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LOUIS MARSHALL, JULIUS HENRY COHEN, BENJAMIN CARDOZO, AND THE NEW YORK EMERGENCY RENT LAWS OF 1920: A CASE STUDY IN THE ROLE OF JEWISH LAWYERS AND JEWISH LAW IN EARLY TWENTIETH CENTURY PUBLIC INTEREST LITIGATION

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* Professor of Law, Pepperdine University School of Law. This Article was written in connection with the Conference on Jews and the Legal Profession, October 22-24, 2006, and will be published in a forthcoming volume of the conference proceedings. I thank Suzanne Stone and Marc Galanter for inviting me to participate in the conference, and Steve Flanders, Bob Gordon, Larry Mitchell, Russ Pearce, and Tanina Rostain for helpful conversations. For ongoing assistance in historical research, I thank the Law Librarians at Pepperdine University School of Law, in particular Don Buffaloe, Senior Research Services Librarian. Finally, I thank Fraida Liba, Yehudah, Aryeh, and Rachel for continued encouragement.

I. INTRODUCTION

In 2006, Cardozo Law School hosted a groundbreaking conference on "Jews and the Legal Profession," exploring the impact Jewish lawyers have had on the practice of law in the United States.[1] Scholars from a wide range of disciplines addressed a variety of important and interrelated themes including: sociological issues, such as the connection between the Jewish social and religious experience and areas of law commonly practiced among Jewish lawyers in the United States; historical studies of the role of Jewish lawyers in the evolution of the American legal profession; and the substantive function of Jewish law in the development and conceptualization of American law.[2]

This Article aims to consider an example of the interplay of these themes through an examination of the litigation surrounding the New York Emergency Rent Laws of 1920. In particular, the Article focuses upon a series of cases litigated by two of the most prominent Jewish lawyers in United States in the first half of the twentieth century: Louis Marshall and Julius Henry Cohen. Typical of many leading Jewish lawyers at the time, in addition to their other accomplishments, Marshall and Cohen distinguished themselves in their commitment to public service. Moreover, much of Marshall's most important work was dedicated to serving the needs of American Jewish individuals and communities, while Cohen showed a sustained interest in Jewish communal concerns, albeit to a considerably lesser degree than Marshall. In the context of the rent cases, however, Marshall and Cohen found themselves on opposing sides, yet in much of the litigation they each represented Jewish clients.

Among other notable aspects of the litigation, the cases reached the New York Court of Appeals and the United States Supreme Court, which at that time included two of the most eminent jurists in the history of the United States, Judge Benjamin N. Cardozo and Justice Oliver Wendell Holmes, Jr., respectively.[3] One element of the strategy Cohen employed in advocating before these courts adds yet another component to the signi-

1. *See* Center for Jewish Law and Contemporary Civilization, http://www.cardozo.yu.edu/cjl/conferences.asp?id=3948 (the conference was cosponsored by the American Association of Jewish Lawyers and Jurists, Fordham Law School's Institute on Religion, Law, & Lawyer's Work, Harvard Law School's Program on the Legal Profession, and New York Law School's Center for Professional Values and Practice) (last visited Oct. 8, 2008).

2. *See* Conference Invitation, http://www.cardozo.yu.edu/jlis/conference-invitation.pdf (invitation to the Jews and the Legal Profession Conference, October 22-24, 2006) (last visited Oct. 8, 2008).

3. *See, e.g.*, 810 West End Ave. v. Stern, 130 N.E. 931 (N.Y. 1921); Block v. Hirsh, 256 U.S. 135 (1921).

ficance of Jewish lawyers and Jewish law in the context of the Emergency Rent Laws cases. Specifically, in both his briefs and his oral arguments, Cohen relied, in part, on materials from medieval Jewish legal history. In his memoirs, published nearly twenty-five years later, Cohen offers a candid and entertaining reflection on his possible motivations for including these materials, recalling a colorful—if historically questionable—anecdote suggesting that he hoped to influence Cardozo through the references to Jewish law.[4]

Part I of this Article provides a brief background of the New York Emergency Rent Laws, tracing the enactment of the legislation as well as the course of the ensuing litigation. As illustrated in the names of the parties, many of the cases involved Jewish litigants, in addition to Jewish lawyers. Part II explores the roles of Marshall and Cohen in these cases, placing their contributions in the context of their broader efforts and shared commitments to furthering public and Jewish communal interests. Finally, Part III of the Article focuses on Cohen's reliance on Jewish legal sources and other historical precedents in his arguments supporting the constitutionality of the New York Emergency Rent Laws. In light of the limited substantive relevance of Jewish law to the legal issues surrounding the Emergency Rent Laws, the Article looks at alternative motivations for Cohen's inclusion of these materials in his briefs and arguments. In particular, Cohen's memoirs recall the remark of one of the judges on the New York Court of Appeals suggesting that the reference to Jewish law was an effective method for influencing Cardozo.[5]

However, the Article concludes that this story, even if accurate, was most likely not a reliable reflection of Cohen's reasons for relying on Jewish law, and indeed, that Cohen may have recounted the colorful story primarily as means of entertainment. This conclusion is reached on the basis of a number of factors, including a consideration of Cardozo's attitude toward the law and toward his Jewish heritage, as well as an examination of the interactions of lawyers and judges involved in the New York Emergency Rent Laws Cases. Ultimately, the Article suggests, Cohen's anecdote provides a valuable framework for reflection on the interests and interrelationships that might have influenced judicial decision making in the early twentieth century. Moreover, in light of controversies that have arisen regarding the religious beliefs and personal relationships of members of the current Supreme Court, this exercise has abiding relevance and potential application in the early twenty-first century as well.

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4. *See* JULIUS HENRY COHEN, THEY BUILDED BETTER THAN THEY KNEW (1946) (dedicated "To my friends--/Portraits within" (dedication page, unnumbered); the original title of the book was apparently: *They Builded Better Than They Knew, Selective Portraits for an American Gallery 1895-1945*).

5. *See id.*

II. BACKGROUND—EMERGENCY RENT LAWS

A. The Legislation

During World War I and in the years that followed, many large American cities experienced severe housing shortages, resulting from the combination of a precipitous growth in population and a drastic decrease in construction.[6] In New York City, landlords took advantage of the situation, demanding exorbitant rent increases under the threat of eviction.[7] As the New York Court of Appeals later found, "dispossess[ion] proceedings, more than had ever been known before, were pending to the number of upwards of 100,000; each proceeding practically involved a family averaging four or five persons."[8] In response, in April 1920, the New York State Legislature passed a set of housing laws placing a variety of restrictions on landlords.[9] Significantly, however, in practice the April Laws generally allowed landlords to increase rents up to twenty-five percent.[10] Of more urgent concern, leases of unspecified duration were deemed to be set to expire on October 1, enabling landlords to serve eviction notices on tens of thousands of tenants, who would be required to leave their dwellings on September 30.[11]

In the face of the impending crisis, the Legislature convened an extraordinary session and, on September 27, 1920, enacted the Emergency Rent Laws.[12] Among other significant features, with limited exceptions, the September housing laws stayed dispossession proceedings until November 1, 1922, and required that rent increases comply with statutory and judicial determinations of reasonableness.[13] Not surprisingly, the September laws engendered strong protests from landlords, leading to a series of cases litigated though the various levels of the New York State court system,[14] reaching the New York Court of Appeals[15] and, ultimately, the

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6. *See* People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 437-38 (1921).
7. *See id.* at 438.
8. *Id.*
9. April Housing Laws, N.Y. Sess. Laws 1920, chs. 131-38. *See* JOSEPH A. SPENCER, *New York City Tenant Organizations and the Post World-War I Housing Crisis*, *in* THE TENANT MOVEMENT IN NEW YORK CITY, 1904-1984, at 72 (Ronald Lawson ed., 1986); JARED N. DAY, URBAN CASTLES: TENEMENT HOUSING AND LANDLORD ACTIVISM IN NEW YORK CITY, 1890-1943 134-36 (Kenneth T. Jackson ed., Columbia University Press 1999) (1963).
10. *See* SPENCER, *supra* note 9, at 73; DAY, *supra* note 9, at 139-40.
11. *See* SPENCER, *supra* note 9, at 73-74.
12. September Housing Laws, N.Y. Sess. Laws 1920, chs. 942-53.
13. *See* People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 438 (1921); SPENCER, *supra* note 9, at 74-75. *See also* Guy McPherson, Note, *It's the End of the World as We Know It (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125, 1131-32 (2004); Note, *Residential Rent Control in New York City*, 3 COLUM. J. L. & SOC. PROBS. 30, 30-32 (1967).
14. *See infra* Part I.B.
15. *See* Durham Realty Corp. v. La Fetra, 230 N.Y. 429 (1921).

United States Supreme Court.[16] A look at the identities and interactions of many of the parties, a number of the lawyers, and some of the judges in these cases provides a window into various aspects of the attitudes and impact of Jewish lawyers in the United States in the early twentieth century.

B. The Cases

Litigation over the Emergency Rent Laws commenced almost immediately after they were enacted and proceeded expeditiously through both the New York State and the United States court systems.[17] One of the earliest decisions on the Emergency Rent Laws was handed down in the New York State Supreme Court in Bronx County on October 19, 1920.[18] The names of the parties, Jacob Guttag and Hyman Shatzkin,[19] as well as the lawyers, Bernard Deutsch and Julius Tobias,[20] present an early illustration of the involvement of Jewish individuals in these cases. Similarly, a number of New York County cases decided shortly thereafter included Jewish parties, as indicated by names such as: Rose Heyman,[21] Mortimer Osterweis,[22] Ellis Hyman,[23] Abraham Gordon,[24] Edgar A. Levy Leasing Company,[25] Jerome Siegel,[26] and Henry Stern.[27]

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16. *See* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

17. *Edgar A. Levy Leasing Co.*, 258 U.S. 242; *Marcus Brown Holding Co.*, 256 U.S. 170; *Durham Realty Corp.*, 230 N.Y. 429. Likewise, the Emergency Rent Laws engendered almost immediate scholarly reaction. *See* Harold G. Aron, *The New York Landlord and Tenant Laws of 1920*, 6 CORNELL L.Q. 1 (1920). *See also* George W. Wickersham, *The Police Power and the New York Emergency Rent Laws*, 69 U. PA. L. REV. 301 (1921).

18. Guttag v. Shatzkin, 113 Misc. 362, 185 N.Y.S. 71 (N.Y. Sup. Ct. 1920), *rev'd*, 194 A.D. 509 (N.Y. App. Div 1920), *rev'd* 230 N.Y. 647 (1921).

19. *Guttag*, 113 Misc. at 362.

20. *Id.* at 363. Similarly, Clara Wasserman, the plaintiff in a case decided in Kings County on October 16, 1920, was represented by Benjamin Ammerman. *See* People *ex rel.* Wasserman v. Fagan, 113 Misc. 255, 185 N.Y.S. 308 (N.Y. Sup. Ct. 1920).

