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Remarks for Touro Synagogue (Newport, Rhode Island)
Celebration of the 350th Anniversary of Jews in America
August 22, 2004

It is a pleasure to join you at this special celebration. In the lively discussion she led yesterday, Pauline Maier referred several times to Brandeis Professor of American Jewish History Jonathan Sarna. Author of many works, including a book published just this year on *American Judaism*, Sarna tells us: The 23 or so refugees from Recife, Brazil, who arrived in New Amsterdam in September 1654 were not really the first Jews to set foot on North American soil. Sarna recalled the sage comment of Rabbi Jacob Rader Marcus: "Nobody is ever the first Jew anywhere. There is always another Jew who was there before." But, Sarna added, the refugees from Recife were the first to stay permanently. So it is fitting that we celebrate this year the start of Jewish *communal life* in North America.

Some years ago, perhaps anticipating the historic milestone we are commemorating, the Supreme Court Historical Society sponsored, and later published, a lecture series on the first five Jewish Justices, from Louis Brandeis to Abe Fortas. I will speak of those jurists, and then endeavor to explain why I believe there will be no supplement to the Historical Society's lecture series ranking me and Justice Stephen Breyer as the sixth and seventh Jewish Justices.

In the introduction to the Historical Society's publication of the lectures, I wrote of an age-old connection between Judaism and law. For centuries, rabbis and other Jewish scholars studied, restudied, and ceaselessly interpreted the Talmud, producing a vast corpus of juridical writing. Jews have always prized the scholarship of judges and lawyers in their own tradition, and when anti-Semitic occupational restrictions lessened, Jews were drawn to the learned professions of the countries in which they lived. Law figured prominently among those professions.

Law became and remains an avenue of social mobility, a field in which intellectual achievement is rewarded. And, as it evolved in the United States, law also became a bulwark against the kind of oppression Jews have encountered and survived throughout history. Jews in large numbers became lawyers in the United States, and some eventually became judges. The best of those lawyers and judges used the law not only for personal gain, but to secure justice for others. So it was with the first five Jewish Justices. I will recall in quick snapshots the lives in the law of those Justices, and the legacies they left.

The first Jew to be seated on the Court was Louis D. Brandeis, but he was not the first Jew offered the post. The man who might have preceded Brandeis by some 63 years rejected the offer. His name was Judah Benjamin. In 1853, he declined nomination to the Court by President Fillmore. Benjamin had just been elected U.S. Senator from Louisiana and he preferred to retain his Senate seat. (His preference for the Senate suggests that the Supreme Court had not yet become the co-equal branch of Government it is today.) Benjamin later became a leader in the Confederacy, eventually serving as Jefferson Davis' Secretary of State. (Although he achieved high office, Benjamin lived through a time of virulent anti-Semitism in America. Political enemies called him "Judas Iscariot Benjamin.")

When the South lost the Civil War, Benjamin fled to England, surviving a peril-filled journey. There, in his middle 50's, he started over, enrolling as a student at Lincoln's Inn. In time, he became an acclaimed barrister. The *Times of London*, in an obituary, described Benjamin as a man with "that elastic resistance to evil fortune which preserved [his] ancestors through a succession of exiles and plunderings."

The historical first thus fell to a man with a more secure start in life, Louis Dembitz Brandeis. During his days at the bar, Brandeis was sometimes called "the people's attorney," in recognition of his activity in the great social and economic reform movements of his day. Raised in Louisville, Kentucky, Brandeis already showed signs of greatness when he was graduated from Harvard Law School in 1876 at age 20, with the highest scholastic average in that law school's history. Practicing law in Boston, he became a leading champion of the progressive era, a prominent defender of trade unions, proponent of women's suffrage, and promoter of business ethics.

Brandeis was also a founder of the pro bono tradition in the United States. Spending at least half his working hours on public causes, Brandeis reimbursed his Boston law firm for the time he devoted to non-paying clients. He made large donations of his wealth from practice to good causes and lived frugally at home. A friend recounted that, whenever he went to the Brandeis house for dinner, he ate before and afterward.

Brandeis helped shape President Wilson's "new freedom" economic doctrine. In 1916, Wilson appointed him to the Court after a stormy confirmation process. Franklin Delano Roosevelt, among others, called Brandeis, not "Judas," but "Isaiah." Admirers, both Jewish and Gentile, turned to the scriptures to find words adequate to describe his

contributions to U.S. constitutional thought. At the Court, however, Brandeis encountered an openly anti-Semitic colleague. James Clark McReynolds, appointed by Wilson two years before Brandeis, rose and left the room when Brandeis spoke in Conference. No official photograph was taken of the Court in 1924, because McReynolds refused to sit next to Brandeis, where McReynolds belonged based on seniority.

