

Masthead Logo

**Kentucky Law Journal**

Volume 87 | Issue 2

Article 4

1998

# The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, the Supreme Court

Jack Achiezer Guggenheim  
*Sidley & Austin*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

Part of the [Judges Commons](#), and the [Legal History Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Guggenheim, Jack Achiezer (1998) "The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, the Supreme Court," *Kentucky Law Journal*: Vol. 87 : Iss. 2 , Article 4.  
Available at: <https://uknowledge.uky.edu/klj/vol87/iss2/4>

This Essay is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# ESSAY

## The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, the Supreme Court

BY JACK ACHIEZER GUGGENHEIM\*

### I. INTRODUCTION

While many have taken note of the Supreme Court's recent decision in *National Endowment for the Arts v. Finley*<sup>1</sup> for its effect on the interaction between government funding and free speech, another significant implication of the case may have been missed.<sup>2</sup> This potentially overlooked factor is an instance of first impression in the Supreme Court: it is the first time a decision of the Supreme Court, albeit a concurrence, used the term "chutzpah."

---

\* Associate, Sidley & Austin, Washington, D.C. B.A. 1993, Yeshiva University; J.D. 1996, Columbia University; COA 1996, Parker School of International and Comparative Law. This Essay expresses only the views of the author. Other works of the author which address the interaction of American jurisprudence and Jewish culture include *KOA is A.O.K.: The Second Circuit's Recent Kosher Trademark Decision Further Illustrates That the Patent and Trademark Office Must Answer to a Higher Authority*, 22 COLUM.-VLA J.L. & ARTS 203 (1998), and *Art & Atrocity: Cultural Depravity Justifies Cultural Deprivation*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 699 (1998).

<sup>1</sup> *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

<sup>2</sup> For example, Professor Volokh, who along with Judge Alex Kozinski wrote on the interaction of Yiddish and the law in *Lawsuit, Shmawsuit*, 103 YALE L.J. 463 (1993), chose not to mention the use of the word "chutzpah" in *Finley* in a newspaper piece he wrote about the decision. See Eugene Volokh, *How Free is Speech When the Government Pays?*, WALL ST. J., June 29, 1998, at A18.

“Chutzpah” is a Yiddish word connoting brazenness.<sup>3</sup> In *World Granite & Marble Corp. v. Wil-Freds Construction, Inc.*,<sup>4</sup> the court noted the plaintiff’s chutzpah and cited *Webster’s New World College Dictionary*<sup>5</sup> as defining “chutzpah” to mean “‘shameless audacity; impudence; brass.’”<sup>6</sup> In *Lugo v. Alvarado*,<sup>7</sup> the court commented upon the appellant’s chutzpah and cited Leo Rosten’s *The Joys of Yiddish*,<sup>8</sup> which defines “chutzpah” as a Yiddish idiom meaning “‘gall, brazen nerve, effrontery.’”<sup>9</sup> Neither English translation fully does the word justice, as neither definition fully captures the audacity simultaneously bordering on insult and humor which the word “chutzpah” connotes. Indeed, in *Engel Industries, Inc. v. First American Bank, N.A.*,<sup>10</sup> Judge Sporkin noted the defendant’s chutzpah. Also citing Leo Rosten’s *The Joys of Yiddish*, he defined “chutzpah” as “presumption-plus-arrogance such as no other word, and no other language can do justice to.”<sup>11</sup> However, in defining “chutzpah” in the context of American jurisprudence, it is also important to note that “[l]egal chutzpah is not always undesirable, and without it our system of jurisprudence would suffer.”<sup>12</sup>

Part of the uniqueness of Yiddish words like “chutzpah” is that their meaning varies depending on context and degree. In the right circumstances and to the right degree, “chutzpah” may intimate spunk. In the wrong situation or to an improper degree, “chutzpah” implies insolence. As Professor Dershowitz has stated:

[T]he word chutzpah has both a positive and a negative connotation. To the perpetrator of chutzpah it means boldness, assertiveness, a willingness to demand what is due, to defy tradition, to challenge authority, to raise eyebrows. To the victim of chutzpah, it means unmitigated gall, nerve,

---

<sup>3</sup> See *Lugo v. Alvarado*, 819 F.2d 5, 6-7 (1st Cir. 1987).

<sup>4</sup> *World Granite & Marble Corp. v. Wil-Freds Constr., Inc.*, No. 96 C 6441, 1996 WL 763230 (N.D. Ill. Nov. 25, 1996).

<sup>5</sup> WEBSTER’S NEW WORLD COLLEGE DICTIONARY 405 (3d ed. 1996).

<sup>6</sup> *World Granite*, 1996 WL 763230, at \*1.

<sup>7</sup> *Lugo v. Alvarado*, 819 F.2d 5 (1st Cir. 1987).

<sup>8</sup> LEO ROSTEN, *THE JOYS OF YIDDISH* (1968).

<sup>9</sup> *Lugo*, 819 F.2d at 6, 7 (quoting ROSTEN, *supra* note 8, at 93).

<sup>10</sup> *Engel Indus., Inc. v. First Am. Bank, N.A.*, 798 F. Supp. 9 (D.D.C. 1992).

<sup>11</sup> *Id.* at 15 n.7. Judge Sporkin also employed the word “chutzpah” in his decision in *Teich v. Food and Drug Administration*, 751 F. Supp. 243, 251 (D.D.C. 1990).

<sup>12</sup> *Chaffee v. Kraft Gen. Foods, Inc.*, 886 F. Supp. 1164, 1167-68 (D.N.J. 1995).

uppityness, arrogance, hypercritical demanding. It is truly in the eye of the beholder.<sup>13</sup>

For example, the plaintiff in *Torres v. CBS News*<sup>14</sup> was an attorney who offered to fill out visa lottery applications for a fee. He charged that Congressman Charles Schumer's statement, "In Brooklyn, we have a word for something like that—chutzpah," was false and defamatory.<sup>15</sup> The plaintiff obviously felt that "chutzpah" under the circumstances was not a positive description. He therefore sued for injury to professional character and reputation, mental anguish, and loss of business. He claimed actual damages of \$100 million and also sought punitive damages.<sup>16</sup> The court, however, granted Congressman Schumer's motion to dismiss the complaints against him.<sup>17</sup> Similarly, in *In re Celotex Corp.*,<sup>18</sup> the attorney for judgment creditors moved to have a judge recused due to bias against the attorney. He pointed to the judge's use of the word "chutzpah" as a clear manifestation of the judge's partiality.<sup>19</sup> However, the court, noting other judges' use of the word, denied the attorney's motion after finding that "chutzpah" is not a derogatory term indicating bias.<sup>20</sup>

In recent years, Yiddish words have increasingly made appearances in court decisions. This occurrence reflects not only the integration of Jewish lawyers into the fuller spectrum of American judicial culture but also the discovery that Yiddish words offer a unique and spirited means of encapsulating and presenting ideas, characteristics, descriptions, and emotions. As the court in *Smith v. Farley*<sup>21</sup> noted, Yiddishisms such as "chutzpah" "have become absorbed into standard English and are now applied to members of all racial and ethnic groups."<sup>22</sup>

Of all words in the Yiddish language, "chutzpah" has enjoyed particularly strong and widespread popularity. It seems natural that federal

---

<sup>13</sup> ALAN M. DERSHOWITZ, CHUTZPAH 18 (1991).

