

STUDIES IN LAW, POLITICS, AND
SOCIETY

STUDIES IN LAW, POLITICS, AND SOCIETY

Series Editor: Austin Sarat

Recent Volumes:

Volumes 1–2: Edited by Rita J. Simon

Volume 3: Edited by Steven Spitzer

Volumes 4–9: Edited by Steven Spitzer and Andrew S. Scull

Volumes 10–16: Edited by Susan S. Sibey and Austin Sarat

Volumes 17–33: Edited by Austin Sarat and Patricia Ewick

Volumes 34–77: Edited by Austin Sarat

Volume 78: Edited by Austin Sarat

STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 79

STUDIES IN LAW, POLITICS, AND SOCIETY

EDITED BY

AUSTIN SARAT

*Department of Law, Jurisprudence and Social Thought, and
Political Science, Amherst College, USA*



United Kingdom – North America – Japan
India – Malaysia – China

Emerald Publishing Limited
Howard House, Wagon Lane, Bingley BD16 1WA, UK

First edition 2019

Copyright © 2019 Emerald Publishing Limited

Reprints and permissions service

Contact: permissions@emeraldinsight.com

No part of this book may be reproduced, stored in a retrieval system, transmitted in any form or by any means electronic, mechanical, photocopying, recording or otherwise without either the prior written permission of the publisher or a licence permitting restricted copying issued in the UK by The Copyright Licensing Agency and in the USA by The Copyright Clearance Center. Any opinions expressed in the chapters are those of the authors. Whilst Emerald makes every effort to ensure the quality and accuracy of its content, Emerald makes no representation implied or otherwise, as to the chapters' suitability and application and disclaims any warranties, express or implied, to their use.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

ISBN: 978-1-78973-728-8 (Print)

ISBN: 978-1-78973-727-1 (Online)

ISBN: 978-1-78973-729-5 (Epub)

ISSN: 1059-4337



ISOQAR
REGISTERED

Certificate Number 1985
ISO 14001

ISOQAR certified
Management System,
awarded to Emerald
for adherence to
Environmental
standard
ISO 14001:2004.



INVESTOR IN PEOPLE

CONTENTS

<i>List of Contributors</i>	vii
<i>Editorial Board</i>	ix

SECTION I LAW AND RELIGION

For God’s Sake, Don’t Segregate! Two Kinds of Religious Schools and Equality in Education <i>Tammy Harel Ben Shahar</i>	3
“Honorable Religious Premises” and Other Affronts: Disputing Free Exercise in the Era of Trump <i>Jenna Reinbold</i>	31
An Uneasy Encounter: Male Circumcision, Jewish Difference, and German Law <i>Mareike Riedel</i>	55
Religious Accommodation in the Secular State: The Sharia Debates in Australia, Canada, and the United Kingdom <i>Amira Aftab</i>	85

SECTION II LAW AND SOCIAL CHANGE: OLD QUESTIONS, NEW ANSWERS

How Legal Intermediaries Facilitate or Inhibit Social Change <i>Shahin Talesh and Jérôme Pélisse</i>	111
The Politics of Litigation <i>Jeb Barnes</i>	147
Prosecuting and Partnering for Social Change: Law, Social Movements and Australia’s Mandatory Detention for Refugees and Asylum Seekers <i>Jennifer Balint</i>	169

This page intentionally left blank

LIST OF CONTRIBUTORS

<i>Amira Aftab</i>	Macquarie Law School, Macquarie University, Australia
<i>Jeb Barnes</i>	Department of Political Science, University of Southern California, USA
<i>Jennifer Balint</i>	School of Social and Political Sciences, The University of Melbourne, Australia
<i>Tammy Harel Ben Shahar</i>	Faculty of Law, University of Haifa, Israel
<i>Jérôme Pélisse</i>	Center for Sociology of Organization (CNRS), Sciences Po Paris, France
<i>Jenna Reinbold</i>	Department of Religion, Colgate University, USA
<i>Mareike Riedel</i>	Max Planck Institute for the Study of Religious and Ethnic Diversity, Germany
<i>Shahin A. Talesh</i>	School of Law, University of California Irvine, USA

This page intentionally left blank

EDITORIAL BOARD

Gad Barzilai
Department of Political Science, Tel Aviv University, Israel

Paul Berman
School of Law, George Washington University, USA

Roger Cotterrell
Department of Legal Theory, Queen Mary College, University of London, UK

Jennifer Culbert
Department of Political Science, Johns Hopkins University, USA

Eve Darian-Smith
Department of Global Studies, University of California, Santa Barbara, USA

David Delaney
Department of Law, Jurisprudence, and Social Thought, Amherst College, USA

