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REFLECTIONS ON WAY PAVING JEWISH JUSTICES AND JEWISH WOMEN

Ruth Bader Ginsburg*

I appreciate so very much the kind words just said about me. Yet I know that, more than anything else, it was good fortune—"mazel"—that gained me the good job I now hold, and the praise attending it. Wisdom retold by Isaac Bashevis Singer is on point.

Singer's grandfather was a rabbi who, in a sermon, asked his congregation this question: Why is the Almighty so eager for praise? Three times a day we pray to Him, we say how great He is, how wonderful. Why should the creator of all the stars, all the planets, be so eager for praise? The rabbi's answer: The Almighty knows from experience, from divine experience, that when people stop praising Him, they begin to praise one another. This, Singer's grandfather said, is what the Almighty does not like. But small people that we are, Singer continued, we enjoy sometimes some praise, especially when it comes from the mouths of good people.¹ Just so this evening, I enjoy being with

*Associate Justice, Supreme Court of the United States. This lecture was presented on September 18, 1997 at Touro Law School. It is published here substantially as delivered. To aid the reader, footnotes have been added.

¹ See Isaac B. Singer, *Verbatim: Taking a Compliment*, N.Y. TIMES, June 29, 1986, at E7.

you, and I am glad to be a visiting teacher at Touro Law School these two days.

May I invite you now to travel back with me to the summer of 1994, when Justice Stephen Breyer became the 108th Justice—and the seventh Jewish Justice—to be appointed to the United States Supreme Court. "Would having two Jews on a Court of nine make a difference?," some people asked. Similarly, the preceding summer—the summer of 1993—the press inquired whether the Court would be different when served by two women: first Justice Sandra Day O'Connor, appointed in 1981; then, twelve years later, me. I thought about both questions as I prepared an introduction to a book published late in 1994 by the Supreme Court Historical Society, a series of lectures on the five Jewish Justices who preceded Justice Breyer and me.² This is the answer I gave.

Justice O'Connor, when asked whether women judges decide cases differently by virtue of being women, has several times quoted, as I have, the reply of Minnesota Supreme Court Justice Jeanne Coyne. In her experience, Justice Coyne said, "a wise old man and a wise old woman reach the same conclusion."³ I agree. But it is also true, I am convinced, that women, like persons of different racial groups and ethnic origins, contribute to the United States judiciary what a brilliant jurist, the late United States Court of Appeals Judge Alvin B. Rubin of Louisiana, described as "a distinctive medley of views influenced by differences in biology, cultural impact and life experience."⁴ In this sense, Jewish judges have notably enriched the United States system of justice. As Jeffrey Morris wrote in his perceptive appraisal of the American

² THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS (Jennifer M. Lowe ed., Supreme Court Historical Society 1994) (hereinafter THE JEWISH JUSTICES).

³ Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1558 (1991) (citing David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16).

⁴ *Healy v. Edwards*, 363 F.Supp. 1110, 1115 (E.D. La. 1973).

Jewish Judge, they "ha[ve] added to our expectations of individuals in the service of the state."⁵

There is an age-old connection between Judaism and law, a connection I tried to convey in my introduction to the Supreme Court Historical Society's book on Jewish Justices.⁶ For centuries, rabbis and other Jewish scholars have studied, restudied, and ceaselessly interpreted the Talmud. These studies have produced a vast corpus of juridical writing.⁷ Jews are sometimes called "the people of the book," reflecting their placement of learning first among cultural values.

Jews have always prized the scholarship of judges and lawyers in their own tradition, and when anti-Semitic occupational restrictions lessened, they were drawn to the learned professions of the countries in which they lived. Law figured prominently among those professions. Law became and remains an avenue of social mobility, a field in which intellectual achievement is rewarded. And, as it evolved in the United States, law also became a bulwark against the kind of oppression Jews encountered and endured throughout history. Thus, Jews in large numbers became lawyers in the United States, and some eventually became judges.⁸ The best of those lawyers and judges used the law not only for personal gain, but to secure justice for others. And so it was with the first five Jewish Justices. I will next comment briefly on their lives in the law and the tracks they left.

I should note initially that the first Jew offered a Supreme Court post turned the job down. In 1853, Judah Benjamin⁹ declined the nomination of President Millard Fillmore. Benjamin

⁵ Jeffrey B. Morris, *The American Jewish Judge: An Appraisal on the Occasion of the Bicentennial*, JEWISH SOC. STUD., Summer-Fall 1976, at 215.

