ARTICLES

Expelling and Suspending Students: An American and Jewish Legal Perspective

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I. INTRODUCTION

The right to a basic education in the United States is something that is taken for granted. Children understand by the time they reach five years old, that they will be attending school. High school students know that until they reach the age of sixteen, they must stay in school. So it would seem to follow that children between the ages of five and sixteen have the right to an education. However, the U.S. Constitution does not guarantee such a right, and each state is left to its own to determine what laws it will implement to protect a child's right to education.

First, this article will discuss the topic of fundamental versus non-fundamental rights in relation to how individual states are left to determine their own educational policies. Second, suspension and expulsion will be discussed, noting the Due Process procedural safeguards necessary to suspend or expel a child. Third, a look into private schools reveals the ease with which these institutions may suspend or

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permanently expel a child, bypassing procedural safeguards that public schools must follow. Fourth, we explore how states have initiated a zero tolerance policy for drugs and weapons, and how such policies result in an absence of a backup guarantee for an education. Last, these four areas will be contrasted with a Jewish legal perspective.

II. FUNDAMENTAL AND NON-FUNDAMENTAL RIGHTS AND LEVEL OF REVIEW

The United States Supreme Court classifies certain rights as particularly valuable to individuals and, as such, labels them as "fundamental rights." Rights that have been deemed fundamental include the right to procreate,[1] the right to marry,[2] the right to vote,[3] and the right of interstate travel.[4] Non-fundamental rights are those whose roots, while based in the Constitution, are less clear.[5] This distinction is vitally important because it determines how courts will scrutinize state actions that infringe upon those rights.

Fundamental rights are afforded the highest level of protection under the Constitution and receive a strict scrutiny

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[1] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that the right to procreate is implicitly fundamental "to the very existence and survival of the race").

[2] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that marriage is one of the basic civil rights and this is a fundamental right).

[3] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (the right to vote is implicitly fundamental because it is preservative of other Constitutional rights).

[4] *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (the right to travel is implicitly fundamental because of its connection to the Privileges and Immunities Clause and the Commerce Clause).

[5] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding a Georgia law forbidding sodomy because there is no fundamental right to engage in sodomy under the Constitutional right to privacy).

level of review. In order to impede upon a fundamental right, the state must show that there is a compelling interest that necessitates infringing upon that right. In order to survive a strict scrutiny level of review, the means chosen by the state must be the least restrictive and narrowly tailored to achieve the desired end.[6]

When a non-fundamental right is infringed upon, courts will use a rational relations test, which merely requires that the state have a legitimate purpose for restricting or denying a non-fundamental right. The means chosen by the state need only be rationally related to achieving the desired end.[7] Courts will generally defer to a state when applying the rational relations test, and will assume both a legitimate purpose and rationality without requiring the state to demonstrate that the means chosen are the best possible.[8]

A third level of review has evolved because not all rights can be classified as either fundamental or non-fundamental. The level of review for these rights, which receive a heightened level of review, falls between the rational basis and strict scrutiny tests. This intermediate level of review requires that the state have an important purpose for its infringement, and that the means chosen by the state are substantially related to achieving that important purpose.[9] This intermediate level of review is similar to strict scrutiny in that it requires a legitimate state objective, but unlike strict scrutiny, the means used to achieve this end do not need to be the least restrictive.[10]

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[6] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973).

[7] *Id.* at 40.

[8] *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 487 (1955).

[9] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that a classification based on gender must serve important governmental objectives and must be substantially related to achievement of those objectives).

[10] *See* Califano v. Webster, 430 U.S. 313, 317-320

III. EDUCATION IS NOT A FUNDAMENTAL RIGHT

The Court has held that the right to an education is not a fundamental right, and thus strict scrutiny protection does not automatically apply. Rather, through several landmark decisions, the Court has permitted each state to make its own determination whether to classify education as a fundamental right. The end result is that each state is permitted to place its own level of protection on educational laws. In *San Antonio Independent School District v. Rodriguez*, residents of San Antonio brought an action against a local school district claiming that the Texas school system's reliance on local property taxes to finance public schools favored the wealthy.[11] The plaintiffs maintained that there was a violation of Equal Protection under the Fourteenth Amendment because of the large disparities in per-pupil expenditures resulting from the differences in the values of assessable property among the districts.[12] The Supreme Court held that no suspect class was involved and that *education is not a fundamental right guaranteed by the Constitution*.[13] In determining that equal protection was not violated, nor was a fundamental right denied, the Court went on to apply a mere rational relation standard of review.[14] In using such a standard, the Court found that the school funding system was rationally related to a legitimate state purpose of permitting participation in and control of educational programs at the local level. Therefore, the Court concluded that there had been no violation of Equal Protection under the Fourteenth Amendment.[15]

(1977) (holding permissible different treatment of men and women in attempting to equalize traditional inequalities).

