Daniel Pollack and David J. Schnall

Daniel Pollack, MSW, JD, is a professor at the Wurzweiler School of Social Work, Yeshiva University.
Dr. David J. Schnall is Guest Editor of this issue of TRADITION.

VESHINANTAM LEVANEKHA: EXPLORING THE RIGHT TO EDUCATION IN THE AMERICAN AND JEWISH LEGAL TRADITION

I.

Introduction

The right to a basic education in the United States is more or less taken for granted. It is assumed that children will attend school from a very young age until their late teens, if not for longer. Given Judaism's broad emphasis upon study both as an instrumental tool and a religious, often obligatory value in itself, one might also expect its legal tradition to project such a right in unmistakable terms. Yet in both instances, the discovery and the identification of a right to education is no simple matter. And the issue is quite important, especially as it bears upon children who for one reason or another do not fit well in mainstream educational settings.

This study will examine the scope of any right to education in both the American and Jewish legal traditions: first, by surveying recent American legal opinion concerning how individual states determine—and ought to determine—their own educational policies; this will be followed by a parallel survey of biblical and rabbinic attitudes about where study is conducted and about the proper roles of public authorities and private individuals in overseeing education. The ensuing section applies the earlier considerations to cases of children who struggle in the conventional environments. Finally, the conclusion summarizes the outstanding features of the American and the classical-Jewish approaches.

TRADITION 37:4 / © 2003 Rabbinical Council of America

The American Legal Perspective

The United States Supreme Court classifies certain rights as "fundamental," including 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 origins are less clear (even as they might appear in the Constitution). This distinction is vital because it determines how courts 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" 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 must be narrowly tailored to achieve the desired end.[5]

When a non-fundamental right is infringed upon, courts 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.[6] Courts generally defer to a state when applying the rational relations test, recognizing both a legitimate purpose and rationality without requiring the state to demonstrate that the means chosen are the best possible.[7]

A third level of review has evolved because not all rights can be classified fundamental or non-fundamental. The level of review for the third class falls between the rational basis and strict scrutiny tests. It requires the state to have an important purpose for its infringement, and for the means chosen to be substantially related to achieving that purpose.[8] This is similar to strict scrutiny in that it requires a legitimate state objective, but unlike strict scrutiny the means pursued do not need to be minimally restrictive.[9]

A Fundamental Right?

By and large, the Supreme Court has held that education is not a fundamental right per se, and thus strict scrutiny protection does not automatically apply. Through several landmark decisions, the Court has permitted each state to make its own determination whether to classify education as a fundamental right. Each state is thus 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.[10] 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.[11] The Supreme Court held that no suspect class was involved and that "education is not a fundamental right guaranteed by the Constitution."[12]

In determining that equal protection was not violated, nor a fundamental right denied, the Court went on to apply a mere rational relation standard of review.[13] The Court found that the school funding system was rationally related to a legitimate state purpose of permitting participation in and controlling the programs of local educational programs. Therefore, the Court concluded that there had been no violation of Equal Protection under the Fourteenth Amendment.[14]

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." The Court went on to impose what may be interpreted as a stricter level of scrutiny on state regulation of education by requiring states to show a "substantial state interest" when abridging or eliminating educational rights.[15] 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.[16]

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."[17] This allowed several state constitutions to explicitly provide for education as a fundamental right and to invoke a strict scrutiny standard of review when such rights were compromised. For example, 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."[18] Similarly, 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,"[19] and in *Wilkinsburg v. Wilkinsburg Education Association,* the Pennsylvania Supreme Court stated that "public education in Pennsylvania is a fundamental right."[20]

By contrast, other states do not offer education such heightened

level of protection. In *Claremont School District v. Governor*,[21] for example, 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."[22] This opened the possibility that education would only receive an intermediate level of scrutiny. Indeed, some state courts have explicitly found that there is no fundamental right to an education, such as the Massachusetts Supreme Judicial Court, which, in *Doe v. Superintendent of Schools*, held that the state's constitutional education clause did not incorporate a fundamental right to education.[23]

