

10-1-1984

Text and Intellect

Monroe E. Price

Benjamin N. Cardozo School of Law, Yeshiva University

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Law and Society Commons](#)

Recommended Citation

Monroe E. Price, *Text and Intellect*, 33 Buff. L. Rev. 562 (1984).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol33/iss3/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

published in his memory in the *Review* of the law school to which he was so devoted.

In an issue of the *Stanford Law Review* dedicated to Justice Robert H. Jackson, Philip Halpern described Justice Jackson as "a natural-born lawyer, endowed with great native ability,"³ who "regarded the law as truly a public profession, whose primary objective was to serve the public interest through the composing of differences, the vindication of rights and the defeat of oppression."⁴ In describing Justice Jackson, who was an admired mentor, Philip Halpern also described himself.

Text and Intellect

MONROE E. PRICE*

Biography and autobiography as touchstones for analysis have their treacheries. But in the explication of the extraordinary experience of the Jewish community in the United States—an experience in which the career of Justice Philip Halpern plays an exemplary part—the summation of personal vignettes has been a useful, almost indispensable component. Today's discussions, memorializing Justice Halpern, evoke thoughts of self and the relationship between self and collective responsibility. My life, indeed, has been enriched by my association with Justice Halpern's son Charles, as a classmate at the Yale Law School, and as a companion in the brutal and often frustrating task of defining a suitable personal and professional life. I, of course, did not know Justice Halpern; but through Charles I have seen the consequences of an unusual inheritance: the feeling of an enormous responsibility to think and act to improve the quality, integrity, and compassion of the legal profession. I have watched Charles as he founded the Center for Law and Social Policy in Washington and greatly influenced the public interest movement in this country; and, now, he is contributing greatly to the rethinking of legal education in our

3. Halpern, *Robert H. Jackson, 1892-1954*, 8 *STAN. L. REV.* 3, 3 (1955).

4. *Id.* at 6.

* Dean, Benjamin N. Cardozo School of Law, Yeshiva University.

country. It has always been my suspicion that the presence of Justice Halpern informs his conscience if not his actions.

—A—

There is a rich literature concerning what it means to be a Jewish writer in America,⁵ or at least what we deem to be the connection between being Jewish and being a writer here. There has been less thought, less introspection, about the relationship between being Jewish and being a lawyer here.⁶ Perhaps it is because lawyers tend to be less authentically autobiographical; perhaps it is because they have less to be introspective about. But I shall want to suggest some connections, only a few, between culture and context, between the culture of being Jewish and the context of being a lawyer. I shall do this, to some extent, in the narrow frame of personal recollection, generalizing to the extent possible, from my own experience.

Among my strongest recollections as a young boy in Cincinnati is as a student in a modest Talmud Torah, across the street from my elementary school, where I went four afternoons a week to study. I did not know it then, but I begin to know now, what contrast there was between the rhythms and purposes of my secular education in the public schools and my religious training at the cheder.⁷ The function of the public school was to take a boy who was out of the mainstream, who had come as a refugee from Vienna as an infant, and provide the training and social basis for achievement in the American milieu. The purpose of the cheder was to provide the basis for holding on, for preserving and strengthening a way of thinking, an attitude toward the world, a differentiated approach to the analysis and resolution of conflict.

At the South Avondale school, where the jostling of a community in sharp transition occurred, we learned about public

5. See, e.g., *JEWISH-AMERICAN LITERATURE: AN ANTHOLOGY OF FICTION, POETRY, AUTOBIOGRAPHY AND CRITICISM* (A. Chapman ed. 1974); T. GROSS, *THE LITERATURE OF AMERICAN JEWS* (1973).

6. See, however, B. MEISLIN, *JEWISH LAW IN AMERICAN TRIBUNALS* (1976) (specific examples of American courts discussing Judaic law); R. ST. JOHN, *JEW, JUSTICE AND JUDAISM* 287-92 (1969) (Jewish contributions to American law); E. VAN DEN HAAG, *THE JEWISH MYSTIQUE* 170-77 (1969) (importance of the law in Judaism); A. VORSPAN, *GIANTS OF JUSTICE* (1960) (Jews in American law and politics).