⁶ See Ruth Bader Ginsburg, *Introduction to THE JEWISH JUSTICES*, *supra* note 2, at 3-4.

⁷ See Morris, *supra* note 5, at 221 ("Jewish scholarship for thousands of years was interconnected with legal analysis.").

⁸ See Morris, *supra* note 5, at 202-05 (tracing the growth in the number of Jewish lawyers and judges in the United States during the decades after 1880).

⁹ See generally ARTHUR L. GOODHART, *FIVE JEWISH LAWYERS OF THE COMMON LAW* 4-15 (1949).

had just been elected United States Senator from Louisiana, and he preferred to retain his Senate seat. Benjamin later became a leader in the Confederacy, ultimately serving as Jefferson Davis' Secretary of State. When the South lost the Civil War, Benjamin fled to England, surviving a peril-filled journey. There, he started over, and became an acclaimed barrister. The *London Times*, in an obituary, described Judah Benjamin as a man with "that elastic resistance to evil fortune which preserved [his] ancestors through a succession of exiles and plunderings."¹⁰

First Jew to be seated on the Court was Louis Brandeis.¹¹ During his days at the bar, Brandeis was sometimes called "the people's attorney" for his activity in the great social and economic reform movements of his day. Brandeis graduated from Harvard Law School at age twenty, with the highest scholastic average in that law school's history. He was appointed to the Court by President Wilson in 1916. President Franklin Delano Roosevelt, among others, called Brandeis "Isaiah," and admirers, both Jewish and Christian, turned to the scriptures to find words adequate to describe his contributions to U.S. constitutional thought.

Brandeis was not a participant in religious ceremonies or services, but he was an ardent Zionist, and he encouraged the next two Jewish Justices—Cardozo and Frankfurter—to become members of the Zionist Organization of America. As explained by Brandeis scholar Melvin Urofsky, Brandeis brought three gifts to American Zionism: organizational talent; an ability to set goals and to lead men and women to achieve them; and above all, an idealism that recast Zionist thought in a way that captivated Jews already well-established in the United States.¹² Jews who needed to flee from anti-Semitism abroad, Brandeis urged, would have a home, a place to build a new society, free from the prejudices that marked much of Europe; Jews comfortably situated in the

¹⁰ *Id.* at 14.

¹¹ See generally *id.* at 24-38; Melvin I. Urofsky, *Justice Louis Brandeis*, in *THE JEWISH JUSTICES*, *supra* note 2, at 9.

¹² Melvin I. Urofsky, Address at the Israeli Embassy, Washington, D.C. (April 2, 1997) (transcript on file with author).

United States would have a mission, to help their kinsmen build that new land.

When Brandeis retired from the Supreme Court in 1939, at age 83, his colleagues wrote in their farewell letter:

Your long practical experience and intimate knowledge of affairs, the wide range of your researches and your grasp of the most difficult problems, together with your power of analysis and your thoroughness in exposition, have made your judicial career one of extraordinary distinction and far-reaching influence.¹³

That influence continues to this very day.

Benjamin Cardozo¹⁴ was appointed to the Court in 1932, and he served together with Brandeis. Tutored in his youth by Horatio Alger, Cardozo learned to treasure words and to thrive on hard work, and he approached his calling to the legal profession with "ecstatic consecration."¹⁵ Cardozo's fine hand adjusted the common law to meet the needs of an evolving society. He served with unmatched distinction for eighteen years on New York's highest court—the last five as Chief Judge—before President Hoover named him to the United States Supreme Court. "What doth the Lord require of thee," the prophet Micah said, "but to do justice and to love kindness (mercy) and to walk humbly with thy God."¹⁶ Cardozo's life and work exemplified that instruction. "It has been said that genius consists in the ability to make clear the obvious which has never been understood before,"¹⁷ and in this sense, Cardozo's opinions and other writings are indeed works of genius.

Cardozo remained a member of New York's Spanish and Portuguese Synagogue all his life. Like Brandeis, however, he was not a participant in religious observances. His seat was used

¹³ GOODHART, *supra* note 9, at 36.

¹⁴ See generally *id.* at 51-62; Andrew L. Kaufman, *Benjamin N. Cardozo, Sephardic Jew*, in *THE JEWISH JUSTICES*, *supra* note 2, at 35.

