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Corporal Punishment in School: A Study in the Interaction of Halakha and American Law with Social Morality

The purpose of this essay is to present an apercu of the diverse approaches for enforcing school discipline as propounded in contemporary times by American law[1] and halakha.[2] Our comparative examination focuses upon the differences between the learned decisions among contemporary halakhic decisors and the rulings in contemporary American courts. Though we will allude to the relevant rules of these two legal systems, it is the jurisprudential perspective rather than the substantive content which is the primary theme.[3]

In the 1977 American Supreme Court case Ingraham v. Wright, citing historical and contemporary documentation supporting the use of physical punishment in the public schools, Justice Lewis Powell Jr. concludes that " a single principle has governed the use of corporal punishment since before the American Revolution: teachers may impose reasonable but not excessive force to discipline a child."[4] This legal tradition has deepened over time and today many states continue to recognize this societal value—i.e., a teacher's right to administer reasonable force within the context of the school setting. Many states have legitimated this right by legislative enactment and by judicial decision.[5]

The question that arises is: What criteria should a societal value satisfy if it is to be figured into the calculus of a legal decision? The answer advanced by certain legal scholars is that judges should use the values that modern society wants to protect as the basis for establishing new legal norms or justifying the modification of existing norms.[6] Is the meting out of force by teachers rooted in the aspirations of the American community as a whole and can it be said to have substantial support in the community? Does the imposition of corporal punishment within the context of an educational setting constitute an infrac-

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tion of a moral norm, i.e., an unnecessary act of violence? Implicit in these questions, is the underlying premise that one of the tasks of American law is to explore the extent to which actions that are perceived by the community as injurious to its social fabric should give rise to remedies at law.[7]

The main obstacle to using conventional morality to establish or amend a legal norm in a pluralistic society is that this approach assumes the existence of a social consensus about what values deserve to be protected. A pluralistic society acknowledges that individuals who have different ethnic, religious and socio-economic backgrounds may not share the same beliefs. In fact, there is no "common experience" through which one may discern a "community sense" of the propriety or impropriety of the employment of physical force in the American school setting. In 1977, the Ingraham court noted that "professional and public opinion is sharply divided on this issue."[8] Today, twenty six years later, contemporary opinion regarding this matter remains divided.

When we compare the legal acceptability of corporal punishment in the classroom with the view of numerous social scientists and medical experts, including those who have written extensively on the subject of child rearing and violence, we encounter a substantial gap. There are several potential harms for the imposition of physical force in the framework of an educational setting. The most obvious risk is that hitting a student may cause physiological damage to the child and may escalate into child abuse.[9] Additionally, it may give rise, during childhood, to a host of psychological and behavioral disorders such as aggression,[10] antisocial behavior,[11] and loss of love and self-esteem leading to depression, increased anxiety and withdrawal.[12]

The foregoing overview of these professional findings leads to the realization that what was once considered a normal child rearing practice might now constitute abuse. Moreover, what is now viewed as normal treatment of a child may one day be considered abusive.[13] Accordingly, legal scholars argue that it is time for the federal courts to recognize contemporary standards of decency, affirm the moral norm of societal condemnation of unnecessary violence and abandon the use of force in the public schools.[14]

Implicit in this approach is the notion that social morality is capable of determining the legal norm rather than merely affecting it. Contrary to the teachings of David Hume, one may derive an "ought" from an "is."[15] The premise underlying this approach is that one can study public morals and yield prescriptive content . Moreover, these norms are repre-

sentative of the "evolving standards of decency that mark the progress of a maturing society."[16] In the words of Arthur Lovejoy, there is a "tendency inherent in nature or in man to pass through a regular sequence of stages of development in past, present, and future, the latter stages being- with perhaps occasional retardations or minor retrogressions – superior to the earlier."[17] Translating Lovejoy's idea into jurisprudential terms, law is functioning properly if it is dynamically adapting to social and moral change.[18] Compliance with the norm of the meting out of corporal punishment in the school is mandated only if the social and moral consensus from which it emerged and which alone justifies its continued compliance continues to exist. Inherent in the legal rule of imposing corporal punishment in school is the notion of its possible legal abrogation when "the evolving standards of decency" warrant the legal conclusion that the continued justification of the rule no longer exists. In fact, a 1993 study noted that in the last 20 years, the number of states abolishing physical punishment in schools has increased from one to twenty-six.[19] Clearly, a trend towards its elimination has emerged. Accordingly, certain legal scholars contend that the courts should abolish the practice pursuant to the evolving standards of modern society.[20]

On the other hand, other professional studies regarding the efficacy of corporal punishment in school arrive at different conclusions. There is a widespread acceptance of parental and teacher's use of physical force in our society. In the related context of parental corporal punishment of children, data from studies conducted from the 1950's through the 1990's indicate that nearly ninety per cent of parents employ physical force upon their children. Forty nine per cent of the respondents to a national survey indicated approval of a public school teacher hitting a student.[21] As recently as 1998, Kandice Johnson, a law professor at the University of Missouri, offered cogent argumentation to preserve the parental privilege to employ force while simultaneously providing for the child's need for bodily integrity.[22] Lastly, Professor Murray Straus, who has devoted a significant portion of his career to the study of corporal punishment and its negative effects upon children, recognizes that the empirical evidence on the negative effects of force is not definitive.[23]

In sum, though there are signs that society is rejecting teacher's use of force as a right, nevertheless the issue remains unresolved. The mixed signals emerging from the professional literature indicate a collision between two norms of American social morality: one social norm endorsing the administration of physical punishment in the school, the other rejecting its continued use. When we speak of the social norms of

a community, it is tempting to speak of a simple social consensus,a homogeneity of norms, one that forms an enduring and uncontroversial basis for our culture and traditions. Undoubtedly, our issue demonstrates that such an image is unrealistic, at least for a community in the modern world.