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.[24] Suspension is the short-term removal of a student from school or the "denial of participation in regular courses and activities."[25] Suspension also may be 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."[26] Expulsion, on the other hand, is the compete removal of a student from school for an extended period of time,[27] usually for the remainder of the school term.[28]

Although education appears not to be deemed 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.[29] The law stipulated parental notification and allowed for an appeal of the decision to the Board of Education, but did not extend such right to students who were merely suspended.[30] 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.[31]

The Court, in reaching its holding, ruled 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.[32] Additionally, the Court held that students have a "liberty interest" in their standing with fellow students and teachers and in their opportuni-

ty for higher education and employment.[33] 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.[34]

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.[35] The hearing requirement mandates that the hearing take place before the student is expelled and that the charges against the student must be supported by substantial evidence.[36] 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.[37]

Private Institutions

Although some procedural safeguards must be followed in private school settings, private institutions are permitted to structure their school policies and to 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 deny entry on the basis of race or gender.[38] 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.[39]

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 rights must be caused by state involvement, and such involvement must be substantial.[40] 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."[41]

The Court has assumed a three-pronged approach to determine whether the extent of public involvement is so great that it may be protected under the Fourteenth Amendment. It looks to the Constitutional interests on both sides, to the public function served by the private institution, and to state regulation of the very activity that

allegedly deprives the plaintiff of a Constitutional right.[42] For a private institution to be in violation of the Fourteenth Amendment, the state must have significant control over its policy-making process, or be so involved in the financing and running of the institution that it effectively facilitates the Constitu-tional violation in the plaintiff's complaint.[43] Mere financial assistance by the government, absent evidence of substantially more state involvement, cannot alone be a basis for finding state action.[44]

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 do not usually have 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.

For example, 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.[45] 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.[46] The court noted that private schools are afforded broad discretion in running their institutions, which includes decisions about the discipline of students.[47] 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."[48]

In *Flint v. St. Augustine High School*, the Louisiana Court of Appeals expelled a student for violating the private school's no-smoking policy.[49] 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.[50] As long as there is "color" of due process, that is enough.[51] Additionally, in private and religious schools, the contentious policy of retention (i.e. not promoting a student to the next grade-level), involves only the contract signed between parents and the school, and does not implicate Constitutional laws.[52]

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.

The rampant use of drugs and the violence that invade the public-school system are growing concerns. Several years ago President Clinton issued a memorandum on the Implementation of Safe School Legislation, which requires public-school districts to expel for at least one academic year students who are found with weapons on school grounds or risk forfeiting federal educational funds under the Elementary and Secondary Education Act.[53] Additionally, public outrage over the violence in public schools has led 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.[54]

In 1994, Michigan lawmakers passed legislation mandating that any student found with a weapon or found guilty of arson or rape would be permanently expelled from all public-school districts in the state.[55] 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 youth off the streets.[56] The biggest criticism of a "zero tolerance" policy is that students found carrying weapons are given no second chance, no appeal, and no guarantee of alternative school programs or education.[57]

A majority of states require school districts to provide alternative education to students of compulsory-attendance age who are expelled pursuant to the "zero tolerance" policy. In New Jersey, if an alternative program is unavailable, some kind of home instruction or other program must be made available.[58] Virginia also requires that a board of education establish alternative education options.[59] Such programs place an emphasis on building self-esteem and promoting personal and social responsibility.[60]

However, absent legislative mandate, states have no duty to furnish alternative schooling during a period of expulsion.[61] 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.[62]

II. THE JEWISH LEGAL PERSPECTIVE: AN OVERVIEW

Jewish tradition and culture have always placed a high value on education, both as an end in itself and as a means for improving the individual and the society in which he resides. The Talmud says homiletically that our world exists only for the breath of schoolchildren, and that a town with no facilities for educating its young deserves to be razed.[63] The primary concern was not merely the pursuit of vocational or professional skills. Jewish education was meant to encompass *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 ethical lives and fulfilling detailed personal obligations to God, neighbor, and community.

