

# **Human v. Religious Rights?**

**German and U. S. Exchanges and  
their Global Implications**

Edited by A. G. Roeber

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Michael J. Broyde

## Human Rights in Judaism Reviewed and Renewed

Education as a Prototypical Positive Human Right in Judaism

### Introduction

In contemporary Western discourses, human rights encompass a broad constellation of material and moral needs and interests that ought to be protected and guaranteed to all people on the basis of their humanity.<sup>1</sup> Like many other religious and normative traditions, Judaism and Jewish law acknowledge and protect many of these currently recognized human rights.<sup>2</sup> Judaism recognizes the inherent equality and dignity of all people; respects people's natural liberty and autonomy; protects people's rights to life, bodily integrity, health, property, education, and basic food, housing, and healthcare; and provides important legal rights closely resembling contemporary ideas of due process in the courts. Furthermore, since it is both a legal and a religious system, it mandates charity, kind works, good deeds, prohibitions against gossip and other ethical duties as well. It is not hard to argue that the Jewish legal system does a better job at ensuring many of these basic material human needs than does the modern rights-driven common law system, which hesitates to impose positive duties to care, and is deeply wed to a modern free-market capitalist system that tends to leave significant segments of society vulnerable and without basic human needs. The lack of a safety net in the common law system makes any failure particularly costly.

Describing education as a human right in Jewish law is a bit misleading, but still necessary for the needs of this paper. What the secular world would describe as a right that is innately conferred on all individuals by virtue of their existing, Jewish law would impose on them as a duty. It is through this lens—the way education is viewed—that the similarities and stark differences

- 1 For important recent scholarship providing useful overviews of the history, substance, and evolution of Western human rights discourses, see Stearns, Peter N.: *Human Rights in World History*, New York 2012; Kao, Grace Y.: *Grounding Human Rights in a Pluralist World*, Washington, D. C. 2011.
- 2 For an overview of human rights thinking in Judaism, see Konvitz, Milton R.: *Judaism and Human Rights*, New York 1972; Broyde, Michael J./Witte, John Jr. (eds.): *Human Rights in Judaism: Cultural, Religious, and Political Perspectives*, Lanham 1998. On human rights in the Islamic and Christian traditions, see Witte, John Jr./ven der Vyver, John D. (eds.): *Religious Human Rights in Global Perspective*, Grand Rapids 1996; Bederin, Mashood: *Islam and Human Rights: Advocacy for Social Change in Local Contexts*, New Delhi 2006.

between the Jewish tradition and the secular world can be seen. Neither approach is objectively better than the other, but both are products of different goals sought for different reasons.

## 1. The Jewish View on Human Rights

The late and great Professor Robert Cover of Yale University Law School noted this as a crucial difference between the rights-based approach of common law countries and the duties-based approach of Jewish law. He remarked:

Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a "Rights" movement is started. Civil Rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we "take rights seriously" we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.<sup>3</sup>

The difference in the rights and duties surrounding education between Jewish and common law is as clear an example of this phenomenon as one can encounter. International law, and many states in America, recognize a child's "right" to an education, but from a Jewish perspective, this type of right would be a lonely one. It gives a child the right to something that this child will not have when he becomes an adult, as it is not connected to any duty imposed on the child to seek an education or for the child to continue their education through adulthood.

Such is not the approach of Jewish law.<sup>4</sup> The Jewish tradition recognizes a child's right to an education. However, this right is part of a broader picture within the Jewish tradition that focuses on the duty of each and every person to be educated. Children possess a right to be educated so that they can be in the best position to fulfill their duty to continue that education as adults. This is a prototype of how the Jewish tradition views all basic human rights—as a human duty.

Where Judaism tends to do a poor job at protecting human rights—and where modern states and non-state organizations tend to better succeed—is in the realm of recognizing and protecting the less tangible: inchoate rights, and especially the range of rights associated with freedom of religion, conscience, association, and the right to dissent from prevailing societal norms and values. One of the core human rights widely recognized by numerous states and international

3 Cover, Robert M.: *Obligation: A Jewish Jurisprudence of the Social Order*, in: *Journal of Law & Religion* 5/65 (1987), 65–74, 67 (footnotes omitted).

4 Nor for that matter, of Canon or Islamic law; see the discussion in text accompanying notes 21 through 22. All three of these religious legal systems mandate a duty on people (adults and children) to be educated.

conventions is the right to freedom of religion—and more particularly—the right to freely choose to not practice or believe in a particular faith, or any faith at all.

A more readily discussed right in current times is freedom from religion.<sup>5</sup> Religious freedom, however, is not a principle often associated with the Jewish tradition.<sup>6</sup> A large part of what makes religions what they are is their strong normative claims about correct practice and dogma to the exclusion of all others. Even when religious leaders do acknowledge the possibility that practitioners of other faiths may be believing and worshipping in a way that is essentially legitimate, such tolerance does not typically extend to members of their own religious communities that express dissent and autonomy in belief or practice by rejecting prevailing norms.<sup>7</sup> Religions, especially nomos-centric faiths in which religious virtue is measured principally in terms of one's conformity to a wide-ranging and comprehensive set of behavioral norms, prescribe correct and unacceptable modes of conduct in both public and private life. The scriptures and teachings of such traditions, moreover, typically include a wide range of penalties and consequences—some imposed by temporal religious authorities and others by God—for religious infractions. Often, particularly harsh punishments are prescribed for those who leave the faith by expressing heretical or blasphemous ideas or who convert out by affirmatively adopting the tenets and practices of another religion.<sup>8</sup>