Florence Dore
Department of English, University of North Carolina, USA

David Engel
School of Law, State University of New York at Buffalo, USA

Anthony Farley
School of Law, Albany Law School, USA

David Garland
School of Law, New York University, USA

Jonathan Goldberg-Hiller
Department of Political Science, University of Hawaii, USA

Laura Gomez
School of Law, University of California, Los Angeles, USA

Piyel Haldar
Department of Law, Birkbeck College, University of London, UK

Thomas Hilbink
Open Society Institute, USA

Desmond Manderson
Department of Law, Australian National University, Australia

Jennifer Mnookin
School of Law, U.C.L.A., USA

Laura Beth Nielsen
Research Fellow, American Bar Foundation, USA

Paul Passavant
Department of Political Science, Hobart and William Smith College, USA

Susan Schmeiser
School of Law, University of Connecticut, USA

Jonathan Simon

*Department of Jurisprudence and
Social Policy, University of
California, Berkeley, USA*

Alison Young

*Department of Criminology,
University of Melbourne, Australia*

Marianna Valverde

*Department of Criminology,
University of Toronto, Canada*

SECTION I
LAW AND RELIGION

This page intentionally left blank

FOR GOD’S SAKE, DON’T SEGREGATE! TWO KINDS OF RELIGIOUS SCHOOLS AND EQUALITY IN EDUCATION

Tammy Harel Ben Shahar

ABSTRACT

Legal and philosophical scholarship on religious education typically focuses on religious schools that challenge core liberal values. Religious schools that offer their students quality secular education, and whose religious character is mild, do not raise these concerns and have therefore evaded scrutiny thus far. This chapter argues that the latter kind of religious schools, which I call “creaming religious schools,” may have a negative effect on educational equality and should therefore be subject to restrictive legal regulation. The negative effect on equality is caused by the fact that when successful, these schools appeal not only to members of the religious community but also to non-member high-achieving students who leave the public schools (a process called creaming) thus weakening them. The chapter argues that the harm caused to public schools cannot be redeemed by alluding to the right to religious education because the religious justification for creaming religious schools is relatively weak. The chapter then examines several potential legal measures for contending with creaming religious schools: the antidiscrimination doctrine, which the chapter rejects, showing that it actually aggravates creaming, locating schools in disadvantaged neighborhoods, restricting tuition, reflective enrollment policy, and finally, the total prohibition of establishing creaming religious schools.

Keywords: Religious education; educational equality; liberal education; discrimination; education law; segregation

INTRODUCTION

The rich discussion concerning religious education usually focuses on the content and scope of the parental right to direct the upbringing of their children and the duty the state has regarding the education of religious children. This lively debate is driven primarily by the concern that schools that serve religious communities, and especially anti-liberal religious minorities, will fail to supply children with the education they need in order to become autonomous, self-sufficient, and tolerant members of society in a modern liberal state. Framed this way, religious schools that provide adequate secular education and endorse liberal values seem to raise no concerns, and should be allowed to operate uninterrupted, and possibly even be supported by the liberal state.

This article disputes this stance and argues that religious schools that provide satisfactory secular education, prepare their students for higher education and instill democratic civic values may create a separate category of worries – related to equality – that justify state intervention.

Empirical evidence shows that in recent years, religious schools in many democratic countries are gradually losing their religious distinction and are increasingly becoming a means of gaining educational advantage. As a result, religious schools are attracting high-achieving students, some of whom are not members of the religious community that established the schools. These advantaged students leave public schools, in a process called “creaming.” Creaming harms public schools and the students that remain in them because students’ achievements depend, among other things, on the educational abilities of their peers. Creaming also results in the student bodies of public schools being composed of a higher proportion of students from disadvantaged backgrounds, students who are not native language speakers and disabled students, all of whom are more expensive to educate.

Not all religious schools cause this effect. There is, I argue, an inverse relationship between the strength of the religious character of the school and the extent to which it creates these processes. The more robust the religious education, pervading all classes, activities, and the school’s atmosphere, the less likely the school is to appeal to a broader population of students and thus to infringe upon equality in education. In order to demonstrate this claim, I distinguish between two kinds of religious schools that are located at two ends of a continuum of religious schools.

The first kind of school, which I call *non-creaming religious schools*, consists of schools that provide robust religious education that differs substantially from that of public schools, in content, values, and atmosphere and often does not fully prepare its students for successful participation in modern society. These religious schools are the archetypical kind of religious schools that philosophers and legal scholars have in mind when engaging in the debates mentioned above concerning civic education. They are highly valued by members of their community, as they offer education that is completely different from that provided by public schools and as a result are sometimes perceived as a threat to the liberal state. Yet while they raise concerns pertaining to their ability to prepare students

for participation in the workforce and civic life, they do not create the distributive justice concerns caused by creaming.