21. *See* Heyman v. Osterweis, 113 Misc. 282 (N.Y. Sup. Ct. 1920). The opinion is dated October 1920.

22. *See id.*

23. *See* Hyman v. Gordon, 185 N.Y.S. 301 (Mun. Ct. 1920). The opinion is dated October 25, 1920.

24. *See id.*

25. *See* Edgar A. Levy Leasing Co. v. Siegel, 194 A.D. 482 (N.Y. App. Div. 1920). As noted in the appellate court opinion, the trial court judgment was entered on November 26, 1920. *Id.* at 483.

26. *See id.* at 482.

27. *See* 810 West End Ave. v. Stern, 186 N.Y.S. 56 (N.Y. App. Div. 1920). The appellate court opinion, decided December 24, 1920, does not cite a date for the trial court judgment. *See also* Versailles Holding Corp. v. Stein (N.Y. Sup. Ct. Nov. 26, 1920) (unpublished opinion, on file with author); Burke v. Hurlbut (N.Y. Sup. Ct. Dec. 17, 1920) (unpublished opinion, on file with author); Sperling v. Barton, 188 N.Y.S. 857 (N.Y. App. Term 1921).

Likewise, Jewish parties were named in many of the reported cases litigated pursuant to the April Laws. *See, e.g.*, Kuenzli v. Stone, 182 N.Y.S. 680 (N.Y. App. Div. 1920); Blek v. Davis, 183 N.Y.S. 737 (N.Y. App. Div. 1920); Horn v. Klugman, 183 N.Y.S. 150 (N.Y. Mun. Ct. 1920),

Notably, of the numerous lawyers who participated in the cases—many of whom were likewise Jewish—two lawyers stand out, both for their central roles in the rent cases and for their broader significance in Jewish and legal communities in the early twentieth century: Louis Marshall and Julius Henry Cohen. Cohen worked on a number of Emergency Rent Laws trial court cases, decided in November[28] and December, 1920,[29] in New York State Supreme Court, New York Special Term, and he continued to litigate many of the cases through the final appeal.[30] Marshall, who rarely served as a trial attorney,[31] became involved at the appellate level.

On December 24, 1920, the New York State Supreme Court, Appellate Division, First Department, issued several opinions relating to the Emergency Rent Laws, all of which list Cohen as counsel arguing in support of the laws.[32] In two of the cases, *Edgar A. Levy Leasing Co. v. Siegel*[33] and *810 West End Ave. v. Stern*,[34] Cohen and Marshall are listed as lead counsel for the opposing sides. Less than one month later, on January 19, 1921, the New York Court of Appeals heard arguments on many of these cases,[35] with Cohen and Marshall serving as central figures in the

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rev'd, 184 N.Y.S. 927 (N.Y. App. Div. 1920); Shanik v. Eckhardt, 183 N.Y.S. 155 (N.Y. App. Div. 1920); Paterno Investing Corp. v. Katz, 184 N.Y.S. 129 (N.Y. Sup. Ct. 1920); Seventy-Eighth St. & Broadway Co. v. Rosenbaum, 182 N.Y.S. 505 (N.Y. Mun. Ct. 1920).

See also Spencer, *supra* note 9, at 70-71 (noting the prevalence of Jewish litigants, lawyers, and communal organizations in the controversy over the Emergency Rent Laws).

28. *See, e.g.*, William Brandt & Co. v. Weil, 185 N.Y.S. 497 (N.Y. Sup. Ct. 1920).

29. *See, e.g.*, People *ex rel.* Durham Realty Corp. v. La Fetra, 185 N.Y.S. 638 (N.Y. Sup. Ct. 1920); People *ex. rel.* Brixton Operating Corp. v. La Fetra, 185 N.Y.S. 632 (N.Y. Sup. Ct. 1920); Ullmann Realty Co. v. Tamur, 185 N.Y.S. 612 (N.Y. Sup. Ct. 1920). Cohen also participated in an Emergency Rent Laws case that came before a federal court, on the basis of diversity jurisdiction, and was decided in December of 1920. *See* Marcus Brown Holding Co. v. Feldman, 269 F. 306 (S.D.N.Y. 1920).

30. *See, e.g.*, Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

31. *See* Oscar Handlin, *Introduction*, *in* I LOUIS MARSHALL: CHAMPION OF LIBERTY, SELECTED PAPERS AND ADDRESSES xvi (Charles Reznikoff ed., 1957).

32. *See* Edgar A. Levy Leasing Co. v. Siegel, 186 N.Y.S. 5 (N.Y. App. Div. 1920); 810 West End Ave., Inc. v. Stern, 186 N.Y.S. 56 (N.Y. App. Div. 1920); People *ex rel.* Durham Realty Corp. v. La Fetra, 186 N.Y.S.63 (N.Y. App. Div. 1920); People *ex rel.* Brixton Operating Corp. v. La Fetra, 186 N.Y.S. 58 (N.Y. App. Div. 1920); Guttag v. Shatzkin, 186 N.Y.S 47 (N.Y. App. Div. 1920), *rev'd*, 130 N.E. 929 (N.Y. 1921); Clemilt Realty Co. v. Wood, 186 N.Y.S. 415 (N.Y. App. Div. 1920); People *ex rel.* H.D.H. Realty Corp. v. Murphy, 186 N.Y.S. 38 (N.Y. App. Div. 1920); People *ex rel.* Ballin v. O'Connell, 186 N.Y.S. 46 (N.Y. App. Div. 1920).

An additional Emergency Rent Laws case was decided in the New York State Supreme Court, Appellate Division, Second Department, on December 7, 1920. *See* People *ex rel.* Rayland Realty Co. v. Fagan, 194 A.D. 185 (N.Y. App. Div. 1920). Although Cohen is not listed as counsel on the case, William D. Guthrie, who worked with Cohen on many of these cases, is listed as having submitted an amicus brief. *Id.* at 186.

33. Edgar A. Levy, 186 N.Y.S. 5.

34. 810 W. End Ave., 186 N.Y.S. 56.

35. *See, e.g.*, People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 434 (1921), which also decided the appeal of People *ex rel.* Brixton Operating Corp. v. La Fetra, 186 N.Y.S 58; Edgar A. Levy Leasing Co. v. Siegel, 230 N.Y. 634 (1921); 810 West End Ave. v. Stern, 230 N.Y. 652 (1921); People *ex rel.* H.D.H. Realty Corp. v. Murphy, 230 N.Y. 654 (1921); People *ex rel.* Rayland

proceedings.[36] The Court of Appeals decided these cases in several opinions handed down on March 8, 1921.[37] Finally, less than one year later, the cases of *Levy Leasing*[38] and *810 West End Avenue*[39] reached the United States Supreme Court,[40] argued on January 24 and 25, 1922, with Marshall and Cohen again serving as lead counsel. On March 20, 1922, in a 6-3 decision, the Court ruled in Cohen's favor, upholding the constitutionality of the Emergency Rent Laws.[41]

III. THE LAWYERS: LOUIS MARSHALL AND JULIUS HENRY COHEN

A. Louis Marshall

Marshall's life and work have been well-documented through his own words in letters, papers, and addresses posthumously edited and collected in two large volumes.[42] Tellingly, the subtitle of the collection ascribes to

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Realty Co. v. Fagan, 230 N.Y. 653 (1921); People *ex rel.* Ballin v. O'Connell, 230 N.Y. 655 (1921); Clemilt Realty Co. v. Wood, 230 N.Y. 646 (1921); Guttag v. Shatzkin, 230 N.Y. 647 (1921).

36. Cohen is listed as counsel in People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 434 (1921), the opinion of which served as the majority opinion for the other Emergency Rent Laws cases in the Court of Appeals as well. Cohen was also listed in the cases of: People *ex rel.* H.D.H. Realty Corp. v. Murphy, 230 N.Y. 654 (1921), People *ex rel.* Rayland Realty Co., Inc. v. Fagan, 230 N.Y. 653 (1921), and People *ex rel.* Ballin v. O'Connell, 230 N.Y. 655 (1921). Marshall is listed in Edgar A. Levy Leasing Co. v. Siegel, 230 N.Y. 634 (1921), and 810 West End Ave. v. Stern, 230 N.Y. 652 (1921).

37. The majority opinion for all of these cases was handed down in People *ex rel.* Durham Realty Corp. v. La Fetra, 130 N.E. 601 (N.Y. 1921).

For the concurring opinion in these cases, *see* Guttag v. Shatzkin, 230 N.Y. 647, 648 (1921) (Crane, J., concurring in result).

For the dissenting opinion in these cases, *see* Edgar A. Levy Leasing Co. v. Siegel, 120 N.E. 923, 924 (N.Y. 1921) (McLaughlin, J. dissenting).

38. Edgar A. Levy Leasing Co. v. Siegel, 120 N.E. 923 (N.Y. 1921).

39. 810 West End Ave. v. Stern, 130 N.E. 931 (N.Y. 1921).

40. In 1921, three other cases involving emergency rent laws reached the Unites States Supreme Court. On April 18, 1921, in a 5-4 decision, the Court upheld a Washington, D.C., emergency rent law. *See* Block v. Hirsh, 256 U.S. 135 (1921). Justice Homes wrote the majority opinion, while Justice McKenna wrote a dissenting opinion, joined by Chief Justice Taft and Justices Van Devanter and McReynolds.

On the same day, divided along the same lines, the Court upheld the New York Emergency Rent Laws, affirming the judgment of the United States District Court for the Southern District of New York. *See* Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921). In a preview to the *Levy Leasing* litigation, Cohen and Marshall filed opposing briefs in the case. *See infra* notes 85 and 134 and accompanying text.

Finally, on October 10, 1921, deciding a case litigated by Marshall, the Court issued a Memorandum Decision dismissing an appeal of People *ex rel.* Brixton Operating Co. v. La Fetra, 257 U.S. 665 (1921).

41. *See* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922). The majority opinion was written by Justice Clarke, with Justices McKenna, Van Devanter, and McReynolds dissenting without opinion.

42. *See* 1 LOUIS MARSHALL, LOUIS MARSHALL: CHAMPION OF LIBERTY, SELECTED PAPERS AND ADDRESSES (Charles Reznikoff ed., 1957) [hereinafter, 1 MARSHALL: PAPERS AND ADDRESSES]; 2 LOUIS MARSHALL, LOUIS MARSHALL: CHAMPION OF LIBERTY, SELECTED PAPERS AND ADDRESSES (Charles Reznikoff ed., 1957) [hereinafter, 2 MARSHALL: PAPERS AND ADDRESSES].