In another article, co-authored with Dr. Shlomo Pill, I explore the practice of religious freedom within the rabbinic legal tradition.<sup>9</sup> It focuses on the extent to which rabbinic law—despite being a system of religious standards that makes strong prescriptive claims about exclusively correct practices and beliefs—has

- 5 Li, Anne: 'Religious Liberty' Has Replaced 'Gay Marriage' In GOP Talking Points, in: *FiveThirtyEight*, 9. March 2016. <https://fivethirtyeight.com/features/religious-liberty-has-replaced-gay-marriage-in-gop-talking-points/>, accessed 07.12.2017; Liptak, Adam: *Across the Atlantic, Another Supreme Court Case on Cake and Gay Rights*, in: *The New York Times*, 18. December 2017, <https://www.nytimes.com/2017/12/18/us/politics/northern-ireland-court-case-cake-gay-rights.html>, accessed 18.12.2017; Mislin, David: *The Messy Reality of Religious Liberty In America*, in *Salon*, 3. December 2017. [https://www.salon.com/2017/12/03/the-messy-reality-of-religious-liberty-in-america\\_partner/](https://www.salon.com/2017/12/03/the-messy-reality-of-religious-liberty-in-america_partner/), accessed 07.12.2017; Weigel, George: *The Catholic Journey to Religious Freedom*, in: *National Review*, 20. December 2017, <http://www.nationalreview.com/article/454792/george-weigel-religious-freedom-institute-speech>, accessed 20.12.2017.
- 6 See Witte, John Jr.: Introduction, in: Witte, John Jr./ven der Vyver, Johan D. (eds.): *Religious Human Rights in Global Perspective*, xvii–xxxv, xvii, xx–xxi.
- 7 See Novack, David: *Religious Human Rights in Judaism*, in: Broyde, Michael J./Witte, John Jr. (eds.): *Human Rights in Judaism: Cultural, Religious, and Political Perspectives*, Lanham 1998, 1–33, 1, 3.
- 8 See, e.g., Elon, Menacham (ed.): *The Principles of Jewish Law*, Jerusalem 2007, 529; Affi, Ahmed/Affi, Hassan: *Contemporary Interpretation of Islamic Law*, Kibworth Beauchamp 2014, 1–28; Helmholtz, Richard H.: *The Spirit of Classical Canon Law*, Athens 2010, 360–65.
- 9 Broyde, Michael J./Pill, Shlomo C.: *Human Rights in Judaism: Freedom of Religion, Conscience, and Association in Rabbinic Practice*, forthcoming.

recognized the right of Jews to autonomously dissent from settled religious norms without attempting to coerce conformity and compliance with Jewish law. While rabbinic law does make strong assertions about correct religious practice and belief, and unabashedly affirms that Jews are obligated to observe such standards, it generally does not seek to coerce members of societies regulated by Jewish law to actually uphold their purely personal religious obligations. Instead, Jews living in Jewish communities governed by rabbinic law and rabbinic decisors have been left generally free to be as religiously observant or non-observant as they wish. Social or formal legal sanctions were traditionally brought to bear only—though not always—if individual dissent from rabbinic laws threatened the well-being and cohesion of society or caused material harm to other individuals. Common law is consistent with this idea, best described by the adage that one's rights end where another's nose begins. This article uses several examples from various areas of rabbinic law to show that in practice rabbinic jurisprudence creates substantial space for religious dissent and religious freedom even within the confines of rabbinically-regulated religious society.

Many scholars have noted that Judaism does not really speak in the language of rights—human rights or otherwise—and instead couches norms in the language of duties and obligations.<sup>10</sup> Nevertheless, the norms and values of Jewish law evince a strong commitment many of the core protections typically enshrined in Western human rights discourses, and in some cases, the rabbinic tradition goes even further in its robust respect for human life, health, property, and dignity. The rest of this paper focuses on one example: education, with the implied (and truthful) promise that this is prototypical of many other rights. Indeed, the principle of inherent individual equality, which forms the necessary moral and logical starting point for any complex system of universal human rights, is enshrined in the Mishnah, the foundational second-century text of Jewish law that reflects the sum of rabbinic thinking over the previous several centuries.<sup>11</sup>

Judaism and Jewish law embrace many of the kinds of material human rights typically associated with contemporary liberal rights discourses. However, the Jewish approach to less tangible human rights—especially rights to freedom of religious practice and conscience, and rights of free expression, association, and dissent—is more complicated and is discussed in greater depth elsewhere.<sup>12</sup>

10 Novack: *Religious Human Rights in Judaism*, 1; Broyde, Michael J.: *Introduction: Rights and Duties in the Jewish Tradition*, in: Pollack, Daniel (ed.): *Contrasts in American and Jewish Law*, Hoboken 2001, xxiii–xxx. See also Glendon, Mary Ann: *Rights Talk: The Impoverishment of Political Discourse*, New York 1991.

11 See the articles cited in note 10.

12 See Broyde/Pill: *Human Rights in Judaism*.

## 2. Education as a Model of a Human Right in Judaism: Introduction

In every legal system a gap exists between the law as it is actually enforced by the courts and the ethical categorical imperative.<sup>13</sup> Although it was rejected by Justice Holmes in his "bad man rule,"<sup>14</sup> a strong claim can be made that the measure of an enlightened and advanced legal system and society is their success in bridging this gap. Within a religious legal system<sup>15</sup> that rejects the clear separation of law and ethics, the severity of this problem is ameliorated. As illustrated by Jewish law, even such a system's purely civil law must be influenced by ethical duties to a far greater degree than in secular legal systems.<sup>16</sup> Education law is one such area. The Jewish tradition believes that there is a human right imposed on both parents and society to educate children.