What I call *creaming religious schools*, in contrast, are religious schools that offer quality secular education in addition to their religious education. They grant their students all the credentials and skills that traditional public schools do, while their religious characteristics are relatively mild. These schools, when successful, appeal not only to members of the specific religious community but also to high-achieving students from outside this religious community, who would otherwise attend traditional public schools. Losing advantaged students weakens traditional public schools and causes a decline in their student's educational achievements. Because they do not raise the aforementioned liberal concerns, creaming religious schools have, for the most part, evaded philosophical and legal criticism.¹ In this article, I argue that when religious schools cream, state intervention is justified in order to prevent the negative effects they have on educational equality.

Creaming religious schools need to be distinguished not only from non-creaming religious schools. Creaming religious schools also differ, in the normative considerations that apply to them, from creaming secular schools (most typically prestigious private schools). Creaming secular schools have negative effects on educational equality, and therefore, some scholars argue that they should be restricted (Swift, 2003). The argument I present concerning creaming religious schools endorses this argument and aims to apply it to the case of creaming religious schools. This application, however, is not straightforward and requires a separate justification. The parental right to religious education justifies distinguishing between creaming religious and secular schools and arguably offers religious schools protection from state intervention that secular schools do not have.

In response, I show why the religious justification for creaming religious schools is especially weak and cannot override the egalitarian challenges. First, only members of the religious community can rightfully espouse the religious justification, and creaming religious schools often have large shares of non-member students. Second, their relative similarity to public schools and the nature of their remaining uniqueness suggest that they are not crucial for realizing the right to religious education. As a result, I conclude that when these schools negatively affect other schools, the religious argument in their favor cannot redeem the inequality they create.

Law has a central and unexpected role in the development and thriving of creaming religious schools. Various legal systems have instituted antidiscrimination rules that do not allow religious schools to consider the applicant's religion in their admission policies. In order to accommodate students who do not belong to the relevant religious denomination, antidiscrimination rules are usually accompanied by rules making all religious activity at school elective. While this seems, at first glance, an effective way of contending with inequality caused by creaming religious schools, antidiscrimination rules, in fact, exacerbate the problem. They facilitate the entry of non-member students into creaming religious schools, making the choice of religious schools a means to gain educational advantage rather than a way to realize religious convictions.

Therefore, antidiscrimination rules should be replaced by other means of regulation that are better suited to contend with the special challenge of creaming.

The chapter proceeds as follows. First, I offer a short description of peer effects and creaming, the educational processes that underlie the arguments in the chapter. Then I present the category of non-creaming religious schools and demonstrate it using the examples of Amish one-room schools in the US and Israeli ultra-orthodox schools. I move on to describe the phenomenon of creaming religious schools and how they become a vehicle for social exclusion. The examples in this section include Catholic schools in France, religious charter schools in the US, and *Torani* schools in Israel. After completing the descriptive analysis, the chapter moves on to the normative argument according to which creaming religious schools should be restricted. Finally, the chapter discusses law's role in aggravating inequality in the case of creaming religious schools and suggests possible legal measures that may be more effective in contending with the challenges that creaming religious schools pose to educational justice.

PEER EFFECTS AND CREAMING

Student composition is an important factor in determining the quality of education offered in any given school. Education is a unique good, in which the outcome depends, among other things, on the identity of the consumers. Studying in a class with bright and motivated peers, who cultivate academic aspirations and contribute their cultural capital, improves student achievement (Orfield & Lee, 2005). Some researchers argue that taken alone the peer group is the most influential factor in educational outcome (Johnson, 2000; Zimmer & Toma, 2000). Peer effects can explain, in part, why students' achievements are higher in private schools that group together high-achieving students than in schools that do not (Lubienski & Thuele Lubienski, 2014). Correspondingly, concentrating children with low abilities in one school causes negative peer effects that decrease their educational achievement.

There is also substantial evidence according to which the academic attainment of students from affluent families is higher, on average, than that of students from low-income families (Kahlenberg, 2001; Rothstein, 2004; Rumberger & Palardy, 2005) as a result of various environmental factors such as adequate nutrition and health care, and the amount and quality of interactions with parents (Ermisch, Jantti, & Smeeding, 2012; Lareau, 2003; Ross & Kena, 2012).

What follows from the correlation between socioeconomic status and educational ability is that grouping together students according to their social class (e.g., in neighborhood schools when neighborhoods are socioeconomically segregated, or by charging high tuition) also entails grouping together students according to their academic ability. Similarly, schools that select their students according to seemingly neutral academic qualifications (or practices such as ability grouping) are likely to result in homogeneous student bodies (Cipriano-Walter, 2016; Greene, 2014; Losen, 1999; Oakes, 1995). This separation further

compromises the educational opportunities of children of lower socioeconomic classes. Negative peer effects combine with their family background in curtailing the development of their abilities.