[11] *Rodriguez*, 411 U.S. at 1.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

Almost ten years later, the Supreme Court in *Plyler v. Doe* expanded its view on education to acknowledge that education is more than "some governmental benefit indistinguishable from other forms of social welfare legislation."[16] The Court went on to impose what may be interpreted as a stricter level of scrutiny on state regulations of education by requiring the states to show a "substantial state interest" when abridging or eliminating educational rights.[17] Although the Court did not explicitly recognize this to be a heightened level of review, the concurring opinions acknowledged that the Court applied or could have applied a somewhat higher standard of review in this case.[18]

Although education is not a fundamental right under the Constitution, the Supreme Court has stated that "the appropriate means of school discipline is committed generally to the discretion of school authorities subject to state law."[19] Therefore, several state constitutions explicitly provide that education is a fundamental right and invoke a strict scrutiny standard of review when such rights are compromised. In *Horton v. Meskill*, the Connecticut Supreme Court held that "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."[20] In *Rose v. Council for Better Education, Inc*., the Kentucky Supreme Court held that "a child's right to an adequate education is a fundamental one under our Constitution."[21] And in *Wilkinsburg v. Wilkinsburg Education Association,* the Pennsylvania Supreme Court stated that "public education in Pennsylvania is a fundamental right."[22] Therefore, although the Federal

[16] Plyler v. Doe, 457 U.S. 202, 221 (1982).
[17] 457 U.S. 202 (1982).
[18] *Id.* at 238-39 (Powell, J., concurring). *Id.* at 235 n.3 (Blackmun J., concurring).
[19] Ingraham v. Wright, 430 U.S. 651, 682 (1977).
[20] Horton v. Meskill, 376 A.2d 359 (Conn. 1977).
[21] 790 S.W.2d 186, 212 (1989).
[22] 667 A.2d 186, 212 (1989).

Constitution does not explicitly recognize the inherent value of education, many states afford the highest level of protection to what they deem to be a fundamental right.

While several State Supreme Courts have held that education is a fundamental right, other states do not offer education such heightened level of protection. In *Claremont School District v. Governor*,[23] the New Hampshire Supreme Court did not explicitly find education to be a fundamental right, but rather found that it was "at the very least an important, substantive right,"[24] thereby leaving open the possibility that education would only receive an intermediate level of scrutiny. However, some state courts have explicitly found that there is no fundamental right to an education. In *Doe v. Superintendent of Schools*, the Massachusetts Supreme Judicial Court held that the state's constitutional education clause did not incorporate a fundamental right to education.[25]

IV. SUSPENSION AND EXPULSION

Expulsion and suspension are two of the means by which school personnel can enforce rules and regulations. School authorities have the power to expel or suspend a student who disobeys a reasonable rule or regulation.[26] Suspension is the short-term removal of a student from school or the "denial of participation in regular courses and activities."[27] Suspension

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[23] 635 A.2d 1375 (N.H. 1993).

[24] *Id.* at 1381.

[25] 653 N.E.2d 1088, 1095 (Mass. 1995).

[26] Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[27] Philip T. K. Daniel & Karen Bond Coriell, *Suspension and Expulsion in America's Public School: Has Unfairness Resulted from a Narrowing of Due Process?,* 13 HAMLINE J. PUB. L. & POL'Y 1, 10-11 (1992).

may also classified as a removal that lasts longer than "ten days but less than the time between the start of the suspension and the end of the [school] term."[28] Expulsion, on the other hand, is the complete removal of a student from school for an extended period of time,[29] usually for the remainder of the school term.[30]

Although education is not deemed to be a federal right under the Constitution, the Supreme Court has held that school districts must comply with important procedural safeguards before suspending or expelling a student. In *Goss v. Lopez*, the plaintiffs, nine high school students who had been suspended from public school without a hearing, challenged an Ohio law that empowered public school principals to suspend students for misconduct for up to ten days or to expel them.[31] The law provided for parental notification and an appeal of the decision to the Board of Education for those students who were expelled, but did not extend such right to students who were merely suspended.[32] The Supreme Court upheld the lower court's finding that the plaintiffs were denied due process by not being afforded a hearing before their suspension or within a reasonable time thereafter.[33]

The Court, in reaching its holding, stated that when a state decides to provide public education, it must recognize that students have a property interest in education protected by the Due Process Clause.[34] Additionally, the Court held that students have a liberty interest in their standing with

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[28] LAWRENCE F. ROSSOW, THE LAW OF STUDENT EXPULSIONS AND SUSPENSIONS 3 (1989).