Jewish Law demands of society that certain basic rights be provided for all children. Most of these rights are intuitive. There is an obligation to feed and care for children; there is an obligation to refrain from abusing children; and to the extent a legal system can mandate, there is an obligation to love one's children.<sup>17</sup> This paper explores an area of obligation not generally considered a "right" in the common law tradition, but which Jewish law views as a fundamental obligation that a parent (and society) owes to a child: the duty to educate children. As shall be explained in this article, Jewish law mandates that a parent—and if a parent could not, then society—must provide for the religious, moral, and secular

13 See e. g. Herzog, Isaac: Moral Rights and Duties in Jewish Law in: *The Main Institutions of Jewish Law*, Vol. 1, London 1936, 381–386 for an excellent general analysis of moral claims in Jewish law as compared with those in English common law.

14 Justice Holmes subscribed to the view, extremely popular in its day, that the law should only attempt to provide guidance for acceptable "legal" rather than proper conduct; thus, Justice Holmes was of the opinion that:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, and not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions.

Holmes, Oliver Wendell: *The Path of the Law*, in: *Harvard Law Review* 10 (1897), 457–478, 457, 459.

15 A system in which law is but one component of a religious system.

16 This area of the law was chosen for a number of other reasons as well. First, it is an area of the law far distant from any apparent religious significance, thus making it an excellent paradigm for comparing the civil law of a religious system with the civil law of a secular system. Second, from the perspective of the common law, the field of education law is devoid of constitutional or federal interests, thus allowing the common law to develop in its historical manner.

17 For a general and popular survey of the child-parent relationship in Jewish law, see Matzner-Bekerman, Shoshana: *The Jewish Child: Halakhic Perspectives*, Hoboken 1984.



education of children.<sup>18</sup> This obligation is as much a part of the parental duty as the obligation to feed and clothe. Indeed, as will be explained later, according to many, the duty to educate is the basis for the right of parents to have custody of their child, and even custody rights can be affected by abandonment of the duty to educate.

It is the thesis of this article that the duty to educate—both oneself and one's children—is fundamental within the Jewish tradition. However, this right to an education is categorically different from the right to an education that one currently encounters in modern international law and in various states in America. Jewish law imposes a duty to educate children so that they—when becoming adults—will be equipped with the skills and knowledge to fulfill their own duty to be educated, as adults also are obligated to educate themselves according to the Jewish tradition. International law and the various states in America that have granted children “rights” to an education have done so without imposing any duty on these children when they are adults to continue their own education.

## 2.1 The Duty to Educate Children: A Religious Education

Jewish law, like Canon and Islamic law, rules that there is a duty to provide for a religious education. The classical code of Jewish law, the *Shulhan Arukh*, written by Rabbi Joseph Caro,<sup>19</sup> codified the rule when it states:

There is an obligation upon each person to teach his son Jewish law; if the father does not teach him, the son is obligated to teach himself.... One is obligated to hire a teacher to teach one's children ...<sup>20</sup>

Indeed, it is quite impossible to imagine a faith group not imposing an obligation upon its adherents to seek out a religious education. Two contemporary scholars expressed very similar notions when explaining the duty to educate in Canon and Islamic law. Father James Conn stated:

18 Indeed, to this very day, American constitutional law does not mandate that government provide for the education of children, although once it provides for the free public education of some, it must do so for all; *Plyler v. Doe*, 457 U.S. 202 (1982). As noted in *Plyler*, as late as 1960 there were areas of the United States where no public education was provided; *id.*, 220.

19 Israel, 1488–1575.

20 *Shulhan Arukh*, *Yoreh De'ah* 245:1. In the Jewish tradition, a number of authorities note that even when, for one technical reason or another, the formal verse-based obligation to educate one's children is inapplicable, there is an intuitive obligation to propagate the faith by teaching religious tenets to adherents. “*Hinukh*,” in: *Encyclopedia Talmudica* Bd. 16, Jerusalem 1978, 161–201, 165.

The relevant legislation on the issue of [the] right to be educated is found in the most recent Code of Canon Law, based on the teaching of the popes and of the Second Vatican Council. Specifically, there are sixteen canons that enumerate the obligations and rights of the Christian faithful. For example, Canon 217 assures all members of the Church "the right to a Christian education by which they will be properly instructed so as to develop the maturity of a human person and at the same time come to know and live the mystery of salvation."<sup>21</sup>

Professor Azizah Y. al-Hibri summarized the Islamic position by stating:

Many Islamic jurists viewed education as either completely or practically compulsory based on an *ayah* (*Qur'anic* verse) that states: "[T]hose who conceal [from people] the clear Signs and Guidance which we revealed, after we have made them clear to people in the Book [the *Qur'an*], shall be cursed by God and others who [are entitled to] curse."<sup>22</sup>

In the Jewish tradition, the duty to provide for the education of children is discussed in considerable detail. Jewish law explains that the obligation to "teach" a child is not limited to reading and text skills, but includes rudimentary Jewish philosophy and theology:

When does one begin to teach a child? When he begins to speak one teaches him that God commanded Moses on the Mount with the Law (*Torah*) and the principle of the unity of God. Afterwards one teaches him a little bit until he is six or seven at which point one sends him to elementary school.<sup>23</sup>

The Code also mandates that a Jewish school system be established in every community, "and every community that does not have an elementary school should be shunned [until one is established] ... since the world only exists out of the merit of the discourse found when small children study."<sup>24</sup> Indeed, that

21. Conn, James S.J.: Roman Catholic Response to "Duty to Educate—Fact Pattern," in: Moodle, Michael R./Conn, James/Al-Hibri, Azizah/Broyde, Michael J./et al.: Symposium on Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud, in: *Loyola of Los Angeles International & Comparative Law Journal* 16/1 (1993), 9–106; 13.