In the absence of societal consensus regarding this practice, how should the courts respond? In the absence of shared beliefs among the subcultures of our pluralistic society,[24]

> a court may, for example, believe that one colliding norm is regarded by the community as significantly more weighty than the other; or that one norm is waxing while the other is waning or that one norm is more congruent with applicable policy and more consistent with the body of the law than the other; or that one norm is better connected to the community's fundamental concepts of justice. Similarly, where there is a collision between a relatively general principle and a relatively specific judgment, each of which appears to have substantial social support, the court may attempt to reconcile the two by reformulating either the general principle or the specific judgment so that they are in equilibrium.[25]

In fact, for almost 150 years, American courts have heard challenges to the practice of the use of force in the public schools based on alleged violations of tort law, criminal law, state legislation and constitutional guarantees.[26] The employment of physical punishment in an educational framework, opponents argue, had a substantive basis in the applicable legal and social concepts of a bygone era, but is socially incongruent and systemically inconsistent with contemporary societal norms. However, these challenges have usually failed.[27] In effect, the law has put its weight and imprimatur behind the moral and social norms which continue to endorse this practice. Presently, the moral norm of condemning physical force lacks either the weight or the requisite social support to overturn the legal norm permitting the continuance of this practice.

II.

How do contemporary Jewish legal arbiters resolve the issue of meting out corporal punishment to Jewish children within the context of the Jewish educational system? To unravel the varying and diametrically opposed positions, one must define their matrix and probe the meaning of the implicit *halakhic norm* underlying the decisions.

To define the content of this norm, one must turn to its source, the Talmud. What is the significance of the fact that this norm derives from the Talmud? One of the systemic assumptions of the halakhic process is the authoritative nature of the Talmud's rulings. These dicta are binding upon the Jewish community and every arbiter, in every generation, is compelled to render his decision in accordance with them.[28] Accordingly, this norm in the Talmud will assume authoritativeness in the mind of the arbiter.

The Talmud provides a clear and uncontested position regarding our issue. If a teacher inadvertently causes a mishap during the administration of physical punishment resulting in harm being done to the young student, is he exempt from criminal liability? Is the student entitled to monetary compensation (i.e., *nezek*)? Though a Jew is liable for intentional, negligent and accidental damage caused to his fellow Jew,[29] nevertheless the teacher-student relationship is an exception to this rule. As the Talmud instructs, a teacher who strikes a student inadvertently injuring him or causing his death is exempt from paying damages or criminal punishment, respectively.The rationale offered in the Talmud is that the educator is "*engaging in a mitsva*."[30]

The Talmud adds a crucial caveat. The teacher who administers reasonable corporal punishment is exempt from liability. However, the teacher who employs excessive force is criminally liable and damages will be awarded to the injured party.[31]

Into what conceptual-axiological framework does the practice of teacher-imposed corporal punishment fit? Is it a one dimensional act or does it involve a tense and dialectical action? The Talmudic posture, reminiscent of a Tosefta's ruling,[32] reflects a polarity, the balancing of two commandments .On one hand, there is recognition of the legitimate goal of educating children. An educator, engaging in the commandment of "*hinnukh*" (i.e., education)[33] or "*tokhaha*"[34] (i.e., reproof) may employ force as a legitimate means to promote the welfare of a child.[35] On the other hand, the Talmud must reckon with the general prohibition against "*havala,*" i.e., wounding.[36] In effect, the halakhic norm of the allowance of the employment of force in an educational setting is an illustration of privileged battery, involving a "*mattir,*" a suspension of the prohibition of *havala*.[37] In the absence of the Talmud's legitimating category of the educator's performance of a *mitsva*, the prohibition of *havala* is operative. The "dialectical pull" or tension between the two *mitsvot* is great, for the "breakdown of the equilibrium" is always an imminent possibility. Accordingly, if the use of force is to express the

anger or frustration of the teacher rather than for purposes of the child's behavioral modification, the act falls under the rubric of *havala*.[38]

Halakhically, how does one understand this talmudic posture? A contemporary Torah scholar, Rabbi Dr. Neriah Gutel, suggests that the normative recognition of reasonable corporal punishment by an educator is expressive of the decision making principle "*aseh doheh lo ta'aseh*" —i.e., when a positive and a negative duty are in conflict and one or the other must be transgressed, priority is accorded to the fulfillment of the positive commandment.[39] Though R. Gutel does not convey to us his reasoning for invoking this principle, the teaching of Rabbi Joseph Nathanson is quite instructive in understanding R.Gutel's position. According to R. Nathanson,[40] the Jew who while performing a positive commandment simultaneously transgresses a negative commandment, does not intend to rebel against the *devar Hashem* but rather desires to discharge a positive commandment. Accordingly, there is no halakhic infraction. The halakhic weight accorded to a positive commandment which will suspend a negative commandment resonates in other areas of social interrelationships. As Rabbi Elhanan Wasserman observes,[41] "All the prohibitions between man and his fellow man are only prohibited if they entail wanton destruction . . . all these prohibitions are permitted for a beneficial purpose. . . ." In our situation, the *educator's intent* transforms a prohibited act of *havala* into a defined and regulated performance serving the educational goals of the Jewish community.

How does one define the parameters of this performance? The tension between these two commandments, *hinnukh* and *havala*, involves a quest for equilibrium which results in the talmudic articulation of a norm that essentially sanctions the use of reasonable and moderate force within the educational setting.[42] Is it a mandatory norm, i.e., a *hova*? Clearly, our analysis suggests that the talmudic norm of the practice of moderate corporal punishment in the school is permissive and hence discretionary, i.e., *reshut*.[43] In short, it is a *permissive norm*, in the sense that it is serves as an exception to the general prohibition against battery. Secondly, it is a *discretionary norm*. Though physical punishment is allowed in the classroom under certain prescribed conditions, a teacher is not mandated to employ force with his students.