[29] Daniel & Coriell, *supra* note 27, at 7.

[30] ROSSOW, *supra* note 28 at 3. *See* Matthews v. Eldridge, 424 U.S. 319 (1976).

[31] 419 U.S. 565 (1975).

[32] *Id.* at 567-68. *See also* Draper v. Columbus Public Schools, 760 F. Supp. 131 (S.D. Ohio 1991).

[33] *Goss*, 419 U.S. at 572.

[34] *Id.* at 574.

fellow students and teachers and in their opportunity for higher education and employment.[35] Thus, because the Due Process Clause protects these interests, the Court concluded that states are not permitted to suspend students, even on a short-term basis, without notice and a hearing.[36]

For long-term suspension and expulsion, Due Process requirements are more stringent. The notice requirement must warn students that certain types of behavior can result in long-term suspension or expulsion, and the student and his or her parent must be informed of the specific charges and grounds for expulsion.[37] The hearing requirement mandates that the hearing must take place before the student is expelled and the charges against the student must be supported by substantial evidence.[38] However, as long as the hearing is performed in good faith without a gross deprivation of rights, courts will generally uphold the decision of school authorities.[39]

V. PRIVATE INSTITUTIONS

Although some procedural safeguards must be followed in private school settings, private institutions are permitted to structure their school policies and discipline students who violate such policies with little interference from the state. The Constitution bars public but not private schools from using invidious entrance criteria. Public schools may not

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[35] *Id.* at 574-75.

[36] *Id.* at 576.

[37] ROSSOW, *supra* note 28, at 3 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961)).

[38] *Id*. at 21 (citing Birdsey v. Grand Blanc Community School, 344 N.W.2d 342 (Mich. Ct. App. 1983)).

[39] *Id*. at 8 (citing Greene v. Moore, 373 F. Supp. 1194 (N.D. Tex. 1974)).

deny entry on the basis of race or gender.[40] In contrast, private schools may bar admission on such criteria, although there may be some state action limitations on the tax benefits or other forms of general public assistance that governments give to such schools.[41]

Just as private institutions do not have to follow race-neutral and gender-neutral laws regarding admission, they do not have to follow state policies regarding the suspension or expulsion of students from their schools. In order to raise a Constitutional claim, even one that would receive mere rational review, the infringed upon right must be caused by state involvement, and such involvement must be substantial.[42] This holds true even in situations where conduct is initially private and later becomes "entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[43]

In order to determine whether the extent of the public involvement is so great that it constitutes state involvement under the Fourteenth Amendment protection, the Court looks to the constitutional interests on both sides, the public function served by the private institution, and state regulation of the very activity which allegedly deprives the plaintiff of a constitutional right.[44] Thus, in order for a private institution

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[40] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1953) (holding that admission to a public school cannot be denied because of race). *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that the denial of admission based on gender to a public university is unconstitutional).

[41] Allen v. Wright, 468 U.S. 737 (1984) (the Court denied standing to plaintiffs seeking to challenge what they claimed was an inadequate system of detecting the existence of racial discrimination in private schools).

[42] Reitman v. Mulkey, 387 U.S. 369 (1967).

[43] Evans v. Newton, 382 U.S. 296 (1966).

[44] *See* Pendrell v. Chatham College, 370 F. Supp. 494 (W.D.Pa. 1974).

to be in violation of the Fourteenth Amendment, the state must either have significant control over input into the policy-making process of the private institution, or be so involved in the financing and running of the institution that it effectively facilitates the constitutional violation that is complained of by the plaintiffs.[45] Mere financial assistance by the government, absent some showing of substantially more state involvement, cannot alone be a basis for finding state action.[46]

Little distinction exists between non-secular private schools and religious based private institutions. Private schools, regardless of whether they include religious teachings, are governed by a contract between the parent and the school. It is difficult for a child to raise a valid Constitutional claim when suspended or expelled because these schools cannot usually show substantial government involvement. Although there are no uniform guidelines governing suspension and expulsion from private schools, most state courts are extremely reluctant to interfere because of their private nature.

In *Hutchenson v. Grace Lutheran School*, a first grade student in New York was expelled because of behavioral problems and the parents brought suit to compel the reinstatement of their child.[47] The court determined that their power was limited to a determination as to whether there was a rational basis in the exercise of the school's discretion, or whether the action to expel was arbitrary and capricious.[48] The court noted that private schools are afforded broad discretion in conducting their programs, including decisions involving the discipline, suspension, and expulsion of their

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[45] Wisch v. Sanford School, Inc., 420 F.Supp. 1310 (D. Del. 1976).

