

The Fifth William Frankel Lecture

THOUGHTS OF A JEWISH JUSTICE ON JEWS WHO PAVED THE WAY

Delivered by Justice Ruth Bader Ginsburg

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This is an abridged version of the Fifth William Frankel Lecture, which was delivered to a JPR audience in September by Justice Ruth Bader Ginsburg of the Supreme Court of the United States and was chaired by Lord Rothschild GBE.

Born in Brooklyn, New York in 1933, Ruth Bader Ginsburg graduated from Columbia Law School in 1959. In 1972 she co-founded the Women’s Rights Project of the American Civil Liberties Union. Championing the rights of women, she demanded the end of gender discrimination. Considered by some ‘the legal architect of the modern women’s movement’, she came to be seen as one of the pre-eminent players in legal reform. In 1993 she was nominated by President Clinton to serve on the Supreme Court. She became only the second female justice appointed to the Court.

The First Jewish Justice Manqué

Judah P. Benjamin might have preceded Justice Brandeis by 63 years as the first Jewish member of the U.S. Supreme Court. His career path is intriguing. Born in 1811 in the Virgin Islands, Benjamin grew up in South Carolina the son of Sephardi Jews and became a celebrated lawyer in antebellum New Orleans. Though his boyhood was steeped in Jewish culture, he married outside the faith and did not observe Jewish laws or holidays. Yet he could not escape his Jewish identity. The world in which he lived would not allow him to do so.

In 1853, President Fillmore nominated Benjamin to become an Associate Justice of the Supreme Court. However, elected the preceding year as one of Louisiana’s two U.S. Senators, Benjamin declined the nomination, which suggests that the Supreme Court had not yet become the co-equal Branch of the U.S. Government it is today. Benjamin was the first acknowledged Jew to hold a Senate seat; he was elected to a second six-year term in 1858. (That was the year Lionel Rothschild, first elected to Parliament in 1847, at last took his seat, despite his long refusal to swear loyalty “on the true faith of a Christian”). In 1861, in the wake of Louisiana’s secession from the Union, Benjamin resigned from the Senate.

Benjamin is perhaps best known in the U.S. for his stirring orations in the pre-Civil War Senate on behalf of Southern interests —expressing sentiments with which we would no doubt disagree today — and later for his service as Attorney General, Secretary of War, and finally Secretary of State in the Confederate cabinet. Although Benjamin achieved high office, he lived through a time of virulent antisemitism. Political enemies called him Judas Iscariot Benjamin. He was ridiculed for his Jewishness in the press, by military leaders on both sides and even by fellow Confederate politicians.

After the Confederate surrender, Benjamin fled to England; en route, he narrowly survived close encounters with victorious Union troops and storms at sea. His political ventures were bracketed by two discrete but equally remarkable legal careers, the first in New Orleans, the second in Britain.

Having left Yale College without taking a degree, Benjamin came to New Orleans in 1832, studied hard, and was called to the bar that same year. His fame and fortune quickly grew after the publication in 1834 of a book that treated comprehensively for the first time Louisiana's uniquely cosmopolitan and complex legal system. But his fortune plummeted with the defeat of the Confederacy. He arrived in England with little money. His Creole wife and a daughter reared Catholic had settled in Paris; they anticipated continuing support from Benjamin in the comfort to which they had grown accustomed. Yet he resisted business opportunities in Paris, preferring the independence of a law practice, this time as a British barrister.

Benjamin opted for a second career at the bar despite being required to enrol at an Inn of Court and serve an apprenticeship, which he undertook cheerfully and with industry, although he was doubtless relieved when Lincoln's Inn admitted him after only six months.

Benjamin became a British barrister at age 55. Once more a newly minted lawyer with a struggling practice, but he wrote to a friend, "as much interested in my profession as when I first commenced as a boy." Repeating his Louisiana progress, Benjamin made his reputation in England by writing a work that came to be known as 'Benjamin on Sales'. First published in 1868, the book was a near-instant legal classic. Its author was much praised, and Benjamin passed the remainder of his days as a top earning, highly esteemed advocate. He became a Q.C. seven years after his admission to the Bar. His voice was heard in appeals to the House of Lords and the Judicial Committee of the Privy Council in no fewer than 136 reported cases between 1872 and 1882.