Chief among these obligations (according to some, equal to all others combined) was a lifelong commitment to learning and reflection through formal, informal, and individual study.[64] Adults were directed to attend 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.

As with many other areas of Jewish life, primary responsibility fell upon the individual before the collective, following 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. Indeed, before detailing these trends, it may be well to consider several components of Jewish public law.

Jewish law exhibits 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 theories 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 rather than mere privilege. It venerates neither a struggle for freedom from executive and administrative power, nor a "sovereign people," from whom a political or administrative elite derives 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.

Jewish history shows, however, that for centuries conditions were far from accommodating toward this ideal model. Juridical development and public practice were pressed to contend with, among other challenges, capricious overlords and hostile host cultures. In the ensuing struggle to reach some kind of settlement with a difficult reality while preserving the integrity of the tradition, Jewish tradition can be said to have followed along three discernible paths, rooted in early sources and carefully elaborated over time.

The first was a substantial allowance for local custom: to help fill the breach where tradition was silent and occasionally to assume precedence where strict adherence to tradition would cause undue hardship and make daily life untenable. While this occurred primarily in the secular arena, e.g. in civil, financial and social relations, it was more than occasionally applied to ecclesiastical space as well. Such tolerance for local diversity allowed flexibility in confronting the unstable and insecure conditions of medieval and modern Jewish communities.

Second, and related to the first, was the concentration of communal governance among autonomous municipal or local leaders, resulting in an early "federalism," occasionally extending over an entire region. 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 more rigidly enforced. Those who would reside or trade there were expected to conform, even if it meant discounting one's alternative scriptural or talmudic preference.

Finally, Jewish legal and political culture was characterized by a well-developed sense of the dialectic. For each position, there was often an opposition, for each proof-text, a counter-text—grounded in deductive argumentation, precedent, and homily. Dissenting and minority opinions were preserved for their intrinsic worth and for their use as future precedent, should circumstances warrant normative reexamination. In this sense, classic Jewish study tended toward scholastic "ahistoricity," favoring the argument upon its merits and almost, though not quite, regardless of its context. The result provided a framework for change while promoting fluency with the past, a formula that has stood well in hostile and hospitable environs alike.[65]

Talmud Torah is Equivalent to All Else

Early talmudic sources established a set of mutual obligations, both social and ritual, to inhere in the relationship between parent and child. Among these, the parent was expected to teach the child Torah, to see that he married, to teach him a trade, and, interestingly, to teach him to swim.[66]

In the course of discussion, later talmudic sources linked these specific responsibilities to biblical texts, thereby establishing the centrality of both character education and career training in the pursuit of successful living. Medieval commentaries noted that swimming represented a skill useful for survival, and was perhaps emblematic of other important physical capabilities.

Additionally, through careful derivations from several biblical sources, talmudic authorities placed the primary obligation of education upon fathers toward their sons, with daughters largely excluded from the basic duties, and benefits, of *talmud Torah*. This confirms a more general predisposition expressed elsewhere in the Talmud.[67]

Such sources provide several insights key to our analysis. First, apparently education was understood as 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 ruling that the fathers who neglected to pay for the care and education of their children could have their properties attached and their social and religious privileges withheld.[68] If, whether by malevolence or inadvertence, a child reached adulthood without proper education, the obligation for *talmud Torah* transferred to him.

Additionally, it is clear that the wide-ranging private obligations to educate the young 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 the practical details of their specific religious obligations and a facility in reading Scripture.[69]

Moreover, absent a clear mandate for women to be formally educated, it was inferred that mothers, regardless of their capacities, were free of any direct obligation to educate their children, male or female. Early sources suggest, however, that mothers did have some contact with teachers, and were typically involved in seeing to the welfare of their children at school. Nevertheless, this bias toward male responsibility for education even 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 look after their schooling.[70]

Talmud Torah in the Public Square

This system of largely private initiative soon proved inadequate to the task, especially in the face of important social inequities and dislocations. Consequently, the Talmud records a major change in public policy regarding education associated with the efforts of one Yehoshua 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's 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 sixteen or seventeen. 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 six or seven.[71]

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 with regard to the orphaned, abandoned, or neglected. Such circumstances may have reached crisis proportions in the midst of the political turmoil and social instability of the Roman persecutions contemporaneous with ben-Gamla's administration. As we will see, later authorities expanded

these provisions to include families financially unable to care for the education of their children.