<sup>14</sup> *Torres v. CBS News*, 879 F. Supp. 309 (S.D.N.Y.), *aff'd*, 71 F.3d 406 (2d Cir. 1995).

<sup>15</sup> *Id.* at 313.

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> *In re Celotex Corp.*, 137 B.R. 868 (Bankr. M.D. Fla. 1992).

<sup>19</sup> *See id.* at 876.

<sup>20</sup> *See id.* at 876 n.11 (citing *Northwest Airlines v. Air Line Pilots Ass'n Int'l*, 808 F.2d 76, 83 (D.C. Cir. 1987); *Archer v. Levy*, 543 So.2d 863, 864 (Fla. Dist. Ct. App. 1989); *Hartford Accident & Indem. Ins. Co. v. Birdsong*, 553 A.2d 251, 257 (Md. Ct. Spec. App. 1989)).

<sup>21</sup> *Smith v. Farley*, 59 F.3d 659 (7th Cir. 1995).

<sup>22</sup> *Id.* at 664.

courts in New York, which is probably home to the greatest concentration of Yiddish speakers in the United States, have used the word "chutzpah" in numerous decisions.<sup>23</sup> It also seems natural that the Federal District Court for the District of Las Vegas, a city with exuberant charm, would have used "chutzpah" in a decision.<sup>24</sup> However, the repeated use of the word "chutzpah" by the Federal District Court for the Virgin Islands seems more surprising.<sup>25</sup> Perhaps even more unexpected is the use of the word "chutzpah" in decisions by district courts in Iowa, Alabama, and Puerto Rico.<sup>26</sup>

The first "lawyer" to have exhibited chutzpah may have been Abraham; in *Genesis*, Abraham has the nerve to defend the people of Sodom against the divine wrath.<sup>27</sup> However, "chutzpah" did not make its debut in American federal jurisprudence until 1973, in a decision by the United States Court of Claims (now known as the United States Court of Federal Claims).<sup>28</sup> The courts in our nation's capital have continued to raise the profile of this boisterous word by creating a "chutzpah championship," "chutzpah award," and "chutzpah doctrine."<sup>29</sup> The United States Court of Federal Claims, the Court of Appeals for the Federal Circuit, and the Court

---

<sup>23</sup> See, e.g., *United States v. Blau*, 961 F. Supp. 626, 633 n.7 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 68 (2d Cir. 1998); *Torres v. CBS News*, 879 F. Supp. 309, 313 (S.D.N.Y.), *aff'd*, 71 F.3d 406 (2d Cir. 1995); *Dubin v. E.F. Hutton Group, Inc.*, 845 F. Supp. 1004, 1012 n.20 (S.D.N.Y. 1994); *Kingsepp v. Wesleyan Univ.*, 142 F.R.D. 597, 599 n.1 (S.D.N.Y. 1992); *In re Pan Am. Corp.*, 140 B.R. 336, 342 (S.D.N.Y. 1992); *United States v. Russo*, 1991 WL 177347, at \*2 (S.D.N.Y. Sept. 4, 1991); *Katara v. D.E. Jones Commodities, Inc.*, 652 F. Supp. 907, 911 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 835 F.2d 966 (2d Cir. 1987); *Gemveto Jewelry Co., Inc. v. Jeff Cooper Inc.*, 568 F. Supp. 319, 336 (S.D.N.Y. 1983).

<sup>24</sup> See *Johnson v. Incline Village Gen. Improvement Dist.*, 5 F. Supp. 2d 1113, 1117 (D. Nev. 1998)

<sup>25</sup> See *Wells v. Rockefeller*, 97 F.R.D. 42, 46 (D.V.I. 1983), *aff'd in part and vacated in part*, 728 F.2d 209 (3d Cir. 1984); *American Fidelity Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp. 164, 183 (D.V.I. 1975).

<sup>26</sup> See *Reynolds v. Alabama Dep't of Transp.*, 996 F. Supp. 1130, 1145 (M.D. Ala. 1998); *Benson v. Richardson*, Civ. No. C-86-2009, 1990 WL 290144, at \*33 (N.D. Iowa July 16, 1990), *amended by* 1990 WL 290145 (N.D. Iowa Oct. 2, 1990), *aff'd*, 950 F.2d 726 (8th Cir. 1991); *Torres v. Hernandez Colon*, 672 F. Supp. 639, 655 n.1 (D.P.R. 1987), *aff'd in part and rev'd in part*, 889 F.2d 314 (1st Cir. 1989).

<sup>27</sup> See *Genesis* 18:26-33. See generally Alan M. Dershowitz, *The Vanishing Jewish Lawyer*, CAL. LAW., Sept. 1997, at 34.

<sup>28</sup> See *Weir v. United States*, 474 F.2d 617 (Ct. Cl. 1973).

<sup>29</sup> See *infra* Parts V-VII.

of Appeals for the District of Columbia Circuit, all of which are frequently the arbiters of extremely complicated technical nuances such as military and administrative agency regulations whose interpretation hang on the placement of a comma or a knowledge of quantum physics, have been the most ardent boosters of the entry of “chutzpah” into the judicial vernacular.<sup>30</sup> With all the attention such prominent courts were giving the word, it was only a matter of time until the buzz reached the highest court in the land and “chutzpah” made its debut in a concurring decision of the Supreme Court of the United States.<sup>31</sup>

## II. YIDDISH

“Chutzpah” is one of the most widely known and oft-used words of Yiddish, a language which offers unique expression, emphasis, and nuance. Yiddish is a language that has been used among European Jews and their descendants for the past 1000 years.<sup>32</sup> Yiddish is an intricate fusion of several unpredictably modified languages.<sup>33</sup>

Over the centuries, Yiddish, in its vast territorial scattering, became regionally differentiated.<sup>34</sup> In the main, the Yiddish sound system has been

---

<sup>30</sup> The Boards of Contract Appeals, which also must address difficult statutory and specification interpretation, have also used “chutzpah” in their decisions. *See, e.g., Weir v. United States*, 474 F.2d 617 (Ct. Cl. 1973). Indeed, even the most sophisticated arbiter of linguistic nuance, the United States Tax Court, has found that only the word “chutzpah” will suffice in certain circumstances.

In *Farnham v. Commissioner*, 62 T.C.M. (CCH) 1619 (1991), the court found that petitioner’s argument that the IRS sent notice to the wrong address based on incorrect information which petitioner provided to the IRS, ran afoul of the D.C. Circuit’s chutzpah doctrine. *See id.* at 1621. The Tax Court also noted the D.C. Circuit’s chutzpah doctrine in *Berg v. Commissioner*, 65 T.C.M. (CCH) 2004, 2008-09 (1993), noting that a taxpayer’s efforts to evade the IRS by failing to leave a forwarding address and living under an assumed name were subject to the “chutzpah doctrine.”

<sup>31</sup> The word “chutzpah” has also made an increasing appearance in legal scholarship. *See, e.g.,* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1029-31 (1998) (suggesting a chutzpah/forfeiture exception to the Confrontation Clause); Barry Latzer, *State Constitutional Chutzpah*, 59 ALB. L. REV. 1733 (1996) (stating that state supreme court’s decisions differing with United States Supreme Court’s decisions of constitutionality exhibit chutzpah).