Having defined the dialectical structure, and permissive and discretionary nature of this talmudic norm, we now can focus our attention upon the varying contemporary approaches which reflect a case study in the exercise of *halakhic discretion*. Discretion is the authority accorded by the halakhic system to each and every arbiter to choose among dif-

ferent possible solutions, each of the alternatives being legitimate. It is not being claimed that an arbiter is sometimes free to decide on the basis of a whim or bias. Neither is it being advanced that an arbiter is ever totally free from the control of authoritative standards and prescribed canons of interpretation of the decision making process which limit his discretion. Rather the claim is that the resolution of our issue is predicated upon the presence of a number of options, each of which will be legitimate in the framework of the system. Where discretion exists, it is as though the system is announcing to the decisor, "I have determined the contours of this talmudic norm (i.e., reasonable force in the school is permitted). From here on, it is for you, the arbiter, to determine the applicability of the talmudic norm, for I, the system, allow you, the arbiter, to choose." [44]

In our scenario, we have observed that the system defines the norm of the employment of physical punishment in the classroom as discretionary. In effect, the arbiter stands before two normative possibilities. The arbiter can either direct the teacher to utilize reasonable force in the classroom or instruct the teacher to refrain from using force. Each directive would be legitimate and would accord with the nature and the dictates of the talmudic norm.

How did the various contemporary decisors resolve our issue? For Rabbi Moshe Feinstein, prior to employing physical force, teachers ought to ask themselves these questions.[45]

1. What is my intent in administering this type of force?
2. To what am I responding?
3. What did I do?
4. Can this form of punishment resolve the situation?
5. Do I have any alternatives?

In short, three factors are relevant: the educator's intent in administering corporal punishment, the nature of the force, and the circumstances surrounding the situation.

The above questions delineate the broad parameters which determine the reasonableness of imposing corporal punishment. First, R. Feinstein contends, teachers can use physical punishment if their intention is to control, train or educate the student through the use of force.[46] In fact, there is evidence on record in the secular professional literature that physical force per se is not harmful and is effective under certain conditions.[47] However, if the administration of force is to express anger or frustration toward the student rather than motivated for educational

reasons, R. Feinstein concludes that the educator will be criminally liable for any assault.[48] Second, the nature of force utilized and the number of times the student is struck become relevant considerations in determining the reasonableness of the punishment being employed.[49] In fact, the scope of the teacher's privilege to use disciplinary force is more limited than the parental privilege.[50] Third, the student's age, physical condition, and developmental level ought to be factored into the equation.[51] Finally, for R. Feinstein, the strongest argument against the use of force is the availability of alternative methods of educational discipline. The administration of force is a last resort in disciplining a student.[52] Misbehavior can be prevented by appropriate verbal responses. For R. Feinstein, communications to the student must be consistent with the teacher's feelings. If teachers say one thing but convey something different with their tone or facial expressions, then the child receives a mixed message that is confusing. A teacher should communicate his message in a sincere and warm manner.[53]

Focusing upon talmudic dicta, reviewing and appraising all the arguments marshaled by his predecessors and then arriving at a cogent and persuasive position, R. Feinstein defines the parameters of this talmudic norm.[54] His position reflects an articulation of a standard that essentially defines the often thin line between acceptable and improper physical punishment and requires the use of force to be moderate rather than excessive. If implemented properly and only as a last resort, this standard provides a viable defense to teachers who use inconsequential force.[55] However, a teacher's privilege does not extend to instances of abuse or assault charges.[56]

A diametrically opposing position is suggested by Rabbi Hayim David Halevy. R. Halevy writes:[57]

> . . . everything is dependent upon the educational character of the individual, the locale, societal conditions and the like, and the use of physical force for education, even though it is halakhically permitted, may not achieve its purpose.

For R. Halevy, "societal conditions" can be invoked as a factor in rendering a decision. If these conditions reflect a disapproval of the use of force in an educational setting, R. Halevy posits, halakha ought to reflect the societal consensus regarding this matter.

Interestingly, Rabbi Samson Raphael Hirsch, a nineteenth century arbiter and educator, arrives at a similar conclusion, albeit from a different perspective. He observes:[58]

> We will be the last ones to recommend corporal punishment and we do not tend to agree with the opinion that a teacher who does not know how to control ongoing incidents in the school without meting out physical force is the appropriate teacher. This matter especially applies to parents. If the child conditions himself to his parental criticism due to his fear of the potential use of force . . . his ethical impulse will be compromised and will fail to be attentive to his teacher's directives. . . .

For R. Hirsch, tolerance for corporal punishment is a highly problematic stance. The practice impairs the halakhic sensitivity of the child. Utilizing his intellectual perceptions and without recourse to empirical evidence which indicates that the imposition of force promotes immoral behavior,[59] R. Hirsch opts for nonviolent alternatives for educating children. Both R. Hirsch and R. Halevy fail to endorse the employment of physical force in the classroom. Whereas for R. Hirsch, the power of the intellect (i.e., *sevara*) serves as the grounds for rendering his decision, R. Halevy utilizes societal reality as a factor in his halakhic calculus. In effect, the system allows each arbiter to choose between competing rationales (e.g., *sevara* vs. social realia) as grounds for declining to invoke the talmudic norm.

Is R. Halevy's approach innovative? It is important to recognize that this line of reasoning was adopted over seven hundred years ago, by Rabbi Asher b. Yehiel (Rosh) and Rabbi Moshe b. Nahman (Ramban). As the Ramban observes:[60] "Every man smites his son and strikes his student"; and the Rosh notes:[61] "In the manner that young children are physically punished and are pulled by their ears." In short, as R. Gutel concludes, for both the Rosh and the Ramban, social realia serve as admissible data for arriving at a decision.[62] Since, in their respective communities, the administration of force in the classroom was prevalent, therefore, these arbiters approved of the practice. On the other hand, due to the fact that the practice is socially incongruent with his times, R. Halevy opposes the continuance of this practice.

III

Our comparative examination of halakha and American law merits analysis in defining the role that social and moral norms must satisfy in each legal system if they are to figure in the calculus of judicial reasoning concerning an educator's employment of force in school.