[46] *Id.*

[47] 132 A.D.2d 599, 517 N.Y.S.2d 760 (2nd Dept., 1987).

[48] *Id.*

students.[49] Thus, when a private school expels a student "based on facts within its knowledge that justify the exercise of discretion, then a court may not review this decision and substitute its own judgment."[50]

In *Flint v. St. Augustine High School*, the Louisiana Court of Appeals expelled a student for violating the private school's no smoking policy.[51] The student challenged the expulsion by filing a lawsuit. The court held that private institutions have a near absolute right and power to control their own internal disciplinary procedure which, by its very nature, includes the right and power to dismiss students.[52] Therefore, the court ruled so long as there is color of due process, that is enough.[53]

VI. ZERO TOLERANCE LAWS

Although states are required to provide many procedural safeguards before lawfully suspending or expelling a student, there are no protections to ensure that those students receive an education once removed from the school. Children who are expelled from private institutions can enroll in public schools. But what happens when a child is expelled from a public institution? In states that recognize education as fundamental right, suspended and expelled students possess rights that may be protected to a greater extent than under the Federal Constitution. But problems ensue for those students who are expelled in states where education is classified as non-fundamental.

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[49] *Id.* at 599, 517 N.Y.S.2d at 761 (citing Matter of Carr v. St. John's Univ., N.Y., 17 A.D.2d 632, 634, 231 N.Y.S.2d 410, *aff'd* 187 N.E.2d 18, 12 N.Y.2d 802, 235 N.Y.S.2d 834).

[50] *Id.*

[51] 323 So.2d 229 (1975).

[52] *Id.*

[53] *Id.*

The rampant use of drugs and violence which invade the public school system is a growing concern. Several years ago President Clinton issued a memorandum on the Implementation of Safe School Legislation which requires public school districts to expel students founds with weapons on school grounds for at least one academic year, or risk losing federal educational funds under the Elementary and Secondary Education Act.[54] Additionally, public outrage over the violence in public schools has lead lawmakers in various states to adopt a "zero tolerance" policy which requires the automatic suspension or expulsion of students who possess weapons on school grounds.[55]

In 1994, Michigan lawmakers passed legislation mandating that any student found with a weapon on school grounds, or found guilty of arson or rape, would be permanently expelled from all public school districts in the state.[56] Although several other states have adopted a similar policy, Michigan is especially strict because there is no provision for alternative educational programs to accommodate such offenders. Thus, the discussion for new law now focuses attention on whether alternative programs should be provided to keep these youths off the streets.[57] The biggest criticism of a "zero tolerance" policy is that students found carrying weapons are given no second chance, no

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[54] Kenneth J. Cooper, *President Directs Schools to Bar Students with Guns: Law Threatens Elimination of Federal Funds,* WASH. POST, October 23, 1994, at A8.

[55] *See*, *e.g.*, ALA. CODE § 16-1-24.1 (1997); ARIZ. REV. STAT. ANN. § 15-841 (1997); GA. CODE ANN. § 20-2-751.1 (1997); KAN. STAT. ANN § 72-8900 (1997).

[56] MICH. COMP. LAWS. ANN. § 380.1311 (West 1994).

[57] Paul M. Bogos, Note, *"Expelled. No Excuses. No Exceptions."- Michigan's Policy in Response to School Violence: M.C.L.A Section 380.1311,* 74 U. DET. MERCY L. REV. 357, 359 (1997).

appeal and no guarantee of alternative school programs or education.[58]

A majority of states require school districts to provide alternative education or institution to those students of compulsory-attendance age who are expelled pursuant to the "zero tolerance" weapon policy. New Jersey, for example, provides that if a pupil is removed from the regular education program, the student must be placed in an alternative education program. If such placement is unavailable, home program or instruction or other programs shall be provided.[59] Virginia also requires that a board of education establish a program that consists of alternative education options.[60] Such programs for students not only provide an education, but place an emphasis on building self-esteem and the promotion of personal and social responsibility.[61]

However, the states that have enacted a zero-tolerance policy, absent legislative mandate, have no duty to furnish students with any alternative programs during the period of expulsion.[62] The North Carolina Court of Appeals in *The Matter of Jackson* held that a student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system.[63]

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[58] Gary Borg, *Schools Expel 247 with Weapons*, CHI.TRIB., October 10, 1995, at 7.

[59] N.J. STAT. ANN. § 18A:37-8 (West 1997).

[60] VA. CODE ANN. § 221-257 (Michie 1995).

[61] *Id.*

[62] Bogos, *supra* note 57, at 377.

[63] 352 S.E.2d 449 (N.C. Ct. App. 1987).