¹⁵ Morris, *supra* note 5, at 206 (quoting STEPHEN B. BIRMINGHAM, *THE GRANDEES* 297, 300 (1971)).

¹⁶ *Micah* 6:8.

¹⁷ GOODHART, *supra* note 9, at 58.

mainly by relatives. As a young lawyer, he once addressed the Congregation. In that address, he urged rejection of a proposal to end the separation of women from men at services.¹⁸ His eloquence may have carried the day. Would he persist in that position were he with us today, who can say?

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

His gentleness and self-restraint, his ineffable charm, combined with his alertness and mental strength, made him a unique personality. With us who had the privilege of daily association there will ever abide the precious memory not only of the work of a great jurist but of companionship with a beautiful spirit, an extraordinary combination of grace and power.¹⁹

Appointed in 1939 after the untimely death of Cardozo, Felix Frankfurter²⁰ had been a Harvard Law School professor for twenty-five years, an ardent advocate of the right of labor to organize, a founder of the American Civil Liberties Union (ACLU), a member of a National Association for the Advancement of Colored People (NAACP) advisory lawyers committee, and a defender of Sacco and Vanzetti, anarchist shoemaker and fishmonger accused of murder in Massachusetts. As a Supreme Court Justice, Frankfurter was first to employ an African-American law clerk, William T. Coleman, Jr., in 1948. (Bill Coleman remains, to this day, one of the bright lights of the legal profession.) Sometimes criticized for excessive judicial restraint, Frankfurter was also the Justice who wrote: "[B]asic rights do not become petrified as of any one time. . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right."²¹

¹⁸ See Kaufman, *supra* note 14, at 42.

¹⁹ Proceedings in memory of Mr. Justice Cardozo, 305 U.S. at xxviii (Dec. 19, 1938); see also GOODHART, *supra* note 9, at 62.

²⁰ See generally Michael E. Parrish, *Justice Frankfurter and the Supreme Court*, in THE JEWISH JUSTICES, *supra* note 2, at 61.

²¹ Wolf v. Colorado, 338 U.S. 25, 27 (1949).

After Frankfurter retired in 1962, Arthur Goldberg²² joined the Court. A Kennedy appointee, Goldberg had been counsel to labor unions at a time when strikers were often the target of armed thugs. Goldberg was the only Jewish Justice to have experienced childhood poverty (his father, who died when he was eight, sold produce in Chicago, from a wagon pulled by a blind horse). Goldberg was the sole member of his large family to continue his education beyond grade school. And, unlike Brandeis, Cardozo, and Frankfurter, Goldberg was a keeper of religious ceremonies. At Passover seders in his home, Goldberg would relate the story of the Israelites in Egypt to the story of all the oppressed and outcasts of the world. My colleague, Justice Stephen Breyer, was among the few privileged to clerk for Justice Goldberg during Goldberg's less than three-year tenure on the Supreme Court.

I recently came upon a story Justice Goldberg told to the congregation of Temple Emanu-El in Honolulu during his brief time on the Court. The story explains part of his heritage many in this audience will understand. The Justice was visiting his mother, who had become active in several Jewish organizations. He was sleeping late one morning when the telephone rang for him. His mother answered the phone and asked, "Who's this?" The caller replied, "This is the President." She next inquired, "Nu, from which *shul*?"²³

Succeeding Goldberg in 1975, Abe Fortas²⁴ had been a courageous defender of persons smeared by Senator Joseph McCarthy at the height of the Cold War Red Scare, and counsel to people who had nowhere else to turn. Although religious observance was not a prime part of Fortas' family life, it was due to a scholarship established by a rabbi in Memphis, Tennessee that this brilliant man was able to attend college.

²² See generally Emily F. Van Tassel, *Justice Arthur J. Goldberg*, in THE JEWISH JUSTICES, *supra* note 2, at 81.

²³ Evelyn Trapido, *News from the Justice Bernard H. Levinson Hawaii Jewish Archives*, J. TEMPLE EMANU-EL OF HONOLULU, HAWAII, Sept. 1997, at 6.

²⁴ See generally Bruce A. Murphy, *Through the Looking Glass: The Legacy of Abe Fortas*, in THE JEWISH JUSTICES, *supra* note 2, at 103.