Historians have employed this source to make inferences regarding the evolution of public education in ancient Israel and the values implicit. Educational reform, they have argued, began originally in Jerusalem, the national religious and social center. Children who had been educated at home until the age of sixteen or seventeen would be brought to the academies to pursue advanced study. When this practice excluded the large portion of adolescents whose parents were unable to sustain them there, parallel schools were established in each district to meet the need.[72]

Apparently, this too proved untenable for the broad majority of students, perhaps less able or less motivated than those with 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.

It was the innovation of ben-Gamla to ordain that teachers for elementary-level students be retained in each 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 in the quarters provided for the teacher. These arrangements were publicly supported by the general treasury and provided free for the orphaned or abandoned. Moreover, to reinforce its support for this reform, the Talmud rules (and later codes endorse) that in a locality with 25 children, citizens may petition for a mandatory fund to create such a program, even if adequate facilities exist in the next district.

Those whose parents were able to arrange for their education privately 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 execute their individual responsibilities directly, through something akin to home schooling. They would personally provide for *talmud Torah*, or hire tutors for that purpose, until their offspring took charge of their education in adulthood. The parents were not required to use the local school, though they supported it through contributions to the community fund.

III. THE PROBLEM CHILD

Evaluating the position of Jewish law in regard to suspending or expelling students is no simple matter. With some exception, classical sources are largely silent on policy, suggesting discretion in practice for private teachers, school administrators, and lay leaders. Moreover, early sources often appear to support contrary approaches. There are some that urge patience and forbearance with even the least able of students. "Educate the child according to his path," we read in *Proverbs*, implying that teachers ought to tolerate various styles of learning, and extend freedom and flexibility to their students. If one among them proves stubbornly unable or unwilling to learn, the Talmud adds, the wise educator ought neither to reprove him heavily nor remove him from class, but rather keep him with his peers for the social benefits—and the hope that one day the lessons will be absorbed.

This outlook is reflected in individual anecdotes celebrating the proliferation of *talmud Torah* that followed Rabbi Elazar ben Azarya easing the strict requirements for entry into the academy. Similar is the approach attributed to Bet Hillel, which favored education for all, irrespective of their piety or academic qualifications, so that they might be brought closer to Torah.[73]

Other sources project more rigorous standards and read Scripture accordingly. Indeed, "Educate the child according to *His* path," i.e., according to the strict pathways of the Lord. Reprove him handily during his early years, filling him with stern words of moral instruction and rebuke lest he veer from the pathways of righteousness.

Late adolescence appears to be a period of particular concern, during which parents are advised to "rest your hands on your son's neck."[74] In keeping with this austerity, the Talmud admonishes, "Let no man teach a student who is not appropriate," and warns that one who accepts such a student "will descend to purgatory," for such actions are like "tossing [precious] stones before an idolater." Later authorities rule that a teacher or the school should "return him to the straight path," after which he may be readmitted to the study hall.[75]

For the most part, the context of these discussions suggests that, given the child's poor moral and religious conduct, to continue his Torah study without correcting the dissonant proclivities would only contribute to further delinquency. Contemporary authorities generally have applied these rulings to theological differences between various Jewish denomina-

tions. The sources are generally silent regarding disorderly students, or those who threaten the security and well-being of others.[76]

As a result, recent rulings are found on both sides of the issue. One author for example, gives testimony to a verbal statement issued by Rabbi Abraham Karelitz, the *Hazon Ish*. Proscriptions against teaching unfit students, he argued, presumed that suspension or expulsion would serve as a deterrent for children and their families. Indeed, in an earlier age, the accompanying embarrassment and social sanction would spur them to mend their ways and be readmitted to study with their peers. In the contemporary world, however, absent such a cohesive environment, expulsion merely dooms students to spiritual oblivion. It is worthwhile to note that this thinking was presaged by Rabbi Shneur Zalman of Lyady many years earlier.[77]