VII. JEWISH LEGAL PERSPECTIVE

Jewish tradition and culture have always placed a high value upon education, both as an end in itself and as a mechanism for improving the individual and the society in which he resides. The Talmud, an early source of Jewish legal, social, ritual and communal practice gathered over a period of some 700 years and codified during the sixth century, poetically records that our world exists only for the breath of schoolchildren. It rules that a town with no facilities for educating its young deserves to be razed.[64]

It should be understood, however, that the primary locus of this concern was not the pursuit of vocational or professional skills and credentials, though provision was made for such training. Rather the scope of Jewish educational thinking was largely grounded in *Talmud Torah*, the study of Torah, including the Hebrew Bible and Talmud, alongside related rabbinic writings and commentary. Its purpose was to shape and mold young students to follow the paths of righteousness, leading moral and ethical lives, and fulfilling detailed personal obligations to their God, their neighbors and their community.

Moreover, chief among these obligations, according to some, equal to all others combined, was a lifelong commitment to continued learning and reflection through programs of formal, informal and individual study.[65] Adults were adjured to attend classes and lectures, to study with friends and family, and to fill spare moments with personal reflections on the traditions and practices of their culture. Equally, they carried a primary obligation to educate their young and to socialize them in the ways of God and society.

Thus, as with many other aspects of Jewish thought, primary responsibility falls upon the individual before the

[64] Talmud Bavli: Shabbat 119a.

[65] Talmud Bavli: Peah 1:1; Talmud Shabbat 127a.

collective, with a religious and moral rather than utilitarian trajectory. Any comparison of American and Jewish law related to education and its place in an ordered society must be understood within these parameters. Before detailing these trends, however, it would be well to provide a brief introduction to the Jewish legal tradition.

A. Historical Context

Jewish law exhibits several characteristics that distinguish it from much of contemporary Western thought. One relates to the role of obligation in both personal relationships and public policy. American legal and political theory typically place heavy emphasis upon individual rights, both enumerated and reserved. By contrast, classic Jewish thought posits a complex of detailed and interlocking obligations, broadly dichotomized between the ritual, i.e. those that define relationships with the Deity, and the social, i.e. those that define individual and communal responsibilities toward one's fellow.

This generates an organic, even corporate, social framework that establishes differentials of power and status as standards for custodial responsibility, more than privilege. It venerates neither a struggle for freedom from executive and administrative power, nor a "sovereign people," from whom political or administrative elites derive the right to govern, both of which often contribute an adversarial flavor to much of American legal culture. Instead, executive authority and the rights of the governed each derive from and are limited by the "word of the Lord" and those who interpret it.

Familiarity with Jewish history will confirm, however, that for tens of centuries, conditions were far less than ideal. Juridical development and public practice both were pressed to accommodate capricious overlords and hostile host cultures, without undermining the tradition and its essential

integrity. This followed at least three related paths, rooted in early sources and carefully elaborated over time.

The first was a substantial allowance for local custom to assume precedence when strict adherence to tradition would cause undue hardship and make daily life untenable, and for it to fill the breach when the tradition was silent. This was applied primarily in the secular arena, e.g. in civil, financial and social relations, but more than occasionally in regard to ecclesiastical concerns as well. Such tolerance for local diversity allowed flexibility in confronting the unstable and insecure nature of medieval and modern Jewish history. Second and related to the first, though attempts at regional hierarchy met with occasional success, the locus of power was generally municipal or local, especially in Europe, lending an early "federalism" to Jewish communal administration. This fit neatly with the feudal societies within which Jewish communities found themselves and was, in part, shaped by that reality. Therefore, it is appropriate to speak of a tolerance for diversity between Jewish communities in Poland, Germany or Morocco. However, within those communities, adherence to local practice was rigidly enforced and those who would reside or do business there were expected to conform, even in the face of Scriptural or Talmudic precedent to the contrary.

Finally, Jewish legal and political culture is characterized by a well-developed sense of the dialectic. For each position, there is an opposition, for each proof-text, a counter-text, grounded in deductive argumentation, homily and precedent. Dissenting and minority opinions are preserved for their intrinsic worth and for their use as future precedent, should circumstances require normative re-examination. In this sense, classic Jewish study tends toward scholastic "ahistoricity," favoring the argument upon its merits and almost, though not quite, regardless of its context. The result provides a framework for change while promoting fluency

with the past, a formula that has stood well in hostile and hospitable environs alike.[66]

B. Religious Doctrine

Early Talmudic sources establish a set of mutual obligations, both social and ritual that inhere to the relationship between parent and child. Among these, the parent is expected to "teach him [the child] Torah, to see that he marries, to teach him a trade, for he who does not teach his child a trade teaches him thievery, others add, to teach him to swim."[67]

In the course of discussion, later Talmudic sources link these specific responsibilities to biblical proof texts, thereby establishing the centrality of both character education (*Talmud Torah*) and career training in the pursuit of successful living. Medieval commentaries added that in this context, teaching one's child to swim is basic to survival, and perhaps emblematic of other physical competencies integral to good parenting.