<sup>32</sup> *See* 16 ENCYCLOPEDIA JUDAICA 789 (1972).

<sup>33</sup> *See id.* (noting use of German and pronunciations and lexicon, along with influences from multiple Slavic languages).

<sup>34</sup> *See id.*

determined by those German dialects which contributed the bulk of its basic lexical stock.<sup>35</sup> Regional varieties of Yiddish display rich vocalic distinctions.<sup>36</sup> The basic grammatical plan of Yiddish likewise follows the German model, as modified by a number of innovations.<sup>37</sup> The graphic basis of Yiddish writing is the Hebrew alphabet with a number of standardized diacritics.<sup>38</sup> The complex fusion of several different languages and the rise of purely internal innovations have given the Yiddish language words of dramatic nuance not present in the contributing languages.<sup>39</sup>

The use of the Yiddish language reflected the historical reality that from the tenth through the eighteenth centuries, the Jews of Europe generally did not enjoy the rights of citizenship of the countries in which they lived.<sup>40</sup> Yiddish therefore developed during this period as an expression of autonomy.<sup>41</sup> A rich cultural literature was written in Yiddish and manifested in both serious and humorous writings, newspapers, and theater.<sup>42</sup> The migration of peoples in the nineteenth and twentieth centuries brought Yiddish to many different parts of the world.<sup>43</sup> It has been estimated that on the eve of World War II, there were eleven million Yiddish speakers.<sup>44</sup> This number was drastically reduced by the Holocaust and a shift to the native tongue of countries that offered equal rights.<sup>45</sup> While the use of the language as a primary vernacular has been ever-declining, recent years have seen a sentimental and intellectual renewed interest in Yiddish.<sup>46</sup>

### III. JEWISH AMERICAN LAWYERS

Yiddish entered the lexicon of American jurisprudence through two main avenues. First, non-Jewish and Jewish members of the bar alike realized that Yiddish can provide the best word with the proper connotation for a particular situation. Second, society recognized American Jewish

---

<sup>35</sup> *See id.* at 790.

<sup>36</sup> *See id.*

<sup>37</sup> *See id.* (discussing vowels, diphthongs, and pronunciations).

<sup>38</sup> *See id.* at 791.

<sup>39</sup> *See id.* at 792.

<sup>40</sup> *See id.* at 789.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

lawyers as part of the wonderful American cultural mosaic.<sup>47</sup> Indeed, it is somewhat ironic that Yiddish has really only begun to enter the American legal lexicon now, at a time when so many Jewish lawyers are assimilating.<sup>48</sup> Motivated by the Biblical adage, "Justice, justice shall thou pursue,"<sup>49</sup> and fortified with a history of Talmudic scholarship, Jews have made substantial contributions to the development of law.<sup>50</sup>

The first Jew to professionally study law in the United States was Moses Levy, who was admitted to the Philadelphia bar in 1778.<sup>51</sup> He became a successful and distinguished attorney and later served as judge of the District Court for the City of Philadelphia.<sup>52</sup> Jews began to make their mark and rise to prominence in the legal profession by the beginning of the nineteenth century.<sup>53</sup> Two Jewish lawyers of particular prominence in the nineteenth century were Philip Phillips and Judah Philip Benjamin. Phillips argued more than 400 appeals before the Supreme Court of the United States.<sup>54</sup> Benjamin was the first Jew to be offered a seat on the Supreme Court; he turned down the offer, however, and subsequently became the attorney general of the Confederacy.<sup>55</sup> The twentieth century

---

<sup>47</sup> See generally Jerome Hornblase, *The Jewish Lawyer*, 14 CARDOZO L. REV. 1639 (1993); Russell G. Pearce, *The Jewish Lawyer Question*, 27 TEX. TECH L. REV. 1259 (1996). Both articles discuss the role and identity of the American Jewish lawyer.

<sup>48</sup> See generally Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993) (noting the increased difficulty of defining who is an American Jewish lawyer).

<sup>49</sup> Deuteronomy 16:20.

<sup>50</sup> See 10 ENCYCLOPEDIA JUDAICA, *supra* note 32, at 1503-05 (outlining the historical progress of Jews in America); see also Robert M. Cover, *Obligations: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987); Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199 (1996); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

<sup>51</sup> See 10 ENCYCLOPEDIA JUDAICA, *supra* note 32, at 1503.

<sup>52</sup> See *id.* However, the first Jewish judge in the United States was a layman, Isaac Miranda, who was appointed deputy judge of the Vice-Admiralty of the Province of Pennsylvania in 1727. David Emanuel and James Lucena, also laymen, became justices of the peace in Georgia in 1766 and 1773, respectively. See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* After the defeat of the Confederacy, Benjamin escaped to England where he became a leading counsel of the English bar. Other prominent Jewish American lawyers of this time included Raphael J. Moses, who was the leading



saw a substantial increase in the number of Jews appointed to judgeships and university professorships.<sup>56</sup> However, prior to World War II, Jews continued to face prejudice and were denied entry into various areas of the law, such as the larger and more established law firms.<sup>57</sup> Nonetheless, Louis Brandeis, Benjamin Cardozo, and Felix Frankfurter were appointed to the Supreme Court during this period and are recognized as among the greatest Justices to sit on the bench.<sup>58</sup> Prominent legal scholars and philosophers of this time included Max Radin, professor of law at the University of California, and Morris Raphael Cohen, professor of philosophy at the City College of New York.<sup>59</sup> Outstanding advocates of this time included Louis Marshall, Louis Nizer, Samuel Leibowitz, and Lee M. Friedman.<sup>60</sup>

A gradual improvement in the acceptance and status of Jewish lawyers took place after World War II.<sup>61</sup> To a large extent, Jews found it easier to be admitted to large law firms. However, research in the 1960s indicated that discrimination still existed, that Jewish graduates found it harder to find jobs than non-Jewish graduates, and that Jewish graduates on average earned lower salaries than non-Jewish graduates.<sup>62</sup> As the situation

---

commercial lawyer of Georgia, and William Mallory Levi, who was a justice of the Supreme Court of Louisiana. *See id.*

<sup>56</sup> *See id.* at 1504.

<sup>57</sup> *See generally* Note, *The Jewish Law Student and New York Jobs-Discriminatory Effects in Law Firm Hiring Practices*, 73 YALE L.J. 625 (1964).

<sup>58</sup> *See* 10 ENCYCLOPEDIA JUDAICA, *supra* note 32, at 1503; *see also* ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988) (comparing Justices Felix Frankfurter and Louis Brandeis and the influence of their Jewish heritage on their judicial philosophies); Ruth Bader Ginsburg, *Reflections on Way Paving Jewish Justices and Jewish Women*, 14 Touro L. REV. 283 (1998); Mark Miller, *Jurists With a Difference*, WALL ST. J., July 16, 1998, at A16 (discussing Justice Cardozo).

Other Jewish judges of note during this period include Judge Julian Mack of the U.S. Circuit Court of Appeals, Justice Horace Stern of the Pennsylvania Supreme Court, Chief Justice Henry Butzel of the Supreme Court of the State of Michigan, Judge Irving Lehman of the New York Court of Appeals, and Justice Samuel Kalisch of the New York Supreme Court. *See* 10 ENCYCLOPEDIA JUDAICA, *supra* note 32, at 1504.

