be deduced that he harbored sentimental and humbled feelings for the antiquated environment of traditional Jewish communities, but abhorred the communal ignorance of secular studies on an individual level, especially cultural illiteracy based on artificial-utopian dreams of pure Talmudic scholarship; a lifestyle of:

disregarding the value of worldly sciences, considering the Torah and the numberless commentators the acme of all human wisdom, sincerely convinced that this exclusive study not only beautifies this life but prepares the immortal spirit for all the blessings in store for the Israelite in future life... their books tell them of a brilliant future that will compensate them richly for

⁵² Ibid., 87.

⁵³ On this point, Günzburg wrote, "The Germans make themselves great and reproach us that among hundreds of thousands of Russian Jews, there was not a single one to be found on whom the government can rely, until a German doctor from a distant land appeared and the government empowered him to fulfill its will. This judgment, so degrading to us, is not correct!" *ibid.*, 88.

⁵⁴ Lilienthal, *My Travels in Russia* in Philipson and Lilienthal, Max Lilienthal, 262.

⁵⁵ *Ibid.*, 273.

all of the sufferings they are enduring.⁵⁶

Ultimately in 1845, Lilienthal's systems of reform were enacted, and he mysteriously fled Europe⁵⁷ and immigrated to the United States, where he emerged as one of the founders of the American Reform Movement.

While the recollections of Lilienthal provide invaluable insight into the religious state of Eastern European Jewry during the 1840s, historians have questioned the validity of his writings for a number of reasons. Lilienthal's recollections of this period could very well have been slightly hazy, for in the years 1856-1857 he was dictating events that happened in 1841. This problem is validated even more by the differences in exaggeration between his memoirs, and his letters to one of the leading Maskilim in Vilna named Nissan Rosenthal, which were written in the 1840s. For example, take the nature of Lilienthal's relationship with Reb Itzele Volozhiner: while in Lilienthal's letter, dated September 13, 1842 he wrote: "I rejoiced greatly to be received by Rav Itzele as a beloved and precious son..."⁵⁸, the version that was published sometime between 1855 and 1857 reduced Volozhiner's affections to simply "a truly good Jew"⁵⁹, an expression that is sincere, yet majorly-subdued when compared to "a beloved and precious son." These differences of recollection are also evident in the different versions of what

⁵⁶ Ibid., 286.

⁵⁷ For various theories on why Lilienthal suddenly fled Russia, see Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century America, 60.

⁵⁸ Epstein, Mekor Barukh, 1078-1080 as quoted in Kamenetsky, Making of a Godol, 211. The same logic used in this essay to question the accuracy of Lilienthal's recollections could be used regarding Epstein's work as well, for the first edition of Mekor Barukh was published in 1905, at least twelve years after Epstein heard about this episode from his uncle, Rabbi Naftali Zvi Yehudah Berlin, the son-in-law of Reb Itzele Volozhiner (see footnote 36). That means that Epstein transcribed his secondhand account almost fifty years after it occurred, and at least twelve years after he had heard it from Berlin, who died in 1893. Although it is not relevant in Epstein's discussion of Lilienthal, it is important to note that many historians have accused Epstein of fabricating certain stories in his autobiographical work Mekor Barukh: for an analysis regarding the questionable historical legitimacy of this work, see Dr. Marc B. Shapiro, "Clarification of Previous Posts," The Seforim Blog, entry posted January 16, 2008, <http://seforim.blogspot.com/2008/01/clarifications-of-previous-posts-by.html> (accessed May 12, 2011).

⁵⁹ Lilienthal, My Travels in Russia in Philipson and Lilienthal, Max Lilienthal, 345. It is also worth noting that according to Lilienthal, Volozhiner invited him to accompany him to the mikvah the afternoon of Yom Kippur, something which was considered to be a great honor in yeshiva circles. *ibid.*, 352.

happened on Yom Kippur in Volozhin: Lilienthal, who at the time of the publication of his memoirs was in the midst of a major ideological battle with the Orthodox communal leader Isaac Leeser, probably did not want to convey that after listening to Volozhiner's speech, he himself felt some hesitancy towards what he was doing in Russia. Lilienthal's deliberate attempts at revising history were compounded by his failure to mention the coercion that he employed to get Volozhiner to acquiesce to his reformational plans⁶⁰, a tactic that was most probably employed in order to present Volozhiner as being optimistic and encouraging of Lilienthal's agenda; which would legitimize his actions in the eyes of the Orthodox Jews.

A second factor, which has major implications on the amounts of bias determined from his writing, is that Lilienthal radically changed his philosophical beliefs between the time of his Russian visit and the publication of his memoirs. At the time of his travels in Russia, Lilienthal was an acculturated yet traditional Jew, who "in spite of his exposure to this liberal nexus of ideas in the German-Jewish subculture, and especially at university, maintained his religious traditionalism for many years."⁶¹

That being said, it is also important to realize as his life moved on, Lilienthal began to understand the essence of his German-Jewish Bildung philosophies on a more radical and profound level; a comprehension that was attained from his experiences of living amongst the Hassidic and Mitnagdic Jews in Russia in the 1840s.⁶² This change being considered, it is easy to understand how Lilienthal could have altered his memories to paint a picture of the Orthodox-dominated lifestyle of Lithuania as backwards, unbearable and doomed to fail. A shift in his views is evident from the fact that in 1845, upon assuming his first pulpit, the only ritual reforms he requested to implement was an added level of decorum during synagogue services.⁶³ Eleven years later, in the midst of the publication of his memoirs, Lilienthal advocated that Judaism could not remain unenlightened and outdated when debating with traditionalist Isaac Leeser.⁶⁴ Lilienthal may have decided to describe the Orthodox Jews of Russia in a

⁶⁰ See footnote 42

⁶¹ Ruben, Max Lilienthal: Rabbi, Educator, and Reformer in Nineteenth-Century America, 327

⁶² Ibid.

⁶³ Naomi W. Cohen, *What the Rabbis Said: The Public Discourse of Nineteenth-Century American Rabbis* (New York and London: New York University Press, 2008), 101.

⁶⁴ Ibid., 102.

more negative light because of his frustrating and constant arguments with the Orthodox establishment in the United States on how to delineate the proper boundaries of adjusting to broader society.

The Age of Enlightenment was quite possibly one of the most revolutionary epochs in human history. The repercussions of Lilienthal's attempts to acculturate the Jews of Russia are being felt nearly two hundred years later. The difficulty of balancing tradition with innovation is a struggle that the Jewish people have reacted to in different ways: either by embracing it like Lilienthal, or discarding it like the more traditional Russian Jews. While there are arguments to be made regarding the different approaches to ensuring Jewish survival, Lilienthal's memoirs provide a poignant and emotional glimpse into the Russian Jewish reaction towards the Enlightenment, as well as a portrait of the youthful endeavors of a major figure in the American Jewish historical scene of the nineteenth century.

Northern Exposure: The Fisk Jubilee Singers and the Whites Who Watched Them Sing

Elie Friedman

Setting out from Nashville, Tennessee, in October 1871, eleven African Americans later known as the Jubilee Singers began a concert tour whose proceeds would save Fisk University from financial ruin.¹ But their successful mission did much more than rescue a cash-strapped school. By saving Fisk from bankruptcy, the group played a groundbreaking role in African American education. By introducing Negro spirituals to white audiences, they remade American popular culture. And, by the very act of singing in front of whites, the Jubilee Singers presented the American public with a positive image of black performers, distinct from the condescending antics of minstrels.

Examined in context, the Jubilee Singers' accomplishments provide a window into yet another story. It is one that relates more to the people surrounding them than to the group itself: the way Americans, particularly the group's liberal Northern audience, perceived blacks in the early post-Civil War years. The Jubilee Singers experienced their fair share of overt, ugly, violent racism. They also enjoyed the aid of idealistic whites who helped the recently emancipated slaves integrate into American society; those people were, in fact, largely responsible for the establishment of Fisk. But many whites fell in the middle of the spectrum. They did not subscribe to Jim Crow racism, but neither did they treat blacks as though they were simply fellow human beings with darker skin. The varying perceptions Americans held of blacks after the War profoundly influenced the reception and achievement of the Jubilee Singers.

The Jubilee Singers seemed to defy all negative stereotypes of blacks. They sought an education and, through their singing, raised the money to pay for it. Everywhere they traveled, the group's director, George White, enforced a strict moral code that tolerated no sex, drinking, or even the-

¹ They took on the title "Jubilee Singers" a few weeks into their first Northern tour in the hopes that the new name would generate more interest than "colored students from Fisk University," as they had previously been advertised. See Andrew Ward, *Dark Midnight When I Rise* (New York: Farrar, Strauss, and Giroux, 2000), 138-9.

ater.² If whites sought an alternative to the image of the licentious, hapless, and helpless black man, they could find no better model than these students. But that did not save the singers from the belligerence of America's racists. Even before the group had begun traveling north, they gave concerts in their home state to black audiences.

In June 1871, between trains on the way home from a concert in Memphis, a crowd of drunken whites attacked the group and derided their director as a "Yankee nigger school teacher."³ Nearly a year later, on the way back from their inaugural Northern tour and now a veritable sensation, the Singers nearly caused a riot by insisting that their first-class tickets entitled them to sit in the train's first-class section. The situation quieted down only when they agreed to take their rightful place in the smoking car.⁴

The Jubilee Singers did not experience racism only in the South. In the North, commercial establishments routinely refused to serve blacks. This was so even in New York City, where the Singers would make their biggest financial breakthrough. In fact, when the group arrived in the City, their hotel initially did not allow them to eat in the dining room, forcing them to eat in their rooms for a doubled fee. Only after White, the director, called the proprietor and explained the group's mission were they permitted access (Pike 103-4).⁵⁶

The American Missionary Association, the Singers' main backers headquartered in New York City, fell on the other side of the spectrum of racial attitudes. Founded by white evangelical Christians with the goal of assisting African Americans, it took on increased responsibility as slaves gained emancipation.⁷ The AMA described its mission as ridding American society of "caste" by reforming a system that "degrades people on the

² Ward, *Midnight*, 186.

³ *Ibid.*, 118.

⁴ *Ibid.*, 187.

⁵ G.D. Pike, *The Jubilee Singers and Their Campaign for Twenty Thousand Dollars* (Boston: Lee and Shepard Publishers, 1873), 103-4.

⁶ Similar incidents occurred throughout the trip. In New Haven, the city's two largest hotels would not take them in. Later, in Newark, a hotel owner refused the group service. In response, some enlightened city elders passed a resolution condemning the proprietor and even voted to integrate the city's schools. See Ward, *Midnight*, 167.

⁷ Toni Passimore Anderson, "The Fisk Jubilee Singers: Performing Ambassadors for the Survival of an American Treasure, 1871-1878" (Ph.D. diss., Georgia State University, 1997), 27-8.

FISK JUBILEE SINGERS

THE ORIGINAL

Organized Oct. 6th, 1871



UNDER EXCLUSIVE CONTROL OF

THE CENTRAL LYCEUM BUREAU,

Management:

H. H. RICH, Rochester, N. Y.
S. B. HERSHEY, Cleveland, O.
FRED. FELHAM,
Western Department, Chicago, Ill.
A. E. PALMER, So. Western Department, Kansas City, Mo.

Representatives:

New York, K. M. WHITE, Rochester, N. Y.
New England, F. W. KEW, Springfield, Mass.
Penna., Del., N. J., Maryland and Virginia, J. S. ARNOLD, Harrisburg, Pa.
Eastern Ohio and West Virginia, C. M. PARKER, Cleveland, O.
Western Ohio and Indiana, G. W. HENNEBERGER, Indianapolis, Ind.
Michigan, CHAS. T. MAINES, Flint, Mich.
Ontario, Canada, Address ROCHESTER OFFICE.

grounds of race or color.”⁸⁹ While the AMA, fearing the “speculative” nature of the Jubilee Singers’ project, did not initially back the Singers until they reached New York – and only then with intense pressure from White – it eventually lent its whole-hearted support.¹⁰ Besides providing publicity and financial help, the AMA also commissioned the accounts of G.D Pike and J.B.T. Marsh on which most historiography about the Singers is based. Written contemporaneously with the events described, these books display no detectable racism and put forward the most progressive face of post-Civil War white America.¹¹

The AMA’s progressive attitude, on the one hand, and many Americans’ virulent racism, on the other, represents the extremes of the spectrum. However, the story of the Jubilee Singers reveals the many shades that fall in the middle. White Americans willing to allow blacks into their churches to sing Christian music would certainly not warrant the depiction of incorrigible racists. At the same time, their attitudes, evidenced in the way they spoke about the Fisk student group, do not seem at all color-blind. In a society in which blacks could have been legally enslaved until only a few years earlier, and in which they still occupied the lowest rungs on the socioeconomic ladder, the average person could hardly escape some generalized conception of black people as a race.

The most egregious form of such racism is demonstrated in the use of the terms of the slave market to describe the singers. In a March 1872

⁸ Ibid., 31

⁹ Despite these high-minded words, historians have criticized the AMA for not having actually escaped the culture of racism. Some have noted racist language used by their missionaries, others condescension and paternalism, others lackadaisical attempts to pursue their agenda, and yet others the watered-down curriculum that blacks were taught in AMA schools. See Anderson, “Ambassadors,” 43-47 for a full survey of other criticisms. However, after acknowledging these points, Anderson concludes: The AMA was one of the most progressive voices for social equality of its time, never retreating from its doctrine of the equal brotherhood of mankind. Since its inception, in both word and deed, it has continued to uphold the idea of a society free from caste and prejudice... (48-9).

¹⁰ Anderson, “Ambassadors,” 70-71.

¹¹ Of course, this does not mean that the book is an unbiased account. As Anderson notes, the AMA had a financial interest in making the Singers look good (3). Moreover, their religious bent may have motivated them to exaggerate the extent to which whites could be won over by the sincerity of spiritual singing. See Pike, *Campaign*, 119. For further discussion of this evaluation of the AMA, see the previous note and Anderson’s discussion cited there.

concert in Manhattan, General Clinton Fisk, the University's namesake and a senior official in the Freedmen's Bureau, told the audience of the cash values the singers had earned as slaves: "[Thomas Rutling's] last cash evaluation was \$450...I think he would be quick to draw \$500 for continued service at Steinway Hall." As for Minnie Tate, who was once evaluated at \$350, that night's performance proved that "one thousand dollars would be cheap for her."¹² And this was no isolated incident:

Fisk's quip reflects an unfortunate strain that ran through the Jubilees' press. The Newark *Evening Courier's* review...praised Fisk and the singers but called them "picanninies" and listed them as if they were items in a slave dealer's catalogue: "Negro man, very black, six feet high, worth in old times \$2,000 under the hammer - basso..."¹³

This list continues, describing the other members of the group in similar terms. Having seen blacks portrayed as property for so long, even those who had opposed slavery still thought in terms that reflected the "peculiar institution's" degradations.

Racism also led critics to assume the Singers more fundamentally suited to certain types of singing than others. A critic for the New York *World* wrote that,

the troupe should sing camp-meeting and nigger melodies proper than venture on opera. Your colored individual is not good at Ernani but when it comes to something about the golden streets or 'de heaven gate' is all at home. It was noticeable in the singers that they had the air of well-trained monkeys when put upon the scientific, but as the programme touched a wild darky air, [they] limbered out instantly and sung with mellowness and life.¹⁴

Even if the Singers' general repertoire did not stand out musically as much as their spirituals, this writer betrays a not-so-hidden belief that this difference derived from race rather than from training or experience.

If this example was particularly offensive, there were many similar instances that, while more benign, still revealed racist assumptions. Firstly, the Jubilee Singers were no informal group of amateurs. Their director, George White, insisted on perfection in all their singing, the spirituals in-

¹² Ward, *Midnight*, 182.

¹³ *Ibid.*, 182.

¹⁴ *Ibid.*

cluded. Georgia Gordon, a member of the group, remembered that,

He would keep us singing [the songs] all day until he was satisfied that we had every soft or loud passage to suit his fastidious taste. We sometimes thought him too exacting...¹⁵

Similarly, the daughter of the University's director recalled that, "Mr. White drilled incessantly...His ear was exquisite...The minutest thing was of importance to him."¹⁶

Despite the care with which the group practiced, critics often insisted on attributing the group's appeal to some kind of raw, untrained African-ness. They described the blacks' singing like a nineteenth century sentimentalist might the noble savage: as something unencumbered by the bonds of civilized formality. Writing in the *Christian Advocate*, one reviewer began his piece by praising the good work of Fisk University "to secure for colored students a liberal education." Then, he extolled the quality of the Jubilee Singers' performance, asserting that, "They have not been trained for public concerts. Simply singing together during their late school experience, they have developed their remarkable gifts..."¹⁷ Another critic exclaimed that "they sang like mockingbirds because they could not help it."¹⁸ These listeners, all sympathetic and certainly not Jim Crow racists, could not imagine that the power of the Singers' performance did not derive from some characteristic of their race.

Complementing the view that the Jubilee Singers' performed without training, many described the spirituals themselves as the result of pure, untainted innocence. Theo F. Seward, having transcribed the Singers' spirituals for popular distribution, wrote about the origins of that musical form in the New York *Musical Gazette*:

They come from no musical cultivation whatever, but are the simple ecstatic utterances of wholly untutored minds. From so unpromising a source we could reasonably expect only a mass of crudities as would be unendurable to the cultivated ear. On the contrary, however, the cultivated listener confesses to a new charm, and to a power

¹⁵ Ibid., 115

¹⁶ Ibid.