Additionally, through careful manipulation of several biblical sources, the Talmudic authorities found the primary obligation of education to fall upon fathers toward their sons. In the minds of these early masters of Jewish law, daughters

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[66] *See* STUART COHEN, THE THREE CROWNS: STRUCTURES OF COMMUNAL DISCOURSE IN EARLY RABBINIC SOCIETY (1990); Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order,* 5 JOURNAL OF LAW AND RELIGION 65-90 (1987); DANIEL ELAZAR, KINSHIP AND CONSENT: THE JEWISH POLITICAL TRADITION AND ITS CONTEMPORARY USES (1983); DANIEL ELAZAR, THE JEWISH POLITY: JEWISH POLITICAL ORGANIZATION FROM BIBLICAL TIMES TO THE PRESENT (1985); Steven Friedell, *The Different Voice in Jewish Law: Some Parallels to a Feminist Jurisprudence,* 67 IND. L. J. 915-949 (1992); Suzanne Stone, *In Pursuit of the Counter Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,* 106 HARVARD L. REV. 813-894 (1983).

[67] Talmud Bavli: Kiddushin 29a.

were excluded from the basic duties, and benefits, of *Talmud Torah*. This normative finding confirmed a more general predisposition expressed elsewhere in the Talmud.[68]

These sources provide a number of insights important to our analysis. In the first instance, it appears that education was understood to be a private responsibility, whose parameters whether religious, social or utilitarian, fell upon the family. Indeed, authors of later codes of Jewish law, were most aggressive in demanding that fathers who neglected to pay appropriate support for the care and education of their children could have their properties attached and their public social and religious privileges withheld.[69]

However, whether by malevolence or inadvertence, if one reached his majority without proper education, the obligation for *Talmud Torah* now transferred to the child. The sources fall silent in regard to available recourse for damages from parents or their estate to cover the future costs of educating an adult child, or to compensate for other consequent loss or suffering, further confirming the private nature of these requirements.

Additionally, it is clear that the wide-ranging private obligations to educate the young grounded in Jewish sources were not universal but differentiated, most especially by gender. Indeed related sources questioned the wisdom of allowing females any access to Jewish education, save for a facility in reading Scripture along with the practical details of religious obligations that pertained to them.[70]

Moreover, absent a clear mandate for women to be formally educated, it was inferred that mothers, regardless of their capabilities, were free of any direct obligation to educate their children, male or female. Early sources suggest, nevertheless, that mothers had contact with their teachers and

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[68] Talmud Bavli: Kiddushin 29b, 82a and Sotah 20a.

[69] Shulchan Arukh: Even Haezer 94:1.

[70] Talmud Bavli: Sotah 21b, Kiddushin 29b; Yad Hahazakah: Hikhot Talmud Torah 1:13; Shulchan Arukh: Yoreh Deah 246:6.

were typically involved in seeing to the welfare of their children at school. The matter interceded upon judicial decisions regarding child custody. In the case of marital dissolution, for an example, Jewish courts were predisposed to leave young children and older daughters with their mothers. Sons beyond the age of six or seven, however, were generally assigned to their fathers whose exclusive responsibility it was to see that they were properly educated.[71]

C. Expanding Public Responsibility

This system of largely private initiative soon proved inadequate to the task, especially in the face of important social inequities. Consequently, the Talmud (Baba Batra 21) tells us of a major change in public policy regarding education, associated with the efforts of one Joshua ben-Gamla, a high priest whose administration spanned the early part of the common era.

In the words of the Talmud:

> Had it not been for him, Torah would be forgotten in Israel. At first one who had a father, taught him Torah. One who had no father learned no Torah. So they ruled that teachers be retained in Jerusalem. Then, one who had a father brought him to Jerusalem, while one with no father did not reach Jerusalem. And so they ruled that teachers be appointed in each district, and children entered at the age of 16 or 17. But one whose teacher was cross with him would leave, until Joshua ben-Gamla established teachers in each town, and children were brought at the age of 6 or 7.[72]

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[71] Talmud Bavli: Kiddushin 29a, 83a Ketubot 65b; Yad Hahazakah: Hilkhot Ishut 21:17; Shulchan Arukh: Even Haezer 82:7. *See also* Sylvan Schaeffer, *Child Custody: Halacha and the Secular Approach*, 6 THE JOURNAL OF HALACHA AND CONTEMPORARY SOCIETY, 3, 33-45 (1983).