Marshall the appellation "Champion of Liberty,"[43] drawn from a tribute Benjamin N. Cardozo offered on Marshall's seventieth birthday.[44] Succinctly summarizing Marshall's career, Cardozo described him as "a great lawyer; a great champion of ordered liberty; a great leader of his people; a great lover of mankind."[45]

Marshall's reputation as a lawyer grew in part out of his work as a name partner in the prominent corporate law firm, Guggenheimer, Untermyer & Marshall. Complementing his corporate practice, Marshall served as a leading constitutional lawyer, earning Cardozo's praise through his efforts to champion the liberties of numerous minority groups and communities, including: African-Americans, whose housing and voting rights he worked to protect in his capacity as a director of the National Association for the Advancement of Colored People; Native-Americans, whose property rights he defended in serving voluntarily as counsel for the Pueblo nations;[46] Japanese-Americans, who were subjected to discriminatory property laws; and Catholics, whose religious freedoms were infringed upon by a law that was challenged in the landmark United States Supreme Court case of *Pierce v. Society of Sisters*.[47] Indeed, Marshall gained such respect as a lawyer that he was considered in 1911 as a possible nominee to the United States Supreme Court.[48]

Moreover, as Cardozo further observed, as part of his commitment to "liberty" and "mankind," Marshall distinguished himself as a "great leader of his people," the Jewish community.[49] Marshall felt a deep and abiding connection to his Jewish heritage, nurtured during his upbringing in a home observant of Orthodox practice.[50] On a communal level, Marshall was a central figure in various institutions and organizations, serving, for example, as president of Temple Emanu-El and chairman of the Board of Directors of the Jewish Theological Seminary.[51] Most significantly, Marshall helped found the American Jewish Committee and continued to guide it for many years while serving as its president.[52] The broad and ambitious mission of the AJC, "to aid in securing the civil and religious rights of the

43. 1 MARSHALL: PAPERS AND ADDRESSES, *supra* note 42.
44. *See id.* (introductory quotation, unnumbered).
45. *Id.*
46. *See* Handlin, *supra* note 31, at xxxix-xl.
47. *Id.*
48. *See id.* at xvii.
49. *See id.* at xiii; *See also id.* (dedication page, unnumbered).
50. *Id.*
51. *See* Handlin, *supra* note 31, at xix; *see also* JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 98-100,109-10 (1990).
52. *See* Handlin, *supra* note 31, at xxvi. One scholar describes Marshall as "the undisputed leader of Jewish communal affairs until his death in 1929," AUERBACH, *supra* note 51, at 94, and concludes that "hardly an issue of consequence in American Jewish life was resolved independently of his contribution." *Id.* at 111. *See also id.* at 110-11.

Jews in all countries where such rights are denied or endangered,"[53] reflected the scope of Marshall's efforts and concern for Jewish individual and communal needs.

B. Julius Henry Cohen

Though less prominent a figure than Marshall in both legal and Jewish communities, Julius Henry Cohen played a substantial role in numerous matters of public interest in the first half of the twentieth century. Like Marshall, the most comprehensive source of information about Cohen's life and work is found in his own words. Unlike Marshall, however, whose writings were collected and published by others after his death, Cohen reflected upon his own experiences in a candid, insightful, and highly entertaining memoir, framed largely through a portrayal of Cohen's interactions with important public figures over the course of fifty years.[54]

Cohen demonstrated concern for the public interest through the variety of positions he held and efforts he undertook, including, among many others: assisting in the formation of the Port of New York Authority and serving as its general counsel for more than twenty years; serving as a founding member of the American Arbitration Association and helping to establish its policies and procedures; playing a central role in resolving the 1910 garment workers' strike in New York; and serving as Special Assistant United States Attorney and Special Deputy Attorney General in a number of cases of public importance.[55]

Cohen's connection with his Jewish heritage was far less public than Marshall's and, based on his own reflections, his attitude toward Jewish religious practice may best be characterized as somewhat ambivalent.[56] Nevertheless, in much of his professional life he was closely involved with segments and influential individual members of the Jewish community, through both the substance of his public interest work and the identity of many of his associates and clients.[57] In fact, in some ways Cohen's legal career typified the experience of many leading Jewish lawyers at the time.

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53. *See* AUERBACH, *supra* note 51, at 110.

54. *See* COHEN, *supra* note 4. *See* Julius Henry Cohen, *Rent Control After World War I—Recollections*, 21 N.Y.U. L. Q. REV. 267, 267 (1946) (unnumbered footnote).

55. *See J.H. Cohen Dies; Ex-Counsel to Port Authority*, N.Y. HERALD TRIBUNE, Oct. 7, 1950, at 12; *Julius Cohen, 77, Lawyer 53 Years*, N.Y. TIMES, Oct. 7, 1950, at 19; *Necrological: Julius Henry Cohen*, NEW YORK LAW JOURNAL, Oct. 18, 1950. *See also* Gerald Fetner, *Public Power and Professional Responsibility:Julius Henry Cohen and The Origins of Public Authority*, 21 AM. J. LEGAL. HIST. 15 (1977).

56. *See* Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 11-12 n.52 (2005). For further discussions of Cohen's work, see *id.*, *passim*; Samuel J. Levine, *Professionalism Without Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 FORDHAM L. REV. 1339 (2003).

57. *See* COHEN, *supra* note 4, *passim*.

Indeed, one scholar has cited Cohen and Morris Hillquit as examples of early twentieth-century "Jewish lawyers . . . who were deeply involved with new immigrant groups, unionism, the use of arbitration in industrial disputes, and public service as counsel to various administrative agencies."[58]

C. Interactions Between Marshall and Cohen

Thus, although they found themselves on opposing sides in the Emergency Rent Laws cases, Marshall and Cohen shared a number of common goals and principles, reflected in their similar perspectives on other legal issues. Indeed, Marshall and Cohen were two of the primary architects of the agreement that settled the garment workers' strike. Not incidentally, as Cohen later observed, most of the employers and workers in the garment industry were members of a relatively closely-knit Jewish community.[59] According to Cohen, it was out of familiarity with and concern for the Jewish community that such prominent lawyers as Marshall and Louis D.

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58. ANDREW L. KAUFMAN, CARDOZO 99 (1998). *Cf.* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 218 (1976) (noting that "during the 1930's . . .[m]inority-group lawyers, especially Jews, flocked into a field of practice where it was possible to merge liberal reform or radical hope with professional fulfillment"); Marc Galanter, *A Vocation for Law? American Jewish Lawyers and Their Antecedents*, 26 FORDHAM URB. L.J. 1125, 1125 (1999) (observing that Jewish lawyers in the United States "have contributed disproportionately to many branches of the 'public interest sector,' with particular prominence in public service, public interest law firms and the defense of minorities and unpopular causes, to name a few"); Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 33 (1988) (stating that "the ideal of independent lawyering . . . has found some of its greatest exponents among Jewish lawyers (for example, Louis Brandeis, Louis Marshall, Felix Frankfurter, Jerome Frank), who, excluded from the inner circles of the WASP elite, had the vantage point of marginality to scold that elite for selling out its public service traditions to big business clients"); Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1616-23 (1993).

59. *See* COHEN, *supra* note 4, at 183. Cohen quotes at length the view of one historian who observed:

> The fact that most employers and workers alike long belonged to the relatively compact Jewish community, where the sufferings of one group could not long escape the attention of the other, *aided understanding*. The more enlightened employers did not want the needle trades, the most distinctively Jewish industries in America, to remain at a sweatshop level. Prominent Jews had used their influence to bring peace to the industries on a basis fair to all. As a result the needle industries, while contributing some stirring chapters to the history of American industrial strife, have been especially noted for experiments in peaceful industrial relations.

Id. (quoting JOEL SEIDMAN, THE NEEDLE TRADES 246, 247 (1942) (emphasis added by Cohen).

Similar sentiments were expressed in the 1952 article, "The Jewish Labor Movement in the United States." *See* Will Herberg, *The Jewish Labor Movement in the United States*, AMERICAN JEWISH YEAR BOOK 1952, Vol. 53, at 18-20, *cited in* 2 MARSHALL: PAPERS AND ADDRESSES, *supra* note 42, at 1128 n.*. The author of the article recounts the efforts of Brandeis, Marshall, and others, noting that Marshall and Jacob H. Schiff "felt that the good name of the Jewish community was being imperil[]ed by the conflict, particularly since public opinion was overwhelmingly on the side of the workers . . . ." *Id.* Moreover, the author concludes that "[t]he sensitivity to public opinion, the strong tradition of arbitration, and the common ethnic, cultural, and religious background [ ] probably contributed very considerably to the achievement of the Protocol of Peace and to the development of industrial relations in the major Jewish unions for some time thereafter." *Id.*

Brandeis devoted so much of their time,[60] while other lawyers of varying political views worked together,[61] in an effort to find a resolution to the matter. As Cohen put it, "They understood and knew the people in the industry. They had different views on economics and on politics but they had a common background."[62]

Along with their common interests, Marshall and Cohen shared mutual respect. A few years after they worked to resolve the garment industry dispute, Marshall wrote a gracious letter thanking Cohen for sending a copy of the "Protocols of Peace in the Dress and Waist Industry" and congratulating Cohen for "having accomplished the practical adoption of the now famous protocol of the cloak industry."[63] In turn, recalling in his memoirs the difficulty involved in finding an appropriate title for the agreement, Cohen credits Marshall with selecting the inherently "mysterious" term "Protocol."[64] In a depiction that may tellingly reveal an element of Cohen's perceptions of both Marshall and Jewish religious leaders, Cohen characterizes Marshall as thus "show[ing] his shrewdness, the shrewdness of an old rabbi."[65]

Likewise, despite their disagreement on the merits of the Emergency Rent Laws, Cohen's recollection of the dispute includes words of glowing praise for Marshall, whom he identifies as "very distinctly [the] leading

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60. With respect to the contributions of Brandeis to the resolution of the dispute, it may be worthwhile to note Marshall's remarks in a 1912 letter. 2 MARSHALL: PAPERS AND ADDRESSES, *supra* note 42, at 1127 (Letter from Louis Marshall to Miss Gertrude Barnum, Nov. 29, 1912). Following a disclaimer, stating that "I am not induced to do so by personal vanity," Marshall emphasizes the "possible historical importance" of his reflections. *Id.* Although Marshall acknowledges that "Mr. Louis D. Brandeis performed valiant service in the early stages of the general strike of the cloakmakers in July, 1910," Marshall declares that "his efforts did not bring about the settlement of the strike . . . ." *Id.* Marshall adds that, "[a]s a matter of fact, the manufacturers and the workmen were unable to agree and drifted entirely apart, to the extent that conditions became well nigh perilous." *Id.* According to Marshall, "[i]t was at that time that I was called in by the representatives of the contending parties, to act as mediator, as a result of conferences covering about two weeks, I personally prepared the protocol of peace, and brought about its adoptions by both parties." *Id.* Nevertheless, Marshall insists that "[t]his is of course merely for your information, as I have no desire to minimize the importance of the contribution of Mr. Brandeis to the settlement of the strike." *Id.* at 1128.