¹⁷ "The Jubilee Singers," *The Christian Advocate*, January 11, 1872, 12.

¹⁸ Ward, *Midnight*, 185.

never before felt...What can we infer from this but that the child-like, receptive minds of these unfortunates were wrought with a true inspiration...?¹⁹

African-American music, in this conception, emerges from "child-like minds," uncorrupted by cultural sophistication. Spirituals gave whites a way to access an innocent, naïve faith they, as people of refined culture, no longer possessed.

In this vein, contemporaries repeatedly emphasized the songs' technical infractions as signs of some natural quality. William H. Goodrich, a minister from Binghamton, traced this characteristic to the spirituals' slave origins:

Their ignorance, their degradation as a class...fitted them to produce a rude, but really original utterance, in their broken English speech...Born of ignorant emotion, uncorrected by any reading of Scripture, they are confused in language, broken in connection, wild and odd in suggestion, but inconceivably touching.²⁰

The lack of cultural correctness lent these songs charm.

Of course, the administration at Fisk, as well as the Singers themselves, was well aware that they would not be performing for a color-blind society. This very knowledge led them to consider canceling the entire venture. Adam Knight Spence, principal of the University, wrote in a letter that "a good many think it beneath the dignity of the institution to be represented by a strolling band of singers, or Negro minstrels, as they call it."²¹ Indeed, papers publicizing the Singers' presence frequently referred to the Fisk students in such terms. The *New York Herald*, in reference to a concert given in the church of Brooklyn minister Henry Ward Beecher, spoke of "Beecher's Negro Minstrels." A "comic paper" printed a wood-cut of the group with a similar caption, portraying the students in the image of the minstrel parody.²²

If Spence's fears about the minstrel image were well-founded, they did not stop the Jubilee Singers from pursuing their ambitious plan. Instead, the group learned to use the image imposed upon them to their own ad-

¹⁹ "The Jubilee Singers," *Oneida Circular*, April 15, 1872, 126.

²⁰ Ward, *Midnight*, 156.

²¹ Sandra J. Graham, "The Fisk Jubilee Singers and the Concert Spiritual: The Beginnings of an American Tradition" (Ph.D. diss., New York University, 2001), 97-98.

²² Pike, *Campaign*, 111-112.

vantage. For example, AMA chronicler Augustus Pike realized that, the unkind portrayals notwithstanding, newspaper reports about actual black minstrels “served to the spread the tidings of them.”²³ The Singers aimed simply to attract people to their concerts, hoping that those entering with a skeptical attitude would find themselves overwhelmed by the power of the music. Pike believed this strategy to have succeeded admirably, writing, perhaps with some exaggeration, that “no one ever attended one of their concerts, to my knowledge, without becoming a friend, and wishing his acquaintances should enjoy the pleasure of hearing them also.”²⁴

Even the style in which the group sang reflected their knowledge of what whites expected to hear. Critics frequently mistook the Jubilee Singers’ performances for natural outbursts of religious fervor. But, if this image was inaccurate, it also reflected the way that George White drilled them in practice: “He insisted they use the same naturalness of expression they would use if they were speaking to the audience.” White sought to eliminate all harsh sounds, producing “a sweet, coherent, monolithic sound that rose and faded like a passing breeze.”²⁵ There would be no harmonies, no complication – only soloists and the group backing them.

This drive to accommodate the tastes of their audience also affected the group’s song selection. The Singers’ early repertoire had consisted primarily not of spirituals, but of songs popular among whites. One program from their first campaign featured no Negro spirituals at all.²⁶ However, they soon came to realize that white audiences enjoyed the slave songs, even if that appreciation came tinted with racism. White shifted the group’s focus almost entirely to spirituals.²⁷ Unbeknownst to him, this move would turn the Jubilee Singers from a small novelty into national and, eventually, international stars. The singers’ first big publicity break came from a January 1872 letter to the *New York Tribune* by Minister Theo L. Cuyler. He urged his readers to come listen to “the wild melodies of these emancipated slaves [that] touched the fount of tears.” The letter contained the usual racial stereotypes, calling the students “children of nature,” but gave

²³ Ibid., 112.

²⁴ Ibid., 119.

²⁵ Ward, *Midnight*, 115.

²⁶ Anderson, “Ambassadors,” 101.

²⁷ Anderson, “Ambassadors,” 101-105; Tim Brooks, “‘Might Take One Disc of This Trash as a Novelty’: Early Recordings of the Fisk Jubilee Singers and the Popularization of Folk Music,” *American Music* 18:3 (Fall 2000), 280.

the Jubilee Singers their first positive press coverage. It told the white public of an art form – the spiritual – that it could enjoy *only* by attending one of the Jubilee Singers' concerts.²⁸ The new focus on spirituals had drawn in its target audience. Within months of the letter's publication, the group had toured New York and New England, raising enough money to pay back their debts and contribute \$20,000 to Fisk.²⁹

Fisk University's Jubilee Singers introduced the Negro spiritual to white American culture. Their efforts also saved Fisk University, alma mater of such luminaries as W.E.B. Dubois, from financial ruin. Notwithstanding these extraordinary accomplishments, these students did not escape the demeaning stereotypes imposed upon their race by white America. A significant contingent of the white public did allow itself to admire the work of black artists. These whites, through the concert tickets they bought, contributed substantially to the advent of university education for blacks. But, still, none of this resulted from an absence of race-consciousness. On the contrary, what drove many whites to admire the Jubilee Singers' was a stereotyped sense of African Americans that the Fisk students seemed perfectly to fulfill. The group's ultimate success came not from trying to break down racial stereotypes, but from learning how to use them to their advantage.

²⁸ Only a few years later, the Jubilee Singers' revenue declined considerably when the market became flooded with groups from other colleges seeking to repeat Fisk's feat. But, for at least some period, the Jubilee Singers had monopolized a lucrative niche. See Anderson, "Ambassadors," 6.

²⁹ Pike, *Campaign*, 119; Anderson, "Ambassadors," 101-105, 110.

Ain't Gonna Work on Sunday: The Evolution of the Blue Laws in the United States

Chani Markel

The Blue Laws, or the Sunday-closing laws, are local and state laws which prevent individuals from partaking in certain activities on Sunday.¹ Citizens who violate the blue laws can be subject to harsh punishment, such as monetary fines or jail sentences. The blue laws were originally created to honor the Christian Sabbath, modeled after similar laws previously established in England. These laws range from prohibitions against selling alcohol or clothing to bans on common recreational activities such as hunting, horseracing, and boxing. The evolution of the blue laws is not only indicative of the decline of established religion in America, but also demonstrates trends in consumerism and the rise of religious minorities.

The origins of the Sabbath day can be traced to the Old Testament. The fourth commandment reads, "Remember the Sabbath day and keep it holy. Six days you shall do labor and all of your work, but the seventh day is a Sabbath day of the Lord your God; you shall do no work..."² While, traditionally, people of the Jewish faith follow this law according to a literal reading of the verse and designate Saturday as a day of rest, many Christian sects selected Sunday as the day of rest. The Sunday Sabbath can be traced back even earlier than the spread of Christianity; it can even be found in ancient pagan worship. It was an important tenant of the pagan faith that Sunday be designated a sanctified holiday called the "venerable day of the sun."³ However, the first writings reminiscent of blue laws were codified by Constantine, the Roman emperor, in the year 321. He wrote in his *Codex Justine* "Let all judges and all city people and all tradesmen rest upon the *venerable day of the sun*."⁴ In this codex, Constantine sanctioned the Sunday Sabbath as a holy day of rest, but allowed individuals to do some manual labor in the field. It is interesting to note that there is no men-

¹ David N. Laband and Deborah Hendry Heinbuch, *Blue Laws: The History, Economics and Politics of the Sunday-Closing Laws* (Lexington Books, 1987), 11.

² Exodus 20:8-11

³ Laband and Heindbuch, *Blue Laws*, 17.

⁴ Lib. iii, tit xii, 1.3.

tion of Christianity in this passage, and the Ten Commandments are never referenced.

Only in the year 386 was Christianity explicitly linked to Sunday prohibitions. It is written in the *Codex Theo*, "On the day of the sun, properly called the Lord's day by our ancestors, let there be a cessation of lawsuits, business and indictments." Additionally, this law forbade people from language of the law is unique because it utilizes both the pagan term "the day of the Sun" and the Christian name for Sunday, the "Lord's Day." These laws in the *Codex Justine* and the *Codex Theo* became the precedent for the official blue laws passed in England and, in the 17th century, in the British American colonies.

In 1676, the 29th parliament of King Charles II of England passed a law which prohibited all work on Sunday, the precursor for all of the subsequent blue laws legislated in the colonies and states. King Charles's original law stated:

For the better observation and the keeping holy the Lord's day...all...persons...shall on every Lord's day apply themselves to the observation by the same by exercising...the duties of piety and true religion, publicly and privately...and...no tradesmen, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary calling on the Lord's day...⁵

The first blue law passed by the British on "American soil" was in the colony of Virginia in 1610. Soon after, similar laws were enacted in all of the British colonies.⁶ These laws asserted that individuals must attend religious services on Sunday and, if they fail to do so, must forfeit 50 pounds of tobacco.⁷ It also stated that individuals are forbidden from trade and from working slaves or apprentices on Sunday.

There is much speculation as to why the Sunday-closing laws are also called the *blue* laws. Many scholars trace the name back to the colonial era. Some historians tell the following story about the New Haven colony.⁸ Prior to 1655, the laws were announced orally to citizens and were never formally recorded. After an extended period of time, it was difficult for the

⁵ Neil J. Dilloff, "Never on Sunday: The Blue Laws Controversy," *Maryland Law Review* 39 (1979-1980), 683.

⁶ Laband and Heinbuch, *Blues Laws*, 37.

⁷ *Ibid.*

⁸ *Ibid.*, 16.

courts and the citizens to keep track of all of the laws. Because the tradition of proclaiming the laws orally to the people became too cumbersome, the General Court of the colony ordered that the New Haven laws be codified and appointed Governor Eaton to record them. Allegedly, the New Haven law book was written on blue paper.⁹

Others claim that the blue laws had nothing to do with the color of the paper on which the laws were written. They assert, instead, that the name originates from the old expression “true Blue will never stain.”¹⁰ This aphorism refers to the Puritans and other religious groups who were very dedicated to their principles and beliefs. The phrase means that just as real blue dye never fades in color, so, too, a person secure with his ideology will never deviate from what he believes.

The Sunday-closing laws were heavily enforced by the parliament in the British colonies. People were frequently punished by having to pay a monetary fine, and, in some cases, citizens were even put to death. It was reported in 1876 that 223 people were put to death for disobeying the blue laws in 1819.¹¹ It is interesting to note that, in 1789, President George Washington himself was accused of breaking a blue law. The story is often told that when Washington travelled from Connecticut to New York on a Sunday to attend a religious service, Washington was challenged for breaking the “Sunday traveling laws” in Connecticut, which prohibited people from walking or riding “unnecessarily” on Sunday. Only after promising not to travel beyond the town he intended to reach in New York was Washington allowed to continue on his way.¹²

Despite the fact that there was harsh punishment enforced when citizens did not obey the blue laws, the laws were still frequently disobeyed, even in the colonial era. Some citizens considered the blue laws a sign of the lack of freedom of religion in America, a point highlighted by the prominent role the church played in society. During colonial times, church attendance was obligatory for the colonists, and the preambles of many blue laws reflected this high level of religiosity. Many of the blue laws recorded in the colonial era employed outwardly religious language, describing, for example, the need to save a man’s soul from sin.

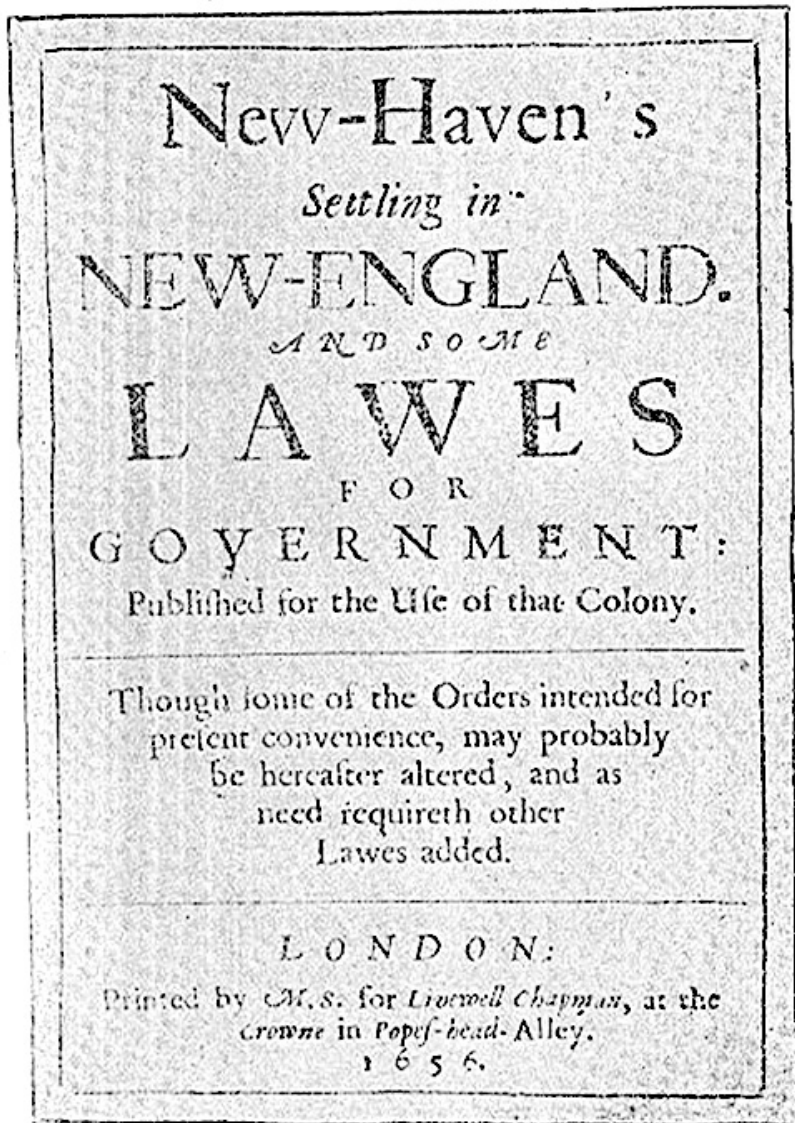
Prior to the 1880s, all of the states had some sort of blue laws, but

⁹ Ibid.

¹⁰ Ibid., 17.

¹¹ Ibid., 46.

¹² Ibid.



Earliest Book on the New Haven Colony

many restaurants, tourist centers and hotels were open on Sunday. The Sabbatharians, Christians who strictly observed the Sabbath and who were becoming a prominent force in American society, were upset about individuals travelling, dining out and conducting business on Sunday. They objected to the operation of trains and other forms of public transportation, as well as to the Post Office Act of 1810, which required mail service to run on Sundays.

In many states, Sabbatarian organizations pressured government officials to enforce Sunday closing laws that prohibited business and recreation on Sundays.¹³ Their attempts did not get too far, and, by the 1860s, the economic boom in the US “undermined the vision of the sacred Sunday.”¹⁴ As America was becoming less religiously devout and more economically prosperous, Sundays were no longer solely devoted to attending church and religious worship. The central position of the church declined significantly after 1700, and, from then, the blue laws gradually become less about religion¹⁵

By the early 20th century, many politicians campaigned for the removal of the blue laws on both the local and the state level.¹⁶ They began lobbying to allow food and non-alcoholic drinks to be sold on Sunday and then proceeded to advocate for permitting recreational activities, such as concerts, movies and professional baseball games. California was the first state to repeal its blue laws. In 1816, Oregon removed many of their blue laws, and a number of other states in the West Coast eliminated or modified their Sunday closing laws as well. In the communities where governors did not want to completely remove the blue laws because they wanted Sunday to retain its original significance as a universal day of rest, they simply added more lists of exemptions for “necessities” that could be sold.¹⁷ With automobiles becoming increasingly more popular in the 1920s and the “two day weekend” concept just emerging, people began to want to drive with their families on Sunday to restaurants and stores. Commercial districts became more lax about enforcing their blue laws. By the 1930s, shops in most states were still formally closed due to Sunday closing laws, but certain recre-

¹³ Alan Raucher, “Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview,” *Journal of Church and State* (1994), 13-33.

¹⁴ *Ibid.*, 17.

¹⁵ *Ibid.*, 47.

¹⁶ *Ibid.*, 21.