[72] Talmud Bavli: Bava Batra 20b-21a.

The reference is informative both for its historical value and for what it reveals about Jewish attitudes toward education as a fundamental right and public obligation. Apparently, the extant system of home schooling and family responsibility left an important social gap in regard to those who "had no father," i.e. those orphaned, abandoned or neglected. Such circumstances may have reached crisis proportion in the midst of the political turmoil and social instability of the Roman persecutions contemporaneous with the administration of ben-Gamla. Later authorities expanded these provisions to include families financially unable to care for the education of their children.

Modern historians have used this source to make important inferences regarding the historical evolution of public education in ancient Israel and the values implicit. Apparently, educational reform began in Jerusalem, the religious and social center. Children who had been educated at home until the age of sixteen or seventeen would be brought to academies established there to pursue advanced studies. However, this still excluded the large portion of adolescents whose parents were unable to sustain them there, and so parallel schools were established in each district to meet that need.[73]

This proved untenable for the broad majority of students, perhaps less able or less motivated than those with the resources to study at the academies in Jerusalem. With little experience in a formal classroom, they ran afoul of their teachers, and took umbrage with attempts at discipline. Having reached their majority, they simply left school.

It was the innovation of ben-Gamla to ordain that teachers for elementary level students be retained in each

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[73] *See, e.g.*, NATHAN DRAZIN, HISTORY OF JEWISH EDUCATION: FROM 515 BCE TO 220 CE. BALTIMORE (1941). *See also generally* EPHRAIM KANARFOGEL, JEWISH EDUCATION AND SOCIETY IN THE HIGH MIDDLE AGES (1992).

locality. Children would be schooled in the basics of Scripture at home until the age of six or seven years. Then they were brought to the local classroom, generally designated in a synagogue building, or as part of quarters provided for the teacher himself. These arrangements were publicly supported from the general treasury and provided free for those orphaned or abandoned. Moreover, to reinforce its support for this reform, the Talmud provides, and later codes endorse, that citizens of a locality with up to twenty-five children can petition for a mandatory fund to create such a program, even if there is an adequate facility in the next district.

However, those with parents able personally to oversee their education retained a number of important options. The small minority who had both the time and the skill to instruct their own children beyond the rudiments of Scripture could thereby execute their individual responsibilities for *Talmud Torah* until their children took charge of their own continuing requirements of education into adulthood. They were not obliged to send their children to the local school, though their support for the local schools continued through contributions to the community fund.

Similarly, parents with sufficient resources could opt to engage private tutors rather than enroll their children in the local schools, so long as they continued to pay their assessment to the local fund. By the Jewish historical record, this practice appears quite common. Finally, those with adequate resources who chose to enroll their children in the town school were required to pay tuition costs for each child, over and above school taxes they were assessed for the local fund.

D. Legal Applications

Thus, deciding on the matter of education as a fundamental right in Jewish law is no mean accomplishment.

Conclusions must perforce be ambiguous and carefully nuanced. There can be no debating the vast import given to study, particularly religious study, as an end in itself, as a means to perfecting one's character, and as the pathway to a life of righteousness. This is understood as a lifelong obligation simultaneously extended to children and grandchildren. Indeed, given the ability and the wherewithal, a secondary obligation exists to teach any interested others with no compensation for time and skill.

In their original formulation, these obligations and any consequent benefits were by no means universal. For an obvious example, they did not include instruction for women, save for the religious and ritual requirements specific to their gender. To be sure, in the many centuries since these discussions were initiated, much has been done to advance the case for female education in Jewish law, on par with what is provided for men. Nevertheless, it would be no simple task to designate it as a fundamental right for purposes of our discussion.

Further, even publicly funded educational agencies for males appear to have been established as a concession to social disruption and dislocation. Once established, their original mission appears to have been aimed at the needs of the underprivileged. Absent need, a child might not have claim to his education as a basic right, nor was there a clear mandate for his parents to avail themselves of services provided.

At least two important considerations underscore the point. Its great importance notwithstanding, Jewish law posits education less as a public responsibility provided to citizens of the realm as their right, than as a private obligation resting primarily upon the individual family. Therefore, beyond their usual taxes and assessments, parents of means also must pay tuition for each of child attending the local public schools. They can make no claim upon the public to free them of their private obligation.