22. Al-Hibri, Azizah Y.: Islamic Response to "Duty to Educate—Fact Pattern," in: Moodle, Michael R./Conn, James/Al-Hibri, Azizah/Broyde, Michael J./et al.: Symposium on Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud, in: *Loyola of Los Angeles International & Comparative Law Journal* 16/1 (1993), 9–106; 23.

23. Shulhan Arukh, Yoreh De'ah 245:5.

24. Shulhan Arukh, Yoreh De'ah 245:7. Islamic law adopts a very similar principle. Islamic law accepts that if the members of one community in a Muslim state agree to abandon education of their children, the ruler—by force if needed—can compel the establishment of an elementary school; see al-Hibri, Islamic Response, 23, n. 9.

broad mandate to educate is not the end of the discussion. The Code addresses the details of classroom management also. For example, it states:

Twenty-five children to a teacher. If there are more than twenty-five students and less than forty, one must provide a teacher's aide; when there are more than forty students, a second teacher must be provided.<sup>25</sup>

Finally, unlike other areas of Jewish law which impose some limits on the competitive nature of business,<sup>26</sup> in the area of education, Jewish law endorses only competition:

One landowner in a courtyard who wants to establish a school in his residence cannot be stopped [through zoning ordinances] from doing so. So too, when one teacher opens a school next to another school, so as to encourage the students to go to this institution [and not the first one], one cannot stop this conduct.<sup>27</sup>

In short, the Jewish tradition is unambiguous that there is a duty placed on parents to educate children. Furthermore, it seems clear that when that duty cannot or will not be fulfilled by parents, there is a community-wide obligation to provide for the education of children.<sup>28</sup>

The purpose of this duty to educate is not merely an abstract commitment to aid in the acquiring of knowledge. Rather, as one recent article noted:

25 Shulhan Arukh, Yoreh De'ah 245:15.

26 For a survey of this area, see Levine, Aaron: *Free Enterprise and Jewish Law*, New York 1980.

27 Shulhan Arukh, Yoreh De'ah 245:22. This stands in contrast to the general rule of Jewish law, which would allow competition in the same general geographical locale but would prohibit competition "on the same block".

28 The Hebrew works in this note are, unless otherwise stated, taken from the Bar Ilan responsa database 26 of Bar Ilan University, Ramat Gan, Israel (2016). BT Bava Batra 21b and commentaries *ad locum*. There is a very interesting dispute within the Jewish tradition as to how exactly this societal duty should be fulfilled. Most authorities maintain that the duty to educate, when it would not be fulfilled by the parents, was then a duty of the court system (in Hebrew, *beit din*), and the courts were directly responsible for the education of those children whose parents would not educate them. This was part of the duty of the court to "orphans". For an exposition of this theory, see *Tosafot*, comment on BT *Nazir* 28b s.v. *beno*; Rabbi Abraham Gambeiner, *Magen Avraham* 640:3; Rabbi Isaac Bruna, *Terumat Hadeshen* 94; and Rabbi Abraham Danzig, *Hayyai Adam* 66:3. The other approach argued that the court's duty was limited to appointing guardians for children to provide for their education. The courts did not supervise the educational process for these children. That obligation was, in essence "privatized". For an exposition of this approach, see Maimonides, *Laws of Inheritance* 11:1; Rabbi Jacob Reisher, *Hok Ya'akov*, *Orah Hayyim* 434:15; and perhaps *Shulhan Arukh*, *Hoshen Mishpat* 290:15. While the theoretical differences between these two approaches are small (as in the end, all authority resides in the court system), the practical differences are quite significant in terms of how these children are educated.

Jewish law imposed a duty to educate a child in those duties [and laws] that he will be obligated in as an adult, in order that he should be prepared and familiar with the commandments... Even though a minor is not obligated to observe the law, he should do so as a form of preparation for adulthood... The same is true for the study of religious texts. The early authorities note that the biblical verse "and you should teach your children to speak about [Jewish law]"<sup>29</sup> requires that one familiarize one's children with the study of Jewish law.<sup>30</sup>

Given this educational framework, a focus on childhood education in preparation for adulthood, the parental duty to educate has a significant impact on other parental rights and privileges. One of the classical examples of this is in the area of child custody law. Rabbi Asher ben Yehiel, one of the premier medieval commentators on Jewish law,<sup>31</sup> in the course of discussing the custody of children, asserts the theory that the right of parents to custody of their children appears to be a manifestation solely of the duty to educate one's children.<sup>32</sup>

Rabbi Asher states that since the Talmud ruled that one must educate children, it is intuitive and obvious that this "duty" to educate gives rise to a "right" of custody, which is necessary to fulfill the duty to educate.<sup>33</sup> He then asserts that one should use this obligation to educate to determine which parent should receive custody in cases where the marriage has ended. In those cases where the mother bears the primary duty to educate, the mother has the right of custody.<sup>34</sup> In those cases where that duty falls primarily on the father, the father

29 Deuteronomy 11:19.

30 "Hinukh," in: *Encyclopedia Talmudica*, supra note 20, 161-162. Indeed, the Hebrew term used to discuss children's education reflects this notion. The term used ("Hinukh") means "beginning" or "preparation", as the focus of Jewish law's educational policies is to prepare children for their roles as adults. For more on this, see Maimonides, *Commentary on the Mishnah*, in: *Menahot* 4:5.