Law as protector of the oppressed, the poor, the minority, the loner, is evident in the work of Justices Brandeis, Cardozo, Frankfurter, Goldberg, and Fortas.²⁵ The traditional commandment "Justice! Justice! shalt thou pursue"²⁶ is a strand that ties them together. Those words, I might add, are posted on a wall in my chambers, an ever present reminder of what judges must do "that [they] may thrive."²⁷

Arthur Goldberg once said: "My concern for justice, for peace, for enlightenment, all stem from my heritage."²⁸ The other Jewish Justices could have reached the same judgment. Justice Breyer and I are fortunate to be linked to that heritage.

I have gained encouragement, too, from the intelligence and bravery of Jewish women through the ages. Please indulge a few examples. High on my great ladies list is Emma Lazarus,²⁹ cousin to Benjamin Cardozo. Twenty-one years Cardozo's senior, Emma Lazarus wrote constantly, from her first volume of poetry published in 1866 at age seventeen, until her tragic death from cancer at age thirty-eight. Her poem, "The New Colossus," is inscribed on the pedestal of the Statue of Liberty. A Zionist before that word came into vogue, the love of Emma Lazarus for her people is evident in her writings. A fair sample, these words from the final stanza of her poem: "The New Year Rosh-Hashanah, 5643 (1882)":

With prayer and praise
 Rejoice that once more tried, once more we prove
 How strength of supreme suffering still is ours
 For Truth and Law and Love.³⁰

²⁵ See Morris, *supra* note 5, at 216-18 (commenting on sensitivity of American Jewish judges to civil liberties and social justice).

²⁶ *Deuteronomy* 16:20.

²⁷ *Id.*

²⁸ Van Tassel, *supra* note 22, at 83; see also Morris, *supra* note 5, at 222-23 (noting that "[t]he particular Jewish sense of social justice is a well-observed phenomenon" and discussing the origins of that phenomenon).

²⁹ See generally *FOUR CENTURIES OF JEWISH WOMEN'S SPIRITUALITY* 68-70 (Ellen M. Umansky & Dianne Ashton eds., 1992).

³⁰ Emma Lazarus, *The New Year Rosh-Hashanah, 5643 (1882)*, in *FOUR CENTURIES OF JEWISH WOMEN'S SPIRITUALITY*, *supra* note 29, at 102.

May I read next the words of Hadassah founder Henrietta Szold,³¹ for they speak movingly to me. Szold wrote to Haym Peretz to acknowledge his kind offer to say the *Kaddish* for Szold's mother. I will read her letter in full:

New York, 16 September 1916

It is impossible for me to find words in which to tell you how deeply I was touched by your offer to act as "*Kaddish*" for my dear mother. I cannot even thank you—it is something that goes beyond thanks. It is beautiful, what you have offered to do—I shall never forget it. You will wonder, then, that I cannot accept your offer. Perhaps it would be best for me not to try to explain to you in writing, but to wait until I see you to tell you why it is so. I know well, and appreciate what you say about, the Jewish custom [that only male children recite the prayer, and if there are no male survivors, a stranger may act as substitute]; and Jewish custom is very dear and sacred to me. And yet I cannot ask you to say *Kaddish* after my mother. The *Kaddish* means to me that the survivor . . . publicly manifests his . . . intention to assume the relation to the Jewish community which his parent had, [so that] the chain of tradition remains unbroken from generation to generation, each adding its own link. You can do that for the generations of your family, I must do that for the generations of my family. I believe that the elimination of women from such duties was never intended by our law and custom—women were freed from positive duties when they could not perform them, but not when they could. It was never intended that, if they could perform them, their performance of them should not be considered as valuable and valid as when one of the male sex performed them. And of the *Kaddish* I feel sure this is particularly true. My mother had eight daughters and no son; and yet never did I hear a word of regret pass the lips of either my mother or

³¹ See generally FOUR CENTURIES OF JEWISH WOMEN'S SPIRITUALITY, *supra* note 29, at 117-18.

my father that one of us was not a son. When my father died, my mother would not permit others to take her daughters' place in saying the *Kaddish*, and so I am sure I am acting in her spirit when I am moved to decline your offer. But beautiful your offer remains nevertheless, and, I repeat, I know full well that it is much more in consonance with the generally accepted Jewish tradition than is my or my family's conception. You understand me, don't you?³²

Szold's plea for understanding, for celebration of our common heritage while tolerating—even appreciating—our differences, is indeed captivating, don't you agree?