61. In Cohen's view "[t]his explains why Max Meyer and Reuben Sadowsky could work with Morris Hillquit and Meyer London." *See* COHEN, *supra* note 4, at 183. Cohen dedicated four chapters of his memoirs to his recollections of Meyer, Brandeis, Hillquit, and London, respectively. *See id.* at 179-89; 190-200; 201-14; 215-22.

62. *Id.* at 183.

63. 2 MARSHALL: PAPERS AND ADDRESSES, *supra* note 42, at 1130 (letter from Louis Marshall to Julius Henry Cohen, Jan. 20, 1913). The letter concludes with Marshall's acknowledgment that Cohen is "entirely right in [his] analysis of the situation." *Id.* Specifically, reflecting their commonly shared—if broadly articulated—ideals, the last lines of the letter state: "Reason and justice must be regarded as equally important to labor and capital. It is the golden mean between oppression and anarchy." *Id.*

Likewise, a letter from Marshall to Meyer London in the midst of negotiations expressly credited the drafting of the protocols to the work of Marshall, London, and Cohen. *See id.* at 1128 n* (letter from Louis Marshall to Meyer London, Sept. 1, 1910).

64. COHEN, *supra* note 4, at 221.

65. *Id.*

lawyer" for the landlords in these cases.[66] Cohen describes Marshall as "a great constitutional lawyer of [his] day"[67] and "one of those extraordinary people who can give you the number of the volume, the page reference and even the year any case was decided."[68] Moreover, on a more personal level, Cohen admired Marshall as "a great character" who "came here from leadership at the Syracuse bar which he won by clear merit."[69]

Notably, although Marshall and Cohen often shared common legal and social ideals,[70] Cohen did not fault Marshall for taking the position that the Emergency Rent Laws were unconstitutional. Cohen understood the perspectives and legal arguments offered in support of landlords, acknowledging that "[a]s a matter of fact, these laws did result in considerable hardship in some instances, especially in the cases of widows dependent upon fixed incomes coming from rentals."[71] In fact, Cohen estimated that had a poll been conducted among leaders of the legal establishment consisting of "lawyers on Pine, Wall, Broad Streets and lower Broadway, something like ninety-five percent [sic] would have been for 'unconstitutionality'. . . of the Emergency Rent Laws."[72]

In light of these impressions, Cohen presents a candid and insightful observation about William D. Guthrie's participation on behalf of tenants in these cases. In Cohen's account, Guthrie agreed to join the litigation at the urging of Bernard Hershkopf, whose "fine social instinct put him in complete sympathy with the [Emergency Rent L]aw[s]," and with whom Guthrie worked on important constitutional cases.[73] A leading member of the elite legal establishment, Guthrie had served for more than two decades as a name partner, and over a decade as senior partner in the law firm that evolved into the Cravath Firm.[74] Indeed, during the last years of his leadership, from 1901 to 1906, the firm was named Guthrie, Cravath & Henderson.[75] Like Marshall, Guthrie argued many important cases before the United States Supreme Court, and at one point Guthrie was considered a possible candidate for the Court.[76]

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66. *Id.* at 168. Cohen's recollections of the litigation surrounding the Emergency Rent Laws were published separately in an issue of the *New York University Law Quarterly Review* shortly prior to their publication as a chapter in his memoirs. *See* COHEN, *supra* note 4, at 162-75.

67. COHEN, *supra* note 4, at 169.

68. *Id.* at 169.

69. *Id.* at 172.

70. *See* COHEN, *supra* note 4, at 183.

71. *Id.* at 168.

72. *Id.* at 170.

73. *Id.* at 169.

74. *See* 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS: 1819-1947 vii, at 359-62, 659-65, 767-82 (1948).

75. *See id.* at vii, 664-65.

76. *See id.* at 781; Andrew L. Kaufman, *Cardozo's Appointment to the Supreme Court*, 1 CARDOZO L. REV. 23, 24 & n.9 (1979). Robert Gordon has identified Guthrie, Marshall, and a number of others as among "perhaps the most prominent" of "superelite" lawyers who entered practice in

According to Cohen, as a result of Guthrie's professional status, other lawyers found surprising Guthrie's support for the constitutionality of the Emergency Rent Laws. In Cohen's colorful recounting of a lunch meeting he had with Guthrie at the Downtown Club, "after the public announcement" that Guthrie had joined him on the case, "friend after friend of [Guthrie's] came up to him . . . and intimated politely that he must be rapidly approaching senility."[77] By the same measure, though, Cohen realized the value of having a lawyer of Guthrie's caliber and reputation as co-counsel on the cases. Given the centrality of the constitutional questions raised by the Emergency Rent Laws, and the formidable opposition posed by Marshall, Cohen attached substantial importance to the fact that "Guthrie was known throughout the country as a great authority on constitutional law."[78]

Perhaps more dramatically, Cohen understood the political significance of Guthrie's willingness to represent tenants against the interests of the real estate industry. Employing characteristic candor, Cohen observed that Guthrie's support "helped us a lot, because if Guthrie came with us, we could not be called a *bunch of radicals*."[79] Though Cohen did not elaborate on this reference to radicals, the self-mocking tone—including the italicized emphasis—unmistakably points to the composition of the lawyers and activists who supported the Emergency Rent Laws. In addition to the

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New York City between 1860 and 1910 and who were also "active in reform politics or law reform." Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 67 n.6 (Gerard W. Gawalt ed., 1984).

77. COHEN, *supra* note 4, at 169.

78. *Id.* at 169. Among other distinctions, Guthrie held positions as Storrs Lecturer at Yale University in 1907-08 and as Ruggles Professor of Constitutional Law at Columbia University from 1909 to 1922. *See* SWAINE, *supra* note 74, at 362. He was also the author of WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1898), which was published by Little, Brown & Co., and "received favorable reviews in the *Harvard Law Review* and in the *Yale Law Journal*." *Id.* at 660 (citations omitted).

Not surprisingly, Marshall and Guthrie often crossed paths in the course of their work, including working together on the landmark Unites States Supreme Court case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Guthrie and Hershkopf served as counsel for the Society of Sisters, *see* Brief on Behalf of Appellee, while Marshall filed an amicus brief on behalf of the American Jewish Committee in support of the appellees. *See* Brief for American Jewish Committee.

It is worth noting Marshall's letter to Guthrie, years later, chiding Guthrie for language he used that, in Marshall's estimation, carried anti-Semitic intonations. *See* 1 MARSHALL: PAPERS AND ADDRESSES, *supra* note 42, at 277-80 (Letter from Louis Marshall to William D. Guthrie, Apr. 9, 1926). Although Marshall stated that "[i]t is needless for me to say that I know that you have no prejudices" and "[w]e have fought together on a number of occasions to combat prejudices of this character," he nevertheless declared that "unconsciously, you have permitted yourself to use expressions which are unfortunate, and coming from such as you are apt to contribute to a perverted notion in public mind." *Id. Cf.* AUERBACH, *supra* note 51, at 121-22.

See also 1 MARSHALL: PAPERS AND ADDRESSES, *supra* note 42, at 277 n.** (quoting Guthrie's earlier letter to Marshall that had commended Marshall for voicing a similar protest to an address by Elihu Root: "You have admirably and most eloquently resented an unwarranted attack upon thousands of educated and patriotic Americans").

79. COHEN, *supra* note 4, at 169 (emphasis in original).

legal arguments leveled against the constitutionality of the Emergency Rent Laws, the laws faced a number of challenges in the public arena as well, perhaps most prominently as a result of the combination of the Red Scare and the visibility of Socialist tenant groups.[80] In particular, a number of Jewish union groups, social organizations, and lawyers were closely associated with the efforts of the tenants, often serving in leadership roles, prompting a rising incidence of anti-Semitism.[81] Thus, Cohen recognized, Guthrie's decision to part ways in this matter with the overwhelming majority of the legal and political elite, allying himself instead with groups and lawyers viewed by many as radicals, helped lend an air of credibility and a prospect of hope to the struggles of a largely unpopular cause.

IV. COHEN'S ARGUMENT FROM JEWISH LAW

A. The Supreme Court Brief

As lead counsel in Emergency Rent Laws cases before both the New York Court of Appeals[82] and the United States Supreme Court,[83] Cohen and Guthrie were joined on their briefs by Guthrie's colleague, Hershkopf, and by Elmer G. Sammis. In the 117-page brief they submitted to the United States Supreme Court in *Edgar A. Levy Leasing Co. v. Siegel*,[84] they presented a number of arguments in support of the constitutionality of the Emergency Rent Laws, relying primarily upon Supreme Court precedent,[85] the police power of the State,[86] and an examination of the emergency conditions that prompted the enactment of the laws.[87]

The final argument in the brief, authored by Cohen and documenting responses to emergency housing shortages in other countries, referenced

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80. *See* Spencer, *supra* note 9, at 51-93.

81. *See id.* at 71. The anti-Semitism was exacerbated by the fact that many of the landlords were Jewish as well. *See id.* at 70-71. *See also supra*, notes 19-27 and accompanying text.

82. *See* People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 434 (1921).

83. *See* Brief on Behalf of the Attorney-General and the Joint Legislative Committee on Housing, Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 243 (1922).

84. *See id.*

85. *See id.* at 10-34. Specifically, they urged the Court to adopt as controlling precedent the rulings decided on April 18, 1921, in Block v. Hirsh, 256 U.S. 135 (1921), and Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), both of which upheld emergency rent laws. Indeed, as they noted in the brief, in *Marcus Brown Holding*, the Court decided many of the same issues regarding the constitutionality of New York's Emergency Rent Laws. *See* Brief, *supra* note 83, at 17.

Strikingly, Cohen had filed a brief, by leave of the Court, in *Marcus Brown Company*, along with the other lawyers who joined him in arguing *Levy Leasing*. *See* Brief on Behalf of the Attorney-General and the Joint Legislative Committee on Housing of the State of New York. Likewise, Marshall, who was lead counsel opposing Cohen in *Levy Leasing*, had filed an opposing amicus brief in *Marcus Brown Holding*, on behalf of Edgar A. Levy Leasing Company and 810 West End Avenue Incorporated. *See* Points for Edgar A. Levy Leasing Co. Inc. and 801 West End Avenue Inc. as Amici Curiae on Constitutionality of Chapters 136, 944 and 946 of the New York Laws of 1920.

86. *See* Brief, *supra* note 83, at 34-54.