31 Germany and Spain, 1250-1327.

32 Yehiel, Asher ben: *Response of R. Asher (Rosh)* 17:7; see also Rabbi Judah ben Samuel Rosannes, *Mishneh Lemelekh*, in: *Ishut* 21:17.

33 Yehiel, *Responsa of Asher*, 82:2. Support for this approach can be found in other early rabbinic authorities; see e.g. Rabbi Meshullam, *Yeruham ben: Toldot Adam veHava* 197a, in the name of the gaonim; Molena, Isaac de: *Kiryat Sefer* 44:557, in the name of the gaonim; and Gaon, Joseph: *Ginzey Kedem* 3:62. Of course, all of these authorities would agree that in circumstances in which the parents are factually incapable of raising the children—are legally unfit—they would not be the custodial parent. However, Asher appears to adopt the theory that *parents are custodial parents of their children based on the obligations to educate*, subject to the limitation that even a natural parent cannot have custody of children if unfit to raise them.

34 For reasons that relate to the presence of a "tender years" doctrine, the mother also has custody rights in small children. The details of this are beyond the scope of this article. For more on this, see Broyde, Michael: *Child Custody: A Pure Law Analysis*, in: *Passamaneck, S.M./Finley, M.: Jewish Law Association Studies VII: The Paris Conference Volume*, Binghamton 1994, 1-20.

receives custody. When the duty to educate ends—at the age of legal adulthood<sup>35</sup>—the concept of “custody” (like the duty to educate) disappears as a matter of law, and children are placed with whichever parent or stranger they wish to be placed with.<sup>36</sup>

## 2.1 A Moral Education in the Jewish Tradition

As noted by the medieval authority, Rabbenu Manoah,<sup>37</sup> the obligation to provide for the religious education of one’s children has two different components to it. The first is to raise one’s children “on the straight and narrow path” of life and to convey to them the imperatives of moral people. This is the primary educational obligation of a parent. Secondly, one is under a duty to provide for one’s children’s formal education in technical religious law and observances. This obligation, however, is secondary in nature.<sup>38</sup> Rabbi Joseph Kapach, writing for the Rabbinical Court of Appeals in Israel, notes that in modern times the technical aspects of education are almost always delegated to educational institutions, and the primary job of parents is to provide for the moral, rather than the textual, education of their children. He states:

Even if neither parent will educate the children in the study of Jewish law ... still a parent owes his children—and children should receive from their parents—a close

35 Twelve for a girl and thirteen for a boy; Shulhan Arukh, Orah Hayyim 55:9 and Even Ha-Ezer 155:12. This age also requires signs of physical maturity; *id.*

36 For a longer discussion of this issue, see the responsa of rabbis Landau, Ezekiel: Noda Be-Yehudah E.H. 2:89, and Weiss, Isaac: Minhat Yitzhak 7:113, where these decisors explicitly state that in a case where the mother was assigned custodial rights, but the father was granted the right to educate (an unusual arrangement), and this right was incompatible with the mother’s custody claim, his rights and obligations to educate supersede hers and custody by the mother will be terminated.

37 Narbonne, end of 13th century to mid-14th century. Much of Rabbenu Manoah’s life remains clouded in mystery; for more on this, see “Rabbenu Manoah of Narbonne,” in: *Encyclopedia Judaica* 11, Jerusalem 1973, 892.

38 Manoah, Rabbenu: Shevitat He-Assor 2:10. Similar such observations can be found in Rabbi Meir Simha of Dvinsk: *Meshekh Hakhmah*, Genesis 18:19; and Rabbi Hayyim Or Zarua: *Or Zarua* 2:48. The correctness of this observation of Rabbenu Manoah is quite significant, as it affects the practical obligations toward children in many cases. For example, Rabbi Meir Schlesinger, in: *The Duty to Educate*, in: *Sha’alei Da’at* 1 (5749), ponders what educational policy one should adopt when the secondary duty to teach technical religious law conflicts with the primary duty to teach moral behavior—such as the case when too much pressure is exerted upon a child to conform to the details, thus causing the child to abandon the faith completely. Rabbi Schlesinger asserts based on an insight of the late Rabbi S. Z. Auerbach that one must insure that the primary obligation is not abandoned in the process of teaching the secondary requirements—technical religious law. The duty to educate needs an assessment of what maximizes the total amount of proper behavior rather than what fulfills the technical obligations.

and robust relationship through which a child can develop into an adult with adult characteristics and an adult demeanor.<sup>39</sup>

In sum, the Jewish tradition mandates a duty to educate oneself and one's children in religious law, religious observances, ethical principles, and theology.

