

# **GARDEN STATE CLE LESSON PLAN**

**A 1.5 credit course**

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## **JEWES AND AMERICAN LAW**

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**With**

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### **Program description**

Professor Paul Finkelman explores the Jews' role in early American history, law affecting religious expression, and how Supreme Court rulings have altered Jewish rituals. This 1.5 credit CLE is made with Kosher facts and case law. Enjoy!

## **I. Introduction**

- **Jews today are the most disproportionate members of the bar compared to presence in total population**
- **Jews have been deeply involved in American law – since 1960s**
- **Jews being in the law is neither remarkable nor surprising – it is omnipresent**

## **II. History of Jews in American Law**

- **While Jews are major players in law, American law has not been friendly to Jews and SCOTUS has not been friendly to “Jewish” issues**
- **The settlement of America is by Protestant groups who came here not for religious freedom but to establish their own religion**
- **First American colony – Virginia – started by the crown - only 1 church in Virginia – Church of England**
- **Second colony – Plymouth Colony – Separatist colony – wanted to separate from Church of England (vs. Puritans wanted to purify Church of England)**
- **Puritans come 10 years later – Massachusetts Bay Colony – not interested in anyone else but must by law allow Anglicans to settle**
- **No religious diversity**
- **Puritan colony kicked out people who did not follow Puritan orthodox – most famously Anne Hutchinson is kicked out of Mass. Bay and moves to the Bronx; Roger Williams also was to be returned to England but escaped from jail and founded the Rhode Island Colony**
- **Rhode Island Colony is the first to allow for religious diversity – Williams did not believe in religious persecution – diversity was a colony of different kinds of Protestants**
- **Maryland started as haven for English Catholics**
- **1649 Maryland passes Toleration Act – considered “1<sup>st</sup> formal statement of religious freedom”**
- **A Jew in early Maryland was prosecuted and sentenced to death because he refused to acknowledge that Jesus is the son of God**
- **Religious freedom in Maryland means that you allow Catholics to be Catholics and other Christians to have their faith but nothing outside of the Christian faith is tolerated**
- **No Jews in US until 1654 when group of 20 Jews arrives in New Amsterdam – escaping from Dutch colony in Brazil who were**

- forced to leave – most Jews got to Holland and one boat of people comes to US**
- **Boat is met by other Jews that were already here – 4-5 other Jews living here – all from Holland and all accepted and living here and no one questioned**
- **When boat arrives there is conflict – Peter Stuyvesant the Governor of the Colony tries to kick them out because they are Jews; Stuyvesant raised in anti-semitic period and believed Jews were undermining the colony but also because they are not Dutch Reform**
- **In 2 years, Stuyvesant turns his focus on Quakers and Lutherans – jails the local Lutheran Minister, beats Quakers; with Jews only wrote nasty letters to England asking permission to remove Jews from colony – England said “we need colonists so leave them alone**
- **Jews settled and working into a community – no religious freedom – no religious toleration – citizenship is intrinsically tied to religion or ethnicity**
- **In 1655 local officials go to Oscar Levy (an Ashkenazi Jew) who came directly from Europe and asked him to pay fine that every man must pay if won’t stand night watch; Levy says who said I won’t stand the night watch; officials say Jews never stand night watch because they are not soldiers**
- **In Brazil Jews helped to take over Portuguese colony**
- **Other men in night watch won’t stand watch with a Jew**
- **1656 Levy again says wants to stand watch and is allowed**
- **1657 Levy insists on being made a citizen of the city because he stood the night watch; earliest example of Jews using a “legal culture” to be admitted formally to the society where they are living**
- **Levy and 2-3 others become citizens of the city; when British arrive a number of Jews are citizens of the city and then are considered citizens of the British Empire**
- **Significant number of Jewish property owners**
- **1664 1<sup>st</sup> Jew to buy land under British law is Oscar Levy**
- **Evolution of citizenship for some Jews**
- **Not a universal situation – Jews could vote in NY but not Virginia or Rhode Island**
- **S. Carolina formed in 1680s and begins formation by declaring absolute religious freedom and Jews can have own synagogue**
- **Georgia had Jewish community early on**