<sup>59</sup> *See* 10 ENCYCLOPEDIA JUDAICA, *supra* note 32, at 1504.

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* As a result, Jewish lawyers tended to work at Jewish law firms. In 1950, for example, it was estimated that nearly 85% of Jewish lawyers entering law

continued to improve, Bernard Segal became the first Jew to serve as president of the American Bar Association, and Simon Sobeloff became the first Jew to serve as the Attorney General of the United States.<sup>63</sup> However, the best representation of the ever-increasing presence and acceptance of Jewish legal scholars, Jewish members of the bench, and prominent Jewish advocates and counselors since World War II is the appointment of four more Jewish luminaries to the Supreme Court: Arthur Goldberg, Abe Fortas, Ruth Bader Ginsburg, and Stephen Breyer.<sup>64</sup>

One of the most significant aspects of Jewish participation in American law in the twentieth century has been the extensive interest of American Jewish lawyers in upholding and extending civil liberties and the substantial influence exerted in such effort on constitutional doctrines affecting race relations, the administration of criminal justice, and the operation of the political process.<sup>65</sup> The increased participation of Jews in the legal profession in some instances brought with it both Jewish scholarship and Jewish cultural heritage, which occasionally included knowledge of the Yiddish language.<sup>66</sup>

#### IV. YIDDISH AND AMERICAN JURISPRUDENCE

The unique shades and subtleties that Yiddish allows have made it a language of choice in recent American jurisprudence when English fails to provide a word with the proper connotation. According to Judge Alex

---

firms went to firms where the majority of the partners were Jewish. *See id.*; *see also* Note, *supra* note 57, at 625.

<sup>63</sup> *See* 10 ENCYCLOPEDIA JUDAICA, *supra* note 32, at 1505.

<sup>64</sup> *See* Ginsburg, *supra* note 58, at 285; *see also* Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441 (1998).

<sup>65</sup> *See* 10 ENCYCLOPEDIA JUDAICA, *supra* note 32, at 1505. American Jewish lawyers whose careers have in large measure been dedicated to civil liberties include Arthur Garfield Hays, Samuel Leibowitz, Walter Pollack, Jack Greenberg, Anthony Amsterdam, Leonard Boudin, William Kunstler, Osmond Fraenkel, Norman Dorsen, Aryeh Neier, Max Radin, Mayer Sulzberger, Horace Stern, David Bazelon, and Charles Wyzanski. *See id.*

<sup>66</sup> *See, e.g.*, Cover, *supra* note 50; Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535 (1991); Stone, *supra* note 50; Gordon Tucker, *The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics*, 13 FORDHAM URB. L.J. 99 (1985).

Kozinski of the United States Court of Appeals for the Ninth Circuit, Yiddish is quickly supplanting Latin as the spice in American legal argot.<sup>67</sup> The earliest reported case that uses a Yiddish word is believed to be *In re Kladneve's Estate*,<sup>68</sup> where the judge attempted to use a Yiddish descriptive, but apparently ended up making up a word.<sup>69</sup> Similarly, Judge Kozinski has noted more recently that the United States Court of Appeals for the Second Circuit incorrectly defined "bagel."<sup>70</sup> The word "kibbitz" has appeared in at least ten decisions,<sup>71</sup> the word "maven" in at least four decisions,<sup>72</sup> "klutz" in at least three decisions,<sup>73</sup> and the word "schmooze" in at least one decision.<sup>74</sup> In a subtler use of Yiddish, a California Court of

---

<sup>67</sup> See Kozinski & Volokh, *supra* note 2, at 463. Kozinski and Volokh's article has further perpetuated the use of Yiddish in court decisions. Judges, including Judge Kozinski himself, will use the word "chutzpah" and then cite the article for support. See, e.g., *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996); *United States v. Gomez*, 92 F.3d 770, 776 (9th Cir. 1996); *In re Alpex Computer Corp.*, 71 F.3d 353, 358 (10th Cir. 1995); *Prolerized Schiabo Neu Co. v. Hartford Accident & Indem. Co.*, 990 F. Supp. 356, 367 (D.N.J. 1997); *Chaffee v. Kraft Gen. Foods, Inc.*, 886 F. Supp. 1164, 1168 (D.N.J. 1995); see also Ralph Slovenko, *Plain Yiddish for Lawyers and Judges*, TRIAL, June 1992, at 86; Gerald F. Uelman, *Plain Yiddish for Lawyers*, A.B.A. J., June 1985, at 78. See generally ALAN M. DERSHOWITZ, CHUTZPAH (1991).

<sup>68</sup> *In re Kladneve's Estate*, 234 N.Y.S. 246, 247 (Sur. Ct. 1929).

<sup>69</sup> See Kozinski & Volokh, *supra* note 2, at 463 n.4. The word was "schmorer," which has no Yiddish meaning. See *id.*

<sup>70</sup> See *NLRB v. Bagel Baker's Counsel*, 434 F.2d 884, 886 (2d Cir. 1970).

<sup>71</sup> See *Gacy v. Welborn*, 994 F.2d 305, 314 (7th Cir. 1993); *In re Finkel*, 151 B.R. 779, 782 n.2 (Bankr. W.D. Tex. 1993); *Bachowski v. Brennan*, 413 F. Supp. 147, 150 (W.D. Pa. 1976); *People v. Oliver*, 241 Cal. Rptr. 804, 810 (Ct. App. 1987); *People v. Holtzman*, 294 N.E.2d 708, 711 (Ill. App. Ct. 1973); *State v. Davis*, 515 S.W.2d 181, 182 (Mo. Ct. App. 1974); *Zannone v. Polino*, 155 N.Y.S.2d 836, 837 (City Ct. 1956); *Robison v. Robison*, 394 P.2d 876, 878 (Utah 1964); *In re Bodus' Will*, 36 N.W.2d 926, 927 (Wis. 1949); *Galbraith v. State*, 503 P.2d 1192, 1197 (Wyo. 1972).

<sup>72</sup> See *Eklöf Marine Corp. v. United States*, 762 F.2d 200, 203 (2d Cir. 1985); *In re Love*, 61 B.R. 558, 558 (Bankr. S.D. Fla. 1986); *Nova Ribbons Prods., Inc. v. Marchand*, Civil Action No. 89-4340, 1992 U.S. Dist. LEXIS 13123, at \*27 (E.D. Pa. Aug. 21, 1992) (Kennedy, J., concurring); *Farmer v. Supermarkets Gen. Corp.*, No. 8607-1244, 1991 Phila. Cty. Rptr. LEXIS 26, at \*4 (Phila. Cty. C.P. Apr. 11, 1991).

<sup>73</sup> See *Thomas v. City of Evanston*, 610 F. Supp. 422, 429 (N.D. Ill. 1985); *State v. American Equitel Corp.*, 395 N.E.2d 1355, 1368 (Ohio C.P. 1979); *Miffleton v. State*, 777 S.W.2d 76, 82 (Tex. Crim. App. 1989).

<sup>74</sup> See *MCG Dev. Corp. v. Bick Realty Co.*, 230 S.E.2d 26, 27 & n.1 (Ga. Ct. App. 1976) (noting variant of spelling and use).