## 2.2 The Duty to Educate Children: A Secular Education

The parental duties to educate are by no means limited to a religious (or moral) education. The Talmud, writing nearly 1700 years ago, is quite explicit that there is a duty to teach one's children a way to earn a living.<sup>40</sup> The Talmud recounts:

Rabbi Judah states: Anyone who does not teach his children a profession, it is as if he has taught them robbery.<sup>41</sup>

The later Jewish law authorities note that the Talmud does not call for a parent to provide a child merely some method to earn a living or simply a gift of money. Rather Jewish law requires that a child be taught a "profession".<sup>42</sup> As noted by Rabbi Joshua Boaz,<sup>43</sup> a parent does not fulfill this obligation merely by providing a child with an ongoing source of income, such as a trust fund, or even with an income-producing business that the child cannot run, but merely derives income from.<sup>44</sup> The obligation to provide a trade or a skill—rather than just a source of income—is elaborated on by Rabbi Shlomo Yitzhaki (*Rashi*)<sup>45</sup> in his commentary on the Talmud. He states that Rabbi Judah's ruling that a profession need be taught was predicated on the belief that absent work to occupy one's time, a person might turn to mischievousness—or even crime—out of boredom.<sup>46</sup>

39 Pseudonymous case, 9 Piskei Din Rabbaniyim [Israeli Rabbinic Court] 251, 259 (1974).

40 Indeed, more generally, parents are under an obligation to teach children "survival skills" for life. Thus, the Talmud, in Kiddushin 29b, recounts that parents are obligated to teach children to swim, as a child who cannot swim is lacking a basic skill necessary to survive. Other authorities have understood the Talmudic phrase "to swim" as an idiom directing a parent to teach children all things needed for survival. For more on this, see "Av," in: Encyclopedia Talmudica 1, Jerusalem 1948, 16–18.

41 BT Kiddushin 29a, 30b.

42 A "profession" (in Hebrew, *um'nut*) appears to mean more than a way to earn a living—it denotes specific skills.

43 Spain and Italy, ca. 1470–1557.

44 Shelta Gibborim, commenting on Kiddushin 12a (1) (Rif pages).

45 France, 1040–1105.

46 Commenting on *Kiddushin* 30b; see also comments of the rabbi Gumbiner, Abraham: Magen Avraham, on Shulhan Arukh, Orach Hayyim 156. This obligation, however, is not so narrow that it forces a parent to pick a particular profession. Thus, providing a child with the skills needed to be a farmer, rather than just giving them an income-producing farm, would certainly fulfill this obligation.

Thus, a parent must provide a child with the skills that groom the child towards becoming a fine, upstanding adult.

In short, Jewish law requires that one teach his progeny a profession, and that this duty is part of the parent's general obligation to educate one's children.<sup>47</sup>

How precisely to teach a child to earn a livelihood, particularly when the needs to earn a living conflict with the obligation or inclination to study Jewish law or other aspects of Judaism, is itself unclear.<sup>48</sup> So too, what particular type of secular education to provide for each child is left to the discretion of the parents. In the details of this, Jewish law provides little definitive direction. However, it is clear that there is an obligation.<sup>49</sup> Moreover, this right to an education is not limited to children alone; parents are obligated to educate themselves, as will be noted in the next section.

### 2.3 The Duty to Educate: The Obligation of an Adult

Unlike modern common or international law, which limit the right to an education to children, Jewish law does not confine the duty to receive an education to children only. In the chapter immediately following the rules related to teaching children, the classical Jewish law code, the *Shulhan Arukh*, states:

Every Jew is obligated to study Judaism whether he be rich or poor, healthy or sick, single or married... All are obligated to set aside a time for study every day and night.<sup>50</sup>

Adults, like children, have a duty to spend time educating themselves and have the right to receive an education. For example, the *Shulhan Arukh* states:

A person [adult] must trifurcate his study and spend a third of his time on the study of the twenty-four books of the Hebrew Bible; a third of his time on Mishnah, which is the oral law ...; and a third of his time on Talmud, which involves investigating and

47 See generally, "Hinukh," *Encyclopedia Talmudica*, supra note 20, 162. It is worth noting that the rule requiring that one teach his child a trade is not cited explicitly in either Maimonides' code or *Shulhan Arukh*. As demonstrated by Rabbi Jacob Emden, this does not mean that these authorities do not accept that there is such an obligation; see Rabbi Emden, Jacob: *Responsa She'eilat Ya'avetz* 2:68, and the Rabbi Yosef, Ovadia: *Responsa Yehaveh Da'at* 3:75.

48 See Yosef, *Yehaveh Da'at* 3:75, where the author addresses the issue of whether one should send a child to a trade school or an institution of higher study of Judaism. Rabbi Yosef concludes that the obligation to teach a child about Judaism supersedes the obligation to teach them to earn a living.

49 It is beyond the scope of this article to explore the more general question of the theoretical relationship between advanced secular education and Jewish theology and philosophy; for more on this topic see Lamm, Norman: *Torah Umadda: The Encounter of Religious Learning and Worldly Knowledge in the Jewish Tradition*, Northvale 1992.

50 *Shulhan Arukh*, *Yoreh De'ah* 246:1.

comprehending matters from beginning to end and being able to analogize from one matter to another ... until one understands the essence of the law.<sup>51</sup>

When a Jewish society allocates resources to education, adult education is no less a priority than children's education.<sup>52</sup>

### 3. Education: The Need for Balance

It is an open issue how, in the Jewish tradition, parents are supposed to balance their own needs to study with the needs of their children. A person who cannot afford for himself to study and also to pay for the education of his child is only supposed to assign a higher priority to his child's education if he feels that the child will derive more benefit from that education than he will.<sup>53</sup> However, even in a case where the parent's formal allocation of resources is to educate himself, and not his children, it is clear that the obligation to provide a moral and religious education for one's children still applies.