- **When American Revolution begins there are Jews up and down American coast – Jews from GA through RI, no Jewish community in Boston, vibrant Jewish communities in Philly, NY, Savannah and Charleston**
- **When New States’ Right Constitution – after Declaration of Independence, set up rules for citizenship and voting**
- **None of new states that right constitutions have restriction on voting based on religion**
- **All male Jewish citizens are allowed to vote**
- **Fairly open voting provided you own enough property and fall under other requirements**
- **Holding office is different – of 11 states that write constitutions 9 specifically say that in order to hold office you must be Protestant or Christian**
- **Jew prohibited from holding public office in 9 of the states, RI and CT continue old rules which would not permit Jews to hold public office; Jews only allowed to hold office in NY which explicitly has no provision on religious requirements for office holding and VA which evades the issue**
- **Small Jewish community in Richmond**
- **By 1800 Jews are integrated into society**
- **In American Revolution General David Franks served on Washington’s staff – first Jewish officer of an army in western world; entire company in the Army from Savannah, Georgia comprised of Jews**
- **This is at the same time when states are adopting laws that prohibit Jews from holding public office**
- **The first graduating class of West Point in 1802 was 50% Jewish – of the 2 people who graduate – Simon M Levy (#2 in his class)**
- **By 1810 Mordecai Noah was the sheriff of NY**

### **III. Jews in Litigation**

- **1793 PA Supreme Court sitting for a jury trial hears Stansbury v. Marks, 1 Dall, 213 (Pa. 1793) - Marks calls as a witness Jonas Phillips who says he will not testify because the trial is being held on Saturday and that violates his religious beliefs; he is fined £10 for refusing to be a witness; argues that you cannot make me testify on Sabbath; defendant waives his testimony and therefore Phillips is discharged from his fine**
- **1831 PA Supreme Court – Gratz v. Phillips, et al., 1 Pa. Rep. 333 (1831) – fight over estate of wealthy Jewish family, elite of**

**American Jewish community; question whether or not Phillips who is plaintiff is entitled to a new trial because he refuses to appear at trial because trial is held on Saturday – can you hold trial on Saturday? Can Jews be forced to testify or participate in trial on Saturday? Can Jews be punished if not at trial? Court rules Phillips is not being forced to disobey religious beliefs but must decide whether he wants to come to court or not – does not violate religious freedom because no one is forcing him to change his religion but requiring him to violate his religious values – Phillips cannot claim he is entitled to a continuance merely because of religious beliefs; attorney for Gratz argues that if concede point then never able to have trials because always people who will want some type of exemption; Phillips’ lawyer argues that matter of conscience means should have an exemption and get retrial not on Saturday; court says that religious beliefs cannot stop the court’s business; Phillips loses**

- **Jews hold public office – 1<sup>st</sup> US Senator who is Jewish was from Florida**
- **MD prohibited Jews from holding public office until the 1820s – Baltimore wanted to elect a Jewish mayor 2 times**
- **NC would not allow Jews to hold public office until constitution was changed in 1868 – when Jews elected to legislature – not a public office but an office of the people and the people can elect whomever they want**

#### **IV. American Civil War Begins**

- **Order of General Grant in December 1862 – Jews are expelled from his region**
- **Group of Jews from Illinois go to Washington to see Abraham Lincoln who contacts the Secretary of War who contacts Grant and advises him to rescind order immediately and it is rescinded**
- **The only time in US history that official federal policy of anti-semitism – lasts 2 weeks**
- **No evidence Grant shows anti-semitism later in life – Grant’s best friend was Jewish; no discrimination against Jewish soldiers in any way**
- **Judah P Benjamin chosen to be hold many positions in President’s cabinet**
- **Lincoln appoints a Jew to be Governor of Louisiana**
- **A number of Jewish field officers, Jews fight on both sides of the war**