Appeals decision, apparently referring to the dissent, wrote a footnote in which the first letter of each sentence spelled out "SCHMUCK."<sup>75</sup>

Gerald F. Uelman, Dean of the Santa Clara School of Law, has likewise noted the humor and subtle nuances Yiddish can add to legal discourse.<sup>76</sup> Because Yiddish can characterize and add nuance in a manner that other languages cannot, it was only a matter of time before Yiddish words like "chutzpah" began to enjoy substantial judicial attention.

## V. THE CHUTZPAH CHAMPIONSHIP

The first reported use of the word "chutzpah" was *Williams v. State*,<sup>77</sup> an opinion of the Georgia Court of Appeals addressing an individual who broke into a sheriff's office to steal guns.<sup>78</sup> The decision in *Williams* was written by Judge Clark, who went on to write opinions using the Yiddish words "schmooze,"<sup>79</sup> "tsoriss,"<sup>80</sup> "shammes,"<sup>81</sup> and "gut gezacht."<sup>82</sup> However, the federal, national debut of the word "chutzpah" in a reported decision occurred the following year in *Weir v. United States*,<sup>83</sup> penned by Judge Kunzig of the United States Court of Claims. The jurisdiction of the

<sup>75</sup> See *People v. Arno*, 153 Cal. Rptr. 624, 628 n.2 (Cal. Ct. App. 1979).

<sup>76</sup> See Gerald F. Uelman, *Id.*, 1992 B.Y.U. L. REV. 335. Dean Uelman named his law review piece "*Id.*" in the hopes of gaining entry to the *Guinness Book of World Records* for the most cited article.

According to Dean Uelman, Justice William O. Douglas reported that the most important thing he learned at Columbia Law School was the difference between a schnook and a schlemiel: the schnook is the one who always spills his soup while the schlemiel is the one who always gets spilled on. See *id.* at 342 (citing *The Problems of Long Criminal Trials, A Panel Discussion*, 34 F.R.D. 155, 184 (1963) (statement of Edward Bennett Williams)).

<sup>77</sup> *Williams v. State*, 190 S.E.2d 785 (Ga. Ct. App. 1972).

<sup>78</sup> See *id.* at 785 & n.1.

<sup>79</sup> See *MCG Dev. Corp. v. Bick Realty Co.*, 230 S.E.2d 26, 27 (Ga. Ct. App. 1977) (defining "schmooz" [sic] as "'chat'").

<sup>80</sup> See *Banks v. State*, 209 S.E.2d 252, 253 & n.1 (Ga. Ct. App. 1974) (defining "tsoriss" as "trouble," "often accompanied by the Yiddish lamentation, 'oy vay'"); see also Slovenko, *supra* note 67, at 87.

<sup>81</sup> See *State v. Koon*, 211 S.E.2d 924, 925 & n.1 (Ga. Ct. App. 1975) (defining "shammes" as "policemen," stemming from use by Damon Runyon); see also Slovenko, *supra* note 67, at 87 (defining "shammes" as the beadle or sexton of a synagogue).

<sup>82</sup> See *Whitner v. Georgia State Univ.*, 228 S.E.2d 200, 200 (Ga. Ct. App. 1976) (defining "gut gezacht" as "well spoken").

<sup>83</sup> *Weir v. United States*, 474 F.2d 617 (Ct. Cl. 1973).

United States Court of Claims, now known as the United States Court of Federal Claims, encompasses suits against the United States which frequently require the precise interpretation of federal statutes and regulations. It might therefore appear ironic that the Court of Claims was the first federal court to use the word "chutzpah." Upon further reflection, though, it actually is quite logical; a court practiced in scrutinized reading and interpretation is the court one would expect to have the greatest appreciation for a language and words that offer unique nuances not otherwise available.

The value of the nuance, emphasis, and emotion embodied in the word "chutzpah" is evident in its usage in *Weir*. In *Weir*, the court considered the case of a former soldier who made sworn statement that he was a homosexual in order to obtain a premature release from military services.<sup>84</sup> However, after he found that his military discharge influenced his civilian job opportunities, *Weir* revealed that he was not a homosexual.<sup>85</sup> He argued that the military should have discovered that he was lying and denied his discharge.<sup>86</sup> *Weir* then had the temerity to sue for back pay, restoration of rank, and the value of missed promotions! In its rejection of his claims, the court described *Weir* as "the outstanding example of chutzpah to the nth degree."<sup>87</sup> The value of the word "chutzpah" to the federal judiciary was thereby confirmed. Indeed, since only the word "chutzpah" could have done justice to *Weir*'s unbelievable gall, the court did not even bother to define "chutzpah."

In the same year that *Weir* was decided, the Court of Claims also decided *Switkes v. United States*.<sup>88</sup> Dissenting from Judge Kunzig's majority opinion, Judge Nicholas described his colleague's use of the word "chutzpah" in *Weir* as the awarding of the "chutzpah championship."<sup>89</sup> In *Switkes* a former army medical officer, who, after being admittedly AWOL, had obtained federal court orders restraining the army from sending him to Vietnam, brought suit to recover pay and allowances. Judge Kunzig's majority opinion found that *Switkes* was not entitled to pay or allowances for the period he was AWOL. In his dissent, Judge Nicholas found that *Switkes* was not truly AWOL, but rather had waffled in his assertion that he was a conscientious objector and that such waffling was due to the

---

<sup>84</sup> *See id.* at 618-20.

<sup>85</sup> *See id.* at 621.

<sup>86</sup> *See id.*

<sup>87</sup> *Id.* at 620.

<sup>88</sup> *Switkes v. United States*, 480 F.2d 844 (Ct. Cl. 1973).

<sup>89</sup> *Id.* at 851 (Nicholas, J., dissenting).

changes in the legal climate for conscientious objection.<sup>90</sup> Therefore, Judge Nicholas noted that the “chutzpah championship” awarded in *Weir* was not in danger of passing to a new holder.<sup>91</sup>

Two years later, the United States Court of Claims addressed the true epitome of chutzpah in *Steuer v. United States*.<sup>92</sup> In *Steuer*, the plaintiff argued that the army’s failure for eleven years to follow a military regulation requiring verification of medical certification excused his fraudulent representations that he had graduated from medical school and previously worked at a hospital. While the plaintiff’s fraud could have meant that improper medical care was being administered and that lives were at risk, the case was not a criminal prosecution, but rather a suit by the nondoctor plaintiff to recover back pay! Judge Bennett wrote in the opinion that “the court in *Weir* described plaintiff’s claim as ‘the outstanding example of chutzpah to the nth degree.’ The instant case is a worthy rival.”<sup>93</sup>

## VI. THE CHUTZPAH AWARD

Judge Bennet brought the word “chutzpah” with him from the Court of Claims when he was appointed to the United States Court of Appeals for the Federal Circuit. The transported word would eventually become the catalyst for the court’s chutzpah award.<sup>94</sup> In *Senza-Gel Corp. v. Seiffhart*,<sup>95</sup> Judge Bennett’s dissent noted the chutzpah displayed in the brazen assertions of one of the co-defendants. This defendant waited until seven months after trial and a full four and a half years after becoming aware of the disputed patent issue to finally raise it in a motion to reconsider. In spite of this, the defendant argued that it was the plaintiff who was precluded from arguing issues on appeal which it had not raised in its original brief. Despite this seven-month delay in making its argument, defendant argued that it was the plaintiff who was preventing the “just,

---

<sup>90</sup> *See id.* (Nicholas, J., dissenting).