This right of adults to an education leads to one of the significant differences between Jewish law and the current approach of many countries. There is little doubt that modern international law recognizes the right of children to an education. For example, article twenty-eight of the United Nations Convention on the Rights of the Child declares:

States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education; ...<sup>54</sup>

51. Shulhan Arukh, Yoreh De'ah 246:4. The code continues this discussion by addressing under what circumstances a person may change this division of topics, and the proper balance between economic and educational needs.

52. Indeed, when the Shulhan Arukh discusses the laws of education, it has some sections that discuss the problems of educating adults (Yoreh De'ah 246:7-17) and some sections discussing the problems of educating children (Yoreh De'ah 245:9-20).

53. Shulhan Arukh, Yoreh De'ah 245:2. It is worth noting that most authorities rule that there is no duty on a minor child to educate himself; the duty is solely on the parent to educate the child; see comments of Rashi to Berakhot 48a, s.v. 'ad; Rabbi Yom Tov Ishbili (Ritva), Responsa 97; and "Hinukh," *Encyclopedia Talmudica*, supra note 20, 162.

54. United Nations General Assembly Resolution 44/23, U.N. Convention on the Rights of the Child, Article 28. U.N., A/44/23 (1989). For a discussion of this document's integration into American law, see Levesque, Roger: International Human Rights Grow Up: Implications for America Jurisprudence and Domestic Policy, in: *California Western International Law Journal* 24 (1994), 193-240. For an intellectual history of this document, see Detrick, Sharon: The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires, Dordrecht 1992, 382-403.



So too, article twenty-nine of this same convention tells us the purpose of this right to an education:

States Parties agree that the education of the child shall be directed to:  
 (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; ...<sup>55</sup>

However, international law imposes no duty on an educated child when he becomes an adult to continue that education, and there is no duty imposed on society to foster the education of adults. There is no obligation to help adults in the development of their "personality, talents and mental and physical abilities to their fullest potential" in international law. It is a right to a child's education.<sup>56</sup>

The same result is reached by modern American common law. While there has been a vast expansion of the rights of a child to an education in the last decade in America, this has been nearly<sup>57</sup> exclusively limited to the redefining of the state's or parent's duty to children.<sup>58</sup> There is no mention of the duty of adults to receive an education. When the requirement of parents or society to educate children ceases, the obligations of education cease, as the young adult is under no obligation to self-educate.

Indeed, American common law has repeatedly recognized this as an issue and has struggled with it. The most common area of difficulty is in the area of college education. Unlike elementary and (early) high school education, there is no obligation for one to receive any form of post-high school education.<sup>59</sup> Logic

55 U.N. Convention, Article 29.

56 Indeed, others have noted that the United Nations Declaration on the Rights of the Child sometimes grants children more rights than they have as adults; see Gomien, Donna: Whose Right (and Whose Duty) Is It? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child, in: *Human Rights* 7/161 (1989), 162-165.

57 "Nearly" is used because there is one clear exception. States have created adult educational programs as a remedy to the victims of racial discrimination who are now adults, but who were deprived of education as children. See the case *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). This is the exception that proves the theme of this article. Even when American society does mandate adult education programs and might consider it a "right" and a "duty," it is only as compensation for one who was illegally deprived of a child's right to an education. In the Jewish tradition, these two duties are essentially independent of each other. Immediately after the classical Code states that "there is an obligation on a person to educate his children," it states "if one's father does not teach one, one must teach oneself;" Shulhan Arukh, Yoreh De'ah 245:1.

58 See for example, Natapoff, Alexandra: 1993: The Year of Living Dangerously: State Courts Expand the Right to Education, in: *Education Law Reporter* 92 (1994), S. 755-787; which documents the vast increase in the right to education given to children within the previous ten years. This fine article, with its state-by-state survey of the changes wrought by educational reform, makes no mention of any concept of an adult's right to an education.

59 *Quinn v. Johnson*, 589 A.2d 1077 (Supp. Ct. N.J. 1991) (noting that an adolescent who graduates high school prior to reaching majority is under no obligation to attend college,

would also indicate that when a young adult wishes to receive such an education, he must negotiate with his parents over cost issues, and parents are fully within their rights to decline to pay for the college education of their children. This is the law.<sup>60</sup> However, this line has been increasingly expanded in the context of divorced parents, with many courts imposing a duty on parents to assist in the college education of their children, even though these "children" are under no obligation to receive such an education.<sup>61</sup>

Simply put, the modern common law has increasingly stretched the duty of parents to educate, so as to ensure that *someone* is still responsible for the furthering of the "child's" education. In the Jewish tradition, the duty of a parent to educate his children certainly ceases at the time when the child enters legal adulthood.<sup>62</sup> However, the moment the obligation of the parents ceases, the obligation resides directly on the adolescent himself. Jewish law can just as easily force the adolescent to comply with its mandate that he receive an education, as it can force a parent to comply with the mandates of Jewish law to educate a child.

However, the Jewish tradition recognizes the economic reality of modern times, which is that it is exceedingly difficult for one to adhere to a rigorous duty to provide for one's own education without some financial assistance.<sup>63</sup> In various times and in various communities, different supplements were provided. For example, the Chief Rabbinate of Israel decreed in 1944 that:

Whoever looks at this fairly will conclude that the situation [regarding support for adolescents] requires appropriate remedial legislation. In our time, even adolescent children (girls as well as boys) under the age of fifteen face serious moral dangers if their support is not assured on a legal basis.<sup>64</sup>

Thus, the rabbinical courts in Israel mandate support until the age of fifteen.