Finally, our formulation may be inadequate to the analysis. There is a subtle but important distinction between a "right," which inheres in the sovereign individual and from which he may make demands, and an "obligation," bestowed upon him as a function of a relationship but which yields no power of claim. Indeed the notion of a fundamental right, as typically connoted in contemporary law, may be foreign to the original intent of Jewish tradition. Thus, while parents have an obligation to provide *Talmud Torah* to their children, it may be incorrect, even a bit bizarre to suggest that children have a "right" to *Talmud Torah*. Even if parents are negligent, the obligation simply transfers to children upon their majority, with no claim against either their parents or the public authority.

E. Suspension and Expulsion

Evaluating the position of Jewish law in regard to suspending or expelling students for cause, is also no simple matter. With some exception, classic sources are largely silent on the matter, suggesting broad discretion in practice for private teachers, school administrators and lay leaders. Moreover, the early sources that do speak to the issue appear to run in contrary directions.

There are, for an example, those that suggest patience and forbearance with even the least able of students. "Educate the child according to his path," urges the author of *Proverbs*, implying that the teacher tolerate various learning styles, and extend freedom and flexibility to students. If one amongst them proves stubbornly unable or unwilling to learn, the Talmudic sages add, the wise educator ought to neither reprove him heavily nor remove him from class. Rather, allow him to remain with his friends. Eventually he will absorb his studies.[74]

[74] *Proverbs* 22:6 and Talmud Bavli: Bava Batra 21a.

Others assume a more rigorous stance. They understand the same Scriptural verse in a very different fashion. Indeed, "educate the child according to His path," i.e. the strict pathways of the Lord. Reprove him handily during his early years, and fill him with stern words of moral instruction and rebuke so that he does not veer from the path of righteousness in his later years. In particular, late adolescence appears to have been a period of particular concern and a parent was well-advised to "rest your hand on your son's neck."[75]

In keeping with this rather austere assessment, the Talmud warns "let no man study with a student who is not appropriate." Moreover, one who does teach such a student, "will descend to purgatory," for his actions are like unto "tossing [precious] stones before an idolater." Later commentaries added that a responsibility resides with the teacher or the school to "return him to the straight path," after which he may be reinstated in the study hall.[76]

The context of these discussions suggests that the student in question was deemed inappropriate on moral or religious grounds. To continue his Torah study without correcting these dissonant proclivities would only contribute to further delinquency. The inference is supported by contemporary authorities, who generally have applied these rulings to theological differences between various Jewish denominations.[77] The sources are generally silent, however, regarding disorderly students, or those who threaten the security and wellbeing of others.

In this vein, recent authorities have taken a strong position toward unruly and disruptive students whose behavior makes it impossible for others to learn. However,

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[75] Talmud Bavli: Kiddushin 30a.

[76] Talmud Bavli: Makkot 10a, Hullin 133a; Yad HaChazakah: Hilkhot Talmud Torah 4:1.

[77] *See* Rabbi Ovadiah Yosef, Yabiah Omer: Yoreh Deah 2:17 and Rabbi Eliezer Waldenberg Ziz Eliezer, 8:15.

they generally have not grounded their decisions in the early precedents discussed above. In a closing note to his extensive assessment of issues related to synagogue membership and school admission criteria, for an example, one eminent thinker suggests:

> we may expel a child from school for being a nuisance even if by Jewish law he is not accountable or punishable. Our rationale in essence is that we are not punishing him. We are simply trying to prevent him from affecting his peers or other children in the school.[78]

His decision is rooted in general discussions of preventive detention, especially as they relate to strictures imposed on Jewish holy days.[79]

Finally, we have an epistle to educators written by Rabbi Moshe Feinstein and published posthumous to his luminous career. There the sage and religious leader wrote, almost as an afterthought, that a student whose behavior threatens to "spoil others, certainly should be removed." This should be done, however, only with the most careful deliberation, for withholding his education is "tantamount to a capital offense." [80]

VIII. CONCLUSION

Students who are suspended or expelled from school often begin a downward spiral of poor attendance, low grades and decreased participation in extracurricular activities. In their own minds and in the minds of school officials they are seen as troublemakers. Theoretically, there are legal safeguards in

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[78] Rabbi Herschel Schachter, *Synagogue Membership and School Admission*, 12 THE JOURNAL OF HALACHA AND CONTEMPORARY SOCIETY 3, 50-68 (1986).

[78] *Id.*

[79] Rabbi Moshe Feinstein, Iggerot Moshe: Yoreh Deah, 3:71.

place to protect a student's right to public education. In both American law and in Jewish Law, the right to education is held as an important and indispensable part of cultural society. American law has provided certain procedural safeguards guaranteeing a right to public education. However, in Jewish law, education is seen as a private obligation with responsibility resting not only with parents and the community, but also with the students themselves.