American law has put its weight behind the social norm which con-

tinues to endorse this practice. The original social reality that gave rise to the legal norm, and upon which basis alone the norm continues to be defended, remains the underlying matrix of the legal norm. Presently, in the mind of the American courts, the social norm of condemning ostensibly unnecessary acts of violence either is incongruent with applicable policy or lacks the requisite social support to overturn the legal norm sanctioning the continuance of the practice. In the future, courts may take the lead by overturning this legal norm and establishing a new legal rule reflective of a changed social reality. For American law, the legal norm is predicated upon a given social reality. In the words of a contemporary scholar, "Legal norms are primary expressions of and means of reproducing the 'shared values' that function as the integrating glue in liberal societies, orienting everyone's highly differentiated tasks toward a set of common social purposes."[63] In short, the American legal system posits that this extralegal source is legally significant. Social realia are determinative in defining the content of a legal norm.

How do Jewish legal authorities understand the role of societal conditions in rendering a decision regarding this practice? Is community consensus self-validating? Are the Rosh's and Ramban's rulings simply a reflection of a particular historical situation, namely medieval societal approval of corporal punishment in school? Is Halevy's decision a legitimatization of a trend emerging from a particular cultural-socio context, i.e., contemporary communal disapproval of the use of physical punishment? Are the halakhic rulings regarding this matter contingent upon time and place, varying with the vicissitudes of historic exigencies and changing value perceptions? Does a particular arbiter's decision reflect an abrogation of a preexisting halakhic norm?

Upon careful analysis, our presentation would hardly call for such an unwarranted conclusion. Our examination indicates that the halakhic applicability or non-applicability of this practice is an issue resolved by a *decisor* rather than predetermined by socio-cultural reality. Secondly, it is the function of the halakhic system to provide the arbiter with normative guidance for addressing life situations. Halakha responds to the challenge in accordance with its own inner, immanent logic, on its own terms and on the basis of the prescribed methods, procedures, and canons of interpretation of its decision making process.

In our case, the talmudic norm is an *a priori* category posited by the system. It is the function of this norm to provide guidance. In our issue at bar, the talmudic norm is discretionary. The norm assumes pivotal significance allowing for two normative possibilities: the employment or

rejection of the practice of utilizing reasonable force within the framework of the classroom. Since inherently the norm is non-mandatory, the system allows the arbiter to decide whether to invoke the norm or not.

As we have shown, the grounds for the applicability or non-applicability of the talmudic norm among contemporary decisors are varied. Rejecting logic as a justification for refusing to invoke the norm, R. Halevy asserts that social realia are admissible data and serve as the grounds for refraining from applying the norm. On the other hand, according to R. Feinstein and other contemporary decisors,[64] given that the legitimacy of the use of moderate punishment in school is pursuant to the talmudic norm, buttressed by their understanding of the halakhic canons of interpretation and prooftexts regarding our issue—then in the absence of the efficacy of nonviolent alternatives for disciplining children, moderate force by the teacher is permitted in the classroom. In sum, for both arbiters the norm allows for varied and diametrically opposed positions. Throughout the decision making process the norm has neither been amended nor abrogated. It remains authoritative, offering guidance to each arbiter to arrive at his particular decision.

Hopefully, our study reflects an insight attributed to Rabbi Samson Raphael Hirsch. In homiletic fashion, R. Hirsch interprets the question "Have you established prescribed times for Torah?" (*Shabbat* 31a) in the following manner: Prior to entering the world-to-come, every Jew will be asked whether he has shaped the Torah to the times or the times to the Torah. Indeed, the Talmud's unequivocal response is that a Jew's responsibility is to shape the times by the Torah.

NOTES

1. See generally Paul Proehl , "Tort Liability of Teachers," 12 *Vanderbilt L. Review* 1449(1959); Note, "Corporal Punishment: For School Children Only," 27 *Drake L. Rev.*137 (1977-1978); Cynthia Sweeney, "Corporal Punishment in Public Schools: A Violation of Substantive Due Process?" 33 *Hastings L. Journal* 1245(1982); Nadine Block & Robert Fatham, "Convincing State Legislatures to Ban Corporal Punishment," 9 *Children's Legal Rights Journal* 21 (1988); Jerry Parkinson "Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That is Literally Shocking to the Conscience," 39 *South Dakota L. Rev.* 276(1994).
2. For a comprehensive treatment see Binyamin Shmueli, "Parental Corporal Punishment according to Mishpat Ivri- Traditional Approaches and Modern Trends" (Hebrew) 10 *Pelilim* 365(2001).

3. Each of the halakhic arbiter's positions is formulated in the form of a "*teshuva*," i.e., responsum. In our case, the various *teshuvot* are learned decisions in response to an inquiry rather than *bet din* rulings issued to litigants. Hence, our comparative study focuses upon the differences between the *learned decisions* among contemporary halakhic decisors and the *court rulings* in contemporary American law.

   For defining a *teshuva* as a learned decision rather than a beth din ruling, i.e., *psak din*, see R. Hayim Sans, *Teshuvot Divrei Hayim*, 2, *Hoshen Mishpat* no. 56. The halakhic ramifications of this conceptual distinction are beyond the scope of this essay.

   Secondly, the examination of certain contemporary substantive halakhic issues which emerge from our presentation is beyond the scope of this essay. See text accompanying notes 30, 34 & 55.
4. *Ingraham v. Wright*, 430 U.S. 651, 661 (1977). For an excellent critique of this decision, see Irene Rosenberg, "Ingraham v. Wright: The Supreme Court's Whipping Boy," 78 *Columbia L. Rev.* 75 (1978).
5. 59 *American Jurisprudence* 2d Parent & Child, Section 22 (1987); 89 *Annotated Law Reports* 2d 396, 412-413 (1963) and accompanying supplements; Sweeney, *supra* note 1, at 1247, note 17; Parkinson, *supra* note 1, at 279, notes 28 & 30; Dean Herman, "A Statutory Proposal to Prohibit the Infliction of Violence upon Children," 19 *Family L. Q.* 1, 13 (1985); Susan Bitensky, "Section 1983: Agent of Peace or Vehicle of Violence vs. Children," 54 *Oklahoma L. Rev.*333, 362 (2001).
6. A norm is expressive of the idea that an individual ought to behave halakhically(i.e., halakhic norm), legally (i.e., legal norm), morally (i.e., moral norm) or socially (i.e., social norm) in a certain way. Georg von Wright, *The Varieties of Goodness* (Routledge & Kegan: New York, 1963), 157-177; Joseph Raz, *The Concept of a Legal System* (Clarendon: Oxford, 1970), 44-6, 124. Whereas, halakhic norms are prescriptions of a specific course of action directed by a religious legal system, legal norms are directives of a secular legal system.