Brandeis was not a participant in religious ceremonies or services, but he was an ardent Zionist, and he encouraged the next two Jewish Justices - Benjamin Cardozo and Felix Frankfurter - to become members of the Zionist Organization of America. Brandeis scholar Melvin Urofsky commented that Brandeis brought three gifts to American Zionism: organizational talent; an ability to set goals and to lead men and women to achieve them; and above all, an idealism that recast Zionist thought in a way that captivated Jews comfortably situated in the United States.

Jews abroad who needed to flee from anti-Semitism, Brandeis urged, would have a home in the land of Israel, a place to build a new society, a fair and open one, he hoped, free from the prejudices and economic disparities that marked much of Europe, a state where the prophetic teachings of justice, charity, and lovingkindness could be made real. Jews well established in the United States, he counseled would have a complementary mission, an obligation to help their kinsmen build that new land. Brandeis' very stature attracted legions of others. Jews here could say, if it was all right for Brandeis to be a Zionist, then it was OK for them as well.

When Brandeis retired from the Supreme Court in 1939, at age 83, after 23 years on the High Court bench, his colleagues wrote in their farewell letter:

Your long practical experience and intimate knowledge of affairs, the wide range of your researches and your grasp of the most difficult problems, together with your power of analysis and your thoroughness in exposition, have made your judicial career one of extraordinary distinction and far-reaching influence.

That influence continues to this very day.

Brandeis served for a time with Benjamin Cardozo, who was appointed to the Court in 1932. Tutored in his youth by Horatio Alger, Cardozo learned to treasure words and to thrive on hard work; it is rightly said that he approached his calling to the legal profession with "ecstatic consecration." Cardozo's fine hand adjusted the common law to meet the needs of an evolving society. He served with unmatched distinction for 18 years on New York's highest court - the last five as Chief Judge - before President Hoover named him to the U.S. Supreme Court. "What doth the Lord require of thee," the prophet Micah said, "but to do justice, to love kindness, and to walk humbly with thy God." Cardozo's life and work exemplified that instruction. "It has been said that genius consists in the ability to make clear the obvious which has never been understood before." In this sense, Cardozo's opinions and other writings are indeed works of genius.

[Cardozo remained a member of New York's Spanish and Portuguese Synagogue all his life. But like Brandeis, he was not a participant in religious observances, and his seat was mainly used by relatives. As a young lawyer, he once gave an address in which he urged the congregants to reject a proposal to end the separation of women from men at services. His eloquence may have carried the day: There is still separate seating in that synagogue. One of its congregants is today Chief Judge of New York's highest court, Judith Kaye.]

Cardozo died in 1938, after only six years on the Supreme Court. The Chief Justice at that time, Charles Evans Hughes, said of him:

His gentleness and self-restraint, his ineffable charm, combined with his alertness and mental strength, made him a unique personality. With us who had the privilege of daily association there will ever abide the precious memory not only of the work of a great jurist but of companionship with a beautiful spirit, an extraordinary combination of grace and power.

Felix Frankfurter, appointed by Franklin Delano Roosevelt in 1939 after Cardozo's untimely death, had been a Harvard Law School professor for 25 years. No cloistered academic, he was an ardent advocate of the right of labor to organize, a founder of the American Civil Liberties Union, a member of a National Association for the Advancement of Colored People (NAACP) advisory lawyers committee, and a defender of Sacco and Vanzetti, the anarchist shoemaker and fishmonger accused of murder in Massachusetts.

As a Supreme Court Justice, the onetime liberal crusader became a strong proponent of judicial restraint. In some quarters, he was criticized as excessively restrained. Yet Frankfurter was the first Justice to employ an African-American law clerk, William T. Coleman, Jr., in 1948. (Coleman remains, to this day, a prominent practicing attorney. Frankfurter was also the Justice who wrote: "[B]asic rights do not become petrified as of any one time It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right."

After Frankfurter retired in 1962, Arthur Goldberg joined the Court. A Kennedy appointee, Goldberg had been counsel to labor unions at a time when strikers were prey to the harassment of armed thugs. A longtime legal adviser to the steel workers union, he was considered the architect of the trade union merger that created the AFL-CIO.

Goldberg was the only Jewish Justice to have experienced childhood poverty (his father, who died when he was eight, sold produce in Chicago, from a wagon pulled by a blind horse). Goldberg was the sole member of his large family to continue his education beyond grade school. And unlike Brandeis, Cardozo, and Frankfurter, Goldberg was a keeper of religious ceremonies. At Passover seders in his home, Goldberg would relate the story of the Israelites in Egypt to the story of all the oppressed and outcasts of the world. My colleague, Justice Stephen Breyer, was among the few privileged to clerk for Justice Goldberg during Goldberg's less than three-year tenure on the Supreme Court. He resigned in 1965 to become Ambassador of the United States to the United Nations.