7. A cheder is a school where Jewish children receive their religious education. See S. ROSENBAUM, *A YIDDISH WORD BOOK FOR ENGLISH-SPEAKING PEOPLE* 38 (1978).

health and vaccines; we learned about status in society; we learned about the physical strength of bullies; about the separation of our little society into compartments, and about the process, which we could see daily, of differentiated accommodation by our classmates with the world around us. At the Talmud Torah, we learned about who owned an ox that had strayed from its flock; we learned who was responsible if that ox broke a fence; we learned what amount of impurity would render a pot of soup unfit to eat.

My theme relates to these two modes of schooling, these two quite different schools and how they influenced the way Jews of our generation have entered and affected the legal profession. In retrospect, I think the South Avondale school was a metaphor encompassing the pressures of assimilation; our humble Talmud Torah was a metaphor for the complexities of the analytic tradition. Together, these two metaphors mark the way in which professional lives have been shaped and with them our attitudes toward the substantive and career choices that have fixed our paths.

I will urge a larger hyperbole and suggest that the two schools, my two schools in Cincinnati, account for two distinct forces that have informed much of the Jewish community and have made for a remarkable and energizing synthesis, allowing for the harnessing of a valuable engine of thought to the opportunities of a society that was often more open to change and advancement than was thought possible. In some extraordinary way, for a number of Jewish youth, the pressure and compact force of honed reasoning was combined with the external potential of adjustment to a broader society. There was something special about this time (undoubtedly true at others as well) in which there was insistence on learning the forms of the old, but insistence as well on learning the forms of the new.

—B—

Much could be said about the force of aspiration, the drive to the mainstream, the opportunities presented by the democratization of education and the profession, which occurred in our own time. I want, however, to devote this talk to the other force, the force of intellect, to the process of becoming a lawyer and contributing, from an experience and perspective of great value, to the practice, scholarship, and jurisprudence of our legal system.

Each will have his own way of marking the distinction be-

tween the aspirational force and the intellectual force. I recall receiving, when I was young, a book called *The Jew in American Sports*.⁸ It was a wonderful book, with pictures of Sandy Koufax and Hank Greenberg, boxers, and baseball players. There were little descriptions of each athlete and the particular position he played or the fights in which he had engaged. That was enough for identity building—the notion that Jews could, in fact, be athletes, that they could use that route for advancement or for distinction. There was no suggestion then that their experience as Jews had an impact on their athletic endeavors. This was a pretty aspirational message. Something of the same kind was true of law. We were impressed with the idea of Louis D. Brandeis and Felix Frankfurter and Benjamin N. Cardozo as Supreme Court justices.⁹ They were “great” justices. They were stars. They were credits to the Jewish people. That was what seemed important.

But there was something about law that differed in its relation to our attitude toward the world, that differed in its organic relationship to our pattern of learning—to what it meant, in some quite specific way, to be exposed to a particular style of thought, a particular style of education, a particular style of looking at words and at the world. In addition to the aspirational and assimilationist message, there was an intellectual element as well, something that we brought, as Jews, to the profession. How do we articulate this quality, how do we find its basis?

Obviously, there are many aspects and sources of this quality. I want, however, to return to my Talmud Torah in Cincinnati and discuss how the most familiar and historical form of training, the kind of training to which young Jewish boys and girls have been exposed for generations, has as a subtext, if not as its principal text, an extraordinary introduction into legal thinking—an introduction that in many ways rivals in its persistence, systematic nature, and analytic beauty what we do in American law schools today.

This is a subject which, I think, is fitting for this tribute to Justice Halpern. His father was a respected Talmud¹⁰ scholar. Jus-

8. H. RIBALOW, *THE JEW IN AMERICAN SPORTS* (1960).

9. See R. ST. JOHN, *supra* note 6, at 290-92 (discussion of Jewish Supreme Court justices, including Brandeis, Cardozo, Frankfurter, Goldberg, and Fortas).