¹⁷ *Ibid.*

ational activities such as professional baseball games were beginning to take place on Sundays.¹⁸

There was much opposition to the blue laws from Orthodox Jews and other religious groups who closed their markets on Saturdays and believed that it was to their disadvantage to close on Sundays. Some Christian sects, such as the Seventh-day Adventists and the Seventh-day Baptists, also observed their Sabbath day on Saturday and did not want to abide by the Sunday closing laws. There were also economic interest groups and laborers who were opposed to work on Sundays.¹⁹ Many people thought that the Sabbatarians and their followers were old-fashioned religious bigots seeking to impose their beliefs on society. Some national magazines, such as *American Mercury*, considered the Sabbatarians hypocrites and would go so far as to openly mock them and other supporters of the Sunday closing laws.²⁰

In the 1940s, Sundays in the United States became even more commercialized. While people still attended Sunday morning church services, more individuals were beginning to use their Sundays as shopping days. More and more families were beginning to purchase their own cars and, with the rise of growing suburban communities, retailers invested in stores with large parking lots so people could drive to their shops on Saturdays and Sundays. Even in states with strict blue laws, stores tried to circumvent the technicalities of the law and sell only “necessities.” Many who lobbied against the blue laws, especially those living in suburban areas where Sunday shopping was a popular activity, argued less about the separation of church and state and more about the “economic practicalities of business.”²¹

The church and state aspect of the blue laws became more of a pressing political issue in the 1940s. Orthodox Jewish communities in the Northeast and Mid-Atlantic regions of the United States began to object to Sunday closing. Instead of arguing that the blue laws should be abolished completely, Orthodox Jews rallied for exemptions to the laws.²² Prominent Jewish organizations lobbied for a law that would exempt religious minorities from the blue laws. Their opponents argued that the Sunday closing laws

¹⁸ Ibid., 23.

¹⁹ Ibid., 22.

²⁰ Ibid., 23.

²¹ Ibid., 24.

²² Jonathon D. Sarna, *American Jews and Church-State Relations: The Search for “Equal Footing,”* (University of Notre Dame Press, 1997), 9.

represented traditional American ideals, devoid of religious devotion, and claimed that it helped laborers and working families get a much-needed day of rest. They also criticized those opposing the blue laws as being greedy individuals who were too entrenched in material culture to care about what was truly important- a universal day of rest for the country. Religious groups such as the Lord's Day Alliance and the Catholic Archdiocese, as well as patriotic groups and labor unions, banded together in support of the blue laws.²³ Throughout the 1940s, 1950s, and 1960s, the Sunday closing laws became a powerful source of contention in many states.

Having given an historical overview of the blue laws, we will now turn to a number of arguments against these rules, legal and otherwise. According to David Laband and Deborah Heinbuch, throughout the decades, there have been three different types of challenges to the legality of the blue laws: substantive, procedural and preemptive. Substantive arguments challenge the purpose of the laws, asserting that the laws "violate freedom of religion and unlawfully restrain trade."²⁴ While this type of argument is often the first one that people think of when discussing the blue laws, substantive challenges claiming that the blue laws violate freedom of religion are often unsuccessful in both the local and federal courts because the courts often find secular reasons for the blue laws.

Procedural challenges are related to the way that the purpose of the law is enacted, involving issues of due process, equal rights protection, enforcement of the laws and discrimination.²⁵ They may also claim that the blue laws are too vague and that the law doesn't give store-keepers proper notice of prohibited behavior.²⁶ Finally, preemptive arguments may argue that the blue laws go against a previously established federal statute. For example, challengers might state that the blue laws unlawfully monopolize and restrict trade.²⁷

One major argument against the blue laws is a substantive challenge based on the notion of the separation of church and state. The First Amendment's two religion clauses, the Free Exercise and Establishment Clause, are often the basis for challenges against the blue laws. Ever since the Sunday-closing laws were enacted in America, they were closely tied to the

²³ Ibid., 28.

²⁴ Dilloff, "Never on Sunday," 682.

²⁵ Ibid.

²⁶ Laband and Heinbuch, *Never on Sunday*, 49

²⁷ Ibid., 47.

church. But, because there has been a sharp decline in the importance of the church in the United States., these laws are seen as imposing religious practice on people not interested in such observance.

On the other hand, historian Winton Solberg postulates that, while the Sabbatarians did indeed support the Sunday closing laws for religious purposes, the primary purpose behind the blue laws is secular. He writes that “even during the seventeenth and eighteenth centuries, those laws served secular purposes, providing workers with a common day of rest and protecting small shopkeepers from larger competitors to operate on Sundays with hired workers.”²⁸ Solberg emphasized that the real reason for the blue laws, even in the colonial times, was to enforce a universal day of rest to benefit the entire country, devoid of religious significance. For example, Massachusetts declared in 1797 that Sunday must be designated as a day of rest because people need time to relax from their difficult labor and a day to separate from their businesses.²⁹ This notion is reflected in many of the landmark decisions of the Supreme Court that upheld the blue laws in the 1960s and 1970s.

In his article “Never on Sunday: The Blue Laws,” Neil Dilloff points out that it is not even clear what exactly a day of rest actually is. In some states, for example, employers are able to choose one day of the week as a “day of rest,” but do not specify which day it must be. When Georgia had blue laws, employers were told to close their stores either Saturday or Sunday.³⁰ There was no single, universal day of rest for family time and relaxation. In addition to this type of fragmented observance, many people living in places with blue laws would simply travel to a district without Sunday closing rules, further giving the lie to the idea a uniform day of rest.

Dilloff continues by arguing that, if the purpose for the blue laws is indeed secular, and the government imposes Sunday closing laws to enable individuals to have a day of rest from their stressful work lives, the government is essentially saying to the people that designating Sunday as a day of rest is for their greater good. But it is problematic to create laws for the “good of the people” because individuals are complex and are affected by these laws in different ways. For example, if there is a family that enjoys shopping on Sundays and moves to a state where all of the malls in the county are closed because of blue laws, they will not perceive the laws as

²⁸ Ibid., 16.

²⁹ Ibid.

³⁰ Dilloff, “Never on Sunday,” 684.

for their greater good. Rather, they would grow to resent the law because it inconveniences them and prohibits them from doing an activity that they believe is pleasurable. The same notion applies to individuals who want to put in some extra hours in their business on Sunday and Saturday and to Sabbath-observant individuals who feel that the blue laws put them at an economic disadvantage relative to their competitors. Dilloff believes the government in a poor position to dictate what is best for society at large.³¹

Aside from questioning the ideology behind the blue laws, he argues, at a more basic level, that the minor technicalities of the law can become problematic for lawmakers attempting to regulate or enforce them. In some states, there are specific rules as to how large a company must be or how many employees it must have in order to be considered a business that must close on Sundays. It is often hard to define who is considered an employer and how large a business actually is. Many states even have specific rules as to what businesses are under the jurisdiction of Sunday-closing laws- either categorized by the type of occupation or the products being sold. A big question often arises as to whether food and drugs stores should be included under the jurisdiction of Sunday closing laws.³² In most states, “necessary” items are may be sold, such as food, drugs and oil, and even some recreational items such as books, newspapers and sporting goods are permitted as well. In some counties, there are specific designated hours where items are allowed to be sold on Sundays. Legislators of the blue laws are often criticized for either being too specific or too vague when it comes to mandating what businesses or products are under the umbrella of the blue laws.³³

The first Supreme Court case to uphold the constitutionality of the blue laws was *Soon Hing v. Crowley* in 1885. According to San Francisco law in 1885, laundromats were required to close between 10:00pm and 6:00am Monday through Saturdays and could never be open on Sundays. A laundryman, Soon Hing, was arrested for working in a laundromat during the hours that the law prohibited him from doing so. Hing sued the police chief for the arrest, claiming that the city enacted the law because of prejudice against Chinese individuals. The case was later taken to the Supreme Court. Associate Justice Stephen Field argued for the majority in court, stating that the law applied to everyone doing business in the area, not

³¹ Ibid.

³² Ibid., 687.

³³ Ibid., 692.

just to the Chinese. He emphasized that he extended his decision to the Sunday-closing laws as well. While Field upheld the constitutionality of the Sunday-closing laws in San Francisco, he admitted that the courts still could not require local jurisdictions to enforce the laws.³⁴

Four landmark Supreme Court cases affirming the constitutionality of the blue laws took place in 1961. In *McGowan v. Maryland*, the legality of the Sunday-closing laws was challenged by a discount chain store in Maryland.³⁵ Using both substantive and procedural arguments, the store argued that the blue laws which prohibited the store from selling merchandise on Sunday violated their rights dictated by the First and Fourteenth amendments.³⁶ They asserted that the notion of Sunday as the Sabbath day is a Christian idea and that the real reason that the blue laws were in place was to encourage the citizens of Maryland to attend church Sunday mornings. The case went to the Supreme Court that year.

Chief Justice Earl Warren, leading the majority in court, stated that while the blue laws were first created for religious purposes, now in the 20th century they serve a different purpose. In an eight to one majority, Warren postulated that the Sunday-closing laws functioned to promote the well-being of the people in Maryland by ensuring that Sunday be a day of rest and relaxation. He claimed that the Sunday-closing laws are about “provid[ing] a day of rest for all citizens...and set[ting] one day apart from all others as a day of rest, repose, recreation, and tranquility – a day which all members of the family and community have the opportunity to spend and enjoy together.”³⁷ Associate Justice William Douglas dissented, arguing that the Sunday-closing laws violated the Establishment clause of the First amendment and that the state of Maryland had no right to restrict business on Sunday.

In another 1961 Supreme Court case, *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, the Supreme Court concluded once again that the blue laws are indeed constitutional. This case involved Orthodox Jewish merchants who closed their supermarket from sundown on Fridays until Saturday evening to honor the Jewish Sabbath. They opened their store on Sundays, violating the Massachusetts blue laws, claiming that it was impractical for them to keep it open on Saturday nights and then have to close

³⁴ Raucher, “Sunday Business,” 17-8.

³⁵ Laband and Heinbuch, *Blues Laws*, 47.

³⁶ *Ibid.*

³⁷ Dilloff, “Never on Sunday,” 683.

it early Sunday morning. The police arrested the manager of the store after responding to complaints about the store being opened on Sundays.³⁸ The case went to the federal district court, and then to the Supreme Court. In a 6-3 ruling for the state, the court, led by Chief Justice Earl Warren, argued that the blue laws are not purely motivated by religion. They argued that they are about having a public day of rest and that they do not violate the First Amendment. Just like in the previous case, Associate Justice William Douglas dissented, joined by Justices Brennan and Stewart.

Interestingly, another court cases involving Orthodox Jews fell into the hands of the Supreme Court in the same year. In *Braunfeld v. Brown*, Abraham Braunfeld, an owner of a clothing and home-goods store in Philadelphia and an Orthodox Jew, challenged the Pennsylvania blue laws. The blue laws in Pennsylvania prohibited clothing stores, among other types of businesses, from opening on Sunday. Braunfeld argued that the blue law violated his First Amendment rights, claiming that his store must be open six days a week for him to thrive economically and that he was unable to do what would be best for his business because of the blue laws which prohibited him from working on Sunday.

In a 6-3 vote in the Supreme Court, the court decided that Pennsylvania's blue laws did not violate the First Amendment's Free Exercise Clause. Justice Warren, writing for the majority, claimed that the secular reasons for the Sunday-closing laws "overrode any religious injury inflicted."³⁹ The court argued that the laws did not discriminate against Orthodox Jews specifically and did not prevent them from practicing their faith- it just gave them a slight economic disadvantage. Warren claimed that a person's freedom to practice their religion is not totally free from the government's laws and restrictions.⁴⁰

Justice Stewart dissented, stating that the Sunday-closing laws in Pennsylvania are indeed unconstitutional because they violate the Free Exercise clause. He argued that the laws make Sabbath-observant Jews choose between their religion and their economic welfare. *Braunfeld v. Brown* is a significant Supreme Court case because it once again upheld the constitutionality of the blue laws, despite the fact that the laws place an economic burden on religiously observant Jews in America.

Two Guys from Harrison v. McGinley is a fourth 1961 Supreme Court

³⁸ Raucher, "Sunday Business," 28.

³⁹ Laband and Heindbuch, *Blues Laws*, 48.

⁴⁰ *Ibid.*

case involving the Sunday-closing laws. A discount chain store called Two Guys from Harrison-Allentown, Inc. was opened Sunday from 12pm to 10pm, in violation of the state's blue laws. The store owners knew about the blue law, but were aware that the laws had not been enforced by the county for many years. In 1957, local merchants and labor unions demanded that the district attorney force the storekeepers to obey the blue laws and close on Sundays. Many employers were arrested in the store over the course of two years. Two men working in the store appealed to the courts, claiming that the blue laws infringed upon their First Amendment rights because it encouraged an established religion.⁴¹ The district court still upheld the Sunday-closing laws.

When the case finally reached the Supreme Court in 1961, Chief Justice Warren argued that the nature of the blue laws has changed over time. He contended that the laws are no longer motivated by religion and instead are intended to promote public health and the well-being of the people.⁴² Warren rejected the two men's accusations and stated that the blue laws didn't infringe on the citizen's religious practice or beliefs in any way and are not discriminatory to any specific group of people. With a 6-2-1 vote, Chief Justice Douglas argued the dissent, claiming that the law did indeed violate the Establishment Clause of the First Amendment. This court case is significant because it continues with the trend of the court upholding the constitutionality of the Sunday-closing laws in the US, claiming that the laws have secular purposes and do not infringe upon people's religion.

It is ironic that even after multiple Supreme Court cases affirmed the constitutionality of the blue laws, the number of states upholding their blue laws has gradually decreased since the 1960s. This was in part due to a shift in the public opinion opposing the blue laws. In April of 1963, the New York state legislature passed the "fair Sabbath" bill, which enabled small, family-operated stores in New York City to be exempt from the Sunday closing laws.⁴³ Though many benefited from the passing of the bill, the "fair Sabbath bill" made Orthodox Jewish storekeepers especially pleased because they were able to close their shops on Saturday and not lose out on business on Sunday. Throughout the next few decades, many employers, especially those working in large retail stores, began lobbying to repeal the blue laws. Some shopkeepers decided to open on Sundays to become more

⁴¹ Raucher, "Sunday Business," 29.

⁴² *Ibid.*, 30.

⁴³ *Ibid.*, 31.

competitive, despite their state's or district's laws.⁴⁴

By 1986, only eighteen states still had blue laws, and, since then, gradually fewer and fewer states retained their blue laws.⁴⁵ Even in states which kept their blue laws, the enforcement of the laws depended upon the eagerness of the police to implement the laws, resulting in the laws being unevenly enforced in many counties and districts. While the downfall of the blue laws was due in part to the decline in power of the church as a centralized authority, society becoming less religious is certainly not the only factor to be considered. The decline of the blue laws, especially after World War Two, came about because of religious minorities such as Orthodox Jews and Seventh-day Adventists who practiced a Saturday Sabbath. It also seems that people no longer agree with Chief Justice Warren, who claimed that the community needs a universal day of rest to thrive. The concept of a two day weekend and a more commercialized society are also important factors when analyzing the decline of the blue laws in America.

Many people in America today still do not work on Sundays, often by choice- a decision not necessarily motivated by Sunday-closing laws or religious practices. However, despite the fact that the blue laws are no longer as prevalent in the twenty-first century as they were in the colonial era, examining the history of the blue laws still has value in its own right.⁴⁶ Analyzing the evolution of the blue laws can enable one to gain insight into religious and economic trends in the country. Religious minorities were able to amend or eliminate the Sunday-closing laws in many states, demonstrating just how far our country has come in granting its citizens religious freedom. The church is no longer the dominant authority, and individuals have significantly more autonomy to lead their lives as they please. Sunday-closing laws are a testament to the extent to which America has changed since its founding. Only time will tell what the future of the blue laws will be – whether they will persist or fade into our country's history.

⁴⁴ Ibid.

⁴⁵ Ibid., 19.

⁴⁶ For more on the Blue Laws, see, generally, Marc A. Stadmauer, "'Remember the Sabbath - The New York Blue Laws and the Future of the Establishment Clause,'" *Cardozo Arts & Entertainment Law Journal*. 12:23 (1994), 213-236.

Beyond Rational Thought: Yeshiva College during the Holocaust

Adam Zimilover

In “A Scrap of Time,” Ida Fink chronicles the bewilderment that gripped the Jews as they learned of the labor camps and struggled to comprehend their sudden fate at the beginning of the Holocaust.¹ The world of European Jewry became terrifying as the Nazis’ wrath overtook Europe. The term “labor” became the more sinister “labor camp”; “round-up” came to mean grueling forced labor. If European Jews themselves did not fully grasp the horrors that awaited them, it is not surprising that Americans were unaware of the extent of the Nazi regime’s brutality.

American newspapers were unable to accurately report the ongoing events of the war. Misinformation was rampant, and conflicting stories regarding the Jews’ treatment slowly disseminated into America. *The Commentator*, the Yeshiva College official student newspaper, printed such stories, covering the events leading up to the war and the war itself. Somewhat surprisingly, Yeshiva students, a demographic that one would expect to be at the forefront of Jewish activism, did not mobilize in support of European Jewry. In fact, *The Commentator*’s coverage was not radically different than that of other national newspapers such as *The New York Times*.