- **Debate in Congress over military chaplains – Chaplain law says that only someone ordained as Protestant minister can be a chaplain and each regiment allowed to choose own chaplain; Jewish regiment chooses Jewish chaplain – eventually resolved by Lincoln intervening with Congress that passes law allowing Jews to be chaplains**
- **Benjamin offered a place on the Supreme Court but turns it down – not interested in being disconnected from politics**
- **During Fillmore administration another example of where government is not interested in questions involving Jews – Fillmore negotiates trade and commercial treaty with Switzerland and under treaty Americans allowed to buy real estate in Switzerland and vice versa and Americans are allowed to practice business and trade in Switzerland and vice versa but in treaty it says except as limited by Cantonal Law (the law in Switzerland) – each Canton is independent and half of them prohibit Jews from living there or engaging in certain professions or owning land – Fillmore said that this is a great treaty for Americans and there cannot be any objections; Jews complained because Jews would be treated differently than other people – 4 years to ratify treaty and still allows for local discrimination but to a lesser extent than originally written**

**V. Is the Supreme Court A Friend to the Jews?**

- **Think about ways in which the court hears cases that may involve Jews as Jews or Jewish practice as opposed to plaintiffs or defendant who simply happen to be Jewish**
- **It is clear that significant number of successful appellate lawyers with Supreme Court practices were Jewish and also clear that very significant Justices who were Jewish – now we have a Supreme Court with 3 Jewish Justices and 6 Catholic Justices – does not represent the American society**
- **Frank v. Mangum, 237 US 309 (1915) – Leo Frank is business man living in Atlanta and accused of raping a white girl who was working in his factory; Frank is accused, tried, and convicted in “circus” trial; appeals to SCOTUS denied due process because extreme circumstances of his trial – SCOTUS is not interested... does not interfere with state court procedures; Frank argues that he is denied a fair trial because he was Jewish**
- **Lochner v. NY, 198 US 45 (1905) – case on child labor laws**

- **Minersville School District v. Gobitis, 310 US 586 (1940) and West VA State Board of Education v Barnette, 319 US 624 (1943) – “Flag salute cases”**
  - **Gobitis case: 2 children suspended and expelled for refusing to salute the flag because it violated their religious beliefs – they were Jehovah’s Witnesses; court upholds the suspension because patriotism is an important value that saluting flag is important and must have cohesion of flag salute to perpetuate that patriotism; case was during WWII – flag salute very important – opinion written by Frankfurter**
  - **Barnette – court reverses Gobitis decision; court held that Barnette children should not be forced to salute the flag because doing so would violate their free speech rights not to salute the flag and this goes to heart of civil liberties in US; dissent written by Frankfurter who aligns himself with the Jewish minority but yet still writes that it is ok to persecute Jehovah’s Witnesses**
- **Sunday closing laws – 1660 – Jewish businessman in New Netherland was fined for selling goods from his store while the Sunday sermon was going on at local church**
  - **Gallagher v. Crown Kasher Super Market, 366 US 617 (1961) – Kasher grocery store and butcher; open on Sunday and closed on Saturday; argument against Jews’ argument is that it gives them an unfair advantage over other business owners; only people open on Sunday then only one making money; Crown Kasher cannot be open on Saturday because in order to be Kasher cannot be open Saturday; court said that business can be open but Jewish business owners don’t have to be there; Crown Kasher loses; dissent declares that law grossly violates free exercise clause by offering a Jew a choice between economic survival and religious beliefs; Frankfurter writes a 100 page concurrence**
    - **Other Sunday closing cases business owners lose**
    - **Braunfeld v. Brown, 366 US 599 (1961)**
- **1986 Goldman v. Weinberger, 475 US 503 (1986) – Goldman is an Air Force Captain and PhD psychologist who works for Air Force and is re-signing with Air Force does psychological counseling all day in uniform; under uniform hat is small yarmulke because he is an orthodox Jew; no one complained; in 1981 asked to testify in**

**court martial for the defense – Capt Goldman takes off service cap and starts to testify and prosecutor objects and charges him with violation of military rules because out of uniform because wearing yarmulke and is kicked out of Air Force; there is a rule allowing a base commander the right to offer exemption to certain uniform rules for particularly compelling reasons – commander could have given an exception but that did not happen; issue before the court: whether desirability of dress regulations should be decided by military officials and whether constitutional mandate regarding their professional judgment; Rehnquist finds that military right to uniform surpasses 1<sup>st</sup> Amendment; government argues that allowing religious exception here would open the door to other exceptions, i.e. turbans; Brennan in dissent states that other religious garb is not relevant in this case and court must address the facts in this particular case; dissent points out that military is not going to collapse as a result of this issue – reality is that in military there are many people who are wearing religious garb all the time – Christians wear crosses, etc.**