10. The Talmud includes nearly two dozen volumes which consist of the simplifications and interpretations of the Torah—the five books of Moses. R. ST. JOHN, *supra* note 5,

tice Halpern's opinions show the craft and deep respect for language and for context that reflects the perspective of Talmudic analysis.

—C—

I will illustrate the points I want to make from the portion of the Torah known as Hayyei Sarah.¹¹ This portion deals with the death of Sarah. It is, in a sense, about the struggle of Abraham to find the proper way to show respect and commemorate the passing of a figure of historical importance, just as we, today, are part of an effort to find the proper way to commemorate the life and contribution of Philip Halpern.

Sarah was 127 years old when she died. Abraham was in the land of Canaan, near present-day Hebron. After weeping and mourning for his wife, Abraham sought a burial place for her, not an easy task in what was a foreign land. Speaking to the Hittite children of Heth, Abraham said:

I am a stranger and a sojourner among you; give me property among you for a burying place, that I may bury my dead out of my sight. . . . [H]ear me, and entreat for me Ephron, the son of Zophar, that he may give me the cave of Machpelah, which he owns: it is at the end of his field. For the full price let him give it to me in your presence as a possession for a burying place."¹² [And Ephron said,] [n]o my lord, hear me; I give you the field, and I give you the cave that is in it; in the presence of the sons of my people I give it to you; bury your dead.¹³ [Then Abraham said,] But if you will, hear me; I will give the price of the field; accept it from me, that I may bury my dead there.¹⁴

Here is a text, somewhat straightforward. It is about a legal transaction, the process of bargaining for a portion of land. How is it taught? What is the process of learning from it? And what is the relationship of that teaching to the way we ought to think about law generally?

I will start with the last question, the relationship of Talmudic learning to a perception about law and about the role of law in society.

at 287.

11. *Genesis* 23.

12. *Id.* 23:1-9.

13. *Id.* 23:10-11.

14. *Id.* 23:12-13.

Most significant, I think, is the lesson that law has a transcendental purpose, that rights and obligations have a source, that they have a moral imperative.¹⁵ The Talmudist is respected partly because of his dedication to the interpretation of authority, but also because of the very importance of that authority. There is a lesson in the fact that the Torah is virtually enshrined, that it is carried forth each Sabbath almost like a lovely bride, that its text is read in its regular cycle, that it is sung with a chant that is peculiar to the intonation of its words. This is the lesson that there is such a thing as authority, that there is such a thing as the embodiment of rights and obligations.

Furthermore, there is something quite special in the relationship of law to historic myth—human links that provide a substance and drama to law, its definition and exercise. Law is important because it is (to use a word that has fallen on hard times) sacred, but it is relevant because it involves human interaction. In Hayyei Sarah, we see the interplay between the religious—God's commitment to Abraham that he should have the land of Canaan—and the human—the need to negotiate for a site for Sarah's grave.

There is the subtext that law has an ordering effect on everyday life and that it must be interpreted constantly so that conduct is appropriate and falls within established guidelines. We see that in the law dealing with what foods to eat and how to observe the Sabbath. We see it in Hayyei Sarah in Abraham's insistence on correct legal relationships with the Hittites that will formalize and perpetuate his title to the land. We see that symbolism in law is vital; it is not only the phrasing of rights and obligations, but the ceremony and physical marking of the law that has significance. I think of the important symbolic lesson of the bris, the circumcision, as the physical embodiment of the covenant. And in Hayyei Sarah, each word, each act, has its symbolic value, its intimation of greater spheres as well as its function in carrying immediate information, messages of narrative.

Intensely relevant, however, is the methodology of study, the emphasis on text, the attention to words, to the order of words, to

15. See R. St. JOHN, *supra* note 6, at 287 ("the fundamental principle of the Hebraic Commonwealth was that there are great moral laws that no monarch, no benevolent dictator, no democratic government has the right to amend or annul").

the letters of words, the comparison of phrasing in one portion with the phrasing of similar words in another portion. Here is a quality that is the delight of the lawyer and the judge and constitute the working tools of the Talmudist.