Before the War

Contemporary American Jews might be surprised at how the Jewish students of that era viewed a possible American entry into World War II. Far from rallying to save the Jews of Europe, students at Yeshiva College were generally unabashed isolationists. Beginning in its third issue, *The Commentator* published editorial after editorial decrying potential American involvement in the emerging conflict in Europe:

We wish to take this opportunity of expressing editorially our direct and unmitigated condemnation of war...The student body of Yeshiva College places itself firmly and enthusiastically behind those organizations dedicated to the preservation of peace. The various student groups deserve the highest praise

¹ Ida Fink, “A Scrap of Time.” *A Scrap of Time and Other Stories*. (New York: Pantheon, 1987), Print.

for their initiatives in organizing the peace demonstrations. Yeshiva College considers itself in the ranks of the marchers.²

Similar editorials appeared through the middle of the 1930s. In commemoration of the twentieth anniversary of the end of the First World War, *The Commentator* published an editorial urging students to remain opposed to entering a new war, declaring “the same mighty death struggle of imperialism dressed in modern phraseology is with us again.”³ In fact, the editor referred to college students who would hold peace assemblies throughout the country as “enlightened.” The editorial staff urged Yeshiva students not only to reject war as an option, but to actively protest any potential American involvement. As late as 1939, an editorial asserted,

[It is] our firm belief that America will not readily become involved in another world war. We believe that anti-war feeling has run deep into the consciousness of our national life and that the events of the past few years have but served to strengthen our resolve never to become parties again to a new world war.⁴

These pacifist editorials reflect the general consensus of Yeshiva College students as well as college students around the country. *The Commentator* publicized anti-war demonstrations, including a November 1935 mass in the Student Synagogue, where three hundred students “enthusiastically participated in the Nationwide Mobilization for Peace.”⁵ Similarly, a 1936 editorial called for “a militant student front against war.”⁶ This attitude was not unique to Yeshiva, as reported in a 1935 survey by the Associated Collegiate Press. According to the survey, “college students can be expected to oppose vigorously and actively any effort to drag the United States into the general European war...”⁷ One might have assumed that due to the peril faced by European Jewry, Yeshiva students would have been more willing to support American intervention; however, this was clearly not the case.

² “The Peace Strike.” *The Commentator*, New York, April 5, 1935. Print Editorial.

³ “We Want Peace.” *The Commentator*, New York, November 9, 1938. Print Editorial.

⁴ “Our Stand Is.” *The Commentator*, New York, April 14, 1939. Print Editorial.

⁵ “Students Hail United Front Opposing War.” *The Commentator*, New York, November 21, 1935. Print Editorial.

⁶ “Our Last Stand.” *The Commentator*, New York, November 11, 1936. Print Editorial.

⁷ Survey by the Associated College Press quoted by *The Commentator* in October 1935

The students' apparent indifference to the plight of European Jewry appears to stem from a lack of recognition of the danger the Jews of Europe faced, the gravity of the anti-Semitic rhetoric of the Nazi regime. The idea that Hitler was planning to exterminate European Jewry was not known recognized until a few years later.⁸

The Yeshiva students' ignorance is demonstrated by the morbidly ironic usage of specific words in a pre-Holocaust world. They repeatedly used the word "holocaust" as a term for what would happen if America participated in another war.⁹ They called on readers to "protest against the insidious forces fomenting war and Fascism in this country."¹⁰ The disaster, to them, would not come from staying out of the war, but from entering.

The most striking example of their naiveté of the unfolding calamity is the light-hearted manner in which they repeatedly referred to the Nazis. The 1939 Purim edition of *The Commentator* had multiple jokes about the Nazis that would certainly be considered offensive today.¹¹ One headline read "Assimilators Expelled as Novel Non-Aryan Policy Takes Effect," quipping about a new "Non-Aryan policy" at Yeshiva. In jest, they referred to a "Propaganda Minister" at Yeshiva College. Another article referred to a Professor as the "uber-Fuherer" and talks about "Ratzis," apparently a contraction of Rabbi and Nazi. Similarly, a news article in March 1940 mentioned an incident in which the sophomore class woke up the dormitory yelling "The Nazis are here," "Run for cover" and "Stop, please stop."¹²

The first *Commentator* editorial acknowledging the dire Jewish situation in Europe was printed in October 1939, just seven months after the aforementioned Purim edition. The author recognized that 3,500,000 Polish Jews were in danger. He wrote,

We can about [sic] guess what will happen to those who fall under the yoke of the Nazi regime. Untold persecution lies in store for them, coupled with economic and physical isolation.

Although initially it seems that the author might have been aware of the

⁸ "The American Experience - America and the Holocaust." *PBS: Public Broadcasting Service*. Web. April 14, 2011.

⁹ See, for example, "The Peace Strike." and "We Want Peace."

¹⁰ "The Peace Strike."

¹¹ *The Purim Commentator*, New York, March 1, 1939. Print Editorial.

¹² "Sophs Dust of Siddurim and Rabbenu Tam Tephillin, Then Take Over Minyan." *The Commentator*, New York, March 13, 1940. Print Editorial.

physical danger the Jews faced, his next sentence reveals the purpose of the editorial:

Who can deny that such circumstances are abominable? But there is at least one ray of hope. Though the tactics of the Mad Dog of Europe have usually brought undying misery upon the Jewish population, at least the spirit of Judaism will not be killed. The Yeshivoh will continue to thrive and the spirit of Judaism should remain intact.¹³

While Americans recognized that the Jews of Europe were in danger, they still believed that the Jewish communities of Europe would at least remain spiritually intact. After all, Jews had lived in Europe for centuries and had survived past persecutions.

Although one might think the realization of the increasing persecution would change Yeshiva students' attitudes towards American intervention in Europe, this was not the case. The editorials advocating for America not to involve itself in the war continued even as the Jewish problems in Europe began to be recognized. Editorials and articles from 1939 to 1941 continued to promote isolationism.¹⁴ Moreover, there were no editorials that gave more than a cursory mention of what was happening to European Jewry.¹⁵

During the War

On December 7, 1941, the Japanese attack on Pearl Harbor completely altered the American attitude towards involvement in the Second World War. Following the attack, President Franklin Roosevelt famously called December 7, "a date which will live in infamy" and Congress declared

¹³ Jacob E. Goldman, "Maybe I'm Wrong." *The Commentator*, New York, October 11, 1939. Print Editorial.

¹⁴ "War is Denounced at Peace Meeting." *The Commentator*, New York, November 29, 1939. Print Editorial; "Peace Lies in Isolation, Says Villard." *The Commentator*, New York, November 27, 1940. Print Editorial; Charles Shoulson, "Maybe I'm Wrong." *The Commentator*, New York, January 8, 1941. Print Editorial.

¹⁵ The March 26, 1941 editorial section completely consists of passages from Psalms. Initially, this might appear to indicate some sort of knowledge about the Holocaust. However, it appears that this had nothing to do with the Jews. In March 1941, the United States passed the Lend-Lease Act, which gave war material to the Allied Forces. It is probable that the Psalms are included to acknowledge the growing realization that America will enter the war. This, most likely, has nothing to do with the Holocaust.

war on Japan. The declaration of war was supported by both parties and approved almost unanimously by both houses of Congress. This position reflected the newly awakened American support for war. The American isolationism of the 1930s had transformed into national widespread interventionism,¹⁶ a trend that can be traced in the issues of *The Commentator* following the attack.

Immediately following the declaration of war, *The Commentator's* isolationist leanings disappeared. In a December 1941 editorial, the editors supported the impending war effort, saying America "represents not just a free segment of the world, but all mankind which fights for freedom."¹⁷ In none of the editorials, in the months immediately following Pearl Harbor was there any mention of the Jews in Europe. It is apparent that the switch in Yeshiva students to interventionism had little to do with a sudden drive to save European Jewry. In reality, they were no different than the typical American. Ordinary Americans and Yeshiva students supported the war for the same reason: Japan had attacked America, necessitating retribution.

By mid-1942, the first reports on the devastation of European Jewry arrived. One such report was the Reigner Telegram, a message sent by a representative of the World Jewish Congress informing the Allies of the Nazi's Final Solution.¹⁸ Similar accounts began to arrive from people who had escaped from the concentration camps.¹⁹ In response to these reports, the Allies publically attacked "this bestial policy of cold-blooded extermination."²⁰ According to Dr. Jeffery Gurock, "It was known that Jews suffered terribly under Hitler's rule, but news of the Holocaust would not become public until November 1942."²¹

The Commentator published one such report, a narrative account by a Yeshiva College student who witnessed the pillage of Warsaw, recounting the destruction of the Jewish community.²² It is interesting to note that

¹⁶ Harry A. Gailey, *The War in the Pacific: from Pearl Harbor to Tokyo Bay* (Novato, CA: Presidio, 1995), 51-2.

¹⁷ "Let Freedom Ring." *The Commentator*, New York, December 18, 1941. Print Editorial.

¹⁸ Jeremy Black, *The Holocaust* (London: Social Affairs Unit, 2008), 108.

¹⁹ *Ibid.*, 109.

²⁰ *Ibid.*

²¹ Jeffrey S. Gurock, *American Zionism Mission and Politics* (London: Routledge, 1998), 314.

²² "Landa Discloses Pillage of Warsaw." *The Commentator*, New York, May 1942. Print Editorial.

this was not a front-page story in *The Commentator*. It was instead printed on the final page of news coverage in that issue. This begins a trend; even as the events transpiring in Europe became clearer, they were not widely reported in the national media or in *The Commentator*.

In 1943, the first articles and editorials appeared that directly discussed the persecution of European Jewry. From this point on, the context in which the Holocaust was mentioned was primarily related to the increasing demand for an autonomous Jewish state. This rise in Zionism was not unique to Yeshiva students; American Jews began to recognize the value of a Jewish state.²³ Even if a Jewish State in Palestine would not have saved all of European Jewry, it is likely that many could have escaped Nazi persecution by fleeing to the Jewish homeland.²⁴ In February of that year, Rabbi Mayer Berlin, president of Mizrahi, addressed a “huge gathering” and appealed to American Jewry to “throw off its cloak of smugness and indifference... the world is paying for its indifference to Jewish persecution”²⁵ However, at that point there had been no editorial in *The Commentator* that directly condemned Nazi atrocities.

An early March 1943 edition of *The Commentator* appears to signify a major change in its lack of direct coverage of the Holocaust. A special edition of the paper was published, with all articles directly relating to the potential annihilation of the Jews of Europe. One editorial noted that the world has been silent for the previous ten years but “this publication is our initial attempt...to let our brothers know that we are not forgetting them in this, their darkest hour.”²⁶ The editors specifically acknowledged that this was their first endeavor to cover the events; even they recognized that until this point, *The Commentator* had not devoted significant coverage to the Holocaust. An article headlined “European Jewry Faces Total Extinc-

²³ Melvin I. Urofsky, *American Zionism from Herzl to the Holocaust* (Garden City, NY: Anchor, 1975), 422.

²⁴ It is beyond the scope of this paper to delve into the rise of Yeshiva students’ Zionism. It is worth mentioning that from 1943 to 1948, *The Commentator* published editorial after editorial attacking anti-Zionists in the Yeshiva College community and in the greater American Jewish world. Perhaps it is possible to argue that this is directly correlated with the rapidly increasing knowledge of what was occurring to the Jews of Europe. See, for example, the March 4, 1943 special edition of *The Commentator*, where they describe Palestine as the only solution for European Jewry.

²⁵ “Praises Palestinian Courage; Demands Free Jewish State.” *The Commentator*, New York, February 4, 1943. Print Editorial.

²⁶ “Save us, O Lord.” *The Commentator*, New York, March 4, 1943. Print Editorial.

על שבר
בת עמי

ה'תש"ג
The Commentator

דברי תורה
תורה עניי

Special Issue Jointly Sponsored by Yeshiva College Student Council
and Students' Organization of Yeshiva.

VOLUME XVII

NEW YORK CITY, THURSDAY, MARCH 4, 1943

No. 3



**“Out of the Depths Have I
Cried Unto Thee, O Lord!”**

PSALMS CXXX:1

tion- Nazi Pattern of Death Threatens 5,000,000 Jews," relayed what was happening to the Jews, stating,

It is difficult for American Jews living in warmth and comfort to visualize the misery of those clinging to life in the filth, starvation, and disease-ridden inferno of Nazi dominated Europe.²⁷

The Commentator acknowledged that the concept of death camps was so foreign to American college students, that it was extremely difficult for them to comprehend. This is a potential reason for the seeming indifference of both *The Commentator* and the mainstream American media to the plight of European Jewry.

This special edition of *The Commentator* ends with an editorial reproaching Yeshiva students for their apathy to the "unparalleled plight of their people." Such detachment is understandable given the lack of coverage by *The Commentator* itself. However, the editor continued, "Has [sic] any of them (students) reacted even in a mild way to The Commentator's editorials on the Jewish situation?" It is unclear to what editorials this refers; the editors themselves recognized that this edition of *The Commentator* was their first attempt to acknowledge the situation. From an outside perspective, it might seem unfair of *The Commentator* to condemn Yeshiva students for not taking action, while at the same time publishing few editorials relating to the Holocaust. The editorial ends by calling for the "genesis of a new attitude on the part of the students." Despite this call for action, very little change occurred in *The Commentator* or in Yeshiva following this special issue.

For the remainder of 1943, there is no indication of any shift in attitude or concern at Yeshiva College. The final editorial of the spring 1943 semester once again bemoaned the students' apathy. The editorial stated,

We fear that the Yeshiva student is developing a sort of isolationism, shutting himself away from stark reality. We view with alarm the apathy displayed by many students towards questions, which vitally affect them and their people. That such an attitude is prevalent among many of our people is a sad fact; for it to manifest itself among Yeshiva students is criminal.²⁸

²⁷ European Jewry Faces Total Extinction - Nazi Pattern of Death Threatens 5,000,000 Jews." *The Commentator*, New York, March 4, 1943. Print Editorial.

²⁸ "A Parting Word." *The Commentator*, New York, May 5, 1943. Print Editorial.

The students' seeming lack of distress for the Jews in Europe is once again demonstrated. This can be shocking to the contemporary American, who might assume that Yeshiva College students would have lobbied for the United States' intervention. However, before America entered World War II, and even following the attack on Pearl Harbor, student focus was not concentrated on European Jewry.

The trend of apparent indifference of the student body continued until the end of the war. The few editorials that appeared in *The Commentator* regarding the Holocaust upheld the trend of calling on Yeshiva students to take a strong stance. The editorial staff even went so far as to headline a February 1944 editorial, "Students' Lethargy in Jewish Affairs [are] Criminal."²⁹ It is clear that, at this juncture, it was the opinion of *The Commentator* staff that the Yeshiva students were unsympathetic to the reports coming out of Europe. This, coupled with only occasional further editorials by *The Commentator*, indicates that the plight of European Jewry was not an issue at the forefront of Yeshiva College students' minds.

The New York Times

The minimal coverage in *The Commentator* can be understood in the greater context of limited coverage by a national paper, *The New York Times*. Laurel Leff, associate professor of journalism at Northeastern University and Holocaust researcher, argues in *Buried by the Times* that the Jewish publisher of the *Times*, Arthur Hays Sulzburger, intentionally downplayed the unfolding situation in Europe. Leff asserts that Sulzburger's anti-Zionistic leaning led him to remove most coverage of the genocide from the front page of the *Times*.³⁰ Leff provides many such examples, including the fact that only six times during the 2076 days of war were the Jews identified as the victims of the Nazis.³¹ Furthermore, there were very few editorials published by the *Times* that discussed the Jews and their plight.³²

Leff rejects the idea that this was due to a lack of information on the unfolding situation. She contends that even though journalists were barred from reporting directly from Europe, enough information was available

²⁹ Harold Schulweis, "Students' Lethargy in Jewish Affairs Criminal." *The Commentator*, New York, May 24, 1943. Print Editorial.

³⁰ Laurel Leff, *Buried by the Times: the Holocaust and America's Most Important Newspaper* (New York: Cambridge UP, 2005), 42.

³¹ *Ibid.*, 2

³² *Ibid.*, 3

that they should have known what was happening at the time. Leff also believes that the lack of coverage by the *Times* was not due to a disbelief of the legitimacy of the reports from Europe. The articles the paper printed did not give the impression that there was a sense of disbelief. In fact, when the *Times* did write about the events in Europe, the paper directly stated that millions of Jews were in danger from the Nazis.

Conclusion

Yeshiva College students during the late 1930s and early 1940s were somewhat apathetic towards the fate of European Jewry, perhaps because they simply did not realize the magnitude of what was occurring in Europe. However, although this appears to be the case before 1941, it does not explain why the editors of *The Commentator* repeatedly wrote about the indifference of the students even late into the War.

Another, somewhat difficult, consideration is that Yeshiva students were not concerned about the situation and willingly turned a blind eye to European Jewry. As troubling as this might be, for a few students this may have been the case. In *The Abandonment of the Jews*, David Wyman argues that if only American Jews had committed to fighting for European Jewry, perhaps hundreds of thousands of lives could have been saved. Wyman criticizes both the American Jewish and non-Jewish leadership for not speaking out against the Holocaust, even as what was happening first became apparent³³. It is disheartening to suggest that this was the case for Yeshiva students, although such a reason is a distinct possibility for their inaction.

Possibly the lack of action was due to the events of the Holocaust taking place very far from Yeshiva College. The students were college undergraduates who were focused on work, campus events, and routine college life. For them to recognize the magnitude of the situation would have been difficult, given the physical distance. It is likely that this played a role in Yeshiva students' apathy during the Holocaust.

Perhaps the most likely reason that Yeshiva College students, for the most part, did not actively protest during the Holocaust is because the entire concept was beyond rational thought. In *At the Mind's Limit*, author Jean Amery, a Holocaust survivor himself, discusses why the entire Ho-

³³ David S. Wyman, *The Abandonment of the Jews: America and the Holocaust, 1941- 1945* (New York: Pantheon, 1984), ix-xii.

locaust violates the very definition of humanity.³⁴ He believes that it was impossible to rationalize what went on at Auschwitz and the other death camps. According to Amery, it is therefore impossible to discuss intellectual reasons for the Holocaust.