   For the diverse roles moral and social norms play within these two systems, see our ensuing discussion. For the court's task in implementation of the moral choices that people have made, see Joseph Raz, "Legal Principles & The Limits of Law," 81 *Yale L. J.* 823, 849 (1972);Laurence Tribe, "Structural Due Process," 10 *Harvard C.R. L. Rev.* 269, 304, 311-312 (1975); Neil MacCormick, *Legal Reasoning & Legal Theory* (Clarendon Press: Oxford, 1978), 187; Stanley Fiss, "Objectivity & Interpretation," 34 *Stanford L. Rev.* 739 (1982).

   Our citation of constitutional legal scholarship is a reflection of our acceptance of the school of thought that advocates the application of common law reasoning to constitutional provisions. In other words, constitutional interpretation with suitable modifications may shed light on common law interpretation. See Frederic Schauer, " Is the Common Law Law?," 77 *Calif.L. Rev.* 455, 470 (1989); Harry Wellington, *Interpreting the Constitution* (Yale: New Haven,1990)127; Laurence Tribe & Michael Dorf, *On Reading the Constitution* (Harvard: Cambridge,1991), 114-117.

For the *locus classicus* of the approach which insists that community consensus is not self-validating, see John Rawls, *A Theory of Justice* (Harvard:Cambridge, 1971). See also, Jeremy Waldron, "Theoretical Foundations of Liberalism," 37 *Phil.Q*. 127, 144-45(1987).

7. Joseph Raz, "Legal Rights," 4 *Oxford J. Leg. Studies* 1 (1984)
8. *Ibid*., at 660.
9. Peter Newell, *Children are People Too: The Case Against Physical Punishment* 21-32 (1989); Irwin Hyman, *Reading, Writing, & The Hickory Stick: The Apalling Story of Physical and Psychological Abuse in American Schools* 95, 100 (1990);Murray Straus & Denise Donnelly, *Beating the Devil Out of Them* (New York: 1994) 62-63, 81; David Orentlicher, "Spanking and Other Corporal Punishment of Children by Parents Overvaluing Pain, Undervaluing Children," 35 *Houston L. Rev.* 147, 156 (1998); Bitensky, *supra* note 5, at 364.
10. Leonard Eron, "Parent-Child Interaction, Television Violence, and Aggression of Children," 37 *Am Psychology* 197, 203 (1982) and Norma Feshbach, "The Effects of Violence in Childhood," 2 J. *Clinical* (1974). Others reject the correlation between aggressiveness toward children and aggressiveness by children toward others. See Bruce Perry, "Incubated in Terror: Neurodevelopmental Factors in the Cycle of Violence" in *Children in a Violent Society* (Joy Osofsky ed. 1997),124-126; Orentlicher, *supra* note 9, at 157-158; Bitensky, *supra* note 5, at 364; Herman, *supra* note 5, at 33-35.
11. Straus et al., "Spanking by Parents and Subsequent Antisocial Behavior of Children," 151 *Archives of Pediatrics & Adolescent Med.* 761, 764-767 (1997); Orentlicher, *supra* note 9, at 158-159.
12. Straus *et al*., *ibid*., note 11; Charles Greven, *Spare the Child: The Religious Roots of Punishment and the Psychological Impact of Physical Abuse* (New York, 1992),127-130; Orentlicher, *supra* note 9, at 156-157 Bitensky, *supra* note 5, at 364-365. However see David Benatar, "Corporal Punishment," 24 *Social Theory & Practice* 237, 243 (1998) critiquing Straus's conclusions that physical punishment can promote childhood depression; Bitensky, *supra* note 5, at note 199.
13. Herman, *supra* note 5, at 9; Straus, " Corporal Punishment by Parents" in *Debating Children's Lives* (Mason & Gambrill eds., 1994) 195, 197-203.
14. Parkinson, *supra* note 1, at 310-311; Bitensky, " Spare the Rod, Embrace our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children," 31 *U. Mich. J.L. Reform* 353, 464-473 (1998).
15. A.C. MacIntyre, "Hume on Is and Ought", W.D. Hudson (ed.), *The Is-Ought Question* (London, 1969); John Searle, "How to Derive Ought from Is" 73 *Philo. Rev*. 43 (1964); William Goodpaster, ed. *Perspectives on Morality: Essays of William K. Frankena* (Notre Dame: London, 1976), 133-147.

    For one of the most interesting critiques of Searle's stance, see Bernard Hare, "The Promising Game" in *Theories of Ethics* ed. Phillippa Foot (Oxford University:Oxford, 1967), 115-27.
16. *Tropp v. Dulles*, 356 U.S.86, 101 (1958). Upon the basis of this approach, the Supreme Court in *Tropp v. Dulles* was extremely cautious in not extend-

ing the eighth amendment prohibition of " cruel and unusual punishment " to encompass imposing physical force upon public school children.

17. Arthur Lovejoy & George Boas, *Primitivism and Related Ideas in Antiquity* (Baltimore, MD, 1935),1; see also J.B. Bury, *The Idea of Progress: An Inquiry into its Origin and Growth* (Dover: N.Y., 1955) 2; Charles van Doren, *The Idea of Progress* (Praeger: N.Y. , 1967).
18. The classic works include Max Weber, *Economy & Society* (Roth & Wittich eds. 1968); Henry Maine, *Ancient Law* (Oxford: London, 1931); Benjamin Cardozo, *The Growth of the Law* (Yale:New Haven, 1924).