The majority of opinions appears to emerge on the other side of the issue, however, particularly regarding students whose behavior endangers others or makes it difficult for them to learn. Interestingly, however, many of these rulings have not been attributed to the precedents in the sources discussed above, perhaps in deference to their ambiguity. For an example, in closing his extensive assessment of issues related to synagogue membership and school admission criteria, Rabbi Hershel Schachter 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.

It is notable that his decision is not rooted in deliberations over Jewish educational tradition or policy. Rather, it emerges from general discussions of preventive detention, especially as they relate to strictures imposed on Jewish holy days.[78]

Finally, we have a letter to educators written by Rabbi Moshe Feinstein. There the late sage and religious leader states, 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 may be "tantamount to a capital offense."[79]

Rabbi Eliezer Shakh makes the point still more forcefully, though he offers no reasoning or text in support. He rules that no consideration should be given to a student whose presence constitutes a danger

for others—which includes disrupting and distracting them from their studies. He adds, however, that

> if there is no danger to others, only that he has no success in his studies, then we do not distance him, for perhaps over time he will be strengthened and succeed. Particularly in these times, if he will leave the yeshiva it is impossible to know what types of friends he will accrue. He may, heaven forbid, cease to observe *mitsvot*.[80]

IV. SUMMARY COMPARISON

Comparing Jewish and American legal perspectives as to the fundamental right of education yields important similarities and differences. Both traditions promote the importance of education as a functional route toward independence and self-sufficiency, as a modality for improving the personal and social quality of citizenship, and as a means to pursue the noble life. Each posits a basic obligation to provide education to the young.

Whether it is a fundamental right, however, is no simple matter. It appears that the Supreme Court does not find clear justification for assuming a right to education that obligates public authorities throughout the country. Still, it agrees that the public has a substantial interest in the education of its citizens, representing more than merely another publicly sanctioned social service. For the most part, the Court has left its formulation as a right and public obligation to the constitutions and the courts of the individual states.

Moreover, there appears to be a consensus regarding the freedom of private and parochial schools to develop structures and policies that do not conform even to generally accepted fundamental rights. They retain the power to restrict their educational institutions by race, religious affiliation or gender and they may exclude students based on behavior that might otherwise be acceptable in publicly funded institutions. In addition, given increased concern over violence and drug abuse in the schools, programs of zero-tolerance whereby students are suspended or expelled for specific infractions may well leave these students without recourse or alternative venues to continue their education.

In Jewish law education is defined as a lifelong obligation simultaneously extended to one's children. Still, in their original formulation such obligations and any consequent benefits were by no means universal. For an obvious example, they did not include instruction for women, save

for religious and ritual requirements specific to their gender. 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 primarily at the needs of the underprivileged. Absent such 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.

Two further considerations underscore the point. In the first instance, its great importance notwithstanding, education in Jewish thought appears less as a personal right or public responsibility, than a private obligation resting primarily upon the individual family. Beyond usual taxes and assessments, parents of means also are expected to pay tuition for each child attending the local schools. This allows them a fair amount of discretion in choosing and structuring that education but they have little claim upon the public to free them of this financial burden.

Finally, our overall formulation may be inadequate to the analysis, given the subtle but important distinction between a personal "right" and an "obligation" incumbent upon a public other. In the American legal tradition rights inhere in the sovereign individual and on their basis he may make demands upon the public. By contrast, an obligation is bestowed from without as a function of a relationship. It yields little power of claim.

Indeed the notion of a fundamental right, as typically connoted in American constitutional law, may be foreign to the original intent of Jewish tradition. Thus, while parents have an obligation to provide *talmud Torah* to their children, and all Israel has a portion in the Torah itself, it may be incorrect 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 for compensation against either their parents or the public authority.