87. *See id.* at 54-92.

both modern and historical remedies, including a relatively esoteric development in Jewish law from sixteenth-century Italy.[88] As Cohen later noted, he cited the example from Jewish law not only in the brief but also in his oral arguments, in both the New York Court of Appeals and the United States Supreme Court.[89] Cohen's reference to Jewish law in the Emergency Rent Laws litigation may prove to be of considerable historical and sociological interest. In light of the central role of Jewish lawyers and parties in these cases, it seems somewhat fitting that Cohen cited Jewish legal precedent. Perhaps more significantly, Cohen's later recollections suggest the strategic value of relying on Jewish law, as well as Irish law, before the New York Court of Appeals in this case.[90] To the extent that Cohen's recollections were both earnest and accurate, they may shed light on some of the strategic calculations lawyers took into account in appearing before early twentieth-century judges.

Cohen's historical argument in the Supreme Court brief is premised on the observation that "[e]mergencies involving the occupancy of land have arisen and been dealt with in the past, first by communal customs and then by legislation which converted the customs and legally unenforceable obligations into positive law."[91] In particular, "[h]istory has thus again and again evolved as the fair and proper remedy in such cases (1) the restriction of the right to evict, or the recognition of the tenant's right of renewal, and (2) the fixing of reasonable rentals by disinterested authority."[92] As historical evidence for these conclusions, the brief offers a short paragraph documenting equitable protection of tenants' rights in the Roman Empire, followed by more extensive discussions of Jewish law and Irish law.[93]

Cohen introduces the section on Jewish law by asserting that "[i]t is a curious fact that the Jews of the Middle Ages lived through a crisis in many respects similar to that before the court, and dealt with it in a manner analogous to the legislation in suit."[94] Specifically, "[c]onfined to ghettoes and forbidden to own land, they were obliged to rent both dwellings and business places in the limited areas in which they were permitted to stay and do business."[95] Consequently, "[i]t often happened that as soon the landlord discovered that the tenant was able to make a living in the place where he was settled or was successful in his business, the landlord would raise the rent in the dwelling place or street to a large amount."[96]

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88. *See id.* at 104-06.
89. *See* COHEN, *supra* note 4, at 170-72.
90. *See id.*
91. Brief, *supra* note 83, at 104.
92. *Id.*
93. *Id.* at 104-14.
94. *Id.* at 104.
95. *Id.*
96. Brief, *supra* note 83, at 104.

Finally, "when the tenant was unwilling to pay the rent which the landlord demanded, the landlord would find another Jew to whom he would rent the place."[97] In short, "the first Jew lost his living to the second,"[98] resulting in both "rent profiteering" and "ruinous competition for premises among Jews."[99]

As Cohen's brief details, to remedy these conditions, rabbinic authorities in the Jewish ghetto enacted a form of rent regulation. As Cohen describes it:

> [T]he rabbis deduced from the Talmud the law of Hazakah, which gave the tenant in possession the right to continue, even without a lease, as against another Jew seeking to outbid him, and instituted a regulation excommunicating any Jew who offered an unreasonable rent in order to secure a dwelling place or store over the head of a Jew already in occupancy.[100]

Cohen documents this legal analysis in a footnote, citing a number of scholarly works on Jewish law, including encyclopedic treatises written in Hebrew[101] and an article published in *The Menorah Journal*, an American journal on Jewish law.[102] The footnote quotes verbatim an English translation of one such rent regulation, enacted on June 21, 1554, by delegates of the Jewish congregations of Rome, Ferrara, Mantua, Romagna, Bologna, Reggie, Modena and Venice.[103]

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97. *Id.* at 104-05.
98. *Id.* at 105 (internal quotation omitted).
99. *Id.*
100. *Id.*
101. Brief, *supra* note 83, at 105 n.* (citing EISENSTEIN, OZAR HADDINIM—A DIGEST OF JEWISH LAW 129-30 (1917); IV EISENSTEIN, O[]ZAR YISRAEL 265 (1910)). Both of these works were compiled by Judah David Eisenstein, though as published, the title of the former differed from Cohen's citation. The transliterated title page of the 1927 edition reads: "Ozar Dinim u-Minhagim: A Digest of Jewish Laws and Customs, compiled by J. D. Eisenstein." Likewise, the 1917 edition was published with the lengthier title.
102. *See* Brief, *supra* note 83, at 105 (citing Nathan Isaacs, *Jewish Law in the Modern World*, THE MENORAH JOURNAL, Vol. VI, No. 5, at 258 (1920)). Cohen identifies Isaacs as Professor of Law at the University of Pittsburgh, former Professor of Law and Assistant Dean at the University of Cincinnati Law School, and the 1919-1920 Thayer Teaching Fellow at Harvard Law School. *Id.*

Isaacs later returned to Harvard, and in 1924 was named Professor of Business Law at the Graduate School of Business Administration. He also lectured at Columbia University, the Army Industrial College, the University of Rochester, and Yale Law School. In addition, Isaacs was active in Jewish organizations, and among his extensive scholarly endeavors, he edited the National Law Library along with Roscoe Pound. *See Dr. Nathan Isaacs of Harvard Dead,* N.Y. TIMES, Dec. 19, 1941, at 25; *see also Editor's Introduction* to Nathan Isaacs, *Study as a Mode of Worship*, COMMENTARY, Vol. I, No. 8, at 77 (June 1946).
103. *See* Brief, *supra* note 83:

> (v) Whereas there are many who infringe on the tekanah of Rabbenu Gershom, which forbids any Jew from ousting another Jew from a house rented from a Christian landlord, and whereas such offenders claim that when the landlord sells his house the Jewish tenant thereby loses his chazaka (i.e., his rights of preferential tenancy), we

Cohen completes the discussion with a quotation from *Jewish Life in the Middle Ages*, by Israel Abrahams:

> The *Jus Casaca* . . . gave the Jewish tenant of a Christian's house in the ghetto a right in that house which no other Jew could usurp. . . . Clement VIII legalized this Jewish arrangement by practically making evictions impossible so long as the rent (also fixed by him) was duly paid. . . . Similar laws of Chazaka were applicable to Jewish landowners; Duran, for instance, reports a takanah [*i.e.*, a regulation] which rendered it unlawful for a Jew to evict a fellow Israelite by raising the rent or by any other device whatsoever.[104]

On a substantive level, Cohen's reliance on sources of Jewish law appears misplaced. After all, notwithstanding some degree of factual similarities, the internal regulations in the Jewish ghetto in sixteenth-century Italy seem largely irrelevant to the Emergency Rent Laws in early twentieth-century New York. Presumably, Cohen did not expect the New York Court of Appeals or the United States Supreme Court to rely upon Jewish legal principles as grounds for upholding the constitutionality of the Emergency Rent Laws.

Not surprisingly, in response to Cohen's historical arguments, Marshall and his co-counsel, Lewis M. Isaacs, emphasized a number of factual and analytical differences between the Jewish legal precedents and the New York Emergency Rent Laws. Indeed, Marshall replies harshly in his Supreme Court brief, in a section under the heading of "The Supposed

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> therefore decree that though the Christian owner sell his house, the right of the Jewish tenant to retain possession is unchanged, and any Jew who ousts him is disobeying the tekanah of R. Gershom and also this tekanah, now newly enacted.

Id. at 105 n.*.

The quotation is taken from *Jewish Life in the Middle Ages*, by Israel Abrahams, which was published in several editions in the late-nineteenth and early-twentieth centuries, by The Macmillan Company and The Jewish Publication Society of America. In editions published in 1896, 1897, 1911, 1917, and 1920, the quotation is found on pages 70-71. *See* ISRAEL ABRAHAMS, JEWISH LIFE IN THE MIDDLE AGES 70-71 (1896). The brief does not reference a page number for this quotation. In addition, the brief does not indicate which edition of Abrahams' book Cohen consulted. *See infra* note 104.

104. *See* Brief, *supra* note 83, at 105-06 (ellipsis and brackets in original) (quoting ABRAHAMS, *supra* note 103). Cohen references page 69 of Abrahams' book. In the 1896, 1897, 1911, 1917, and 1920 editions of the book, the quotation is found on pages 71 and 72.

For further discussions of these laws, sometimes transliterated as *jus gazaga*, *see, e.g.*, 2 MENACHEM ELON, JEWISH LAW: HISTORY , SOURCES, PRINCIPLES 782-86, 811-13 (Bernard Auerbach & Melvin J. Sykes, trans. 1994); LOUIS FINKELSTEIN, JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES 20-35, 111-47, 171, 181 (1964); Attilio Milano, *The Private Life of a Family of Jewish Bankers at Rome in the Sixteenth Century*, 30 JEWISH Q. REV. 149 (1939); Israel Schepansky, *Takkanot Rabbenu Gershom Me'or ha-Golah*, 22 HA-DAROM 103 (1966); THE JEWISH ENCYCLOPEDIA, Vol. 7, at 395 (1925); MEIR TAMARI, WITH ALL YOUR POSSESSIONS: JEWISH ETHICS AND ECONOMIC LIFE, 111-12 (1987).

Precedents in European Countries."[105] Marshall begins with the declaration that "[o]ur opponents have . . . referred to alleged *responsa* rendered in mediaeval times, in their capacity as arbitrators."[106] After dismissing the relevance of Cohen's other historical references, Marshall asserts categorically: "Nor are *responsa* rendered in the exercise of an ecclesiastical as distinguished from a judicial function by rabbis, who were intent upon the avoidance of conflict among members of the synagogue, of the slightest moment."[107] Finally, Marshall adds, "[t]he very fact that the Jews, in the days when these arbitraments took place, were not permitted to own real property of itself indicates how far afield these alleged precedents are apt to lead one."[108]

To be sure, some of Marshall's conclusions are open to question and may prove less than fully accurate. For example, Marshall claimed that in enacting medieval decrees, rabbis exercised an "ecclesiastical" rather than "judicial" function.[109] However, while Marshall correctly alluded to the important distinction in Jewish law between various functions and roles of rabbinic authorities,[110] the enactment of communal decrees falls within the legislative function exercised by legal authorities as part of the Jewish legal system.[111] In fact, not unlike the Emergency Rent Laws, the rabbinic decrees referenced by Cohen, though perhaps serving an "ecclesiastical" purpose of avoiding conflict, constitute a form of communal legislation, with binding legal force.[112] Nevertheless, despite perhaps succumbing to a degree of overstatement, Marshall convincingly demonstrated basic differences between the Jewish legal principles cited by Cohen and the substantive issues in the Emergency Rent Laws cases.[113]

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105. *See* Points For Plaintiff-in-Error at 108, Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *See* Samuel J. Levine, *An Introduction to Legislation in Jewish Law, With References to the American Legal System*, 29 SETON HALL L. REV. 916 (1999); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997).

111. *See* Levine, *An Introduction to Legislation in Jewish Law*, *supra* note 110.