The *New York Times*' review of Leff's work utilized this logic to potentially explain why the *Times* did not give much coverage to the genocide in Europe.³⁵ The idea of death camps as well as the extent of the murder was unfathomable to those hearing the horrific reports. The reviewer asks, "How could Sulzberger or any other newspaper executive have comprehended the extent of what was happening in Europe?"

Perhaps a similar consideration can explain the dearth of Holocaust coverage in *The Commentator* after 1942. For Jewish-American students, the entire concept of mass murder and concentration camps was utterly irrational. Even as they heard the harrowing reports, even when *The Commentator* finally called on them to cry out for the Jews of Europe, they were apathetic. Like most Americans, Yeshiva students remained silent.

³⁴ Jean Amery, *At the Mind's End* (Indiana UP, 1980), 1-20.

³⁵ Robert Leiter, "'Buried by The Times': Horror Story." *New York Times*, May 15, 2005. Web. Accessed April 14, 2011.

All Quiet on America's Western Front

Jordan Bass

Franklin Delano Roosevelt, the 32nd President of the United States, is well known as a champion of human rights and liberties. In his 1941 State of the Union Address, he articulated his belief that everyone in the world should enjoy the Four Freedoms (freedom of speech and worship, and freedom from want and fear). He issued executive orders to implement the New Deal, an assortment of public relief programs that would help the poor and save the economy from the Great Depression. He courageously declared war on Hitler's Germany and on the Empire of Japan during a time of global despair and died less than a month before the Allied Nations declared victory in Europe. Yet on February 19, 1942, he uncharacteristically signed United States Executive Order 9066; the order authorized the deprivation of the civil liberties of Japanese-American citizens and their internment in American "concentration camps." Feeding into the nation's hysteria and anti-Japanese sentiment, he committed crimes against humanity and left an eternal stain on his legacy.

Years before any Japanese persons immigrated to the United States, there was a pre-existing anti-Oriental sentiment in the West. Beginning in the mid-19th century, Chinese immigrants flooded the Pacific shore during the historic Gold Rush in California. They provided competition against white natives for jobs, especially in the areas of railroads and mining. The stream of immigrants from China became known as the "yellow flood," bringing with them cheap labor and strange clothing and rituals. Denis Kearney, a California nativist politician, led an anti-Chinese movement under the banner "the Chinese must go!" and started the Workingmen's Party to set in motion a Chinese Exclusion Act. His fame gradually ended when people pointed out his Irish immigrant background, but he was successful enough that the California Constitution was rewritten in 1879 with a section that was anti-Chinese, calling upon the California legislature to:

Prescribe all necessary regulations for the protection of the state...from the burdens and evils arising from the presence of aliens who are and may become dangerous and detrimental to the well-being or peace of the state, and to impose conditions upon which such person may reside in the state, and to

provide the means and modes of their removal.¹

The Chinese suffered from mob violence, and in 1882, President Chester A. Arthur succumbed to pressure from both sides of Congress and signed a bill that prohibited Chinese immigration for 10 years.²

When Japan lifted its restriction on emigration in 1895, a steady wave of immigration began with its citizens migrating to America's West Coast in the thousands. Although by 1940 the U.S. Census reported 126,948 Japanese Americans in the U.S., this number accounted for only one-tenth of a percent of the population, 90 percent of this group was concentrated in three Pacific states, and 75 percent of the total population was located in California. However, this clustering of the Japanese populace may have added to the exaggerated hatred towards its population. The Japanese that migrated to America were skilled in agriculture and experienced great success in the fields of California. They were upwardly mobile and ascended the socioeconomic ladder. These factors led to increased animosity towards the Japanese, and, in 1906, the San Francisco School Board ordered the segregation of Japanese students, placing them in Chinese schools. Matters got worse after the catastrophic 1906 San Francisco Earthquake as attacks against the Japanese spread through northern California. Though tensions quieted during World War I as Japan fought on the same side as the U.S., anti-foreigner attitudes were common after the war as the Ku Klux Klan and anti-immigration groups grew in popularity. These feelings were manifested in the Immigration Act of 1924, limiting immigration for all groups.³

The government's stance on the Japanese was quite different in its views and origin. American gunboats had opened up the country of Japan to the world in 1853, allowing independence and preventing further European colonization in East Asia. Surprisingly, the balance of power in Asia shifted enormously; within 50 years, Japan had built an impressive Navy, overwhelmed China in two wars, and opened trade with Europe. President Theodore Roosevelt's outlook towards Japan was inspired by the ideas of Social Darwinism. Though he respected the civilization and values of the Japanese, he believed that their isolation from the West had made their race inherently different from that of whites. But even more influen-

¹ California Constitution, 1879, Article XIX.

² Roger Daniels, *Concentration Camps: North America* (Florida: Robert E. Krieger Publishing Company, 1971), 1-10.

³ *Ibid.*, 5-25.

tial was Alfred T. Mahan's *The Influence of Sea Power on History*. Mahan believed that control of the seas determined a nation's place in the world, and the presidency of Roosevelt oversaw a historic growth in America's naval fleet, making it the supreme naval power in the world. When Japan beat Russia in the Russo-Japan Wars of 1904-05, most Americans were pleased with the underdog victory. However, American leaders, including Franklin D. Roosevelt, grew very weary of the Japanese and started to view them as America's main rival in the Pacific.⁴

When Japan attacked the Manchurian city of Mukden, U.S. Secretary of State Henry L. Stimson called for economic sanctions because Japan had violated the Kellogg-Briand Pact. However, the country was more concerned with the Great Depression, and President Hoover was an ardent isolationist. Thus, a settlement was made between Hoover and Stimson on a policy of "non-recognition" of Japan's conquest, although critics felt it would only alienate Japan. In January of 1933, newly elected President Franklin D. Roosevelt stated that "American foreign policies must uphold the sanctity of international treaties," endorsing publicly what came to be known as the Stimson Doctrine.⁵ Furthermore, he refused to agree to a non-aggression pact with Japan and officially recognized the Soviet Union, privately promising to support the Soviet Union in any future war with Japan. Worried by Japan's refusal to sign a naval limitation at the London Naval Conference in 1935, Roosevelt pressed Congress to approve appropriations that would allow for a naval buildup. Years before the Japanese attack on Pearl Harbor, it was clear that the U.S. was suspicious of and was preparing for a war with Japan.

As early as 1920, there was a fear within the army that Japan would someday invade the island of Hawaii. Projects were created that made plans in case of attack; in 1933, army intelligence sent a report to Secretary of War George H. Dern that predicted Japanese-American disloyalty in Hawaii.⁶ After examining a revision of the plans made by the Joint Planning Committee in 1936, Roosevelt stated:

Every Japanese citizen or non-citizen on the Island of Oahu who meets these Japanese ships or has any connection with their officers or men should be

⁴ Greg Robinson, *By Order of the President* (Cambridge: Harvard University Press, 1966), 1-13.

⁵ *Ibid.*, 46-47.

⁶ *Ibid.*, 54-55.

secretly but definitely identified and his or her name placed on a special list of those who would be the first to be placed in a concentration camp in the event of trouble.⁷

This memo stimulated more extensive government surveillance of Japanese-Americans; but more importantly, it showed Roosevelt's fear that Japanese-Americans were disloyal and a threat to national security, as well as his willingness to confine those suspected to internment camps. It should be noted, though, that his plan seemed to be directed only at those who were suspected on the basis of some sort of evidence.

By mid-1940, the United States public was still hesitant about getting involved in World War II or combating Japan. But when Japan signed the Tripartite Pact with Germany and Italy, it was clear to all that Japan had joined the Axis of Evil. Roosevelt appointed Stimson, an advocate of fighting Japan, to the post of Secretary of War. His intentions, apparently, were to prepare and garner support for actions to be taken against Japan and its conspirators in America. However, the FBI produced a 1940 report on Japanese-American disloyalty in Hawaii. It claimed, to the contrary of that which the army intelligence had reported, that only a small circle of Japanese were at risk for espionage, while most Japanese (both locally born and alien) were loyal to the United States.⁸ Roosevelt had John Franklin Carter undertake a study of the Japanese on the West Coast in the fall of 1941, and Curtis B. Munson was hired to work with him as his chief investigator. Their reports stated that 90 to 98% of Japanese Americans were loyal to the United States, and that those who would assist Japan in an attack on U.S. soil were a rare exception. These observations were consistent with those of Lt. Cdr. Kenneth D. Ringle of the Office of Naval Intelligence (ONI). His own investigations revealed that only a minority of Japanese persons would act treacherously to the U.S., and he felt that it would be more advisable to strengthen their loyalty by involving them in the war effort.⁹

After hundreds of Japanese aircraft attacked the U.S. naval base at Pearl Harbor on the morning of December 7, 1941, the U.S. became filled with anti-Japanese sentiment and calls for revenge. Newspapers made up

⁷ Franklin D. Roosevelt, Memorandum for Chief of Naval Operations, PSF 197.

⁸ Greg Robinson, *By Order of the President* (Cambridge: Harvard University Press, 1966), 62.

⁹ Eric L. Muller, *American Inquisition* (Chapel Hill: University of North Carolina Press, 2007) 15-16.

stories of Japanese treason and incited racial violence. The FBI rounded up 3000 persons who were considered “dangerous”; half of them were Japanese.¹⁰ In the weeks that followed, Carter, Munson, and Ringle sent reports to the White House indicating that there was still no Japanese problem and that they had not changed their minds on the situation. Hostility against the Japanese was growing, however, and five Japanese men had committed suicide in California just days after Pearl Harbor due to the embarrassment of being suspected of disloyalty. Nevertheless, the Western Defense Command (WDC) led by General John L. Dewitt pressed Roosevelt to allow for the internment of those persons that were deemed to be disloyal. He was supported by Provost Marshal General Allen W. Gullion, but both were opposed to the idea of wholesale internment. When the President told Secretary Stimson to allow the Army to act as they thought necessary as long as there was “military necessity,” their aspirations for mass evacuations developed.¹¹

On February 19, 1942, President Roosevelt signed Executive Order 9066, granting General DeWitt and Military Commanders full discretion to pretty much do as they pleased. The order stated:

I hereby authorize and direct...any designated Commander...to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded.¹²

Although, at the time, Roosevelt may not have realized that DeWitt’s designated military zones would cover all of California and large portions of Oregon, Washington, and Arizona, and exclude all American citizens of Japanese origin, he is nevertheless responsible for the outcome. The imprisonment of over 100,000 innocent people was a direct consequence of his order. Though reports and findings that he commissioned indicated that there was no evidence of espionage or plans to sabotage America’s national defense, Roosevelt gave enormous powers to a general whose reporting of a rumor of a major Japanese uprising was discredited only weeks after the attack on Pearl Harbor. And, in DeWitt’s recommendation

¹⁰ Roger Daniels, *Concentration Camps: North America* (Florida: Robert E. Krieger Publishing Company, 1971), 32-36.

¹¹ *Ibid.*, 65.

¹² Executive Order 9066.

for the relocation of Japanese Americans, he stated that Japanese-Americans were members of an “enemy race” and that their “undiluted racial strains” made them intrinsically Japanese and a danger to national security.¹³ By signing Executive Order 9066, Roosevelt confirmed that he shared DeWitt’s Social Darwinist views and racial prejudices, and that they were what led him to act, not rationality or evidence.

In March of 1942, DeWitt established Military Areas #1 and #2, consisting of Washington, Oregon, California, Arizona; 933 prohibited zones were later added to the list. The Wartime Relocation Authority (WRA) was created to set up relocation centers, and the Wartime Civil Control Administration (WCCA) was formed to handle the round-up of Japanese Americans who were put in Assembly Centers before being transported to those relocation centers. On March 27th, a curfew was established in Military Area #1, and Japanese Americans were forbidden to leave (until they were relocated). A trial evacuation was performed on the 54 Japanese families living on Bainbridge Island, Washington; they were told to take whatever they could carry and move to an Assembly Center in Puyallup, Washington with only a few days’ notice. Similar evacuations followed, and, by November 3, 1942, 119,803 Japanese men, women, and children had been moved into ten relocation centers in desolate areas in California, Arizona, Idaho, Utah, Wyoming, Colorado, and Arkansas.¹⁴ Without enough time to pack or sell their lands and businesses, the Japanese Americans of the West Coast would be kicked out of their homes for over two years, stripped of their civil rights and financial resources. The evacuees lived in poor conditions; sanitation, according to the United States Public Health Service was bad. Kitchens lacked cleanliness, hospitals lacked proper supplies, housing units were too small for their occupants, and bathrooms didn’t function properly. These “inmates” were surrounded by barbed wire and armed sentries. The biggest problem, however, was a lack of medical personnel, which resulted in delays in treatment. Evacuees worked for low wages that didn’t provide enough to meet their own minimal needs. The restrictions put on the prisoners by the military police also resulted in great discontent. In one case, 32 children under the age of 11 were arrested for sledding down a hill just outside the camp, leading to protests inside the camp. Though, in

¹³ Greg Robinson, *By Order of the President* (Cambridge: Harvard University Press, 1966), 85.

¹⁴ Roger Daniels, *Concentration Camps: North America* (Florida: Robert E. Krieger Publishing Company, 1971), 74-96.



Manzanar internment camp from Guard Tower, view west.

general, the behavior of the residents was characterized by placid obedience, some situations brought about demonstrations and riots.

Life in the relocation centers had a lasting impact on the future of Japanese Americans. Generational conflicts developed as the *Sansei* (third generation Japanese Americans who were born in camps) grew up angry at their parent's generation for complying with the government. And within the camp, the *Kibei* (American born Japanese citizens who had gone to Japan for education and employment) were targeted and blamed for the situation because of their loyalty to Japan. Normal family life was impossible within the camps; there was a breakdown of family structure as familial roles were lost. For example, fathers could not play the role of breadwinners. The scars of incarceration are still felt as many are generally distrustful of white society, while others blame themselves for what happened, as

rape victims frequently do. Many still feel racially inferior, and others went on to identify with the aggressor by leaving their culture and language behind. According to Dr. Christie W. Kiefer, a cultural gerontologist and author of sociological studies of Japanese-Americans, "Persons who have been tormented for some supposed error or deficiency often end up agreeing with the definition of themselves offered by their tormentors and trying to atone for their error."¹⁵

Matters became more complicated when, after Japan was no longer a threat to the West Coast by the end of 1942, a loyalty review program was established. The evacuees were asked to express their complete loyalty to the United States. On the one hand, they wished to comply, hoping that they would be released, but at the same time they did not want to surrender their feelings of outrage for the oppression and personal injustice that they endured. And although it was determined in the spring of 1943 that there was no longer a military justification to detain the Japanese, they were not permitted to return to the West Coast until December of 1944. The delay has been attributed to Roosevelt's unwillingness to end the exclusion until after the November elections of 1944, since the freeing of the Japanese could harm his chances in the Western states.¹⁶

Franklin D. Roosevelt, by signing Executive Order 9066, and allowing the detainment of 100,000 Japanese-Americans on the basis of their race, without any evidentiary proof or reasonable suspicion, committed multiple crimes against humanity, as defined by the Rome Statute of the International Criminal Court. For one, Roosevelt's Order violated Article 7, 2(d) which states:

'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.¹⁷

Additionally, Article 7, 2(g) was violated, as it states:

'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or

¹⁵ Ibid., 298.

¹⁶ Ibid., 12-14,

¹⁷ *Rome Statute of the International Criminal Court*

collectivity.¹⁸

The Japanese were surely transferred and displaced from their rightful locations on the West Coast, detained for over two years in isolated relocation centers. The issue, though, is the grounds on which the U.S. government acted. If the sole reason for the government's depriving Japanese citizens was DeWitt's rationale, that 'the Japanese race is an enemy race' and 'the racial strains are undiluted,'¹⁹ then it is undeniable that the government stripped its citizens of its fundamental rights due to their identity as a group. Yet there was another important rationalization of the exclusion act.

The other justification at the time was that of military necessity. However, in his February 1942 recommendation for the Executive Order, General DeWitt's rationale lacked any facts or evidence that necessitated military action. The Supreme Court in *Korematsu v. United States* upheld the constitutionality of the exclusion order, giving deference to military authority to determine military interests at the expense of individual rights. But only a year later, the Supreme Court struck down the imposition of martial law in Hawaii in *Duncan v. Kahanamoku*. This, according to the *Commission on Wartime Relocation and Internment of Civilians* (CWRIC), "made clear...that loyal citizens in loyal territory are to be governed by civil rather than military authority and that when the military assumes civil functions in such circumstances it will receive no deference from the courts in reviewing its actions."²⁰ Furthermore, the Supreme Court, in *Ex parte Endo*, ruled that an admittedly loyal American citizen could not be held against her will in a relocation camp. The CWRIC, established by Congress in 1980, declared that military necessity did not warrant the exclusion of the Japanese from the West Coast, as well. Thus, there were no grounds on which President Roosevelt would have been permitted to order such an act that deprived citizens of their right to *habeas corpus* spelled out by the Constitution and forcibly transfer them from their lawful residences. His actions were in violation of current international law, and can be considered to have been crimes against humanity.

President Roosevelt was surely not the only one to blame for the internment of the Japanese during World War II. Congress passed a law that

¹⁸ Ibid.

¹⁹ *Personal Justice Denied: Report Of The Commission On Wartime Relocation And Internment of Civilians* (Washington, D.C., 1982) 6.