Benjamin's indomitable cast of mind characterised both his courtroom advocacy and his response to fortune's vicissitudes. He rose to the top of the legal profession twice in one lifetime, on two continents, beginning his first ascent as a raw youth and his second as a fugitive minister of a vanquished power. The Times' obituary described his "elastic resistance to evil fortune which preserved his ancestors through a succession of exiles and plunderings."

Louis Brandeis: 'the people's attorney'

The first Jew to accept a nomination to the U.S. Supreme Court was Louis Brandeis, called "the people's attorney" because of his activity in the great social and economic reform movements of his day. He helped create the pro bono tradition. Spending at least half his working hours on public affairs, Brandeis reimbursed his law firm for the time he devoted to non-paying matters. He made large donations to good causes and lived frugally at home. A friend recounted that whenever he went to the Brandeis house for dinner he ate before and afterwards.

Brandeis graduated from Harvard Law School at twenty, with the highest scholastic average in its history. He was appointed to the Court by President Wilson in 1916. Brandeis, like me, was 60 years old at the time of his appointment. One of his colleagues, James Clark McReynolds, was openly antisemitic. When Brandeis spoke in conference, McReynolds would leave the room. No official photograph was taken of the Court in 1924 because McReynolds refused to sit next to Brandeis.

However, most people who encountered Brandeis were of a different view. President Roosevelt, among others, called Brandeis "Isaiah." Admirers, both Jewish and Christian, turned to the scriptures to find words adequate to describe his contributions to U.S. constitutional thought. He was an architect of the constitutional right to privacy and the modern jurisprudence of free speech.

Although he did not participate in religious ceremonies, Brandeis was an ardent Zionist. He retired from the Supreme Court in 1939 at age 83. His influence continues to this very day.

Benjamin Cardozo, a man of distinction and humility

Benjamin Cardozo was appointed to the Court in 1932, at age 62, and served together with Brandeis. Justice McReynolds, whom I mentioned earlier, showed his displeasure by reading a newspaper on the bench during his investiture.

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 State's highest court — the last five as Chief Judge — before President Hoover named him to the U.S. Supreme Court. His lecture series were read and re-read by law students of my generation. His opinions and other writings are works of genius.

Cardozo's life and work exemplified the instruction of the prophet Micah, "to do justice and to love kindness and to walk humbly with thy God." He remained a member of New York City's Spanish and Portuguese Synagogue all his life, but, like Brandeis, he did not participate in services. He died in 1938, after only six years on the Supreme Court. The great U.S. Judge, Learned Hand wrote of him: "In this America of ours where the passion for publicity is a disease . . . it was a rare good fortune that brought to such eminence a man so reserved, so unassuming, . . . so gracious to high and low, and so serene."

Felix Frankfurter

Appointed in 1939 after Cardozo's untimely death, Felix Frankfurter had been a Harvard Law School professor for 25 years, an ardent advocate of the right of labour to organize, a founder of the American Civil Liberties Union and a member of a National Association for the Advancement of Colored People's advisory lawyers' committee. Frankfurter involved his students in his advocacy endeavours. He united law teaching with public battles for justice. That method of instruction, rare in his day, is a pattern I followed in the 1970s.

As a Supreme Court Justice, Frankfurter was first to employ an African-American law clerk, William T. Coleman, Jr., in 1948, who remains one of the bright lights of the U.S. legal profession. Perhaps no Justice in the Court's existence came to the bench better versed in the history and judgments of the Court, its problems and needs. Yet Frankfurter was not as effective a persuader of others as were Brandeis and Cardozo. In some quarters criticized for excessive judicial restraint, in others for being a better speaker than listener, Frankfurter was also the Justice who wrote: "Basic 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."

Arthur Goldberg

After Frankfurter retired in 1962, Arthur Goldberg joined the Court. A Kennedy appointee, Goldberg had been counsel to labour unions when strikers were prey to the harassment 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.