    For an implicit critique of this approach, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buffalo L. Rev.* 205 (1979) and Frances Olsen, *The Family and the Market*, 96 Harvard L. Review 1497 (1983). As Ruth Macklin observes, "it is wholly uncontroversial to hold technological progress has taken place; largely uncontroversial to claim that intellectual and theoretical progress has occurred; somewhat controversial to say that aesthetic or artistic progress has taken place; and highly controversial to assert that moral progress has occurred." Macklin, "Moral Progress," 87 *Ethics* 37 (1977).
19. Nat'l Coalition to Abolish Corporal Punishment in Schools, Corporal Punishment Fact Sheet 1 (1993); Herman, *supra* note 5, at 13-14; Block & Fatham, *supra* note 1, at 23.
20. Sweeney, *supra* 1, at 1283; Herman, *supra* 5, at 1; Orentlicher, *supra* note 9, at 185.
21. Herman, *supra* note 5, at 12; Orentlicher, *supra* note 9 at 151.
22. Johnson, "Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse," *University of Illinois L. Rev.* 413 (1998).
23. Straus, et al., "Spanking by Parents & Subsequent Antisocial Behavior of Children," 151 *Archives of Pediatrics & Adolescent Medicine* 761 (1997); Orentlicher, *supra* note 9, at 160.
24. The court's task to convert conventional morality into a legal rule assumes the existence of a uniform set of beliefs about what values should be protected. Clearly, our issue shows the difficulty with adopting this approach. See Wellington, *supra* note 6, at 284; John Ely, "Foreword: On Discovering Fundamental Values," 92 *Harvard L. Rev.* 5, 49-52 (1978); Andrew Lupu, "Untangling the Strands of the Fourteenth Amendment," 77 *Mich.L. Rev.* 981, 1047 (1979); Kathleen Sullivan, "Rainbow Republicanism," 97 *Yale L. J.*1713, 1722-23(1988).

    For other difficulties with this approach, see Paul Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," 90 *Yale L. J* 1063, 1083(1981).
25. Melvin Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard, 1988), 19. According to Eisenberg, law is simply reflective of social and moral norms rather than moving progressively along some uniform evolutionary path toward which societies tend to move (either as a descriptive or prescriptive matter).

    See also Wellington, *supra* note 6, at 284-285; Michael Perry, "Abortion, The Public Morals, & the Police Power: The Ethical Function

of Substantive Due Process," 23 *U.C.L.A.* 689, 716, 727-728, 730-731 (1976).

26. Sweeney, *supra* note 1, at 1254-1255; Orentlicher, *supra* note 9, at 148.
27. See note 26.
28. For the authoritativeness of Talmudic rulings dating from the Geonic period to contemporary times, see *Teshuvot Geonim*, Harkavy ed., no. 349;R. Avraham Ibn Daud *Sefer ha-Kabbalah*, ed. Cohen (JPS: Philadelphia, 1967), 59; *Rambam, Introduction to the Mishneh Torah*, Mossad ha-Rav Kook ed., 11; R. Moshe Schick, *Teshuvot, Maharam Schick*, *Yoreh De'a* 115:3; R. Elhanan Wasserman, *Kovets Shiurim*, vol. 2, 82; Wasserman, *Kovets Inyanim*, 194-195,199; R. Abraham Karelitz, *Kovets Iggerot Hazon Ish* vol. 1, Letter 15; R. Ovadia Yosef, *Teshuvot Yabia Omer* 2: *Even ha-Ezer* no. 7.
29. *Makkot* 26a-27b. Though the focus of our presentation is upon developing the position of contemporary authorities regarding our topic, nevertheless, in our endnotes we will allude to earlier decisors who affirm the talmudic norm.

    Some decisors maintain that in certain cases of accidental damage, the injured party has no cause of action. See *Tosafot Bava Kamma* 27b; R. Shabbetai Rappaport, *Shakh, Shulhan Arukh Hoshen Mishpat* 378: 2.
30. *Makkot* 8b. See *Rambam, Hilkhot Deot* 6:10; *Rambam, Hilkhot Rotse'ah u-Shemirat ha-Nefesh* 5:6; *Hasdei David, Tosefta Bava Kamma* 9:11; R. Yehezkel Abramsky, *Hazon Yehezkel, Bava Kamma* 9:11; R. Eliyahu of Vilna, *Mishlei* 13:24; R. Yaakov Reicher, *Teshuvot Shevut Yaakov, Hoshen Mishpat* 3:140; R. Joseph Franco, *Teshuvot Shaarei Rahamin, Hoshen Mishpat* no. 7; R. Gershon Koblenetz, *Teshuvot Kiryat Hanna* no. 22.

    Others reject "*mitsva*" as the underlying rationale for a teacher's exemption from liability. See *Teshuvot Ramats , Hoshen Mishpat Hashmotot* 11.
31. *Ketubot* 50a; *Gittin* 31a, 36a; *Bava Batra* 21a*; Makkot* 16b; *Bekhorot* 46a; *Yerushalmi Moed Katan* 3:1. See Rambam, *Hilkhot Talmud Torah* 2:2; R. Joseph Karo, *Shulhan Arukh*, *Yoreh De'a* 245:9. For termination of teacher's employment due to meting out unreasonable punishment of students, see *Teshuvot Geonim, Geonica*, part 2, p. 119.
32. *Tosefta Bava Kamma* 9:11.
33. *Rashi, Makkot* 8a; *Mei'ri, Bet ha-Behira, Makkot* 8a; *Rambam, Hilkhot Deot* 6:10; R. Aaron ha-Levi, *Sefer ha-Hinnukh*, *Mitsva* no. 595.
34. *Makkot* 8b. *Tosafot, Makkot* 8b*; Hiddushei Ramban, Makkot* 8b. Does a teacher's obligation to mete out corporal punishment stem from his educational role or in his capacity as a committed Jew discharging a duty to prevent other fellow Jews from transgressing halakha? If the teacher's exemption is based upon the *mitsva* of "*tokhaha*," according to certain decisors , every Jew is allowed to administer physical punishment in order to prevent a Jew from committing a transgression ("*le-afrushei me-isura*"). See R. Asher b. Yehiel, *Piskei ha-Rosh Bava Kamma* 3:13; R. Shlomo Luria, *Yam Shel Shlomo, Bava Kamma* 3:9; R. Mordecai Jaffe; *Levush, Shulhan Arukh, Hoshen Mishpat* 421:13; *Teshuvot Maharam Lublin* 13; R. Raphael Hazzan, *Teshuvot Hikekei Lev, Orah Hayyim* no. 19. Compare R. Aryeh Heller, *Ketsot, Meshovev Netivot, Hoshen Mishpat* 3:1; R. Meir ha-Kohen, *Or*

Sameah, Hilkhot Mamrim 4:3; R. Naftali Berlin, *Ha'amek She'elah* no. 27.