Allow me to recall, too, the hope penned decades ago by a girl barely fifteen. These are her words:

One of the many questions that have often bothered me is why women have been, and still are, thought to be so inferior to men. It's easy to say it's unfair, but that's not enough for me; I'd really like to know the reason for this great injustice! Men presumably dominated women from the very beginning because of their greater physical strength; it's men who earn a living, beget children and do as they please. . . . Until recently, women silently went along with this, which was stupid, since the longer it's kept up, the more deeply entrenched it becomes. Fortunately, education, work and progress have opened women's eyes. In many countries they've been granted equal rights; many people, mainly women, but also men, now realize how wrong it was to tolerate this state of affairs for so long. Modern women want the right to be completely independent!

. . . .

Yours,

Anne M. Frank³³

³² Letter from Henrietta Szold to Haym Peretz (Sept. 16, 1916), in *FOUR CENTURIES OF JEWISH WOMEN'S SPIRITUALITY*, *supra* note 29, at 164-65.

³³ ANNE FRANK, *THE DIARY OF A YOUNG GIRL* 318 (Otto H. Frank & Mirjam Pressler eds. & Susan Massotty trans., Doubleday 1991).

It was one of the last entries in her diary. Anne Frank, *Diary* readers in this audience know, was born in the Netherlands in July 1929. She died in 1945, while imprisoned at Bergen-Belsen, three months short of her sixteenth birthday.

Anne Frank described part of the agenda of human rights issues free societies may be expected to advance in the remainder of this century and in the decades that follow. A prime part of that agenda was also described by a young rabbi over fifty years ago, Chaplain Roland B. Gittelsohn, who delivered a eulogy over newly-dug graves of United States Marines on the Pacific Island of Iwo Jima. The United States forces in Iwo Jima were racially segregated. Rabbi Gittelsohn, whose words are preserved at the Harry S. Truman Library, spoke of the way it was, and the way it should be:

Here lie men who loved America because their ancestors, generations ago, help[ed] in her founding, and other men, who loved her with equal passion because they themselves escaped from oppression to her blessed shores. Here lie officers and men, Negroes and whites, rich and poor, together. . . . Here no man prefers another because of his faith, or despises him because of his color. . . . Among these men there is no discrimination, no prejudice, no hatred. Theirs is the highest and purest democracy. . . . Whoever of us . . . thinks himself superior to those who happen to be in the minority, makes of this ceremony, and of the bloody sacrifice it commemorates, [a] . . . hollow mockery. Thus, then, do we, the living, now dedicate ourselves, to the right of Protestants, Catholics and Jews, of white men and Negroes alike, to enjoy the democracy for which all of them have paid the price.³⁴

Justice Thurgood Marshall, in 1987, when the Constitution's

³⁴ *Rabbi on Iwo* (pamphlet), President's Commission on Civil Rights Pamphlets File, Box 28, Papers of the President's Committee on Civil Rights, Harry S. Truman Library; see also Mary L. Dudziak, *The Supreme Court and Racial Equality During World War II*, 1 J. SUP. CT. HIST. 35-36 (Supreme Court Historical Society 1996).

bicentennial was celebrated, asked us to remember that "We the People" once meant white males.³⁵ (Indeed, it meant only property-owning white males.) Marshall celebrated less the original Constitution than the emergence of new constitutional principles, stemming from post-Civil War Amendments, "to meet the challenges of a changing society."³⁶ "The progress has been dramatic," he said.³⁷ He hoped it would continue. He hoped we would strive that his hope not prove vain.

It may be fitting to conclude these remarks with a passage from a letter written over two centuries ago. In August 1790 George Washington wrote to the members of the Jewish Synagogue at Newport, Rhode Island—the Touro Synagogue—in response to the congregation's good wishes for Washington's presidency. He said: "It would be inconsistent with the frankness of my character not to avow that I am pleased with your favorable opinion of my administration and fervent wishes for my felicity."³⁸ George Washington closed his letter with these words, adapted from the prophet Micah:³⁹

May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here. . . .⁴⁰

To that prayer of our Nation's first President, may we today add: Amen.

³⁵ Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

³⁶ *Id.* at 5.

³⁷ *Id.*

³⁸ Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON 284, 285 (Dorothy Twohig ed., 1987) (hereinafter Letter from George Washington).

³⁹ See *Micah* 4:4.

⁴⁰ Letter from George Washington, *supra* note 38, at 285.