

## Introduction

### Rights and Duties in the Jewish Tradition<sup>1</sup>

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Writing an introduction to a book that compares many different aspects of Jewish law with American law forces one to make certain observations about the two legal systems. The Jewish tradition, as the chapters in this book will demonstrate, is a duty-based legal system; rights are not the fundamental coin in the realm of Jewish law. While almost all rights can be expressed as duties, and the reverse, legal systems make statements about their core values when they express legal norms in one form or the other. In Jewish law, the core value is legal duty. In modern-day America the coin of the realm is rights.

Thus, if at some level this work were exclusively grounded in the linguistic norms of the Jewish tradition and system, the term "rights" would be replaced throughout by "duties." This is not merely a linguistic sleight-of-hand, for the substantive rules are expressed as individual and personal obligations. Thus, there are no procreation rights, but rather a duty to procreate; there is no right due to mental incapacity, but rather a societal duty toward those who are incapacitated. Indeed, even such commonplace notions as the right to divorce would be expressed in the Jewish tradition as a duty to divorce. Within the Jewish tradition, the expression of legal norms as duties almost inevitably creates a specific duty obligating a person or a group of people to act to fulfill this duty. It is rare that one

finds generalized societal obligations in the Jewish tradition; the imposition of a duty requires that one answer the question "whose duty?" In rights-based systems, this question frequently goes unanswered, and thus rights go unfulfilled.

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

[In the United States] [w]hen 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>1</sup>

Cover's insight is worthy of exploration, since the Jewish tradition emphasizes the notion of a duty to act to help others, rather than the notion that one in need has a right to be helped. A classical example of how the rights-duties dichotomy affects how rights and duties actually are implemented can be found in a comparison of the modern right to an education with the ancient Jewish version of it, the parent's and society's duty to educate children.

Every person is under a duty to be educated. In addition, Jewish law mandates that parents—and if the parent cannot, then society—provide for the religious, moral, and educational instruction of their children. This obligation is as much a part of the parental duty as the obligation to feed and clothe. The classical code of Jewish law, the *Shulchan Aruch*, written by Rabbi Joseph Caro, codified the rule when it states:

1. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, J. L. & REL. 5:65, 67 (1987) (footnotes omitted).

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>2</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>3</sup>

The code also mandates that a Jewish school system be established in every community.

Every community is obligated to have an elementary school, 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>4</sup>

Indeed, this 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>5</sup>

2. *Shulchan Aruch*, Yoreh Deah 245:1.

3. *Shulchan Aruch*, Yoreh Deah 245:5.

4. *Shulchan Aruch*, Yoreh Deah 245:7.

5. *Shulchan Aruch*, Yoreh Deah 245:15.

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

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>6</sup> requires that one familiarize one's children with the study of Jewish law.<sup>7</sup>

Jewish law does not confine the duty to receive an education to children. In the chapter immediately following the rules related to teaching children, the classical Jewish law code, the *Shulchan Aruch*, 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>8</sup>

Adults, like children, have a duty to spend time educating themselves and have the right to receive an education. When a Jewish society allocates resources to education, adult education is no less a priority than children's education.<sup>9</sup> Indeed, it is an

6. Deuteronomy 11:19.

7. *Encyclopedia Talmudica*, s.v. *chinuch*, note 2, pp. 161-62. The Hebrew term used to discuss children's education reflects this notion. The term used (*chinuch*) means "beginning" or "preparation," as the focus of Jewish law's educational policies is to prepare children for their roles as adults. See also Maimonides, *Commentary on the Mishnah*, Menachot 4:5.

8. *Shulchan Aruch*, Yoreh Deah 246:1.

9. Indeed, when the *Shulchan Aruch* discusses the laws of education, it has some sections that discuss the problems of educating adults (Yoreh Deah 246:7-17) and some sections discussing the problems of educating children (Yoreh Deah 245:9-20).

open issue how, in the Jewish tradition, parents are supposed to balance their own need to study with the needs of their children. A person who cannot afford to study and also 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 education than he will.<sup>10</sup>

In sum, the Jewish tradition mandates a duty to educate oneself and one's children. This creates, first and foremost, a duty to educate, and then a resulting right to education. The emphasis, however, remains on the duty. There is no discussion of rights in the Jewish tradition.

Given the parental duty to educate, it is not surprising to discover that the abandonment of this duty affects many other parental rights. One of the classical examples is in the area of child custody law. Rabbi Asher ben Yechiel, one of the premier medieval commentators on Jewish law, in the course of discussing the custody of children, asserts 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>11</sup> Rabbi Asher states that since the Talmud ruled that one must educate children, it is intuitive and obvious that the duty to educate gives rise to a right of custody, which is necessary to fulfill the duty to educate. He then asserts that one should use the 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; when the father bears the duty, he has the right.

The Jewish duty-based approach stands in contrast to the rights-based approach of modern legal theory. There is little doubt that modern international law recognizes the right of children to an education. For example, Article 28 of the United Nations Convention on the Rights of the Child declares:

10. *Shulchan Aruch*, Yoreh Deah 245:2.

11. R. Asher ben Yechiel, *Responsa of Asher* (Rosh) 17:7, 82:2.

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>12</sup>

So too, Article 29 of the same convention tells us the purpose of the 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>13</sup>

However, international law imposes no duty on a child to be educated, and certainly imposes no duty on adults to continue their education. Indeed, under international law it is unclear whether parents have any duty to educate their children at all. 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 exclusively limited to the redefining of the child's *right* to an education.<sup>14</sup> When the requirement of society to fulfill children's rights to education ceases, the obligations of education cease, since the young adult is under no obligation to self-educate. Indeed, while a child has a right to an education, he does not have a duty to receive that education, either as an adult or as a child.

12. United Nations Convention on the Rights of the Child, Article 28. U.N. Doc. A/Res/44/23 (1989).

13. United Nations Convention on the Rights of the Child, Article 29.

14. See, for example, Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755-87 (1994) (documenting the vast increase in the right to education given to children within the last ten years).

Thus, the secular tradition has created a right without a duty, and the Jewish tradition has come close to creating a duty without a right.

A focus on duty alone as the Jewish form of rights, however, risks the loss of the essentially religious character of the Jewish tradition; halacha is as much the path one is supposed to follow as a legal system regulating Jews. People were “created in the image of God.”<sup>15</sup> A conceptualization of humanity which focuses merely on the technical legal rules, whether they be rights or duties, misses one of the fundamental purposes of the Jewish tradition: to provide a sense of the Divine in the lives of people. In this regard the essential characteristics of Jewish law differ from those of any secular legal tradition, as it is predicated on the duty to imitate the Divine. Jewish law provides a medium in which the top of Jacob’s ladder, which reached into the heavens, interacts with our daily life at the bottom of the ladder.

The six essays in this book address hard problems. Whether the issue is wrongful living, search and seizure, prisoner rights, environmental damage, or mental incapacity, difficult problems are analyzed and discussed. Each article provides a thoughtful comparison of the various modern American answers and the uniquely Jewish answers to these complex quandaries. In totality these essays begin the process of broadly comparing how the Jewish tradition and American secular law view common problems—a task of interest to many. As Ethics of the Sages (2:16) recounts, “It is not your job to finish the task; however, you are not free to abandon the task (merely because you cannot complete it).” Many other essays remain to be written in the field, and may it be that it will continue to grow and blossom so that we may all eat from the fruits of its accomplishments.

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15. Genesis 1:27.