NOTES

An earlier version of this paper appeared as "Expelling and Suspending Students: American and Jewish Legal Perspectives," *New England Journal of International Comparative Law* (Summer, 2003).

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. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).
6. *Idem*, at 40.
7. See *Williamson v. Lee Optical Inc*., 348 U.S. 483, 487 (1955).
8. 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).
9. See *Califano v. Webster*, 430 U.S. 313, 317-320 (1977) (holding permissible different treatment of men and women in attempting to equalize traditional inequalities).
10. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
11. *Idem.*
12. *Idem.*
13. *Idem.*
14. *Idem.*
15. 457 U.S. 202 (1982).
16. *Idem*, at 238-39. (Powell, J. concurring); Idem, at 235 n.3 (Blackmun J., concurring).
17. *Ingraham v. Wright*, 430 U.S. 651, 682 (1977).
18. *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).
19. *Rose v. Council for Better Education Inc*., 790 S.W.2d at 212.
20. 667 A.2d 186, 212 (1989).
21. 635 A.2d 1375 (N.H. 1993).
22. *Idem*, at 1381.
23. 653 N.E.2d 1088, 1095 (Mass. 1995).
24. *Goss v. Lopez*, 419 U.S. 565 (1975) and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503(1969).
25. Philip T. K. Daniel and Karen Bond Coriell, "Suspension and Expulsion in America's Public School: Has Unfairness Resulted from a Narrowing of Due Process?," *Hamline J. Pub. L. & Pol'y* 1, pp. 10-11 (1992).
26. Lawrence F. Rossow and Jerry R. Parkinson, *The Law of Student Expulsion*

and Suspension (Dayton, Ohio: Education Law Association, 1998).
27. Daniel & Coriell, *supra* note 26, at 7.
28. Rossow, *supra* note 27 at 3. See Matthews v. Eldridge, 424 U.S. 319 (1976).
29. 419 U.S. 565 (1975).
30. *Idem*, at 567-68. And See Draper v. Columbus Public Schools, 760 F.Supp. 131 (S.D. Ohio 1991).
31. *Idem*, at 572.
32. *Idem*, at 574.
33. *Idem*, at 574-75.
34. *Idem*, at 576.
35. Rossow, note 27 (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 Circ.) *cert. denied*, 368 U.S. 930 (1961).
36. *Idem*, at 21 (citing *Birdsey v. Grand Blanc Community School*, 344 N.W.2d 342 (Mich. Ct. App. 1983).
37. *Idem*, at 8 (citing *Greene v. Moore*, 373 F. Supp. 1194 (N.D. Tex. 1974).
38. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (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).
39. *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).
40. *Reitman v. Mulkey*, 387 U.S. 369 (1967).
41. *Evans v. Newton*, 382 U.S. 296 (1966).
42. See *Pendrell v. Chatham College*, 370 F.Supp. 494 (W.D.Pa 1974).
43. Wisch v. Sanford School, Inc., 420 F.Supp. 1310 (D. Del. 1976).
44. *Idem*.
45. 132 A.D.2d 599, 517 N.Y.S.2d 760 (2nd Dept., 1987).
46. *Idem*.
47. *Idem*, 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).
48. *Idem*.
49. 323 So.2d 229 (1975).
50. *Idem*.
51. *Idem*.
52. See *Debra P. v. Turlington* (1981); *G I Forum et al. v. u. Texas Education Agency et al.*, 87 F. Supp.2d 667 (2000); *Eric V. et al. v. Dr. James F. Causby et al.*, 977 F. Supp. 2nd 384 (1997).
53. Kennet J. Cooper, *President Directs Schools to Bar Students with Guns: Law Threatens Elimination of Federal Funds, Washington Post*, October 23, 1994, at A8.
54. 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).
55. Mich. Comp. Laws. Ann. §380.1311 (West 1994).