112. *See id.*

113. Notably, years earlier, Marshall had relied heavily on Jewish law in an argument before the New York Court of Appeals in the case of Riker v. Leo, 133 N.Y. 519 (1892). In fact, Marshall presented a veritable disquisition on the principles of charity in Jewish tradition, through repeated and extensive quotations from the Torah, the Talmud, and the work of Maimonides. *See* 2 MARSHALL: PAPERS AND ADDRESSES, *supra* note 42, at 913-23 (excerpting Marshall's argument on behalf of the North American Relief Society).

In *Riker*, however, the Jewish law of charity seemed particularly relevant, as the issue in the case revolved around a Jewish philanthropist's bequest to a Jewish charitable organization. *See id.* In contrast, although many of the cases relating to the New York Emergency Rent Laws—including the cases that Cohen and Marshall litigated—involved Jewish parties, there existed no substantive nexus between the New York laws and the Jewish laws Cohen cited.

In contrast to the relatively cursory and arguably inapposite comparisons to Jewish law, Cohen dedicated several pages of his brief to a more thorough survey of Irish, English, and Scottish rent laws.[114] Spanning the early eighteenth century through the early twentieth century, these legal systems implemented various rights of renewal to protect tenants from unfair treatment by landlords.[115] As Cohen notes in the brief, eight months earlier, in *Block v. Hirsh*, the United States Supreme Court had upheld a similar emergency rent law in the District of Columbia, in part on the basis of historical precedent in English law.[116] Writing for the majority in *Block*, Justice Oliver Wendell Holmes, Jr., stated that "[t]he preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."[117] Thus, Cohen understandably offered similar historical examples from English law in support of the New York Emergency Rent Laws.[118] However, such explanation does not account for Cohen's inclusion of Jewish law in the brief in the absence of any substantive relevance to the case.

B. Judge Benjamin N. Cardozo and Jewish Law

Instead, perhaps an alternative—if not more plausible—explanation for Cohen's reliance on Jewish law and, to some degree, his reliance on Irish law, can be found in Cohen's later depictions of the events surrounding the oral arguments in these cases. In his memoirs, published in 1946, Cohen recalls that he raised the historical analogies during the two most important oral arguments he presented in the course of the Emergency Rent

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114. *See* Points for Plaintiff-in-Error, *supra* note 105, at 106-14.

115. *See id.*

116. *See* Brief, *supra* note 83, at 114 (citing Block v. Hirsh, 256 U.S. 135 (1921)).

117. *See Block*, 256 U.S. at 157-58.

118. Nevertheless, in responding to Cohen's historical arguments, Marshall discounted the relevance of various European legal systems as well. For example, he wrote that:

> Our opponents have indulged at some length in citations from historians, decisions and statutes dealing with conditions in European countries, as e.g. in Ireland and Scotland . . . . These passages from the history of other countries, whose organic law differs fundamentally from ours have no application here, where legislation is necessarily governed by our written Constitutions.

See Points For Plaintiff-in-Error, *supra* note 105, at 108.

In addition, Marshall borrowed at length from a New York Court of Appeals decision distinguishing between American law and English law. In part, he quoted:

> [W]e are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written Constitution and the Parliament or lawmaking power is supreme. In our country the Federal and State Constitutions are the charters which demark the extent and limitations of legislative power . . . .

Id. at 109 (quoting Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 287 (1911)).

Laws litigation: before the New York Court of Appeals and before the United States Supreme Court.[119] In Cohen's account, a day or two after his argument in the New York Court of Appeals, Judge Frederick E. Crane, an Associate Judge of the Court of Appeals, remarked to Judge Luke Stapleton: "They are a clever bunch, Guthrie and Cohen—[they] cite Irish precedents and they get [Judge John W.] Hogan; they cite Jewish precedents and get [Judge Benjamin N.] Cardozo—and so they bag two of the judges before they even begin their argument."[120]

On one level, Judge Crane's reported remark appears indicative of political realities that dominated New York in the early twentieth century.[121] Indeed, among other factors, the religion and ethnicity of candidates played a primary role in the selection of judges for the Court of Appeals at that time.[122] To the extent that Cardozo's Jewish heritage and Hogan's Irish heritage factored into their successful candidacies,[123] it might be suggested that they accordingly would have responded to arguments that resonated with their religious and ethnic backgrounds.

Upon further analysis, though, it remains highly questionable that Cohen actually believed his reference to Jewish law could have influenced Cardozo's decision in the case. In fact, at various points, Cohen's me-

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119. *See* COHEN, *supra* note 4, at 170-72.

120. *Id.* at 170.

121. Parenthetically, it may be noted that these kinds of political considerations have continued to exert a degree of influence into the early twenty-first century as well.

122. *See, e.g.*, JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 132 (1976) (stating that the New York Court of Appeals that in 1928 decided the case of Palsgraf v. Long Island Railroad Company, 248 N.Y. 339 (1928), "had been composed with that attention to religious affiliation (Protestant, Jewish, Catholic) and regional origin (upstate, metropolis) which often has exhausted political wisdom in New York").

Indeed, in one account, Cardozo was considered for appointment to the Court of Appeals in 1914 only after a number of Catholics had declined Governor Martin Glynn's nomination, including William Guthrie, Frederic Coudert, and William Kelley. *See* KAUFMAN, *supra* note 58, at 615 n.57. Kelley declined specifically "when he learned that he was being offered the position because he was a Catholic." *Id.* Although Kaufman has questioned the historical precision of some details of this account, *see id.*, the story accurately reflects historical dynamics of appointment to the Court of Appeals in the early twentieth century, including the relevance of the appointee's religious affiliation.

123. Cardozo did, in fact, receive some—though not universal—support in his New York judicial campaigns from Jewish communal leaders and organizations. *See* KAUFMAN, *supra* note 58, at 117-29. Perhaps of greater significance in the context of Cohen's reference to Jewish law, by nearly all accounts Cardozo ascribed great value to Jewish religion and tradition. *See, e.g.*, Alan M. Stroock, *Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 20 (1979) (recalling author's clerkship for Cardozo during the 1934 and 1935 Terms of the United States Supreme Court):

> Justice Cardozo's attitude toward his Judaism is difficult to define . . . . [H]e was proud of his ancestry. But I do not remember his ever going to a Synagogue or his observing any of the religious holidays at home. He was a good friend of Rabbi Stephen Wise and other religious leaders, but he never took an active part in any Jewish organization or Jewish cause such as Zionism . . . . On the other hand, he preserved in his subconscious memory his recollections of the Jewish ceremonies of his youth . . . . Moreover, I believe that he thought that his philosophy of life and law was basically Jewish in all its elements . . . .

Id. at 22. *See also* sources cited *infra* note 138.

moirs—often recalling events that, as this one, had occurred decades earlier—suggest a penchant for colorful and largely impressionistic storytelling, at the possible expense of accuracy or earnestness. Likewise, Cohen's reference to the purported conversation about employing Jewish law as a method of winning over Cardozo may prove to be more entertaining than enlightening.

Indeed, aspects of Cohen's depictions of events surrounding the Emergency Rent Laws litigation include inaccuracies that raise serious questions about the reliability of his recollections. For example, according to Cohen, the conversation about the supposed effect of Jewish law on Cardozo took place between Judge Crane and "Judge Luke Stapleton."[124] However, Stapleton, who served as a New York State Supreme Court Justice on both the trial court and appellate levels, resigned from the bench at the end of 1917,[125] more than three years before Cohen and Guthrie argued the Emergency Rent Laws case in the New York Court of Appeals.[126]

Of course, Cohen could have correctly recalled that Stapleton was no longer a judge in 1921, but nevertheless decided to use the title as a measure of respect for Stapleton. Alternatively, Cohen might have correctly recalled that the conversation transpired between Crane and Stapleton, despite erroneously believing that Stapleton had still been serving as a judge at the time. In any event, Cohen's error casts further doubt upon an already dubious story regarding an event that had occurred a quarter century prior to the publication of his memoirs.

Similar questions arise over Cohen's recounting of the courts' decisions in the New York Emergency Rent Laws cases. In his recollection of the cases in which he cited Jewish law, Cohen states that Judge Pound and Justice Holmes wrote the prevailing opinions in the New York Court of Appeals and the United States Supreme Court, respectively.[127] In fact, though, while Judge Pound did write the majority opinion for the New York Court of Appeals in the Emergency Rent Laws cases,[128] Justice Clarke wrote the majority opinion for the United States Supreme Court in *Edgar A. Levy Leasing Co. v. Siegel*.[129]

Cohen's error might be explained as nothing more than a matter of confusing *Levy Leasing*, which the United States Supreme Court decided on March 20, 1922,[130] with two other rent laws cases the Court had de-

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124. COHEN, *supra* note 4, at 170.
125. *See Stapleton Will Retire*, N.Y. TIMES, Dec. 15, 1917, at 14.
126. September Housing Laws, N.Y. Sess. Laws 1920, chs. 942-53.
127. *See* COHEN, *supra* note 4, at 170.
128. *See* People *ex. rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429 (1921).
129. *See* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).
130. *See id.*

cided on April 18, 1921, *Block v. Hirsh*[131] and *Marcus Brown Holding Co. v. Feldman*.[132] Justice Holmes had, indeed, written the majority opinions in both of the earlier cases.[133] In addition, Cohen and Marshall had both filed briefs in *Marcus Brown*, which involved the New York Emergency Rent Laws, and they had included similar arguments relating to the relevance of Jewish law.[134]

Yet, even this somewhat understandable source of Cohen's confusion would not explain the further error he commits in his references to the supposed opinion of the Supreme Court in the case he litigated against Marshall regarding the New York Emergency Rent Laws. When Cohen quotes the majority opinion of Justice Holmes, the quotations are not from the opinion in *Marcus Brown*, but from the opinion in *Block v. Hirsh*.[135] Although argued and decided together with *Marcus Brown*, *Block* involved a District of Columbia rent law and therefore was not in any way litigated or argued by Cohen or Marshall.[136] Again, these lapses may not conclusively render unreliable Cohen's account of the conversation between Crane and Stapleton, but they present additional grounds for healthy skepticism.

Perhaps more to the point, it simply seems incredible that a judge of Cardozo's stature and integrity would have arrived at a decision on legislation as important as the Emergency Rent Laws based on a minor reference to Jewish law, rather than through thoughtful analysis of the vital concerns of American law at issue in the case. While Realists might ponder the possible influence of psychological factors related to Cardozo's Jewish background, Cardozo was an outspoken critic of such a theory of the judicial function, self-consciously engaging in faithful adherence to principled consideration of law and public policy.[137]

Furthermore, notwithstanding the importance of Cardozo's Jewish heritage in both his personal and professional conduct and ideals,[138] it re-

131. Block v. Hirsh, 256 U.S. 135 (1921).

132. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

133. *See id.*; *see also Block*, 256 U.S. at 135.

134. *See* Brief on Behalf of the Attorney-General and the Joint Legislative Committee on Housing of the State of New York, at 68-69; Points for Edgar A. Levy Leasing Co. Inc. and 801 West End Avenue Inc. as Amici Curiae on Constitutionality of Chapters 136, 944 and 946 of the New York Laws of 1920, at 63-64.