<sup>91</sup> *See id.* (Nicholas, J., dissenting).

<sup>92</sup> *Steuer v. United States*, 207 Ct. Cl. 282 (1975).

<sup>93</sup> *Id.* (quoting *Weir v. United States*, 474 F.2d 617, 620 (Ct. Cl. 1973)).

<sup>94</sup> Actually, the first judge of the United States Court of Appeals for the Federal Circuit to use the word “chutzpah” in a reported decision was Judge Broderick. He used the term in passing in a 1984 decision to describe the plaintiff’s behavior in seeking an injunction for patent infringement at the same time that the ownership and validity of the patent were being challenged in another court. *See Shelcore, Inc. v. Durham Indus., Inc.*, 745 F.2d 621, 629 (Fed. Cir. 1984).

<sup>95</sup> *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661 (Fed. Cir. 1986).

speedy and inexpensive determination” required by the Federal Rules of Civil Procedure.<sup>96</sup>

It was almost ten years until the word “chutzpah” appeared again in a decision by the Court of Appeals for the Federal Circuit. In *Checkpoint Systems, Inc. v. United States International Trade Commission*,<sup>97</sup> Judge Lourie used the word “chutzpah” to describe the plaintiff. Checkpoint argued that the equities favored a second inventor over an earlier inventor because the earlier inventor had failed to exercise his rights. In fact, both inventors were employees of Checkpoint, and Checkpoint delayed the first inventor’s efforts while using his help to further develop the invention. Checkpoint then negotiated a better contractual relationship with the second inventor.<sup>98</sup> Judge Lourie stated that, “Checkpoint’s assertion now that the prior inventor ‘slept’ on his invention may qualify as the new definition of ‘chutzpah.’”<sup>99</sup> Perhaps fearing that in its years of disuse the word had slipped from consciousness, Judge Lourie also set out the classic definition for the word “chutzpah,” defining the word for the first time in an opinion by the Court of Appeals for the Federal Circuit. He noted that “chutzpah,” which Checkpoint now threatened to redefine, is “[c]ommonly used to describe the behavior of a person who kills his parents and pleads for the court’s mercy on the ground of being an orphan.”<sup>100</sup>

In *Refac International, Ltd. v. Lotus Development Corp.*,<sup>101</sup> the Court of Appeals for the Federal Circuit elevated its use of the word “chutzpah” into the “chutzpah award.” In *Refac*, the plaintiff argued that the previous affidavit it had submitted in support of its patent application did not demonstrate the plaintiff’s intent to mislead because it was only an affidavit of opinion, not of fact, and the Patent and Trademark Office cannot rely on an opinion affidavit in such context.<sup>102</sup> In another opinion penned by Judge Lourie, the court, noting its use of the word “chutzpah” in *Checkpoint*, stated, “arguing that an affidavit submitted to persuade was defective as presenting only opinion, not fact, and that it should be discounted, qualifies only for a chutzpah award, not a reversal.”<sup>103</sup>

---

<sup>96</sup> See *id.* at 671 n.2 (Bennett, J., dissenting) (citing FED. R. CIV. P. 56).

<sup>97</sup> *Checkpoint Sys., Inc. v. United States Int’l Trade Comm’n*, 54 F.3d 756 (Fed. Cir. 1995).

<sup>98</sup> See *id.* at 758-59.

<sup>99</sup> *Id.* at 763.

<sup>100</sup> *Id.* at 763 n.7.

<sup>101</sup> *Refac Int’l, Ltd. v. Lotus Dev. Corp.*, 81 F.3d 1576 (Fed. Cir. 1996).

<sup>102</sup> See *id.* at 1584.

<sup>103</sup> *Id.* (citations omitted).

In April 1998, the Court of Appeals for the Federal Circuit bestowed its chutzpah award once again. In *Dainippon Screen Manufacturing Co. v. CFMT, Inc.*,<sup>104</sup> the defendant, in essence, argued that a parent company can incorporate a holding company in another state, transfer its patents to the holding company, and arrange to have those patents licensed back to the parent by virtue of its complete control of the holding company.<sup>105</sup> It could then threaten its competitors with infringement without fear of creating declaratory judgment jurisdiction, except perhaps in the state of incorporation of the holding company.<sup>106</sup> The court, noting its earlier decisions in *Refac* and *Checkpoint*, responded by stating that “this argument qualifies for one of our ‘chutzpah’ awards.”<sup>107</sup>

## VII. THE CHUTZPAH DOCTRINE

In 1987, the Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) first used the word “chutzpah” in a reported decision. This use would eventually evolve into the D.C. Circuit’s “chutzpah doctrine.” In *Northwest Airlines, Inc. v. Air Line Pilots Ass’n, International*,<sup>108</sup> the court addressed the reinstatement of a pilot found to have been flying while under the influence of alcohol.<sup>109</sup> The airline contested the arbitration award rendered by the airline system board of adjustment which ordered the conditional reinstatement of the pilot.<sup>110</sup> The district court found for the airline. However, while it might seem that the true chutzpah lay with the pilot and the union for demanding reinstatement despite the immense danger posed to passengers, the D.C. Circuit reversed, finding that “[i]t would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison [the pilot] for flight duty.”<sup>111</sup>

Judge Silberman wrote the D.C. Circuit’s decision in *Southwestern Bell Corp. v. Federal Communications Commission*,<sup>112</sup> referencing the opinion

---

<sup>104</sup> *Dainippon Screen Mfg. Co. v. CFMT, Inc.*, 142 F.3d 1266 (Fed. Cir. 1998).

<sup>105</sup> *See id.* at 1267-69.

<sup>106</sup> *See id.*

<sup>107</sup> *Id.* at 1271.

<sup>108</sup> *Northwest Airlines, Inc. v. Air Line Pilots Ass’n, Int’l*, 808 F.2d 76 (D.C. Cir. 1987).

<sup>109</sup> *See id.* at 78-79.

<sup>110</sup> *See id.* at 80.

<sup>111</sup> *Id.* at 83.