Other authorities, based on the obligation of a person to give charity, have argued that parents are under an obligation to give charity to their children who are engaged in study before the parents be allowed to engage in any other charitable giving, and that a court can compel this distribution if the parents have any

although divorced parents are under an obligation to support such an education if desired by the child.)

60. See Horan, Kathleen Conrey: Postminority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings? in: *Family Law Quarterly* 20/4 (1987), S. 589–612, S. 590.

61. Rusk, Richard C.: Educational Obligations for Children of Dissolved Marriages, in: *Res Gestae* 36 (1992): S. 156–162.

62. Asher, commenting on Nazir 29b.

63. Indeed, the Talmud (Ketubot 49a) clearly notes that there is a religious obligation to support one's children when possible.

64. Decrees of the Rabbinical Court of Israel, 1944, reproduced in Elon, Menachem: *Jewish Law: History Sources and Principles*, Philadelphia 1948, S. 831–832.

money available.<sup>65</sup> So too, many authorities recognize that grandparents have an obligation to provide for the education of their grandchildren (when parents cannot) before they can engage in other charitable activities.<sup>66</sup>

More generally, the support of higher-learning institutions is perceived as a form of charity. Unlike alms-giving, which actually supports the impoverished, the Jewish tradition recognizes that one who cannot himself pursue his own education shares in the education of others by providing for the support of those who are studying. Thus, the Shulhan Arukh states:

One who cannot study, either because he is completely ignorant or because he is busy, can support others who are studying.<sup>67</sup>

Rabbi Moses Isserless,<sup>68</sup> in his classical glosses on this code adds:

Such a person [who supports others who are studying] is considered as if he himself is studying. A person can arrange a partnership in which one studies and the other supports, and they will split the rewards [the divine rewards of education and the profits from the business].<sup>69</sup>

In sum, Jewish law provides for a right to an education for adults as well as children and created support mechanisms to encourage adults to educate themselves or support other adults who were being educated.

## Conclusion

Human rights are complex in both their articulation and their implementation: in hard cases, balance and nuance are needed. The Jewish tradition excels at turning inchoate rights into practical duties and assigning them to specific people, places and institutions in society in order to make sure that human rights

65 Justice Menachem Elon of the Israeli Supreme Court described the process of forcing parental support as follows:

The law prescribes that the giving of charity can be compelled, i. e., when a court is convinced that an individual is financially able to give charity and there are people dependent on charity funds, the court ... may compel the individual to give charity in an amount that it determines he is able to pay. The law relating to charity contains an additional rule that establishes priorities of entitlement for recipients. That rule states: "The poor of one's household have priority over the poor of one's town, and the poor of one's own town have priority over the poor of any other town." The combination of these two rules yielded the conclusion that a father could be subject to legal sanctions for failure to support his children, because such support is the highest form of charity.

Elon, *Jewish Law*, S. 116-117 (footnotes omitted).

66 Rabbi Shabtai ben Meir, Siftai Cohen, Shulhan Arukh, Yoreh De'ah 245:1-3.

67 Shulhan Arukh, Yoreh De'ah 245:1.

68 Krakow, 1520-1575.

69 Comment of Rabbi Moses Isserless, Shulhan Arukh, Yoreh De'ah 245:1.

are honored in fact and not just in the breach. The education duty that we have explored in this article can be well understood as one example of this. Jewish law, unlike almost any other legal system, not only has a right to education but it imposes a duty to educate both adults and children—this model insures that human rights are not only honored in the breach, but honored in daily life and application.<sup>70</sup>

70 Of course, focusing on one right as this paper does hardly gives anyone a sense of how Jewish law works in practice since—in the real world—rights reside in the context of other rights and duties reside in the context of other duties. For example, what happens when the right to an education interferes with other rights, either of the party in question or of other parties, remains a hard question for every legal system. Consider for example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—where the United States Supreme Court ruled that Old Order Amish are exempt from the duty to educate when it profoundly interferes with other religious duties—as just one example. These cases in the Jewish tradition fit into three categories. In one case, the person in question cannot fulfill all of their obligations under Jewish law (due to social, economic, medical or any other reality) and wishes legal instruction as to the hierarchy of obligation. There is an elaborate literature on this process and it is very nuanced and specific. The second case is where one person's fulfillment of all of their obligations impinges on a different person's ability to fulfill their obligations. This is an incessant problem in America where education is expensive, and no one can fulfill their obligation maximally or ideally and compromise due to economics is almost mandated in the real world. The Jewish tradition assigns these types of balancing to government, but generally insists that the governing authority allocate enough resources to each party to ensure that the statutory minimum is accomplished for all. The third case is even more complex, and it focuses on the question of when society can deprive people of access to the duties of others to help them fulfill their rights due to their own misconduct. Consider a simple example: In the Jewish tradition, every person must return lost objects to the person who loses them. But yet, many have argued that a person who refuses to return the lost objects of others and instead keeps them, forfeits the right to have his own lost objects returned and others have no duty to return that person's lost objects. I address this issue at some length in Broyde, Michael J.: *Access to Justice in Jewish Financial Law: The Case of Returning Lost Property*, in: Harris, Michael J./Rynhold, Daniel/Wright, Tamra (eds.): *Radical Responsibility: Celebrating the Thought of Chief Rabbi Lord Jonathan Sacks*, New York/Jerusalem 2013, 111–123.