However, according to other authorities, only a Jew who stands in a relationship to the transgressor (e.g., spouses) can employ such punishment. See R. Yisrael Isserlein, *Teshuvot Terumat haDeshen* no. 218; R. Moshe Isserles, *Rema, Shulhan Arukh Hoshen Mishpat* 421:1. This conclusion will apply equally by analogy to the teacher-student relationship. See *Shevut Yaakov*, *supra* note 30.

Whether there exists a contemporary halakhic obligation to secure compliance to *mitsvot* through the use of physical coercion is beyond the scope of this presentation.

35. In *Makkot* 8b, there emerges the dictum of Raba which introduces a ruling that seems to be at variance with the accepted norm outlined in our presentation. According to Raba, corporal punishment serves as a means of educating studious children. See *Iggerot Moshe, Yoreh De'a* 2:103; R. Hayim Sonnenfeld, *Teshuvot Shalmas Hayim*, no. 352; R. Abraham ha-Levi, *Teshuvot Evan Hain*, p.246.
36. *Bava Kamma* 90b; *Sanhedrin* 58b.
37. R. J. David Bleich, "Privileged Battery," 27 *Tradition* (Spring 1993) 72, 73; Shmueli, *supra* note 2, at 382-386; Yehiel Kaplan, "The New Trend in Corporal Punishment of Children for Educational Reasons" (Hebrew), 3 *Kiryat Hamishpat* 447, 478 (2003).
38. See note 36; *Nishmat Abraham* 3: *Hoshen Mishpat*, 424:7.
39. Gutel, "He Who Spares his Stick, Hates his Son" (Hebrew), *Shana b'Shana* 169, 180(5762). R. Gutel's exact words are that "every permissive assault . . . is akin . . . " to this principle.

    For another contemporary solution, see R. Yitzchok Weiss, *Teshuvot Minhat Yitshak* 3:105.
40. *Teshuvot Sho'el u-Meshiv, Mahadura Tinyana*, 1:95.

    For other rationales for this principle see *Ramban al ha-Torah*, *Exodus* 20:8 and R. Hayim Medini *Sedei Hemed*, *Kelalim, Ma'arekhet* 70, *Kelal* 41. Although the Rashba does not invoke the principle of "*aseh doheh lo ta'aseh*" in explaining the basis for a teacher's exemption from liability in our situation, nevertheless, he similarly observes: ". . . these matters are simple: he intends to fulfill a *mitsva* . . . and everything follows the motivation. . . ." (R. Shlomo ben Aderet, *Teshuvot ha-Rashba* 1:534).
41. R. Wasserman, *Kovetz Haarot*, *Yevamot* 70. A similar opinion is also advanced by Rabbi Sherman, 16 *Tehumin* 160, 164 (5756) and 20 *Tehumin* 353, 362 (5760), who cites this view as earlier expressed by R. Wasserman. Cf., however, the *Meiri, Bet ha-Behira*, *Bava Batra* 16a, *R. Yona, Shaarei Teshuva* 3:85, and others who persuasively argue that there are exceptions to this principle. Cf. Hatam Sofer, *Kovets ha-Teshuvot*, no. 7.

    For the role of "*motivation*" in the non-applicability of the prohibition of *havala* in other matters, see *Shulhan Arukh Hoshen Mishpat* 421:13; R. Yehoshua Falk, *Sema, Shulhan Arukh Hoshen Mishpat* 421:28; *Yam Shel Shlomo, Bava Kamma* 3:27; R. Abraham Borenstein, *Teshuvot Avnei Nezer, Yoreh De'a* no.321; *Iggerot Moshe, Hoshen Mishpat* 1: 103, 2:66; R. Mordecai Breisch, *Teshuvot Helkat Yaakov* 3:11; *Teshuvot Minhat Yitshak* 6:105; R. Menashe Klein, *Teshuvot Mishne Halakhot* 4:246-247; R.

Shlomo Z. Urbach, *Nishmat Abraham, Yoreh De'a*, 349: 3-4.

42. See note 31.
43. The Talmudic terminology is "*muttar*" (permitted). See *Makkot* 8b. In fact, in subsequent generations, the terminology of "*muttar*" and "*rashai*" (allowed) is utilized. *Rambam, Hilkhot Deot* 6:1*; Terumat haDeshen*, *supra* note 34; *Hikekei Lev*, *supra* note 34; *Sedei Hemed*, *Kelalim, Ma'arekhet* 6, *Kelal* 26, subsection 14, s.v. *od katav*.
44. For the suggested conceptual framework for defining judicial discretion, see Aharon Barak, *Judicial Discretion* (Yale: New Haven, 1989), 7-15. Discretion presupposes a zone of possibilities, each of which is legitimate in the context of the system. In our case, the arbiter may choose either to refrain from endorsing corporal punishment or may sanction the use of reasonable force in the classroom. Beyond this zone of legitimacy, the arbiter has no *judicial* discretion.