- **2 years later Congress creates the yarmulkes for the military – officially issued yarmulke that is part of uniform**
- **Debate over 10 Commandments Monuments**
  - **Van Orden v. Perry, 545 US 677 (2005) – Supreme Court upheld 10 Commandments Monument on capital grounds in Austin Texas; argument was that everyone believes in 10 Commandments – different faiths have different 10 Commandments; Court ignores a Jewish issue for larger Christian issue; this was a Lutheran 10 Commandments**
- **Issue of Public Prayer**
  - **Cases are old and unlikely to be upheld these days**
  - **Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) - Plaintiffs argued that this is a government imposition; how can people of different faiths feel they will get a fair chance to have their issues heard; prayer always given by Evangelical Priest – town said did not have a rabbi because no synagogues in town and only ask religious leaders in their town; Justice Kagan wrote a dissent; 5-4 decision**

## **VI. Keeping Kosher – Kosher Law and Civil Law**

- **1813 – members of synagogue went to city council and asked for a law that only their congregation would have the right to sell Kosher meat in NYC – law passed**

- **Others went to council and said denied them religious liberty to buy from whom they wanted**
- **As a result – law was revoked and end of Kosher regulation in NYC for a while**
- **1915 Kosher Bill – made misdemeanor to falsely represent as Kosher if not Kosher; consumer fraud issue**
- **1916 – 57 butchers prosecuted with violating Kosher laws**
- **1910 - 65% of all Kosher butchers were selling non-Kosher meat according to a Kosher butcher's association**
- **More inspections – staff of NYC inspectors inspecting for Kosher violations**
- **Many inspectors not Jewish nor trained to know how to inspect for Kosher**
- **1922 and 1926 stronger laws passed**
- **1923 assigns enforcement to Dept of Marketing**
- **1926 “Kosher Squad” – goes around NYC looking for un-Kosher meat**
- **1925 40% Kosher meat sold in the state was not Kosher – allegations of fraud by inspectors taking bribes**
- **1992 - 21 states have Kosher fraud laws**
- **MD law of 1915 defined Kosher – prepared under and consisting of products sanctioned by the code of Jewish laws**
- **1925 – SCOTUS upholds NY Kosher laws – the law is not violation of due process**
- **1925 1<sup>st</sup> Amendment not incorporated to the States**
- **1992 – Ran-Dav's County Kosher, Inc. v. State of New Jersey, 129 NJ 141 (1992) – plaintiff was Kosher butcher and uses rabbi from NYC; local Kosher inspector (NJ has Kosher inspection board with 10 rabbis) – only NJ inspectors may be hired to conduct Kosher inspections; facing \$5000 fine because in freezer has chicken from a producer who was not Kosher – did not deny – received shipment from Kosher provider who after delivery told that it was not Kosher and to keep in freezer and distributor would pick it up; not selling the non-Kosher chicken; NJ Supreme Court (Justice Handler) – enormous complexity of the Jewish rules to determine what is Kosher and what is not; state concedes there are differences among Jews as to what is Kosher and what is not; Court declares law as unconstitutional – state of NJ cannot get in business of deciding what is and not Kosher and cannot hire the Chief of the Bureau of Kosher enforcement – violates**

**constitutional standards regarding separation of church and state;  
law struck down as unconstitutional**

- **Other Kosher laws may not have been struck down but are not being enforced**
- **One resolution of Kosher law issue - if you say something is Kosher it is up to the consumer to determine whether it is Kosher for that consumer – this is what has worked in most states and throughout the world**
- **Another resolution of the issue – vigorously enforced fraud laws when someone places the Kosher symbol on food and it has not been approved; simple fraud – not up to the state to determine what is Kosher – just whether Kosher authority has determined it is Kosher – state cannot support the Kosher authority – only whether it was approved or not**
- **Another resolution – NY statute – Article 39A – Torah Merchant Statute – anyone who sells a torah must disclose authority that merchant has to sell it; law has certain definition of “torah”; law only goes to whether merchant is authorized to sell – different from prior laws**
- **NY General Business Law of 1988 – civil penalties to someone who sells mezuzah that does not satisfy Hebrew requirements; requirements state to determine what meets Hebrew requirements**