135. *See* COHEN, *supra* note 4, at 172, 353 n.9-10 (citing *Block*, 256 U.S. at 135). *See also Block*, 256 U.S. at 157-58.

136. See *Block*, 256 U.S. at 135.

137. *See John C.P. Goldberg*, Book Review, *The Life of the Law*, 51 STAN. L. REV. 1419 (1999) (reviewing KAUFMAN, *supra* note 58). *See also* KAUFMAN, *supra*, at 458-61 (describing differences and disputes between Cardozo's articulation of his judicial philosophy and Jerome Frank's Realist approach).

138. Cardozo's relationship to his Jewish heritage has been explored extensively in numerous works. *See, e.g.*, Paul Bricker, *Justice Benjamin N. Cardozo: A Fresh Look at a Great Judge*, 11 OHIO N.U. L. REV. 1, 30-31 (1984); KAUFMAN, *supra* note 58, *passim*; GEORGE S. HELLMAN, BENJAMIN N. CARDOZO: AMERICAN JUDGE 163-78 (1940); RICHARD POLENBERG, THE WORLD OF

mains particularly unlikely that he would have relied on substantive Jewish law to reach a decision. After all, a number of years later, Cardozo specifically criticized Magistrate Louis Brodsky for issuing an opinion that, Cardozo concluded, had been influenced by Brodsky's concern for the Jewish community.[139] In Professor Andrew Kaufman's characterization, Cardozo believed that "Brodsky had no business letting his own personal views as a Jew affect his judicial judgment."[140]

Of course, there is no indication that Cardozo's judgment in the Emergency Rent Laws cases was based on considerations other than the merits of the case. If anything, though, to the extent that outside factors could have exerted some degree of influence on Cardozo's decision, presumably Cardozo's close personal and professional relationship with Louis Marshall, Cohen's adversary in the litigation, would have had more impact than Cohen's references to Jewish law.[141] After all, Marshall had served for many years as a mentor to Cardozo, working with Cardozo on a number of cases and causes, beginning in 1899 when Cardozo was twenty-nine years old.[142]

In addition, Marshall's continuing support had proved instrumental at important stages of Cardozo's career. For example, Marshall had secured publication for Cardozo's first book, published in 1903,[143] and he had played a central role in Cardozo's successful 1913 campaign for the trial

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BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 13-18 (1996); 174-85, 238-40 (1997); Stroock, *supra* note 123.

For other works on Cardozo, *see, e.g.*, Stanley Charles Brubaker, Benjamin Nathan Cardozo: An Intellectual Biography (1979) (unpublished Ph.D. dissertation, University of Virginia) (on file with author); JOSEPH P. POLLARD, MR. JUSTICE CARDOZO: A LIBERAL MIND IN ACTION (1935); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990).

139. KAUFMAN, *supra* note 58, at 487-88.

140. *Id.* at 488. As recounted in Kaufman's biography of Cardozo, the episode, which occurred in 1935, involved Brodsky's dismissal of charges against a group of demonstrators who boarded a German liner and tore down a Nazi flag. *See id.* at 487. Brodsky wrote "an inflammatory opinion in which he set forth what might have been in the minds of the defendants in seeking to tear down the Nazi flag," suggesting that "they might have viewed the flag as emblematic of all the acts, which he listed, of the Nazi regime's destroying human freedom." *Id.* at 488.

In response to a letter he received in support of Brodsky's opinion, Cardozo referred sharply to Brodsky's "shameful utterance," adding that "[i]t would have been bad enough if [Brodsky] had been a Gentile; but for a Jew it was unforgivable[,]" because "[n]ow our traducers will say . . . that these are the standards of the race." *Id.* (quoting Letter from Benjamin N. Cardozo to Aline Goldstone, Sept. 14, 1935). Thus, as Kaufman concludes, "Cardozo viewed the matter all the more seriously because Brodsky was a Jew whose performance cast Jews, particularly Jewish judges, in a bad light." *Id.* (quoting Letter from Benjamin N. Cardozo to Aline Goldstone, Sept. 14, 1935).

141. *See supra* text accompanying notes 43-45.

142. *See* KAUFMAN, *supra* note 58, at 79, 110.

143. The title of the book was *The Jurisdiction of the Court of Appeals of the State of New York*. *See id.* at 89. According to Kaufman, Marshall not only wrote letters of introduction and praise to A. Bleecker Banks, an Albany law book publisher, but also served as "negotiator and middleman between Cardozo and Banks[,]" such that "[a]ll matters, including suggestions for changes and even transmission of proofs, went through Marshall's hands." *Id.* at 89.

division of the New York Supreme Court.[144] Finally, and not incidentally in the context of Cohen's remark about Cardozo's purported interest in Jewish law, Marshall's relationship with Cardozo often reflected a common regard for their shared Jewish heritage,[145] presumably outweighing any perceived advantage Cohen might have gained from a citation to medieval Jewish legal sources.

Likewise, Cohen's co-counsel in the Emergency Rent Laws cases, William D. Guthrie, engaged in a variety of professional activities that would seem more significant and potentially influential in the perspective of judges on the New York Court of Appeals than would Cohen's brief references to Jewish legal history. Like Marshall, Guthrie reportedly played an important role in Cardozo's professional advancement, providing crucial support for his election to the Court of Appeals.[146] Moreover, Guthrie's interactions with two other judges on the court, just months after their decision in the Emergency Rent Laws case, suggests close professional—if not personal—relationships.

For example, amid considerable controversy, Guthrie delivered an important speech at the 1921 Republican State Convention in support of the nomination of Judge William S. Andrews to remain on the court.[147] In addition, as chairman of the executive committee of the 1921 Judicial Constitutional Convention, Guthrie worked closely with Judge Cuthbert

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144. *See id.* at 117-26. Marshall wrote "lengthy letters" that were published in a number of Jewish newspapers, describing Cardozo's "extraordinary capacity," "preeminent ability," and "sterling character," and insisting that "because of Cardozo's qualifications, if elected, he would shed luster upon the Jewish name." *Id.* at 122 (quoting Letter from Louis Marshall to Editor of the *Jewish Morning Journal*, Oct. 27, 1913). Marshall sent the same letter to the editors of the *Jewish Daily News* and the *Warheit*. *Id.* at 612 n.26.

As yet a further indication of Cardozo's close relationship with Marshall and appreciation for his support, Cardozo later adopted Marshall's recommendation and hired Abraham Paley of Marshall's office as "attendant and confidential stenographer." *Id.* at 126.

145. *See id.* at 110, 171.

146. At least one biographer of Cardozo has cited a letter sent by Guthrie in support of Cardozo's candidacy to the Court of Appeals. *See* Brubaker, *supra* note 138, at 106 & n.29 (citing letter from William D. Guthrie to Judge Abram Elkus, Nov. 17, 1925). *See also* Hellman, *supra* note 138, at 111. Although at one point Kaufman expressed skepticism regarding the accuracy of some of these accounts, *see* Kaufman, *supra* note 58, at 26 n.15, he later cited the support of leading members of the New York bar, including Guthrie, for Cardozo's appointment as Chief Judge of the Court of Appeals. *See* KAUFMAN, *supra* note 58, at 179.

147. *See* WILLIAM H. MANZ, THE PALSGRAF CASE: COURTS, LAW, AND SOCIETY IN 1920S NEW YORK 85-86 (2005). Guthrie declared that:

> I can conceive of no more destructive assault upon our rights and liberties or of a more fatal blow at the high traditions of the courts of justice of our State, than to have the Republican Party deny a nomination to an able, upright and fearless judges as a punishment for the conscientious and courageous performance of his plain duty to decide according to his conscience.

Id. at 86 (quoting *Nominate Andrews; Urge Tariff to Aid Foodstuff Exports*, N.Y. TIMES, Sept. 24, 1921, at 1-2).

W. Pound, who served as chairman of the convention.[148] Furthermore, to the degree that Cohen emphasized the relevance of Jewish law and Irish law to the decisions of Judges Cardozo and Hogan, respectively, Guthrie might have hoped to gain the favor of the Catholic judges on the court as a result of his close connections with the Catholic Church.[149]

Finally, other elements of Cohen's account cast even further doubt on either the seriousness or the historical accuracy of his reflections regarding the strategy of including references to Jewish law for the purpose of targeting Cardozo's decision in the Emergency Rent Laws case. For example, just over a month after arguing the Emergency Rent Laws case before the New York Court of Appeals,[150] Cohen submitted his United States Supreme Court brief in the case of *Marcus Brown Holding Company v. Feldman*.[151] Although *Marcus Brown* involved the New York Emergency Rent Laws, because the case originated and was litigated exclusively in federal court, it did not come before Cardozo and the New York Court of Appeals. Nevertheless, Cohen included in his brief a similar discussion of Jewish law, apparently aiming to demonstrate historical precedents rather than for the purpose of swaying a particular justice with an interest in Jewish legal principles.[152]

As it turns out, one member of the United States Supreme Court, Justice Louis D. Brandeis, would have been a more likely target than Cardozo for Cohen's citations to Jewish law. Although the precise nature of Brandeis' relationship to his Jewish heritage remains a matter of complexity,[153] unlike Cardozo, he had dedicated substantial efforts to a variety of Jewish communal causes and concerns.[154] Perhaps most notably in the

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148. *See* FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932 263-70 (1985).

149. As John W. Davis said of Guthrie in a memorial address:

> Second to no other enthusiasm, surely, was his deep devotion to the religion he professed. He was a devoted son of the Catholic Church, scrupulous in conforming to her requirements and faithful to the obligations of his membership. But his religion went far deeper than mere outward observance. It filled his soul and colored all his life.

SWAINE, *supra* note 74, at 782. Among other activities connected with the Catholic Church, in 1926, Guthrie "wrote a voluminous opinion for Patrick Cardinal Hayes, attacking the Mexican constitutional provisions affecting the Catholic Church . . . as violations of international law and of the fundamental principles of liberty and justice." *Id.* at 780. *See also id.* at 362 (describing honors Guthrie received from the Catholic Church).

150. *See* Edgar A. Levy Leasing Co. v. Siegel, 230 N.Y. 634 (1921) (argued Jan. 19, 1921).

151. *See* Brief on Behalf of the Attorney-General and the Joint Legislative Committee on Housing of the State of New York, Marcus Brown Holding Co., Inc. v. Feldman, 256 U.S. 170 (1921). The brief is stamped as filed with the Supreme Court on Feb. 28, 1921. *See id.* (on file with author).

152. *See id.* at 68-69.