²⁰ Ibid., 236-239.

made it a criminal act to violate Executive Order 9066, and the Supreme Court upheld its constitutionality in the context of war in *Korematsu v. United States*. But, as Commander in Chief, Roosevelt should never have allowed racial prejudices and the American public's "yellow peril" hysteria to influence him, especially when there was not a single documented act of espionage, sabotage, or 5th Column activity by Japanese in the U.S. Roosevelt could have raised the question to his cabinet, refuted the rumors, and taken measures to calm the West Coast public. Instead, he committed crimes against humanity with the signing of Executive Order 9066, tarnishing his legacy, and leaving a generation of innocent civilians scarred by their American experience.

And Justice for All: The Validity of the Nuremberg Defense during the Vietnam War

Daniel Steinberg

There were occasions, I believed, when a nation was justified in using military force to achieve its ends... and I told myself that in such circumstances I would've willingly marched off to the battle. The problem, though, was that a draft board did not let you choose your war.

- Tim O'Brien¹

The Vietnam War sparked a period of great division in America. To support the war effort the United States employed an unpopular draft. Many Americans shared Tim O'Brien's sentiments regarding the draft, and were willing to act on their consciences. Draftees and anti-war activists sought methods to challenge the Selective Service Act. Some resisters argued that participating in the Vietnam War amounted to war crimes according to international treaties or laws. This claim became known as the Nuremberg Defense. Judges often refuted the practical application of the Nuremberg Defense, a highly politicized claim, while accepting its theoretical application. However, in their reluctance to make a political statement, courts did not properly address the merit of the Nuremberg Defense as a valid legal claim during the Vietnam War.

All is not fair in love and war?

Ideas defining the proper conduct of war began to appear in the mid-nineteenth century. During the American Civil War, Francis Lieber formulated what are generally regarded as the first codification of the customary laws of war, the Lieber Instructions. Shortly thereafter, European powers ratified the first Geneva Convention, the first contract between nations proscribing certain methods a state could use to conduct a war. Its primary significance, similar to that of the Lieber Instructions, was that major powers agreed that certain actions must be restricted during wartime.²

¹O'Brien, Tim. *The Things They Carried* (New York: Houghton Mifflin, 1998), 44.

²"Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal." International Humanitarian Law Research Initiative. n.d. <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083> (accessed April 14, 2011).

The next seventy years saw the ratification of more international treaties. However, the World Wars saw an abrogation of these treaties. The horrors of WWII refocused the need for a new series of treaties regarding war. Concurrently the international community established the United Nations with the aim of the promotion of world peace. Powerful international treaties, such as the founding charter of the UN, decried wars of aggression. The Charter of the UN states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."³ The UN charter similarly called on member states to intervene politically and militarily when states violate these provisions.

The legality of American involvement in Vietnam hinged on the interpretation of relevant treaties. Of specific importance were the status of the 1954 Geneva Accords and the legitimacy of the inclusion of South Vietnam's territory in Southeast Asian Treaty Organization (SEATO).

Vietnam: An Illegal War?

Positioning the Vietnam War in the mind of the public became a matter of utmost importance to anti-war protesters. Eventually jurists began questioning the legitimacy of the war, often writing articles dealing expressly with the legal implications of the Vietnam War. A primary legal point of contention between pro- and anti-interventionists often primarily revolved around the interpretation of the 1954 Geneva Accords. However, the arguments spanned the entire gamut of possible issues from constitutional authority to genocide.

The Department of State provided many of the most cogent defenses of the Vietnam War.⁴ They argued that the primary justification for intervention was the idea that America was coming to the aid of friendly state defending itself from an invasion. Accepting the premise of South Vietnam's independence and American treaty obligations, they justified military action as part of the internationally recognized right to mutual defense treaties. These arguments are predicated on the notion that SEATO placed obligations on the US, coupled with the idea that North Vietnam and South Vietnam were separate states. In other words, the State Departments claim was that there was a substantive alliance between the United States and the

³ "Charter of the United Nations"

⁴ Department of State, Office of the Legal Advisor

South Vietnamese government that was called into action by the aggression of North Vietnam. The State Department highlighted North Vietnam's direct aid to the Vietminh as an example of their belligerence. American officials felt the aid constituted a violation of the 1954 Geneva accords; the accords demarcated locations where "aggressive policies" could no longer be carried out. The infiltration of North Vietnamese guerrillas violated the terms of the treaty giving just cause for American involvement. The prior foreign involvement employed by North Vietnam gave the United States justification to "counter-intervene" in what otherwise might have been labeled a civil war.

The State Department furnished a just cause for the South Vietnam's defiance of the Geneva Convention of 1954 which mandated elections to determine the political nature of a future Vietnamese state. South Vietnam canceled the elections due to the supposed inability of North Vietnam to hold free elections. Consequentially, they feared that any attempt at an open election would be tantamount to handing South Vietnam over to the "oppressive communist regime" in the north. Not all of the issues that the State Department had to deal with were purely external; many were vexed by the President's decision to go to war without formally consulting Congress for a declaration of war.

Crucial to American involvement was the justifying involvement in Vietnam without a declaration of war. The State Department argued that a declaration of war was not necessary because "Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization." Further, they argued that in no way did the United Nations charter require declarations of war, and that the formality of a declaration of war has no impact in international law on the legality of being involved in such a conflagration. However anti-war activists hotly contested the arguments presented by the State Department; none of the issues were as cut and dry as they wished to make them appear.

Opponents of the war vehemently denied the State Department's arguments. A critical issue was the alleged violation of treaties by North Vietnam. Activists claimed that the State Department's arguments, especially those mentioning terms of the Geneva Conference, were grossly inaccurate. Neither the Americans, nor the South Vietnamese signed the Geneva Conference of 1954; protesters argued that "it hardly seems arguable that it

[the United States] is bound by them.”⁵ By this logic America had no obligation to interfere and, activist argued, several reasons not to.

Activists cited the lack of influence the North Vietnamese were alleged to have over the Viet-Cong. North Vietnam’s control over the Viet-Cong had direct ramifications as to the status of the war. If the North Vietnamese were sponsoring the Viet-Cong, then the conflict could be called that of belligerent nations; this would be a conflict that the United States could enter to support its ally. However, if the Viet-Cong were primarily local forces, then the corresponding violence would have to be classified as a revolution. Contemporary legal theories believed that a state had the right to self-determination; intervention by foreign nations had no place in a popular civil war.⁶

The State Department’s contention that North Vietnam was incapable of having a free election appeared to be no more than a hurdle placed by the South. At no point did Saigon request a survey of the North’s actions preventing elections, nor consult the Hanoi government to create a better system of ensuring the fairness of election. “Its failure to do so suggests that South Vietnam, not North Vietnam, created the obstacles to elections.”

Most decisively, in “Vietnam and International Law” the Lawyers Committee on American Policy towards Vietnam argued that not only was there no obligation to help South Vietnam defend itself from the Viet-Cong, it was illegal to do so. The crux of the Lawyers Committee’s argument is that “there is not and never has been a separate state of South Vietnam.”⁷ In other words, the Geneva Accords of 1954 simply determined that there was to be two independent Vietnam zones; when North Vietnam sent infiltrators to the south it was an act of civil war to which the United States had no right to interfere. Consequently, American involvement constituted a violation of numerous international treaties.

I can’t follow orders: The Nuremberg Defense

The Nuremberg Trials inhabit a premier moment in the formulation of international law. Justice Jackson famously stated in his opening statement

⁵ Landsberg, Brian K. “The United States in Vietnam: A Case Study in the Law of Intervention.” *California Law Review*, Vol. 50, No. 3 (Aug., 1962.), 519

⁶ *Ibid.*

⁷ Johnson, D.H.N. “Aquina, Grotius, and Vietnam.” In *The United States in Vietnam: A Case Study in the Law of Intervention*, volume 2, by Richard A. Falk. (Princeton, NJ: Princeton University Press, 1969.), 208

for the prosecution at Nuremberg that for the first time in history victors “stayed the hand of justice⁸.” This was inherently different than the victors justice imposed upon states for millennia. The Allies decided to only prosecute war criminals as opposed to summarily holding all of the losing leaders responsible to create a legal precedent. Under the principle recognized during the trials, an individual could be held liable under international law for a domestically legal act.

An important concept recognized during the trials was the “crime of aggressive war.” Its admissibility as a crime was hotly contested during the Nuremberg Trials due to its possible status as an “ex post facto” law. However at the time of the Vietnam War the legal precedent for the prosecution of crime of aggressive war had already been established. Although at the time of the Vietnam War there was no court prosecuting American soldiers for war crimes, the crime of aggressive war had previously been prosecuted. “Although a soldier is trained to follow orders, he acts at his own peril if he obeys an order to commit a war crime.”⁹ The two criterion determined to be necessary to claim the Nuremberg defense are “first, that he acted on the basis of a reasonable belief that an international crime had been committed [and]second, that his action was a reasonable and prudent way of either terminating his own complicity with the criminal conduct of seeking to terminate the criminal conduct itself.”¹⁰ The International Military Tribunal formed in the wake of World War II made it illegal to participate in these crimes as an accessory. It stated that “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy”¹¹ could be held responsible for the crime of aggressive war.

The second ingredient in claiming the Nuremberg defense was at the forefront of American Law during the Vietnam War. Citizens’ Fifth Amendment rights had recently brought back into the forefront of public attention

⁸ “Justice Jackson’s Opening Statement for the Prosecution at Nuremberg”

⁹ D’Amato, Anthony A., L. Harvey Gould, and D. Larry Woods. “War Crimes and Vietnam: The “Nuremberg Defense” and the Military Service Resister.” *California Law Review*, 1969., 1079

¹⁰ Falk, Richard A. “Six Legal Dimensions of the United States Involvement in the Vietnam War.” In *The United States in Vietnam: A Case Study in the Law of Intervention*, volume 2, by Richard A. Falk. Princeton, NJ: Princeton University Press, 1969., 210

¹¹ “Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal”

due to the 1966 Miranda trial. The claim based of the Fifth Amendment claim is best laid out in a legal article by Anthony D'Amato, Harvey Gould and Larry Woods. The basic argument that they put forward is that of "a constitutional deprivation of due process of law under the Fifth Amendment... the claimant may allege that if he is only obeying orders he will still be responsible"¹² They further claim that even if it would be impossible for a court to convict them it would still be a violation of a citizen's due process to be placed in a situation where they would be committing an immoral act. According to Marbury v. Madison "the primary derelict would exist, even though a court is unavailable to enforce it. The outcome of the combination of the Nuremberg Trial and the Fifth Amendment is the possibility that a citizen could claim that he could not be drafted as it would violate his Fifth Amendment right to not incriminate himself. However the actual admissibility of such a claim in a court was clearly not unequivocal.

The Nuremberg Defense Rejected

The protest rallies, draft card burnings, and draft dodging during the Vietnam War often were the forefront of public attention. Many of those prosecuted for avoiding the Selective Service Act claimed to be conscientious objectors. However, there were others who claimed to not be opposed to war, but to be opposed to *this* war. Several of these objectors raised the Nuremberg Defense. Both the attempts at the application of the defense and the reason for rejection are crucial.

The trial of Captain Howard B. Levy became the first recorded use of the Nuremberg defense in the United States. Captain Levy was an Army doctor on active duty at Fort Jackson ordered to teach "Green Beret aide men" dermatology procedures.¹³ He refused to give them the medical training claiming that to do so would be to aid those committing war crimes, a violation of international law. He was subsequently charged with engaging in "conduct unbecoming an officer and a gentleman."¹⁴ His defense hinged on two factors stemming from the Fifth Amendment. The first, a question regarding a detail in the crime he was accused of; the second, the

¹²D'Amato, Anthony A., L. Harvey Gould, and D. Larry Woods. "War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister." California Law Review, 1969., 1082

¹³ Aide men were specifically trained Green Beret medics. They also provided medical aid to Vietnamese citizens for P.R. reasons.

¹⁴ PARKER, WARDEN, ET AL. v. LEVY



Vietnam War Protest in Washington, D.C.

Nuremberg defense. His lawyers claimed that the crime of “conduct unbecoming an officer and a gentleman” broke a clause in the Fifth Amendment regarding the due process. This argument maintained that the wording of the crime, “conduct unbecoming an officer and a gentleman’ was too vague for him to be charged. This dispute effectively engaged much of the army’s code of conduct, much of which had existed since the Revolutionary War. This point, repeatedly debated in successive appellate courts, occasionally dragged the Nuremberg Defense with it.

Levy attempted to claim his refusal to teach the aide men medicine was justified due to the Nuremberg Defense. The court decided that for this to be a valid defense he would have to prove that Green Berets were actively committing war crimes. However subsequently the court later maintained that the Nuremberg Defense was not applicable in this circumstance, for although war crimes were committed there was no proof that the Green Berets would use the medical information to commit them.

The attempted use of the Nuremberg Defense secured its place in history; the fact that the judge allowed the evidence in court made it a landmark case. Although Captain Levy did not benefit from his use of the Nuremberg Defense, its introduction before the court allowed it to be the framework for future cases. However, in the highly political environment of the Vietnam War, few draft protesters successfully defended their actions on grounds relating to the wars legality.

The use of the Nuremberg Defense was not limited to those directly involved in the war. For example in *U.S. v. John Paul Malinowski* the defendant claimed that his purposeful addition of extra exemptions on his income tax statement first did not qualify as “willful,” and second was also a legal method of protest that was protected under his First Amendment right. In appeals a new issue appeared; the defendant grounded his objection on the Nuremberg Charter. The court ruled that “Whatever validity this ‘Nuremberg Defense’ might have in another context, we do not consider it applicable here, and hence do not reach the issue.” Similar defenses were also raised in the case of *Hawaii v. Rodney J. Marley*. Rodney J. Marley, and several accomplices, protested Honeywell Corporation’s production of weapons used in war crimes. The protest consisted of staging a non-violent sit-in on the corporation’s Honolulu branch. When they refused to leave at closing time they were arrested for trespassing. The court implied that while the claim was inapplicable in this circumstance, the Nuremberg Defense could be applicable under a narrow set of

circumstances.¹⁵

Courts did not always indict those that failed to meet the burden of evidence required for the Nuremberg Defense. In *United States v. Sisson*, the Supreme Court upheld a decision from a lower court that acquitted Sisson. In this case, the appellee (Sisson) argued that he was innocent due to the Nuremberg Defense. Remarkably, the court acquitted him as a conscientious objector. The Supreme Court stated that “Sisson’s interest in not killing [in] the Vietnam conflict outweighed the country’s present need for him to be so employed.¹⁶” However, applying the conscientious objector status skirted the issues of the applicability of the Nuremberg Defense.

The case of *United States v. David Henry Mitchell* appears to be a paradigm of the Nuremberg Defense. It had several issues that allowed it to be appealed to the Second District Court of Appeals. The issue that the Court first dealt with related to Mitchell’s defense counsel; apparently when Mitchell had decided to try his case as a breach of international law he felt that he would need a new lawyer. The original court did not grant Mitchell sufficient time to do so, a violation of his right to counsel. After that issue was resolved the matter was again brought before a lower appellate court regarding his original case of the Nuremberg Defense, and the constitutionality of the war. The court affirmed the previous decision, retaining the original verdict of guilty. It proceeded to completely discredit the claim that the war was unconstitutional, but addressed the Nuremberg Defense¹⁷. The court decided that the Nuremberg Defense was not applicable based on a distinction between the draft due to the Selective Service Act and the war. This claim implies that the case was not properly “ripe” to adjudicate. However legal theorists criticized the court’s refusal to consider the claim. They questioned the ability of an inducted draftee to defend his decision to refuse a command at a later point in time.

Anthony A. D’Amato, Harvey L. Gould and Larry D. Woods in “War

¹⁵ “...The Nuremberg argument cannot defend them. For the key question is whether that moral choice is forced upon them by the law they disobeyed. Would obedience, rather than disobedience, under the given circumstances, have in any way implied participation in or approval of the international crimes being perpetrated (as the disobedient believes) by his own government?” *STATE of Hawaii, Plaintiff-Appellee v. Rodney J. MARLEY et al., Defendants-Appellants, and Fred Steven Radford, Defendant.*

¹⁶ *UNITED STATES v. SISSON*

¹⁷ *UNITED STATES of America, Appellee, v. David Henry MITCHELL, III, Defendant-Appellant*

Crimes and Vietnam: The Nuremberg Defense and the Military Service Resister” argue that cases such as that of the draft resister must be ripe at this time. They claim that once drafted a soldier may have little if any time to resist the claim before being sent to Vietnam. Therefore “a soldier or potential draftee must take advantage of any opportunity that arises to press his case.”¹⁸

The judge revealed more about the nature of the trial in his opinion than the proceedings during the trial possibly could have. The opinion notes that “no matter how misguided, ill-advised or sickening his tommyrot utterances may be” he was not indicted for anything he said, only for his actions. The feelings the judge evoked in describing his opinion about the nature of war resistance reveals volumes about the political atmosphere of the time. Although most cases did not conclude with a lecture from the bench detailing “the sickening spectacle of a 22 year old citizen of the United States seizing the sanctuary of a nation dedicated to freedom of speech to assert such tommyrot,” the polarization of the United States makes it likely that other Judges held similar opinions. The divided state of the country regarding Vietnam created an atmosphere in which a fair trial was next to impossible.