The disadvantages caused by social segregation are even more pervasive. Schools that serve advantaged students attract better teachers, whereas the schools that serve disadvantaged children are usually staffed by less professional teachers (Frankenberg, 2009; Peske & Haycock, 2006); and schools that serve advantaged children also benefit from the involvement of parents, who tend to contribute more resources and time the more advantaged they are (Hickman Wehlburg, Greenwood, & Miller, 1995). As a result, social segregation short-changes children from disadvantaged background and restricts their access to resources crucial to their success.

Creaming leads to segregation, as it results in concentrating high-achieving and motivated students from advantaged families in prestigious (and often selective) schools. When these children are withdrawn from public schools, the latter are depleted of advantaged children and of the resources they bring with them. Disadvantaged children, who cannot access prestigious schools, remain in these public schools that now offer education of poorer quality.² The deterioration of the public school induces even more students to leave until eventually only the most disadvantaged students who are unable to leave remain.

Various factors enable schools to cream. First, in order to cream, schools must be attractive to parents, offering advantages such as better test scores; a better track record in graduates' placements in college; better facilities; more options for advanced placement (AP) courses or college prep programs; better qualified teachers and lower teacher–student ratios; ample educational resources for supplies, field trips, labs, and technology; a safe and pleasant environment; and, importantly, high-ability peers.

Most of the factors that account for schools' positive reputations can be reduced to two main advantages: financial (which can ensure a rich curriculum, qualified teachers, better facilities) and student composition. When a school's prestige is related to test scores and Ivy League placement, the schools are, in part, enjoying the benefits of having advantaged children among their students. Student composition also affects violence rates and the quality of teachers (Peske & Haycock, 2006).

While private schools are the paradigmatic examples of creaming schools, enjoying both financial advantages and privileged student bodies, creaming can also occur in public schools. Public schools that charge fees or have enrollment policies that include exams, essays, or interviews also engender socioeconomic segregation (Finn & Hockett, 2012). Even when formal barriers such as fees and selective enrollment policy do not exist, several mechanisms work together to make prestigious public schools more accessible to children from privileged backgrounds. They may offer curricula that are more attractive to advantaged parents; they may be located in affluent neighborhoods; or the admission process may be complicated. Finally, disadvantaged families might forego the best educational possibilities because they lack the sense of entitlement required to

enroll, and they fear their children might not fit in socially (Fuller & Elmore, 1996; Ladd, Clotfelter, & Holbein, 2015; Whitty, 1997).³

NON-CREAMING RELIGIOUS SCHOOLS

General

Given certain conditions, creaming will occur also in religious schools. Not all religious schools, however, create these conditions. *Non-creaming religious schools* offer a comprehensive and robust religious education; their curriculum and the values they impart are dictated by religious conventions and differ substantially from those of public schools. These schools may teach little or no secular studies, may focus heavily on religious studies, and may teach in a different language than public schools. Schools in this category do not reward their students with the same credentials as public schools – credentials that are crucial for accessing higher education. They may also fail to equip their students with capabilities that are instrumental in the modern job market and public life, focusing instead on capacities that are valuable in community life. The social and educational environments are also unique in these schools. They may be single-sex schools, employ different pedagogical methods, and strict disciplinary norms. The values they endorse reflect those of their religious community that sometimes contradict liberal values. While this is often a source for concern for the modern liberal state, these features make non-creaming religious schools extremely valuable for religious communities, offering an educational service that is completely different from that provided by the state.⁴ For members of such communities, public education is largely inadequate and may even contradict their religious belief. Sectarian schools are, therefore, an important component of the community's religious practices and vital for the continued flourishing of their way of life.

At the same time, these characteristics make it highly unlikely that children from outside the religious community would ever consider attending them. The schools cannot offer them the instrumental benefits schools are supposed to provide students – the credentials, knowledge, and tools required for modern life. Nonreligious students would also probably feel out of place in them, perhaps even socially isolated. As a result, non-creaming religious schools do not attract advantaged students from public schools and do not cause public schools the harm that results from creaming.

Amish One-room Schools

There are several modern examples of non-creaming religious schools. One-room schools serving the Amish community in the US are one (Dewalt, 2001; Hurst & McConnell, 2010; Kraybill, Johnson-Weiner, & Nolt, 2013; Nye, 2013). In these schools, established and managed by Amish communities and guided by their elders, students of all ages from kindergarten through eighth grade study together in one classroom. They are usually instructed by a single young woman from the community who herself has only acquired eight years of