56. Paul M. Bogos, Note, *"Expelled. No Excuses. No Exceptions,"* in *Michigan's Policy in Response to School Violence: M.C.L.A Section 380.1311,* 74 *University of Detroit Law Review* 357, pp. 359 (1997).
57. Gary Borg, *Schools Expel 247 with Weapons*, *Chicago Tribune*, October 10, 1995, at 7.
58. N.J. Stat. Ann. § 18A:37-8 (West 1997).
59. Va. Code Ann. §221-257 (Michie 1995).
60. *Idem*.
61. Bogos, *supra* note 57, at 377.
62. 352 S.E.2d 449 (N.C. Ct. App 1987) .
63. *Shabbat* 119a.
64. *Pe'a* 1:1; *Shabbat* 127a.
65. See Stuart Cohen, *The Three Crowns: Structures Of Communal Discourse In Early Rabbinic Society* (Oxford: Cambridge University Press, 1990); Robert Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal Of Law And Religion* 5 (1970), pp. 65-90; Daniel Elazar, *Kinship And Consent: The Jewish Political Tradition And Its Contemporary Uses* (Lanham: University Press of America, 1983); Daniel Elazar, *The Jewish Polity: Jewish Political Organization From Biblical Times To The Present* (Bloomington: Indiana University Press, 1985). Steven Friedell, "The Different Voice in Jewish Law: Some Parallels to a Feminist Jurisprudence," *Indiana Law Journal*, 67 (1992), pp. 915-949; Suzanne Stone, "In Pursuit of the Counter Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* (1993), 106, pp. 813-94.
66. *Kiddushin* 29a.
67. *Kiddushin* 29b, *Sota* 20a.
68. *Shulhan Arukh*, *Even ha-Ezer* 94:1.
69. *Sota* 21b, *Kiddushin* 29b; *Yad, Hilkhot Talmud Torah* 1:13; *Shulhan Arukh*: *Yoreh De'a* 246:6.
70. *Kiddushin* 29a; Ketubot 65b; *Yad, Hilkhot Ishut* 21:17; *Shulhan Arukh*, *Even ha-Ezer* 82:7; Sylvan Schaeffer, "Child Custody: Halacha and the Secular Approach," *The Journal of Halacha and Contemporary Society*, 6:3 (Fall, 1983) pp. 33-45.
71. *Bava Batra* 20b-21a.
72. See, e.g., Nathan Drazin, *History of Jewish Education: From 515 BCE to 220 CE* (Baltimore: The Johns Hopkins Press, 1941); Ephraim Kanarfogel, *Jewish Education and Society in the High Middle Ages* (Wayne State University Press, 1992).
73. *Proverbs* 22:6 and *Bava Batra* 21a, *Berakhot* 28a and *Avot de-Rabbi Natan* 9:9.
74. *Kiddushin* 30a.
75. *Makkot* 10a, *Hullin* 133a; *Yad, Hilkhot Talmud Torah* 4:1.
76. Rabbi Ovadia Yosef, *Yabi'a Omer*, *Yoreh De'a* 2:17; Rabbi Eliezer Waldenberg, *Tsits Eliezer* 8:15.
77. Cited in Rabbi Chaim Naftalin, "*Kiruv ve-Rihuk: Birur Hilkhati*," in *Niv ha-Midrasha* (Spring 1970), p. 154. See also Rabbi Avraham Karelitz, *Kovets Iggerot*, nos. 89 and 93 (Bnai Brak: Greinneman, undated); *Shulhan*

Arukh ha-Rav, *Hilkhot Talmud Torah* 13; and Rabbi J. David Bleich, *Contemporary Halachic Problems*, volume II (New York: Yeshiva University, 1983).
78. Rabbi Hershel Schachter, "Synagogue Membership and School Admission," *The Journal of Halacha and Contemporary Society*, 12:3 (Fall 1986), pp. 50-68.
79. Rabbi Moshe Feinstein, *Iggerot Moshe*, *Yoreh De'a* 3:71.
80. Rabbi Eliezer Menahem Shach, *Mikhtavim u-Ma'amarim*, volumes I and II (Bnai Brak: 1988), no. 65.