    Nevertheless, to promote the use of nonviolent methods of school discipline in society, a decisor is *legislatively* empowered based upon "*le-migdar milta*" (lit., to safeguard the matter) to award medical expenses to an injured student in cases of the teacher's employment of reasonable force. See *Shevut Yaakov*, *supra* note 30; *Teshuvot Orhot Yosher* 2, *Hoshen Mishpat* no.7.
45. The series of five questions has been constructed by this writer based upon R. Feinstein's standard for school discipline as set forth in his responsa.
46. *Iggerot Moshe, Even ha-Ezer* 3:40*; Yoreh De'a* 2: 103, 106.
47. Orentlicher, *supra* note 9, at 159; Herman, *supra* note 5, at 27. For recent studies demonstrating positive results from spanking, see *Pediatrics* 98:4, October 1996, Supplement.
48. For his recognition of the permissive nature of the norm and the articulation of the standard, see *Iggerot Moshe, Yoreh De'a* 1: 140; 2:103; *Even ha-Ezer* 4:68.
49. *Iggerot Moshe, Yoreh De'a* 3:76; 4:30.
50. *Ibid.,* 1:140; 4:30; *Even ha-Ezer* 4:68.
51. *Ibid.,* 1:140; 2:8; 4:30.
52. *Ibid.,* 1:140.
53. *Ibid.,* 4:30.
54. See his responsa cited in notes 46-53. Additionally, see "Responsa of R. Moshe Feinstein" in Eli Munk, *Reward and Punishment in Education* (Hebrew), (Hamesorah: Bnei Brak, 5742), 107-110; *Iggerot Moshe, Hoshen Mishpat*, 1:3.
55. *Iggerot Moshe*, *Yoreh De'a* 1:140. Whether the teacher would be liable based upon other halakhic principles such as "*dina d'malkhuta dina* " (lit. the law of the land is law) is beyond the scope of this presentation.
56. *Iggerot Moshe*, *Even ha-Ezer* 4:68; *Yoreh De'a*, 4:30.
57. Halevy, *Aseh Lekha Rav* 1:76. See also, Halevy, *Kitsur Shulhan Arukh Mekor Hayim*, Shaar 6, Chapter 126, subsection 14; *Mekor Hayim ha-Shalem*, vol. 5, 251:20. See Shmueli, *supra* note 2, at note 218.
58. Hirsch, *Yesodot ha-Hinnukh* (Netzah: Tel Aviv, 1948) 2:65. See Shmueli *supra* note 2, at note 223. For a similar conclusion advanced in the name of R. Hayim Volozhin, see R. Yitzchok Levy, 17 *Tehumin* 157, 158(5757).

Though the focus of our essay is on the position of contemporary decisors, nevertheless, we have briefly focused on the views of earlier decisors such as R. Hirsch, R. Asher b. Yehiel and R. Moshe b. Nahman in order to compare R. Halevy's posture with their positions. See text accompanying notes 58, 60 & 61.

59. Orentlicher, *supra* note 9, at 158-159.
60. *Milhamot ha-Shem*, *Bava Kamma* 87b.
61. *Piskei ha-Rosh, Moed Katan* 3:94.
62. Gutel, *supra* note 39, at 174.
63. Robert Gordon, "*Critical Legal Histories*," 36 *Stanford L. Rev.* 57, 93 (1984).
64. *Mishna Berura*, *Shulhan Arukh Orah Hayim* 343:1 & 551:103; R. Abraham Sherman, 16 *Tehumin* 160 (5756); Shmueli, *supra* note 2, at 418-419, note 190.

NOTE: PARENTAL CORPORAL PUNISHMENT

The suggestion has been advanced (see Gutel, *supra* note 39, at 183-187) that the controversy between R. Yehiel Weinberg (*Teshuvot Seridei Esh* 3:95) and R. Eliyahu Dessler *(Mikhtav me-Eliyahu*, Bnei Brak, 5724, 3: 360-362) hinges upon the acceptability of factoring modern psychological findings into a halakhic decision.

According to R. Weinberg, these data are relevant considerations in arriving at a decision. However, for R. Dessler, only "the words of *Hazal, rishonim* and *minhagei Yisrael*" (lit. the words of our sages, early decisors and Jewish customs) serve as ingredients in rendering a decision.

A careful reading of their positions leads us to a very different conclusion. Pursuant to the halakhic norm, parents are permitted to employ force upon young children. However, there is a prohibition to impose this type of punishment upon older children (*Moed Kattan* 17a; for an exhaustive list of authorities who subscribe to this talmudic norm see *Evan Hain*, *supra* note 33, at 217-223).

In his responsum, dealing with a delusional older child (15-16 years) possessed by legerdemain, R. Weinberg advises the parents to follow modern pedagogical directives and employ nonviolent forms of discipline to modify their son's behavior. Clearly, R. Weinberg's mention of professional findings was simply advanced in order to show the psychological soundness of the *preexisting* halakhic norm which prohibits the use of force with older children. His use of psychology is expository, i.e., to probe the profundities of the norm.

Similarly, in his discussion dealing with the privilege of employing force with young children, R. Dessler argues vehemently for legitimating the practice of corporal punishment based upon the teachings of the Jewish tradition. (In addition to R. Dessler's reliance on the teachings of the Gra and Luzzato, there are ample aggadic sources which embrace his position ; see *Evan Hain*, *supra* note 35, at p. 250.) Here again, the

decisor is utilizing the wisdom of our Jewish ethical traditions rather than modern psychological data *for heuristic purposes* to explain the cogency of the halakhic norm. Neither R. Dessler nor R. Weinberg is addressing our question of the admissibility of non-halakhic sources as a *factor* in rendering a decision.

NOTE: 5749 "KOL KOREH" OF ISRAEL'S CHIEF RABBINATE REGARDING PARENTAL CORPORAL PUNISHMENT

On the fourth day of Adar 1 5749, the former Chief Rabbis of Israel, R. Abraham Shapiro and R. Mordechai Eliyahu issued the following "*kol koreh*" (i.e., proclamation):

> In the last few years, there have been numerous reported incidents of physical punishment of children and even physical abuse. . . . We shudder that the phenomenon is occurring among our Jewish brethren; that parents and adults will exploit their power and their family position against babies and young children . . . those parents who encounter difficulties in child-rearing and therefore resort to force and emotional abuse should turn to counseling for proper guidance . . . in child rearing.

(Z. Heilbaron, 46 *Safra le-Saifa*, 79, 92[5754], Kaplan, *supra* note 37, at note 149.)