The Verdict

Peace activists ended up defending their protests in a variety of trials. The validity of the Nuremberg Defense in a trial hinged upon the proof of several criteria. First, the application of the Nuremberg Defense requires a corresponding war crime. The crime of aggressive war fit the bill perfectly. Unlike other war crimes such as those committed against civilians or prisoners, a soldier could potentially be convicted of being an “accomplice participating in the formulation or execution of a common plan or conspiracy,” without committing any act other than going to Vietnam.

Could the crime of aggressive war or its corollary crimes against peace have been proven to have taken place in Vietnam? As depicted, one of the key factors is the status of American intervention, in turn determining the status of the American forces in Vietnam. Due to the lack of clarity in the Geneva Accords, arguments regarding the validity of the war in South Vietnam invariably hit a dead end. However, Richard Falk has an additional argument that a crime of aggressive war has been committed

¹⁸ D’Amato, Anthony, Gould, and Woods. “War Crimes and Vietnam: The “Nuremberg Defense”

against North Vietnam. This claim asserts that American reprisals against North Vietnam were by far disproportionate to the amount of support it may have offered to the National Liberation Front.¹⁹ This leads to a perfect set of claims for anti-war activists. If American support for Vietnam preceded the North Vietnamese support, American intervention would have been a textbook illegal intervention in the affairs of a sovereign state. If, on the other hand, North Vietnamese support for the Viet-Cong preceded American intervention, the subsequent American attacks on North Vietnamese soil would be a disproportionate escalation of the war, and therefore a crime against peace.

Next, the Nuremberg Defense would have been applicable to those who could prove that there was a credible chance of there being convicted of the crime. As illustrated in cases such as *U.S. v. John Paul Malinowski* and *Hawaii v. Rodney J. Marley*, a passive participant could not claim the Nuremberg Defense as they could not be indicted in as part of a conspiracy. The only possible defendant would be either in the armed forces, or in the process of being inducted to them. *US v. Mitchell* would appear to be a perfect paradigm for such a case. Yet the judge's remarks in the opinion imply that the court may not have been completely impartial to the outcome of the case. Further, Anthony A. D'Amato, Harvey L. Gould and Larry D. Woods clearly indicate why a case such as *Mitchell's* must be tried before induction to the army, effectively undermining the position of the court.

A concession must be granted to the succession of courts that rejected the Nuremberg Defense at different time. The political atmosphere during of the Vietnam War may not have left anyone with the opportunity to be an impartial judge. In fact, when opposition court cases such as the Russell Tribunal²⁰ were held, results were similarly one sided.

The Vietnam War remains deeply embedded in the American psyche. To this day, whenever a conflict occurs politicians rush to assure constituents that "this won't be another Vietnam." Fears of communist domination shaped American thoughts. Widespread belief of the domino theory made Vietnam appear to be the front line of the battle for democracy.

¹⁹ Falk, "Six Legal Dimensions of the United States Involvement in the Vietnam War," 250

²⁰ The Russell tribunal investigated American military intervention in Vietnam; it was formally known as the International War Crimes Tribunal and was hosted by Sweden. However, many cast aspersions on its motives as many of its members had unabashedly socialist agendas.

Many American leaders honestly felt that giving any ground to communist activities would be tantamount to Soviet world domination. Correspondingly many could not accept that America could do anything wrong. The refusal of many courts to address the validity of the Nuremberg Defense may have been an outgrowth of the uncertainty surrounding the war itself.

Faculty Contribution

Academic Freedom in the 1960s

Professor Ellen Schrecker

Surprisingly, for all the attention that has been devoted to the campus unrest of the 1960s, little of that attention has been paid to the experiences of the nation's faculty members during that turbulent era. And, yet, it is obvious that professors were as deeply affected by the turmoil on their campuses as their students were. Some participated in protests and lost their jobs, while others reconceptualized their disciplines, and others, toiled, as always, in their classrooms, libraries, and labs. For some reason, however, scholars have yet to explore the experiences of the nation's faculties or examine how academic freedom – the ability of professional academics to perform their core functions of teaching and research without outside interference or institutional sanctions – fared at a time of such turbulence.

It is important to realize that 1960 was hardly a demarcation point. While the worst of the McCarthy era witch hunt that had led to the dismissals of over one hundred faculty members had faded from the nation's campuses, it had by no means completely disappeared. The late 1950s and early 60s actually constitute a transition period in which many of the older forms of repression continued to operate, even as new challenges appeared. As late as 1965 (and, in one case, 1970), professors were still losing their jobs because of their supposed Communist connections. By then, however, things had changed. With the intensification of the Civil Rights Movement and the later peace movement, political activity that had been driven to the margins in the 1950s began to reemerge. Students grabbed the headlines, but faculty members were also involved.

We should not, however, exaggerate the extent of faculty activism; even at the height of the turbulence, only a tiny percentage of the nation's professoriate participated in any radical activities. The overwhelming majority of faculty members in the 1960s – as both earlier and later – remained on the sidelines. They became involved only when a crisis could not be ignored – as happened, for example, after the police came onto Berkeley

campus during the Free Speech Movement in 1964.¹

Unlike the 1950s and earlier, the 1960s saw few of what could be termed “classic” violations of academic freedom, cases in which tenured professors lost their jobs for political reasons. The academy – or at least its leading institutions – had learned the lessons of McCarthyism. In 1965, for example, Rutgers University, which had been the first university to fire a tenured faculty member for taking the Fifth Amendment at a congressional investigation in the 1950s, came under political pressure to dismiss the American historian Eugene Genovese for having publicly sided with the Viet Cong at a campus teach-in. But, once the administration and trustees were satisfied that the recently tenured Genovese did not indoctrinate his students, he was retained.²

Dissenters without tenure or those who taught at less prestigious institutions with weaker safeguards for academic freedom were more frequently dismissed. All too often, however, we know little about their cases. Unless someone was fired outright for taking an unpopular position, as was the assistant professor of history at Ohio State who was dismissed after burning his draft card in class in response to the assassination of Martin Luther King, most schools that eliminated controversial junior faculty members did so for other reasons. Often, they would be let go or denied tenure with the concurrence, or at the instigation, of their senior colleagues. The excuses varied: their scholarship was inadequate; their teaching was poor; or, as a faculty member at Northern State College in South Dakota explained with regard to a recently fired political scientist, “he was not compatible with what was expected here.”³

¹ Reginald E. Zelnik, “On the side of the Angels: The Berkeley Faculty and the FSM,” in Robert Cohen and Reginald E. Zelnik, eds, The Free Speech Movement: Reflections on Berkeley in the 1960s (Berkeley: University of California Press, 2002), 265.

² Dorothy Ansart and Judith Grier, Inventory to the Records of the Office of Public Information on the Vietnam War Teach-Ins, 1965-1966 April 27, 1992 Special Collections and University Archives, Rutgers University Libraries, <http://www2.scc.rutgers.edu/ead/uarchives/teachinsb.html> (accessed May 5, 2008); “The Ninth Alexander Meiklejohn Award,” American Association of University Professors Bulletin, vol. 52, no. 2, June 1966 (Summer Issue): 211-13 (hereafter, AAUP Bulletin); Richard M. Nixon, “Professor Genovese and Academic Freedom,” in Louis Menashe and Ronald Radosh, Teach-Ins: U.S.A. Reports, Opinions, Documents (New York: Praeger, 1967), 234.

³ “Ohio State University,” Sept. 1972, “The University of Arizona, Dec. 1963, “Southern Illinois University at Carbondale,” March 1973, “Northern State College (South Dakota)” Sept. 1968, all in Bulletin of the American Association of University Professors, (hereafter, AAUP Bulletin).

One reason why these cases are so hard to identify is that most of the individuals involved found new jobs. Although a few activists were forced out of the academy, the academic blacklist that had dogged political dissenters during the McCarthy era had largely disappeared. The nation's colleges and universities were expanding rapidly during the 1960s and were desperately seeking qualified teachers.⁴ Moreover, in those days of old boy networks, academic hiring was a casual affair and it was not hard for a left-winger with decent credentials to slip onto the faculty at a second- or third-tier institution. When a radical faculty group decided to operate a job placement service for its members, it advised them "Come to us if you are trying to find a place where you can be fired from next."⁵ Some schools, in fact, actually sought out radicals to ensure enough political ferment on their campuses to attract desirable students.⁶

Nonetheless, even if the student unrest overshadowed the dismissals of politically controversial faculty members and the expanding job market mitigated the bite of those dismissals, they still deserve our attention. The evidence for these dismissals, however, is seriously incomplete. Most of the cases we know about come from the published reports of the American Association of University Professors (AAUP), the organization that protects academic freedom. Because of the quasi-judicial nature of its procedures, the AAUP did not take up cases without solid evidence of untoward political interference. The secondary literature contains a few references to radical faculty members who lost their jobs, but, without a larger more systematic investigation, it may well be nearly impossible to assess the extent to which political activists were dismissed or denied tenure for seemingly legitimate reasons. Moreover, it is quite likely that many protagonists of such cases either found other jobs or else did not want to contact such a bourgeois organization as the AAUP.

⁴ As the former president of Princeton recalled "department chairmen literally stood in line to interview job candidates." William G. Bowen quoted in Eileen E. Schell, Gypsy Academics and Mother-Teachers: Gender, Contingent Labor, and Writing Instruction (Portsmouth, NH: Boynton/Cook, 1998), 33.

⁵ Paul Lauter, interview with the author, April 13, 2008; New Universities Conference (NUC) Newsletter, Vol. III, no. 10, Jan. 15, 1970, in New University Conference Papers, Tamiment Library, New York University.

⁶ Lauter, interview; Marvin Gettleman, interview with the author, June 5, 2008. Some administrations also supported the formation of SDS chapters in order to give their campuses a "with-it" image. Jack Nusan Porter, Student Protest and the Technocratic Society: The Case of ROTC (Chicago: Adams Press, 1971, 1973) 47-48.

Even so, the cases we do know about do reveal certain patterns. To begin with, at least in the late 1950s and early 1960s, academics were losing their jobs for many of the same reasons they had lost their jobs for during the McCarthy era: loyalty oaths, congressional investigations, and allegations of Communist connections. The Civil Rights Movement, of course, brought new pressures. Significantly, however, the Southern politicians and administrators who purged racially liberal faculty members often wrapped themselves in the flag and claimed that they were simply eliminating the Communist menace from their campuses.

As the antiwar and student movements heated up after 1965, faculty members themselves became radicalized. A new generation of academics had arrived on campus. No longer passive, they ran into trouble not only, as earlier radicals did, because of their off-campus political activities and associates, but also – and more frequently – because of what they said and did on campus. They advised militant student groups, spoke at demonstrations, participated in strikes and sit-ins, and sought to politicize their classrooms. In addition, the more tolerant political climate of the period made them more willing to challenge restrictive practices that academics had been accepting for years.

Loyalty oaths, for example. A remnant of the early Cold War, almost every state had some kind of loyalty program or oath for its teachers and other employees. The most famous controversy had occurred at the University of California where the Regents fired over thirty professors in 1950. That conflict was eventually resolved when the university's special oath was dropped and replaced by one that all state employees had to sign. By the mid-1960s, however, *that* oath was coming under fire as several current and prospective faculty members refused to sign, took their case to court, and succeeded in getting the most objectionable portions of the oath excised.⁷ The University of California litigants were not alone. Dozens of faculty members from Adelphi University to Harvard to the University of Maryland were rejecting what Joseph Pedlosky, a young MIT mathematician who challenged the Massachusetts oath, claimed was “a kind of ortho-

⁷ N.M. Mundell to Thomas Cunningham, June 21, 1965, Thom. J. Cunningham (VP and Genl Counsel) to Roger W. Heyns Chancellor Oct. 1, 1965, Minutes of the Berkeley Division, Academic Senate, May 17, 19, 25, 1966, Aronson, et. al vs. the Regents of the University of California, all in University of California, President, Permanent Files 1958-75, CU-5, Series 8, Box 27, Folder 3, in the University Archives, University of California, Berkeley.

dox nationalism contrary to the principles of free speech.”⁸

The most important challenge came at the University of Buffalo. A private institution until 1962, Buffalo merged with the SUNY system which, under New York’s 1949 Feinberg Law, required its faculty members to sign an anticommunist affidavit. Five Buffalo professors planned to test the requirement and refused to sign. The two temporary appointees, English instructor Harry Keyishian and poet George Starbuck, were immediately fired, the three more permanent ones were retained pending the outcome of their suit. After a few more appointees, including the poet Gregory Corso, also balked, the administration successfully pressed the SUNY authorities to drop the certificate. However, the Regents still retained the Feinberg Law’s underlying political test.⁹

In its 1967 *Keyishian* decision, the Supreme Court finally voided that requirement. It was a crucial decision. For the first time, the Supreme Court gave constitutional protection to academic freedom, which, Justice William Brennan’s majority opinion stated, “is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁰

But loyalty oaths were not the only artifacts of McCarthyism to threaten academic freedom during the 1960s. Discredited though they may have been by the late 1950s, congressional and state investigating committees were still active and could still endanger the jobs of those academics who defied them. Even as the *Keyishian* case was wending its way through the federal judiciary, the University of Buffalo was divesting itself of Paul Sporn who had refused to cooperate with the House Un-American Activities Committee after an informer had publicly identified him as a Communist party member. Sporn had actually signed his Feinberg certificate, but because he had refused to discuss his political affiliation with the House committee, he was fired on the grounds that he had lied on his certificate.¹¹

There were cases as well at Berkeley and George Washington Universi-

⁸ Michael Sletcher, “The Loyalty of Educators and Public Employees,” *Massachusetts Historical Review*, Vol. 12, No. 1 (2010), 52.

⁹ “Refusal of Feinberg Oath Costs Poet Teaching Job,” *New York Times*, April 7, 1965; Elliot Friedman, “From *Adler* to *Keyishian*: Academic Freedom and the Fight for the Rights of Public Employees.” 13-14 (unpublished student paper).

¹⁰ *Keyishian v. Regents of the State University of New York* 385 U.S. 604 (1967).

¹¹ Friedman, “The *Keyishian* Case,” 7.

ty. The most notorious application of such an anticommunist proscription was the case of Angela Davis at UCLA, who was denied reappointment at UCLA by California governor Ronald Reagan in 1970. In any event, what these cases (and there are several others as well) reveal is that the academic community, even into the 1960s, was hesitant to welcome faculty members tainted with communism.

In the South, charges of communism often camouflaged the dismissals of college teachers who challenged that region's white supremacist regime. This happened at Allen University and Benedict College where the governor of South Carolina forced the presidents of both institutions to fire six "trained communist workers" from the faculty. Though none of the six had engaged in political activities, five were whites whose racial liberalism threatened the Southern status quo.¹² Allegations of communism also accompanied the firing of Lawrence Reddick from Alabama State College in June 1960. Reddick, an accomplished scholar who was close to Martin Luther King and who had tried to keep a low profile at the all-black Montgomery institution. He could not, however, hide his sympathy for his students' sit-ins and demonstrations and so, under pressure from Alabama's governor, he had to go.¹³

Actually, as many of the Southern academic freedom violations of the 1960s reveal, it did not need a supposed communist connection for the segregationist authorities to force what one scholar called "race liberals" from the campuses of Southern schools - both black and white.¹⁴ Auburn, Texas Technological College, Alcorn A and M, Arkansas State Teachers College, Sam Houston State Teachers College, Bishop College - it's a long list and doesn't even include schools that the AAUP did not publicly censure, like Spelman College where several faculty members - including the well-known historian Howard Zinn - lost their jobs for their civil rights activities.¹⁵

¹² "Allen University and Benedict College," *AAUP Bulletin*, March 1960.

¹³ "Alabama State College," *AAUP Bulletin*, December 1961.

¹⁴ Joy Williamson-Lott, "Academic Freedom as an Instrumentality of Treason": Faculty in Southern Colleges during the Civil Rights Movement," paper delivered at the History of Education Society Conference, Philadelphia, Pennsylvania, 2009, in the personal possession of the author.

¹⁵ "Spelman College, Howard Zinn," Box 310, AAUP, Committee A Records, Special Collections Research Center, Gelman Library, George Washington University, contains an enormous amount of detail on Zinn's case, which was complicated by the school's attempt to blackmail him and so much publicity that the AAUP ultimately decided

Southern segregationists borrowed other techniques from the Cold War red scare to harass the civil rights movement. They barred state employees from joining the NAACP and in Mississippi and Arkansas, for example, required their employees to list all the organizations they belonged to and gave money to. Four white professors at the University of Arkansas refused to list their memberships and were fired. With the help of the AAUP, they took their case to court and ultimately prevailed. Even so, they still had to struggle for reinstatement.¹⁶ The situation was worse in Mississippi, where the AAUP could find no academics willing to fight the membership list requirement and had to mount the challenge itself.¹⁷

Sometimes, as happened in Florida, where a state investigating committee sought to police both sexual and political, as well as racial, nonconformity, the miasma of fear that was created forced the removal of professors for almost any kind of unorthodoxy. The University of South Florida, for example, not only withdrew a part-time job offer from the eminent, though controversial, Cold War scholar D. F. Fleming, but it also cracked down on an instructor who assigned a short story by J.D. Salinger and nearly fired a young English professor for teaching an essay by Norman Podhoretz.¹⁸

There was certainly more political space for faculty members outside the South. And as the political climate changed in the late 1950s and early 1960s, professors became more active politically both on and off their campuses. A few suffered reprisals, especially at smaller and more provincial institutions. Thus for example, a Quaker pacifist at Lincoln College in Illinois was fired after he picketed the local post office in opposition to the U.S. blockade during the Cuban Missile Crisis in 1962.¹⁹ A graduate student from Ohio State was denied a promised appointment at Wayne State College in Nebraska because he had hosted a controversial speaker and signed a petition criticizing the Bay of Pigs.²⁰ But not every incident occurred at unknown institutions. The president of Brandeis made it quite clear that

not to request a formal investigation.