Unlike his predecessors, Goldberg did observe religious ceremonies. At Passover Seders in his home, Goldberg would relate the story of the Israelites in Egypt to the oppressed and outcasts of the world.

After three years, Goldberg left the Court, at President Johnson's urging, to replace Adlai Stevenson as U.S. Ambassador to the United Nations. He hoped his negotiating skills would lead to a settlement

of the Vietnam War. That hope failed, and in the course of Goldberg's time at the U.N., the distance between him and Johnson grew ever wider.

Some years ago, I came upon a story Justice Goldberg once told. The Justice was in Chicago visiting his mother, who had become active in several Jewish organizations. He was sleeping late one morning when the telephone rang for him. His mother answered the phone and asked, "Who's this?" The caller replied, "This is the President." Goldberg heard his mother ask, "Nu, President from which shul?". It was, of course, the President of the United States.

Abe Fortas

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

Fortas' tenure on the Court ended abruptly after four years because, unlike Brandeis, he was not careful about his personal monetary receipts. In 1968, President Johnson nominated Fortas as Chief Justice; however, he was obliged to resign from the Court the following year.

Justice, justice shalt thou pursue....

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. Frankfurter, once distressed when the Court rejected his view, reminded his brethren, defensively, that he "belong[ed] to the most vilified and persecuted minority in history." I prefer Goldberg's affirmative comment: "My concern for justice, for peace, for enlightenment," Goldberg said, "stems from my heritage." The other Jewish Justices could have reached the same judgment.

Justice Breyer and I are fortunate to be linked to that heritage, but our situation is distinct from that of the five Jewish Justices of whom I have spoken. I can best explain the difference by this story: in 1948 the then Solicitor General, Philip Perlman, argued the case for the U.S. government that racially restrictive covenants on real property were unconstitutional. The brief was written by four lawyers, all of them Jewish. All the names, save Perlman's, were deleted from the filed brief. The decision to delete was made by the Solicitor General's principal assistant, himself a Jew. "It's bad enough," he said, "that Perlman's name has to be there." It wouldn't do, he thought, to make it so evident that the position of the United States was "put out by a bunch of Jews."

Contrast President Clinton's appointments in 1993 and 1994 of the 107th and 108th Justices, Justice Breyer and me. Our backgrounds were similar: we had taught law and served on federal courts of appeals for many years. And we are both Jews. However, no one regarded Ginsburg and Breyer as filling a Jewish seat. Both of us take pride in and draw strength from our heritage, but our religion was not relevant to President Clinton's appointments.

The security I feel is shown by the command from Deuteronomy displayed in artworks in Hebrew letters in my chambers: "Zedek, Zedek," "Justice, Justice shalt thou pursue." They are ever-present reminders of what judges must do "that they may thrive." My identity is also shown by the large silver mezuzah mounted on my doorpost.

Jews in the U.S. are no longer reticent about letting the world know who we are. A question is indicative of large advances made. What is the difference between a New York City garment district bookkeeper and a Supreme Court Justice? One generation, as my life bears witness, the difference between opportunities open to my mother, a bookkeeper, and those open to me.

This spring tapes came to light recording President Nixon's 1972 conversation with Reverend Billy Graham, spiritual counsellor to several Presidents, including George W. Bush. Graham complained of what he saw as Jewish domination of the news media: "This stranglehold has got to be broken," the Reverend said, "or the country is going down the drain..." Thirty years later, Graham expressed dismay that he could ever have said such things.

True, in recent months, antisemitism's ugly head has been visible in our world. Even so, Jews in the U.S. seldom encounter the harsh antisemitism that surrounded Judah Benjamin, or that Brandeis experienced when the Senate voted on his confirmation. I pray we may keep it that way.

In that vein, may I close with words I often use when asked to say who I am:

I am a judge, born, raised, and proud of being a Jew. The demand for justice runs through the entirety of Jewish history and Jewish tradition. I hope, in all the years I have the good fortune to serve on the bench of the Supreme Court of the United States, I will have the strength and courage to remain steadfast in the service of that demand.