This is the quality which Harold Bloom, in his essay, *Free and Broken Tablets: The Cultural Prospects of American Jewry*, called "a textual idea. . . an obsession with study, a condition of text-centeredness."¹⁶ For Bloom, and this is important, the quality is independent of religion in the formal sense. It involves—he uses the word again—"a creative obsession with a tradition of very recalcitrant Jewish texts."¹⁷

This is the occasion for Bloom's gloomy prediction for the future of educated assimilative Jewry in America, gloomy because he believes in the death of text in America. "A Jewry can survive without a Jewish language," he writes, "but not without language, not without an intense, obsessive concern that far transcends what ordinarily we call literacy."¹⁸

How does this relate to Hayyei Sarah? This portion, like countless others, is the occasion for painstaking analysis of text from which ethical and legal conclusions are drawn. As an example, when Abraham talks to the children of Heth, he says: "I am a stranger and a sojourner among you."¹⁹ These words in Hebrew are "ger" and "toshab" and they have totally different significations, according to the Talmudic scholars. They are terms of status; they suggest the ambiguity of the status of Abraham, the relationship of status to legal rights, and the many kinds of status that a person can have. As a stranger, or alien, Abraham pursues one set of rights to acquire the land. As a sojourner or resident, he implies yet another. These two words open the way for complex issues touching on the way in which the Hittite legal system worked and, also, the relationship of law to Abraham's rights as a consequence of God's commitments to him.

Aside from the question of status, the language of Hayyei Sarah and its interpretation provides an extraordinary lesson in contract law, in the law of real property transactions. What is neces-

16. H. BLOOM, *Free and Broken Tablets: The Cultural Prospects of American Jewry*, in *AGON: TOWARDS A THEORY OF REVISIONISM* 318, 321 (1982).

17. *Id.*

18. *Id.* (emphasis omitted).

19. *Genesis* 23:4.

sary before land can be used for a burial place? The text says that the "field of Ephron . . . with the cave which was in it . . . was made over to Abraham as a possession in the presence of the Hittites, before all who went in at the gate of his city."²⁰ And the scholars say that the witness of the townspeople was necessary because "even one's own estate could not be used for a burying place without the consent of the townspeople."²¹ These few words, then, are windows into a veritable treatise of law, and introduction into the ambiguities of language and the need to impose meaning and certainty on them. These words let us see how competing scholars draw different conclusions, seek different precedents, manipulate history in competing ways.

There is another subtext, though, and it is recognized by the scholars as well. Why did Abraham undergo all these legal niceties, perhaps beyond what was necessary, beyond what Ephron required for the land? Here is scripture meticulously describing the acquisition of property not by divine intervention but by human negotiation. There are here a number of lessons, all intimated by those who study the texts. There is the importance of contract as the basis of relationships among people, particularly with respect to land. And these relationships are negotiated among them and not imposed from a divine source. There is the importance for the Jewish people of having a fixed and unimpeachable title to their most important land holdings so that they will be above suspicion. Related is the importance, especially in foreign lands, of understanding the context of a transaction so as to assure greatest assent to the validity of the transaction.

And finally, there is the lesson in ethics, not law. When the Children of Heth said to him, "You are a mighty prince among us," and offered him their burial sepulchres, Abraham "bowed" and was humble.²² It is good to be called a prince by your contemporaries, but Abraham showed respect for them, say the scholars. The burial place was to be acquired by consent and purchase and not by force or by divinely imposed will.

So here is the text, just one small part of the Torah. It gives

20. *Id.* 23:17-19.

21. Seforno, *Commentary on Genesis 23:9-12* in TORAH WITH COMMENTARY (1968) (in Hebrew; English titles provided here a rough translation) (Seforno's Commentary is part of Talmud).

22. *Genesis* 23:6-7.

us a context for thinking about land and transactions in land; it gives us a context for the law and ritual surrounding death and mourning; it commands respect for language, for the choice of words and the order of words. It links these lessons to a transcendent drama, but one which has a human dimension.