¹⁶ Jeff Woods, *Black Struggle, Red Scare: Segregation and Anti-Communism in the South, 1948-1968* (Baton Rouge: Louisiana State University, 2004), 74-84; "University of Arkansas," *AAUP Bulletin*, December 1963.

¹⁷ Joy Ann Williamson, *Radicalizing the Ebony Tower: Black Colleges and the Black Freedom Struggle in Mississippi* (New York: Teachers College Press, 2008), 82.

¹⁸ "University of South Florida," *AAUP Bulletin*, March 1964.

¹⁹ "Lincoln College (Ill.)," *AAUP Bulletin*, September 1964.

²⁰ "Wayne State College (Nebraska)," *AAUP Bulletin*, December 1964.

he would not tenure the anthropologist Kathleen Gough Aberle after her public attack on the Kennedy administration during the missile crisis.²¹

The coinciding of the Berkeley Free Speech Movement in the fall of 1964 and the escalation of the Vietnam War the following spring marked a turning point in the growing politicization of American campuses. But, and this is very important, that politicization provoked and was accompanied by an increasing polarization within many faculties. Faculty members lined up on both sides of the issues. To a large extent, the Berkeley professors' support for Free Speech Movement was unique in that the issue involved – freedom of speech on campus – was a matter of civil liberties that even conservative faculty members could support. Although there was considerable opposition to the disruptive tactics of the students, administrative bungling along with the community's long-term desire for a freer campus induced the faculty to back the FSM by an overwhelming 824-115 margin in a crucial Senate meeting that essentially ended the struggle.²²

Such unanimity was not to last. To begin with, the student movement became increasingly more radical and obstreperous, thus alienating many of the liberals and moderates who had originally supported it. As one eminent historian who fled Berkeley for the supposedly more placid scene at Harvard noted, he and several colleagues were leaving “not because of lack of sympathy with ‘free speech’ or ‘political action,’ but because, as one put it, who wants to teach at the University of Saigon?”²³ In addition, many faculty members – at Berkeley and elsewhere – feared that taking positions on external political issues like the Vietnam War would irrevocably damage the academy by destroying its neutrality.²⁴

Some of these splits within the academic profession were generational; younger faculty members evinced less regard for the traditionally detached ivory tower. People's fields also influenced their political proclivities. Hard scientists and engineers, who often relied on military contracts to fund their research, tended to support the war and oppose the students. Scholars in the humanities and social sciences took the opposite positions.

²¹ David Price, Threatening Anthropology: McCarthyism and the FBI's Surveillance of Activist Anthropologists, (Durham, NC: Duke University Press, 2004), 320-26.

²² The most useful sources on the Berkeley Free Speech Movement are the volume by Cohen and Zelnik, The Free Speech Movement and W. J. Rorabaugh, Berkeley at War: The 1960s (New York: Oxford University Press, 1989).

²³ David Landes, “Letter to the Editor,” New York Times, Dec. 29, 1964.

²⁴ Howard Brick, Age of Contradiction: American Thought and Culture in the 1960s (New York: Twayne, 1998), 172.

Interestingly, however, even these more liberal and radical faculty members did not welcome student participation in personnel decisions and curricular reform.²⁵

The situation was far from static. There was a definite shift within much of the academic profession by the late 1960s. Hawkishness became marginalized on many campuses as opposition to the war became increasingly respectable. Faculties from Harvard to Buffalo began to pass antiwar resolutions, while individuals who had originally supported the conflict, like Notre Dame's president, Father Theodore Hesburgh, turned against it. In 1972 Hesburgh was one of 60 Midwestern university presidents to sign a letter calling on Nixon to end the war.²⁶ And, in 1968, the Modern Language Association not only voted an antiwar resolution, but elected a radical as its future president.²⁷

Faculty members became active even before their students did. Within a few weeks of the bombing of North Vietnam in February 1965, professors at hundreds of schools had mounted teach-ins. Though usually organized by critics of the war, these programs sought to present a variety of views on as well as background information about the growing conflict. They attracted huge crowds – up to 12,000 at a thirty-five-hour marathon at U. C. Berkeley, for example. Speakers included local faculty experts as well as such well-known antiwar activists as journalist I.F. Stone and baby doctor Benjamin Spock. Quintessentially liberal and academic, teach-in organizers believed that if only the American people and their leaders could understand how misguided the war was they would put an end to it.²⁸

Within a year, however, that earlier confidence in the power of knowledge had begun to erode – at least among the more radical denizens of the academic community. Though some faculty members did participate

²⁵ Everett Carll Ladd, Jr., and Seymour Martin Lipset, The Divided Academy: Professors and Politics (New York: McGraw-Hill, 1975) 108, 122.

²⁶ Kenneth J. Heineman, Campus Wars: The Peace Movement at American State Universities in the Vietnam Era (New York: New York University Press, 1993), 61, 210; Heineman, "American Schism: Catholic Activists, Intellectuals, and Students Confront the Vietnam War," Marc Jason Gilbert, ed., The Vietnam War on Campus: Other Voices, More Distant Drums (Westport, CT: Praeger, 2001), 102-103; Porter, Student Protest, 65.

²⁷ Richard Ohmann, English in America: A Radical View of the Profession (Hanover and London: Wesleyan University Press, 1996, 1st ed. 1976), 28-32.

²⁸ For a useful compendium of articles on the teach-in movement, see Menashe and Radosh, Teach-Ins: U.S.A.

in such confrontational tactics as building take-overs, most antiwar professors opposed the war in more conventional ways. They worked with community peace groups or else formed their own organizations - the Faculty Peace Committee at Berkeley, the University of Texas Committee to End the War in Vietnam, the Michigan State University Faculty Committee for Peace in Vietnam, and so on.²⁹

They also began to confront what they viewed as their own institutions' complicity with the war machine. As the conflict escalated, the draft became an ever more pressing and divisive issue. Antiwar professors were particularly upset about the Selective Service director's fall 1965 directive making undergraduates with low G.P.A.'s eligible for the call up and requiring the institutions that housed them to provide class rankings to the military.³⁰ The somewhat marginalized faculty activists at the University of Buffalo could not convince their students, colleagues, and administrators to defy the Selective Service System. But in 1967, Columbia's students, faculty, and trustees voted to abolish class rankings.³¹

The Reserve Officers Training Corps (ROTC) was another hot issue. While the impetus behind the anti-ROTC campaign clearly came from antiwar activists, they were able to cite legitimate educational reasons for opposing the program. Not only were ROTC courses paid for and designed by the military, but their instructors, who were also selected by the military, did not have genuine academic credentials. By the late 1960s, many schools from Yale to Northwestern had voted either to end compulsory ROTC or to deny it academic credit.³²

Defense-related research was a more complicated issue. After all, many faculty members in engineering and other fields did that kind of work and viewed attempts to curtail it as an attack on their academic freedom. This was not a minor matter. Ever since the Second World War, the military had been funneling vast amounts of money onto the nation's campuses. And not just to schools like Stanford and MIT. The Pentagon actually inaugurated a program to fund research at dozens of less prestigious institutions - in part to avoid hassles with the antiwar activists at the major research uni-

²⁹ Heineman, *Campus Wars*, 159,

³⁰ Heineman, *Campus Wars*, 134.

³¹ Heineman, *Campus Wars*, 166-7; Joanne Grant, *Confrontation on Campus: The Columbia Pattern for the New Protest* (New York: New American Library, 1969), 35.

³² For a useful study of the struggle over ROTC on one campus, see Porter, *Student Protest*.

versities.³³ Faculty members, like the University of Pennsylvania professors who exposed the chemical and biological warfare programs on their campus, played a key role in trying to force their institutions to cancel that research.³⁴

While most of the academic opponents of the war limited their activities to writing articles, passing resolutions, and organizing teach-ins, a few did take part in direct actions on their campuses, joining their schools' student radicals in occupying buildings or demonstrating against ROTC and Dow Chemical. It is likely that most of them lost their jobs. Unlike the McCarthy era victims who were rarely politically active at the time they were fired, the men and women who figured in the Vietnam era academic freedom cases were often out there on the barricades. Their experiences are instructive; they show us how the academic world sought to deal with its most politically controversial members. They also reveal the limits of academic freedom, even during a presumably liberal, if not radical, moment on America's campuses.

There was, for example, the case of Staughton Lynd. A gifted colonial historian, he taught at Spelman College, a black women's college in Atlanta, where he got caught up in the Civil Rights Movement of the early 1960s. He left Spelman in 1964 in protest against the school's firing of Howard Zinn and went to Yale on a five-year contract. His continued activism and a trip to Hanoi in December 1965 scotched his career at Yale where he was soon told that tenure was out of the question. Lynd then moved to Chicago to look for a job. The History Department at Northern Illinois University tried to hire him, but the president vetoed the appointment. The same thing happened at the University Of Illinois-Chicago Circle, where, again, despite the unanimous recommendation of the History Department, the administration would not go along. Finally, a position came through at Chicago State College. In the middle of July 1967, however, just before he

³³ Heineman, *Campus Wars*, 13-18, 214-17.

³⁴ Edward S. Herman and Robert J. Rutman, "University of Pennsylvania's CB Warfare Controversy," *BioScience*, Vol. 17, No. 8 (Aug., 1967), pp. 526-529; NYU chapter of NUC, "A Rational Inquiry into the Roles Played by Dr. Ivan L. Bennett, Jr. and New York University in the Utilization and Development of Technical and Human Resources for the U.S. Government's Chemical Biological Weapons Program and Military Policies," 1970, New University Conference Papers, Tamiment Library, New York University; Heineman, *Campus Wars*, 33, 44, 59-60, 65; Charles V. Kidd, "The Implications of Research Funds for Academic Freedom, *Law and Contemporary Problems* 28 (1963): 614.

was to begin the semester, the Illinois Board of Governors of State Colleges and Universities rejected his appointment by a 5-1 vote. His 1965 trip to Hanoi and espousal of civil disobedience, the Board claimed, “goes beyond mere dissent” and conflicts with the teacher’s “responsibility to support and to stay within the laws of this country.”³⁵ Forced out of the academic profession, Lynd went to law school and became a labor lawyer in Ohio.

The political scientist Michael Parenti was another radical who was ejected from academe. After being arrested at a demonstration at the University of Illinois in the aftermath of the Cambodian invasion, the Chancellor told Parenti that, since there was no point in dismissing him as his temporary appointment was about to end, information about his political activities would go into his permanent personnel file. That information followed him to the University of Vermont, which had hired him before his arrest. Although his Vermont department, deans, provost, and president all wanted to renew Parenti’s contract, the trustees turned it down. His arrest and continued antiwar activities constituted “unprofessional conduct” and so disqualified him from the university. Since then, although Parenti publishes prolifically, he has been rejected for positions at more than 100 institutions. He now supports himself as an independent author and lecturer.³⁶

It would be interesting to find out what happened to some of the lesser known protagonists of the 1960s academic freedom cases. Some, like the Marxist sociologist Alan Krebs, who was fired from Adelphi University in 1964, clearly offended academic mores. Not only did he refuse to give grades and assigned the same single reading, *The Communist Manifesto*, in three different courses, but he gave each class the exact same set of “tentative” (that’s the AAUP’s term) multiple choice questions on the final.³⁷

M.L. Michael Kay had the distinction of being fired from two jobs. First, in 1968 at Alfred University where he was dismissed after participating in several anti-ROTC demonstrations; then at West Chester State College where the History department and administration had almost refused to hire him and then waffled about reappointing him before they finally fired him after he had supported a black student demonstration and the 1969

³⁵ “Fact Sheet on the Staughton Lynd Case” July 27, 1967, mimeo by Committee on Academic Freedom in Illinois, in AAUP Committee A, Box 30, AAUP Records.

³⁶ “Struggles in Academe: A Personal Account,” in Michael Parenti, Dirty Truths (San Francisco: City Lights Books, 1996) 235-252.

³⁷ “Adelphi University,” AAUP Bulletin, September 1967.

antiwar moratorium.³⁸ A similar case occurred at Tulane in 1969, where his “interference” with an ROTC drill and awards ceremony precipitated the dismissal of tenured math professor Edward Dubinsky.³⁹

And then there was the controversial Indiana State University composition teacher Scott Chisholm who had already been warned that he would not get tenure. Besides helping to organize an antiwar coffee house in town, his teaching was too confrontational for his more conservative students. Thus, when he decided to demonstrate the nature of symbolic language by burning a tiny American flag in class, the university suspended him at once. Given the huge outcry from veterans’ groups, politicians, and the local press, it was hardly a surprise that the school’s board of trustees turned that suspension into an immediate dismissal.⁴⁰

Though professors like Krebs, Kay, Dubinski, and Chisholm did not shrink from controversy, the protagonists in some of the other academic freedom cases of the period were less confrontational. Even so, they faced the kinds of cultural conflicts that Chisholm’s experiences seem to reveal. It is unlikely that a teacher at Harvard or Swarthmore would be fired for burning a flag in class, but such would not be the case at less favored institutions in more conservative communities.

Perhaps the most notorious cultural conflict of the 1960s occurred at the University of Illinois where Leo Koch, an assistant professor of biology, was dismissed in 1960 after publishing a letter in the student newspaper criticizing the puritanical mores of the time and defending premarital sex. Koch’s action, the Board of Trustees announced, was so at odds with “those standards of temperateness, dignity, and respect for the opinions of others which should characterize public expression by members of the faculty of the University of Illinois” that it “constituted a decidedly serious and reprehensible breach of the academic and professional responsibility owed by Assistant Professor Koch to the University of Illinois.”⁴¹

There was also the case of W. Haynes Dyches, Jr. An assistant professor of sociology at Armstrong State College in Georgia, Dyches was arrested for – and I quote – “contributing to the delinquency of minors by furnishing lewd and obscene literature to minors.” He had given students copies of

³⁸ “Alfred University (New York),” *AAUP Bulletin*, March 1970; “West Chester State College,” *AAUP Bulletin*, June 1972.

³⁹ “Tulane University,” *AAUP Bulletin*, December 1970.

⁴⁰ “Indiana State University,” *AAUP Bulletin*, March 1970.

⁴¹ “University of Illinois,” *AAUP Bulletin*, March 1963.

the Atlanta underground paper, *The Great Speckled Bird*. That he also lost his job was a foregone conclusion. A similar fate befell the speech teacher Brent Davis at Arkansas Agricultural and Mechanical College. Although Davis had been hired, he explained, in part “to bring some sophistication, dispel some apathy on the campus,” his agnosticism and opposition to the war had made him a controversial figure in the community. His superiors were particularly unhappy about the picture of Malcolm X on his office wall. Then, in the fall of 1965, when he brought a petition against corporal punishment into one of his classes, the trustees ousted him at once.⁴²

Significantly, the protagonists of these and many other academic freedom cases did not always receive the support of their colleagues. Thus, for example, despite the Arkansas A and M administration’s failure to consult with the faculty, the local AAUP chapter at the school passed a unanimous resolution supporting the president’s dismissal of Brent Davis. When W. Haynes Dyches appealed his suspension to his school’s Committee on Faculty Welfare, its members ruled in favor of the administration. There were no issues of academic freedom involved, they claimed, because Dyches had not been punished for anything he did in the classroom. Nor did his colleagues on the Faculty Dismissal Hearing Board believe that there was anything wrong with M.L. Michael Kay’s summary dismissal from Alfred University. At all too many schools, faculties supported or remained silent in the face of grave violations of their colleagues’ academic freedom.

This is not to say that there were not protests and strong opposition to many of these political dismissals during the 1960s. Still, the pattern of academic acquiescence is disturbing. When the *Keyishian* plaintiffs began their path-breaking suit against New York States loyalty program, neither the local AAUP nor the American Civil Liberties Union (ACLU) would support them; and only 47 out of the University of Buffalo’s 2800 full- and part-time faculty members contributed to their defense fund. Even the AAUP’s Committee A sometimes faltered, as it did when the committee split over whether Leo Koch’s public endorsement of premarital sex constituted a breach of his “academic responsibility.”⁴³

Today, as we find ourselves confronting a strong current of public hostility to higher education and to faculty members in particular, it becomes especially important to be alert to the dangers of constricting the academic community’s freedom of expression. The situation, of course, is different.

⁴² “Arkansas Agricultural and Mechanical College,” *AAUP Bulletin*, December 1967.

⁴³ “University of Illinois,” *AAUP Bulletin*, March 1963, especially pp. 41-42.

Campuses are quieter now and few faculty members are as willing to defy their universities as the 1960s radicals were. Still, some recent demands of politicians and others to silence the voices and stifle the research of scholars with whom they disagree should certainly give us pause. In fact, today's challenge to academic freedom may be more serious than that of the 1960s, for it targets higher education's core academic functions – the teaching and research of its faculty members – rather than just their political activities. But that is another story.⁴⁴

⁴⁴ My recent book, [The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom, and the End of the American University](#) (New York: The New Press, 2010), is an attempt to look at the contemporary threats to the academic community.

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