153. *See, e.g.*, AUERBACH, *supra* note 51, at 123-49; ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988), *passim*; Galanter, *supra* note 58, at 1131-36; Eben Moglen, *Jewishness and the American Constitutional Tradition: The Cases of Brandeis and Frankfurter*, 89 COLUM. L. REV. 959 (1989) (reviewing BURT, *supra*), *passim*; PHILIPPA STRUM, LOUIS D. BRANDEIS, JUSTICE FOR THE PEOPLE 173-80, 224-90 (1984).

154. *See, e.g.*, STRUM, *supra* note 153.

context of Cohen's brief, Brandeis had been a leading supporter of the Intercollegiate Menorah Association, which published *The Menorah Journal*,[155] and Brandeis had contributed a letter of tribute to the inaugural issue of the journal.[156] Therefore, had Cohen actually believed that his references to Jewish law affected judicial decision-making in the Emergency Rent Laws cases, he could have highlighted his citation to the 1920 article in *The Menorah Journal* by Nathan Isaacs,[157] an article that would have had strong resonance for—and may even have been read by—Brandeis. Nevertheless, although Cohen provides in his memoirs a detailed description of the reactions of various Supreme Court Justices to the historical points he raised at oral argument,[158] and although elsewhere he

155. *See Editors' Note*, LETTERS OF LOUIS D. BRANDEIS, VOL. III (1913-1915): PROGRESSIVE AND ZIONIST (Melvin I. Urofsky & David W. Levy eds., 1973)

> Founded by Henry Hurwitz . . . , the Menorah movement began at Harvard in 1906 and spread to other American and Canadian universities. In 1913 the Intercollegiate Menorah Association was founded and in 1915 the group began publishing the Menorah Journal under Hurwitz's editorship. The Association, dedicated to fostering Jewish culture, disbanded in 1961 at Hurwitz's death.

Id. at 193 n.3.

156. The letter appeared at 1THE MENORAH JOURNAL 4, Jan. 1915. LETTERS OF LOUIS D. BRANDEIS, VOL. III, *supra* note 155:

> The Formation at Harvard University on October 25, 1906, of the first Menorah Society is a landmark in the Jewish Renaissance . . . .
>
> America's fundamental law seeks to make real the brotherhood of man. That brotherhood became the Jews' fundamental law more than twenty-five hundred years ago. America's twentieth century demand is for social justice. That has been the Jews' striving [for] ages-long. Their religion and their afflictions have prepared them for effective democracy . . . . Furthermore, the widespread study of Jewish law developed the intellect and made them less subject to preconceptions and more open to reason.
>
> America requires in her sons and daughters these qualities and attainments, which are our natural heritage. Patriotism to America, as well as loyalty to our past, imposes upon us the obligation of claiming this heritage of the Jewish spirit and of carrying forward noble ideals and traditions through lives and deeds worthy of our ancestors. To this end each new generation should be trained in the knowledge and appreciation of their own great past; and the opportunity should be afforded to the further development of Jewish character and culture.
>
> The Menorah Societies and their Journal deserve most generous support in their efforts to perform this noble task.

Id. at 398-99 (Letter from Louis D. Brandeis to Editor, *Menorah Journal*, January, 1915).

See also id. at 505 (Letter from Louis D. Brandeis to Henry Hurwitz, Apr. 7, 1915) (stating that "I am much gratified at receiving the pledge from the various members [of the Menorah Society] who met on April 4, 1915 at 600 Madison Avenue, and who have agreed to volunteer their services to the Zionist cause . . . ."); *id.* at 638 (Letter from Louis D. Brandeis to Benjamin F. Levy, Nov. 17, 1915) (referring to "[t]he editorial in the Boston Herald, of which a part is quoted in the October number of the Menorah Journal on page 236").

157. *See* Brief, *supra* note 83, at 105 n* (citing Nathan Isaacs, *Jewish Law in the Modern World*, THE MENORAH JOURNAL, Vol. VI, No. 5, at 258 (1920)).

158. *See* COHEN, *supra* note 4, at 171-72. Though presumably vulnerable to similar questions regarding accuracy and reliability, Cohen's recollections of the oral argument provide an entertaining and potentially valuable perspective on these justices, and thus may merit being quoted extensively.

Cohen begins with an account of Justice Joseph McKenna's reaction to the citations to English, Irish, and Jewish legal history:

> Justice McKenna, who was seated on the right of Chief Justice [William Howard] Taft, and on my left, was quite impatient with my historical presentation. He turned to

dedicates an entire chapter to a portrayal of Brandeis,[159] Cohen does not mention Brandeis in the context of the Emergency Rent Laws case.[160]

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me and said testily, "I don't think this is a matter of *legislative wisdom or experience* at all. It is just a matter of power."

Id. at 171.

Cohen then describes his response:

> I assured him, as Guthrie had demonstrated, that the power was there. The real question was whether it was exercised *capriciously or arbitrarily* and the Court could not say that is was a capricious or arbitrary action of the legislature, unless on the basis of past experience and wisdom, *it could find no basis whatever to support it*. Accordingly, if we were able to show that at critical points in history, parliaments had resorted to this very method for avoiding riot and disorder, then our point was made. The Supreme Court could not, if it would, strike down the act.

Id.

Next, Cohen recalls a challenge from Justice Oliver Wendell Holmes, Jr.: "At this point, Holmes, on the Chief Justice's left (whom we naturally expected to be going our way) said, "Mr. Cohen, I am inclined to agree with my brother McKenna. I don't think it is our function to review the wisdom and experience of the legislature." *Id.*

Cohen replied at length:

> Review not in the sense of substituting *your* judgment for that of the legislature, but in the sense of reviewing the record to see if there is *any* basis for the exercise of the legislative power. You review in the same way as you examine the record in a negligence case, to see if there is any evidence at all upon which the verdict of the jury can be supported, and if you find that there is such evidence, you do not set the verdict aside, you let it stand. This is not substituting the courts' judgment for the jury's, it is reviewing solely for the purpose of determining whether there is *any* evidence at all in the case to support the verdict of the jury.

Id. Following this explanation, Cohen recalls, "I thought the old skeptic leaned back satisfied." *Id.* Finally, Cohen offers a colorful depiction of Chief Justice Taft:

> Then forward advanced the Chief Justice himself. Now what was he going to do "put me on the spot?" And these are the sententious words with came from the lips of this fun-loving Chief Justice: "My brothers seem to be agreed about that, Mr. Cohen, but you may proceed with your argument upon the assumption that a little *wisdom and experience* will not hurt this court."

Id. at 171-72.

159. *See id.* at 190-200.

160. Notably, Brandeis also had professional or personal relationships with the three principal lawyers who litigated the *Emergency Rent Laws* cases before the Supreme Court: Cohen, Marshall, and Guthrie.

Though Brandeis' connection to Cohen was limited largely to their efforts at settling the garment workers' strike, Brandeis and Marshall worked on a number of common matters relating to Jewish communal concerns. Nevertheless, "[t]he relations between Marshall and [Brandeis] were always formal and courteous but also strained and somewhat uneasy although both men were interested in many of the same projects and programs." *Editors' Note*, LETTERS OF LOUIS D. BRANDEIS 294 n.1 (Melvin I. Urofsky & David W. Levy eds., 1972). For expressions of this strain, as portrayed in Brandeis' letters to a third party, *see* LETTERS OF LOUIS D. BRANDEIS, VOL. IV (1916-1921) 354 (Melvin I. Urofsky & David W. Levy eds., 1975) (Letter from Louis D. Brandeis to Julian William Mack, August 26, 1918); *id.* at 507 (Letter from Louis D. Brandeis to Julian William Mack, Nov. 18, 1920).

Brandeis' references to Guthrie in his letters evince a more positive tone. *See* LETTERS OF LOUIS D. BRANDEIS, VOL. V (1921-41): ELDER STATESMAN 93 (Melvin I. Urofsky & David W. Levy eds., 1978) (Letter from Louis D. Brandeis to Felix Frankfurter, May 13, 1923); *id.* at 109 (Letter from Louis D. Brandeis to Felix Frankfurter, Jan. 6, 1924).

V. CONCLUSION

It should not be surprising that following his colorful report of Judge Crane's remark regarding the effectiveness of citing Jewish law to win over Cardozo, Cohen counters with a more plausible reason for including historical references in his brief: his primary litigation strategy in the case was to "get the judges away from the prevailing lawyers' bias against the laws and bring into play the forces of history."[161] Likewise, rather than embracing the notion that he targeted Cardozo through the reference to Jewish law, Cohen instead recalls, more credibly, that "[w]e felt sure of liberal judges like Holmes of the U.S. Supreme Court, Cardozo and Pound of the New York Court of Appeals."[162] Indeed, their strategy proved successful and their expectations accurate, as Cohen and Guthrie prevailed both in the New York Court of Appeals, with Judge Pound writing the majority opinion, which Judge Cardozo joined,[163] and in the United States Supreme Court, with Justice Holmes joining Justice Clarke's majority opinion.[164]

Ultimately, Cohen's participation in and compelling reflections upon the Emergency Rent Laws litigation provide a valuable window into the role of Jewish lawyers in the United States in the early twentieth century. Moreover, among other lessons, Cohen's citation to Jewish legal history in his briefs and oral arguments before the New York Court of Appeals and the United States Supreme Court, in front of such eminent jurists as Judge Benjamin N. Cardozo and Justice Oliver Wendell Holmes, Jr., indicates that Jewish law had achieved a degree of respect and legitimacy within American legal discourse. Finally, though it remains unlikely that Cohen's references to Jewish, as such, had—or were intended to have—an effect on Cardozo's decision in the Emergency Rent Laws case, Cohen's anecdote opens the door for consideration of the interests and interrelationships that might have impacted judicial decision making in the early twentieth century. In light of controversies that have arisen regarding the religious beliefs[165] and personal relationships[166] of members of the current Supreme

161. COHEN, *supra* note 4, at 170.
162. *Id.*
163. *See* People *ex. rel.* Durham Realty Corp. v. La Fetra, 130 N.E. 601 (N.Y. 1921).
164. *See* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).
165. *See, e.g.*, Gregory A. Kalscheur, *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. CATH. LEGAL STUD. 211 (2007); John T. Noonan, Jr., *The Religion of the Justice: Does it Affect Constitutional Decision Making?*, 42 TULSA L. REV. 761 (2007); William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347 (2006); Thomas L. Shaffer, *Roman Catholic Lawyers in the United States of America*, 21 J.L. & RELIGION 305 (2005-06); Symposium, *Catholicism and the Court: The Relevance of Faith Traditions to Jurisprudence*, 4 U. ST. THOMAS L.J. (2006).
166. *See, e.g.*, Cheney v. U.S. Dist. Ct. for the D.C., 541 U.S. 913 (2004) (Scalia, J.); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005); Ross E. Davies, *The Reluctant Recusants*, 10 GREEN BAG 2D 79 (2006).

Court, this study has abiding relevance and potential application in the early twenty first century as well.