—D—

How does this relate to Philip Halpern? I cannot pretend to be a student of his contribution to the law. But I have read enough of his opinions to know that they demonstrate, among other things, a loyalty and fidelity to text, the fascination with the complexity of words as the foundation for understanding and interpreting law. There is something of the Talmudic in his precision about words, his incisiveness about their meaning, the sense of history and precedent he showed in relating the way in which their use could be appropriately defined. This was true whether he was deciding whether a local referendum on bingo was prohibited by a constitutional amendment that barred local elections the same year as state elections,²³ determining the rights and duties of a deputy commissioner of the State Athletic Commission,²⁴ or deciding on the rights of milk dealers to notice of a hearing on a competitor's application for a license to do business.²⁵

23. *City of Buffalo v. Lawley*, 6 A.D.2d 66, 175 N.Y.S.2d 547 (1958).

24. *Erikson v. Helfand*, 1 A.D.2d 59, 147 N.Y.S.2d 157 (1955) (Halpern, J., dissenting).

25. *Dairyman's League Co-Operative Ass'n v. Dumond*, 282 A.D. 69 (N.Y. App. Div. 1953). One author noted the Judaic influence in Judge Halpern's judicial opinions, particularly in the case of *Kalina v. General Hosp.*, 18 A.D.2d 757, 235 N.Y.S.2d 808 (1962), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963). *Kalina* involved a hospital which failed to follow the instructions of the parents of a newborn child as to the child's circumcision. Rather than waiting for the eighth day after birth when the child could be circumcised as part of a ritualistic ceremony conducted by a rabbi (a bris) as Talmudic law requires, the hospital circumcised the child on the fourth day after birth. The parents brought an action against the hospital for the infliction of emotional distress. Judge Halpern dissented from the Appellate Division's summary affirmance of the suit's dismissal, stating:

The ritual of circumcision is a token of the covenant between God and Abraham. Its observance is divinely commanded in Genesis, Chapter 17, verses 9 to 12

The ceremony of circumcision is an elaborate one. It is to be performed by a specially qualified person who is to recite a prescribed prayer. The father and others present also recite prescribed benedictions or blessings.

The emotional distress and mental suffering of the plaintiffs resulting from

His opinions are exercises in text-centeredness. As an interpreter of legislation, Justice Halpern seemed to rejoice, as does the Talmudist, in embracing contested language, in relentlessly pursuing its history, in thoroughly examining the relationship of one word to another, in trying to squeeze meaning from context.

And yet there is, as Bloom says, the very serious danger of the disappearance of this quality.²⁶ We have wandered from our Talmudic tradition, first rejecting its religiosity and then, too often, its discipline, its mode of learning, its ethics, and its ability to link law to a larger tradition. Perhaps these lectures, in honor of Philip Halpern, can help, in some small way, to restore and rebuild that tradition, that yearning for text, that joy in scholarship.

The View from the Hilltop

SAUL TOUSTER*

In Judaism, we do not divide the realm of law from that of ethics or faith. Thus, to observe that Justice Philip Halpern's life exemplified the unity of law, ethics, and faith is to note how his roots in Jewish tradition influenced his secular roles as judge and public servant. I met Justice Halpern when I first came to Buffalo in 1955 as a young law professor. Up until then I had known a few scholars, encountered in my brief practice a few judges, and was exposed to a few deans. But I had not met a man who was all of these until I met him, and when it turned out that he was a friend of my father's—they having served together in national Jewish communal work—the values and continuities were compelling.

One of the things I remember most vividly about him was that, analytically sharp and persuasive in argument as he was, his

the defendant's action in causing the plaintiff's son to be circumcised in a manner violating the fundamental tenets of their faith was obviously of a serious character.

Kalina, 18 A.D.2d at 760, 235 N.Y.S.2d at 813-14 (citations omitted).

26. H. BLOOM, *supra* note 16, at 321-29.

* Proskauer Professor of Law and Social Welfare, Brandeis University.