<sup>112</sup> *Southwestern Bell Corp. v. Federal Communications Comm’n*, 896 F.2d 1378 (D.C. Cir. 1990).



in *Northwest*. The court in *Southwestern Bell* found that the plaintiff's argument for judicial deference towards FCC regulatory efforts in another appeal pending before the D.C. Circuit while challenging in *Southwestern* the FCC's regulatory efforts bordered on "chutzpah."<sup>113</sup>

In *Harbor Insurance Co. v. Schnabel Foundation Co.*,<sup>114</sup> the D.C. Circuit, in another decision by Judge Silberman, again had good reason to invoke the word "chutzpah." *Harbor* involved a dispute as to liability between a construction contractor and its subcontractor. The court noted that:

Schnabel puts forth two theories. The first, which we think quite striking, is that OMNI was negligent in relying on Schnabel's own decision to use a wood lagging rather than a steel shoring system on the excavation wall adjacent to the Sears building. OMNI, we are told by Schnabel, should not have listened to Schnabel. It is certainly somewhat unorthodox for one party to a lawsuit to assert that the second party was negligent for relying on the first party.<sup>115</sup>

In rejecting this argument, the court, citing its decision in *Northwest*, noted, "It reminds us of the legal definition of chutzpah: chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan."<sup>116</sup>

In *Marks v. Commissioner*,<sup>117</sup> the D.C. Circuit's "chutzpah doctrine" was finally born. *Marks* was a per curiam decision to which Judge Silberman contributed. In *Marks*, fugitives from criminal prosecution argued that inadequate efforts were made to notify them of their tax delinquency.<sup>118</sup> The court found that "it is quite apparent that the reason the Marks kept the Commissioner—and the government—unapprised of their whereabouts was because they were fugitives from criminal prosecution."<sup>119</sup> Citing its earlier decisions in *Harbor* and *Northwest*, the court noted, "to turn around and blame the Commissioner for not finding them runs afoul of this court's developing 'chutzpah' doctrine."<sup>120</sup>

<sup>113</sup> *Id.* at 1381 n.2.

<sup>114</sup> *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930 (D.C. Cir. 1991).

<sup>115</sup> *Id.* at 937 (footnote omitted).

<sup>116</sup> *Id.* at 937 n.5 (citation omitted).

<sup>117</sup> *Marks v. Commissioner*, 947 F.2d 983 (D.C. Cir. 1991) (per curiam).

<sup>118</sup> *See id.* at 985.

<sup>119</sup> *Id.* at 986.

<sup>120</sup> *Id.* (citations omitted).

In *United States v. Reese*,<sup>121</sup> the D.C. Circuit addressed the appeal of a defendant who had been convicted of carrying a pistol without a license, but had fled before sentencing. The court established a general rule that a defendant whose flight prevents consolidation of his appeal with that of a co-defendant is not entitled to a belated appeal. The court reasoned that by thwarting consolidation, such flight inherently disrupts the appellate process. The court, citing the *Harbor* definition of chutzpah, as well as *The Joys of Yiddish* by Leo Rosten, noted that to reward the fugitive by granting his claim to a second assignment of the court's limited resources would be perverse.<sup>122</sup>

In *Fischer v. Resolution Trust Corp.*,<sup>123</sup> the D.C. Circuit came close to invoking the chutzpah doctrine again. In *Fischer*, an accounting firm challenged a decision by the Resolution Trust Corporation ("RTC") that it could not contract for the accounting firm's services because of a conflict of interest created by a lawsuit that RTC was filing against the firm. The accounting firm argued that RTC's refusal to contract with it was a debarment without due process. The court found that the accounting firm was essentially arguing that it had the right to put the RTC's lawsuit on trial. However, in its reply brief and oral arguments, the accounting firm retreated to a claim that it should be able to demonstrate that its image should not be tarnished by a lawsuit. In the court's decision, Judge Silberman, citing *Harbor* and *Northwest*, observed that the accounting firm may have retreated in its position for fear it was running afoul of the D.C. Circuit's chutzpah doctrine.<sup>124</sup>

Most recently, in *Caribbean Shippers Ass'n v. Surface Transportation Board*,<sup>125</sup> a decision issued just weeks before the Supreme Court's own chutzpah decision, Judge Silberman's opinion invoked the possibility of the chutzpah doctrine. In rejecting the plaintiff's petition, the court found that the plaintiff might have essentially been arguing that the use of only one inspection and categorization company by all carriers caused the plaintiff injury, because in the absence of competition, the plaintiff would not be able to persuade the inspection company to be less vigilant in enforcement of compliance activities. The court, citing *Marks* and *Harbor*, stated,

---

<sup>121</sup> *United States v. Reese*, 993 F.2d 254 (D.C. Cir. 1993).

<sup>122</sup> *See id.* at 256-57.

<sup>123</sup> *Fischer v. Resolution Trust Corp.*, 59 F.3d 1344 (D.C. Cir. 1995).

<sup>124</sup> *See id.* at 1350 ("Perhaps sensing that this position runs afoul of this circuit's chutzpah doctrine, . . . [petitioner] retreat[s].").

<sup>125</sup> *Caribbean Shippers Ass'n, Inc. v. Surface Transp. Bd.*, 145 F.3d 1362 (D.C. Cir. 1998).

“Indeed, if that is petitioner’s injury, it is doubtful that it would have prudential standing; and it seems that it runs afoul of the court’s chutzpah doctrine.”<sup>126</sup>

## VIII. THE SUPREME COURT’S (OR AT LEAST JUSTICE SCALIA’S) CHUTZPAH

### A. Justice Antonin Scalia

With both the United States Courts of Appeals for the District of Columbia Circuit and the Federal Circuit having used the term within the previous few weeks, the time was ripe for the Supreme Court of the United States to invoke the word “chutzpah.” *National Endowment for the Arts v. Finley*,<sup>127</sup> a case that addressed the government’s right to choose which artistic expressions to sponsor, provided the perfect forum for the highest court in the land to exercise its right to express itself.

It was especially apropos that Justice Antonin Scalia’s concurrence was the first opinion of the Supreme Court to use the term “chutzpah.” Justice Scalia has been admired, even by his ideological opponents, for his appropriate sense of humor in discussing deeply important subjects such as religion and politics.<sup>128</sup> Furthermore, Scalia, a devout Catholic raised in Queens, New York, has repeatedly called for more expressions of tradition and religion in American society.<sup>129</sup> The use of the word “chutzpah,” with its historical roots and association with Judaism, may fulfill such a role. Indeed, Justice Scalia has argued that the Rehnquist Court has gone too far in prohibiting a wide range of religious expression in public activity.<sup>130</sup>

While Yiddish has been equally associated with both anti-religious movements and religious movements, the majority of those who are now conversant in Yiddish are in fact very religious. Therefore, Justice Scalia’s invocation of the word “chutzpah” can be seen as an attempt to bring greater religious expression to public activity. However, the ability to employ Justice Scalia’s use of the word “chutzpah” as a predictor of future

---

<sup>126</sup> *Id.* at 1365 n.3 (citations omitted).

<sup>127</sup> *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

<sup>128</sup> See Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 *FORDHAM URB. L.J.* 427, 428 (1997).

<sup>129</sup> See Eric J. Greenberg, *In Pursuit of Justice: Addressing JTS Audience, Supreme Court’s Scalia Offers His Views on Religion and the Constitution*, *JEWISH WK.*, May 24, 1996, at 13, available in 1996 WL 15747331.

<sup>130</sup> *See id.*

decisions or even to interpret past decisions is limited. As one scholar has noted in the context of assigning ideas to Justice Frankfurter based on his Jewish heritage, “[t]o make claims about connections between . . . identity and the development of legal ideas is to venture into a treacherous domain. In general, demonstrating casual connections between context and text is a challenge for even the most accomplished intellectual historian.”<sup>131</sup>

However, Justice Scalia’s use of the word “chutzpah” comports not just with his personal views, but also with his legal philosophy. Scalia favors the “nonpreferentialist” view, which posits that government may support religion in general but not in a way that prefers any particular religion.<sup>132</sup> Justice Scalia set out his nonpreferentialist interpretation of the Establishment Clause in his dissenting opinion in *Lee v. Weisman*,<sup>133</sup> approving a rabbi’s invocation, which was similar to the “Shehecheyanu,” a traditional Jewish prayer of thanksgiving, at a high school graduation.<sup>134</sup> For Justice Scalia, a Catholic Supreme Court Justice in a country where the majority religion is Christianity, to use a term of a Jewish cultural language could be viewed as in keeping with the nonpreferentialist legal doctrine.