## **VII. Immigration Law**

- **Laws passed in 1921 and 1924 severely restricted immigration – anti-semitic component – one argument for restrictions was that during WWI IQ tests for all soldiers – IQ tests proved that certain groups were so stupid that they should not be allowed into the country**
- **1917 – “dumbest people in America” – Jews, Italians, and African Americans; Jews and Italians are most recent immigrants so had most trouble taking tests in English**
- **Exclude inferior populations**
- **Ties to European divorces – a number of immigration cases where people come to US and then send back Get (religious divorce) to divorce wife but then when go to get remarried charged with bigamy because not really divorced**

## **VIII. Jewish Divorce**

- **Complicated issue**

- **Under Jewish law a divorce can only be initiated by the husband, husband must give wife “Get” (document); parties must go before Jewish religious court which performs divorce ceremony**
- **Do not need Get to remarry in US if have civil divorce**
- **Cannot remarry in US if have Jewish divorce and not civil divorce**
- **Cannot remarry under Jewish law if have civil divorce and not religious divorce – some men can remarry but not women**
- **Orthodox or conservative couple gets married, then get civil divorce; wife asks for Get to remarry and husband says No; under Jewish Law woman is still married and adultery takes place only when married woman has sex with someone who is not her husband – not the same for married man; man is free to have relationships with other women – not adultery under Jewish law**
- **In tightly knit Orthodox community woman is not allowed to date or remarry; if she does remarry children have limited ability to marry in the community and can only marry another with same “issue” – burden**
- **Orthodox Jewish woman who do not receive a Get live in a difficult world**
- **Jewish communities have had this problem for 2500 years – large problem in Israel where no civil divorce – allows Orthodox men to leave wives and take up with girlfriend and not committing adultery and wife cannot get a divorce – Israel cannot resolve problem**
- **Orthodox in US have turned to state legislatures and courts – NY “Get Law” – requires that moving party of a divorce remove all obstacles that are in party’s power to remove; so that spouse can remarry – problem is that if moving party is wife she cannot get a Get so the law does not affect the wife; the only moving party who falls under this law is when a man moves for divorce**
- **Reality is that in general Jewish man is in the driver’s seat and while it is not being done there is nothing in Jewish law that prevents a married man from having a second wife**
- **1992 law allows a judge in a divorce to deny a husband his right to most of marital property without giving a Get**
- **Case in 2002 – NY judge fined a husband \$500 a week for the rest of his life because would not give his wife a Get**
- **Traditional issue is the wife wants a divorce and husband says OK and will give a Get but only if give me house and kids and no**

**alimony otherwise no Get – political and economic coercion by husband**

- **1990 – Illinois – husband had to give Orthodox Get to wife; were married by a rabbi whose congregation did not require a Get; signed marital contract that said must live under the laws of Moses and Israel; judge said that husband had to give Get because that was of the laws of Moses and Israel**
- **Michigan case – a couple was married and husband decided to convert to Christianity and wife demanded a Get – he could not give a Get because he was no longer Jewish; a rabbi in Israel concluded that the marriage did not exist because no signed marital contract**
- **Should Jewish community go to legislature to try to solve a problem which is inherently an internally Jewish problem?**
- **Because state gives civil divorce – this causes the problem of the wife who does not receive a Get**
- **No civil divorce in Israel**
- **One solution: “Lieberman Agreement” – prenuptial clause you agree to give wife a Get if divorced – enforceable agreement that can be adjudicated in state court – breach of contract issue**
- **Another solution: prenuptial of cash payment of significant amount of money for the rest of ex-spouse’s life if does not want to give a Get; civil contract**
- **Adultery for Jewish woman who is married to have sex with someone who is not her husband and has a child then that child is “illegitimate” child and is restricted on who he/she could marry; if artificial insemination – is that adultery and what is that child’s status in Jewish community? Egg donor?**
- **Cannot force someone to give a Get**
- **Orthodox Jews are stuck in world of technology with laws that have not changed in 1000s of years**