(Some years ago, I came upon a story Goldberg once told the congregation of Temple Emanu-El in Honolulu in the early 1960s. The Justice was in Chicago visiting his mother, who had become active in several Jewish organizations. He was sleeping late one morning when the telephone rang for him. His mother answered the phone and asked,

"Who's this?" The caller replied, "This is the President." Goldberg, barely awake, heard his mother inquire, "Nu, president from which shul?")

Succeeding Goldberg in 1965, Johnson-appointee Abe Fortas had been a steadfast defender of people smeared by Senator Joseph McCarthy at the height of the Cold War Red Scare, and counsel to people who had nowhere else to turn. Although religious observance was not a prime part of Fortas' family's life, it was thanks to a scholarship established by a rabbi in his hometown of Memphis, Tennessee, that this brilliant man was able to attend college.

Among other pro bono endeavors, Fortas' successful argument in *Gideon v. Wainwright* secured his legacy as a shaper of the rights of every person, no matter his station. (*Gideon* was the 1963 Supreme Court decision that guaranteed impecunious defendants in criminal cases the right to counsel paid from the public purse.) Fortas' time on the Court was cut short after Johnson, in 1968, nominated him to succeed Earl Warren as Chief Justice. That nomination was filibustered by a coalition of conservative Republicans and southern Democrats. A year later, under attack for apparent ethical lapses, Fortas resigned from the Court and resumed law practice.

Law as protector of the oppressed, the poor, the minority, the loner, is evident in the life body of work of Justices Brandeis, Cardozo, Frankfurter, Goldberg, and Fortas. Frankfurter, once distressed when the Court rejected his view in a case, reminded his brethren, defensively, that he "belong[ed] to the most vilified and persecuted minority in history." I prefer Arthur Goldberg's affirmative comment: "My concern for justice, for peace, for enlightenment," Goldberg said, "stem[s] from my heritage." The other Jewish Justices could have reached the same judgment. Justice Breyer and I are fortunate to be linked to that heritage.

I suggested at the start of these remarks that Justice Breyer's situation and mine is distinct from that of the first five Jewish Justices. I can best explain the difference by recounting a bit of history called to my attention in remarks made a few years ago by Seth P. Waxman. Seth served with distinction as Solicitor General of the United States from 1997 until January 2001.

Seth spoke of one of his predecessors, Philip Perlman, the first Jewish Solicitor General. Perlman broke with tradition in the 1940s and successfully urged in a friend of the Court brief the unconstitutionality of racially restrictive covenants on real property. The case was *Shelley v. Kraemer*, decided in 1948. The brief for the United States was written by four lawyers, all of them Jewish: Philip Elman, Oscar Davis, Hilbert Zarky, and Stanley Silverberg. All the brief writers' names, save Perlman's, were deleted from the filed brief. Perlman's name was listed together with just one other: Attorney General of the United States (and, later, Supreme Court Justice) Tom Clark. The decision to delete the brief drafters' names was made by Arnold Raum, Perlman's principal assistant and himself a Jew. "It's bad enough," Raum said, "that Perlman's name has to be there." It wouldn't do, he thought, to make it so evident that the position of the United States was "put out by a bunch of Jews."

Consider in that light President Clinton's appointments in 1993 of Ruth Ginsburg and in 1994 of Stephen Breyer as the 107th and 108th Justices. Our backgrounds had certain resemblances: we had taught law for many years and then served on federal courts of appeals for some 13 years. And we are both Jews. In contrast to Frankfurter, Goldberg, and Fortas, however, no one regarded Ginsburg and Breyer as filling a Jewish seat. Both of us take pride in, and draw strength from, our heritage, but our religion simply was not relevant to President Clinton's appointments.

The security I feel is shown by the command from Deuteronomy displayed in artworks, in Hebrew letters, on three walls and a table in my chambers. "Zedek, Zedek, tirdof" "Justice, Justice shalt thou pursue," these art works proclaim; they are ever present reminders of what judges must do "that they may thrive." There is also a large silver mezuzah mounted on my door post. It is a gift from the super bright teenage students at the Shulamith School for Girls in Brooklyn, New York, the school one of my dearest law clerks attended.

Jews in the United States today, I mean to convey, face few closed doors and do not fear letting the world know who we are. A question stated in various ways is indicative of large advances made. What is the difference between a New York City garment district bookkeeper and a Supreme Court Justice? Just one generation, my life bears witness, the difference between opportunities open to my mother, a bookkeeper, and those open to me. Where else but in the USA could that happen?

True, as press reports daily document, anti-Semitism's ugly head remains visible in our world. Even so, Jews in the United States seldom encounter the harsh anti-Semitism that surrounded Judah Benjamin, or that touched Brandeis when the U.S. Senate debated his nomination. I pray we may keep it that way.

Just as we draw inspiration from the letter exchange between this Congregation and George Washington, may I conclude these remarks with counsel a wise woman of that age, Abigail Adams, gave to her then young son, future President John Quincy Adams. Her words seem to me suitably fitted to the experience of Jews, now for some 350 years, in America:

These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.