It is understandable that Justice Scalia was the first Justice to use the word “chutzpah.” He had no fear of accusations that the use of a Yiddish word would brand him as an advocate for the promotion of minority religions. In his majority opinion in *Employment Division, Department of Human Resources v. Smith*,<sup>135</sup> Justice Scalia dealt a serious blow to the Free Exercise Clause, which protects minority religions. In that opinion, Justice Scalia ruled that as long as the government does not overtly or intentionally discriminate against adherents of particular religious beliefs when it enacts a generally applicable law, the Free Exercise Clause does not insulate such

---

<sup>131</sup> Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish “Dissimilation”*: Frankfurter, Bickel, and Cover on Judicial Review, 3 S. CAL. INTERDISC. L.J. 809, 813 (1994); see also BARBARA A. PERRY, A “REPRESENTATIVE” SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 55-88 (1991) (discussing the allocation of a Jewish seat on the Supreme Court). *But see* BURT, *supra* note 58 (comparing Justice Felix Frankfurter and Louis Brandeis and the influence of their Jewish heritage on their judicial philosophies).

<sup>132</sup> See Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 877-79 (1986).

<sup>133</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>134</sup> See *id.* at 641 (Scalia, J., dissenting).

<sup>135</sup> *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990).

adherents from complying with the law, even at the cost of violating sincere religious beliefs.<sup>136</sup>

*B. Justice Scalia's Concurrence in Finley*

The Supreme Court often grants certiorari in order to resolve splits between the circuits. However, Justice Scalia's concurrence failed to resolve the split between the Federal Circuit, which believes chutzpah is to be used as an "award," and the D.C. Circuit, which believes chutzpah is a "doctrine." Instead, Scalia returned to the broader general use of the term first announced in earlier judicial decisions.

In *National Endowment for the Arts v. Finley*,<sup>137</sup> a number of performance artists and an artists' organization brought an action against the National Endowment for the Arts ("NEA") claiming that the denial of grant applications violated the artists' constitutional rights.<sup>138</sup> Justice O'Connor, writing for the majority, found that 20 U.S.C. § 954(d)(1),<sup>139</sup> which requires the NEA to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public,"<sup>140</sup> did not inherently interfere with the First Amendment so as to be facially invalid and was not unconstitutionally vague.<sup>141</sup> The NEA had interpreted the statute as merely suggesting that "general standards of decency and respect" be added to the list of criteria to be considered and had formed a panel of geographically and ethnically diverse members to comply with the statute.<sup>142</sup> Justice O'Connor likewise noted that the statute's language was advisory, as opposed to Congress's more explicit, affirmative requirements statutes.<sup>143</sup> Therefore, she found that the artists had not demonstrated a substantial risk that application of § 954(d)(1) would lead to the suppression of free expression.<sup>144</sup> Furthermore, Justice O'Connor found that although § 954(d)(1)'s terms are

---

<sup>136</sup> See *id.*; see also *Nadine Strossen, Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 382-88 (1991).

<sup>137</sup> *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

<sup>138</sup> See *id.* at 2174.

<sup>139</sup> 20 U.S.C. § 954(d)(1) (1985).

<sup>140</sup> *Id.*

<sup>141</sup> See *Finley*, 118 S. Ct. at 2179-80.

<sup>142</sup> See *id.* at 2171.

<sup>143</sup> See *id.* at 2175.

<sup>144</sup> See *id.* at 2179-80.

opaque, when the government acts as a patron and not as a sovereign, the consequences of its imprecision are not constitutionally severe.<sup>145</sup>

The exasperation that Justice Scalia expressed about the artists' challenge to the statute, the NEA's interpretation of that same statute, and even Justice O'Connor's position in the majority opinion all set the stage for the historic first use of the word "chutzpah" in a decision of the United States Supreme Court. In his concurrence, Justice Scalia agreed with the majority's position that the statute was constitutional. However, he found that the NEA's view of the statute as merely an instruction, rather than a directive from Congress to utilize viewpoint-based discrimination, was truly chutzpah. He wrote, "It takes a particularly high degree of *chutzpah* for the NEA to contradict this proposition, since the agency itself discriminates . . . in favor of artistic (as opposed to scientific, or political, or theological) expression."<sup>146</sup> There it is: the historic first use of the word "chutzpah" in a Supreme Court decision. It is interesting to note that although Justice Scalia felt the need to define the words "decency" and "respect" (and called on the *American Heritage Dictionary* to do so), he did not define what "chutzpah" means.<sup>147</sup> Undoubtedly, this is because the word is now so obviously a part of the American judicial lexicon.

It is also interesting that Justice Scalia chose this opportunity to invoke the word "chutzpah," as some might find that he displayed chutzpah in his description both of Justice O'Connor's decision and the NEA's action. Regarding Justice O'Connor's decision, he wrote: "'The operation was a success, but the patient died.' What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it."<sup>148</sup>

Regarding the NEA's conduct, Justice Scalia wrote:

I cannot refrain from observing, however, that if the vagueness doctrine were applicable, the agency charged with making grants under a statutory standard of "artistic excellence"—and which has itself thought that standard met by everything from the playing of Beethoven to a depiction of a crucifix immersed in urine—would be of more dubious constitutional validity than the "decency" and "respect" limitations that respondents (who demand to be judged on the same strict standard of "artistic excellence") have the humorlessness to call too vague.<sup>149</sup>

<sup>145</sup> *See id.*

<sup>146</sup> *Id.* at 2183 (Scalia, J., concurring) (emphasis added).

<sup>147</sup> *See id.* at 2180-81 (Scalia, J., concurring).

<sup>148</sup> *Id.* at 2180 (Scalia, J., concurring).

<sup>149</sup> *Id.* at 2184-85 (Scalia, J., concurring).

Justice Scalia's sharp remarks clearly exhibit the very chutzpah he has noted. This is a prime example of the flexibility of nuance that "chutzpah" implies. Depending on one's feeling for the NEA and its interpretation of the statute and on one's opinion of Justice O'Connor's decision in this case, one might view Justice Scalia's comments as unduly barbed and audacious. Likewise, one might view them as humorous, spirited, and keen. Only the word "chutzpah" can connote both at the same time.

#### IX. CONCLUSION

The use of Yiddish in court decisions, the evolution of the word "chutzpah" into an award, championship, and doctrine, and the appearance of the word "chutzpah" in a concurring decision by a Supreme Court Justice reflect the uniqueness of the United States and celebrate its wonderful cultural mosaic. While American Jewish lawyers initially faced discrimination in the United States, there is now such acceptance of peoples of different heritage that a term from Yiddish, a Jewish cultural language, has been used in the highest court of the land. This mirrors the United States's appreciation of cultural differences and ongoing promotion and protection of cohesive diversity. Maybe this is the most fantastic chutzpah of all: while the world has an unfortunate history of prejudice, in America, tolerance and pluralism are becoming traditional values.