

**ARTICLE****THE ADOPTION OF CHILDREN IN JUDAISM AND IN  
ISRAEL; A CONCEPTUAL AND PRACTICAL  
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Religion has played a fairly significant role in the history of adoption law, both in the U.S. and internationally. Although there are plenty of questions raised by religion in the context of adoption, one particular issue revolves around whether or not religion should factor into a “best interests of the child” placement determination. Whether or not it should factor into the determination, in practice religion often plays a part in the legal determination of which home will provide the best and most supportive environment for an adopted child. While much has been written about the legal aspect of putting a child into a religious home, there has been relatively little exploration of the flipside of that coin, or how to handle—both from the family’s standpoint and from that of the child—the religious aspect of secular legal adoption. For those religiously observant people who see themselves as operating within a dual system, i.e., bound by both the laws of their religion and the laws of their secular state, adoption may present a set of additional questions and challenges. This article attempts to fill in this gap in the adoption literature, at least for the Jewish tradition. In doing so, it will also hopefully highlight the fact that aside from input into placement decisions, religion has much wisdom to add to the discussion of adoption.

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### I. INTRODUCTION

Religion has played a fairly significant role in the history of adoption law, both in the U.S. and internationally.<sup>1</sup> Although there are plenty of questions raised by religion in the context of adoption,<sup>2</sup> one particular issue revolves around whether or not religion should factor into a “best interests of the child” placement determination. From the controversial “orphan trains” system of the late nineteenth century,<sup>3</sup> to the modern laws allowing for at least some religious matching in the

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<sup>1</sup> See Daniel Pollack et al., *Classical Religious Perspectives of Adoption Law*, 79 NOTRE DAME L. REV. 693, 695 (2004).

<sup>2</sup> Including, but not limited to, how much weight to give to a biological parents’ expressed or assumed preference; the significance of the religious background and belief or nonbelief of the adoptive parents; and the effect of a difference in the religious faiths of the adoptive parents and the child or the child’s natural parents, or between the adopting parents themselves. See, e.g., Laura J. Schwartz, *Religious Matching for Adoption: Unraveling the Interests Behind the “Best Interests” Standard*, 25 FAM. L.Q. 171, 181-82 (1991).

<sup>3</sup> This system ignored religious affiliations and placed thousands of children from Eastern cities in Midwestern and Western families despite being criticized for its proselytism. See MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* 135 (Univ. of Nebraska Press 1994); STEPHEN O’CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED* 237 (2001).

adoption process (despite some possible constitutional violations<sup>4</sup>) the question of how much weight to give religion when deciding on the best home for a child is one that has often been subject to debate.<sup>5</sup> Constitutionally required to maintain a posture of neutrality in religious matters, and bound, at the same time and above all other interests, to give paramount consideration to the welfare of the child, courts have generally taken the position that the religious affiliation of the parties in adoption proceedings, while not controlling, is ordinarily a proper matter for consideration in the determination of what will actually serve the best interests of the child.<sup>6</sup> Without getting into the long discussion of whether or not it *should* play a part,<sup>7</sup> in practice at least, religion often plays a part in the legal determination of which home will provide the best and most supportive environment for an adopted child.

While much has been written about the legal aspect of putting a child into a religious home,<sup>8</sup> there has been relatively little exploration of the flipside of that coin, or how to handle—both from the family’s standpoint and from that of the child’s standpoint—the religious aspect

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<sup>4</sup> See Ilene H. Barshay, *The Implications of the Constitution’s Religion Clauses on New York Family Law*, 40 HOW. L.J. 205, 206 (1996). Virtually all states currently provide for some consideration of a child’s religion in the adoption process, and in many states, religion is the most significant factor utilized by agencies in placing children and by courts in deciding whether to approve or deny petitions for adoptions. Schwartz, *supra* note 2, at 178-79. New York, for instance, provides for religious matching in its constitution. N.Y. CONST. art. VI, § 32. It also has religious matching provisions in its Social Services and Domestic Relations Laws and in its Family Court Act. See N.Y. FAM. CT. ACT § 116 (Consol. 2013); N.Y. SOC. SERV. LAW § 373 (Consol. 2013); N.Y. DOM. REL. LAW § 113 (Consol. 2013).

<sup>5</sup> See Comment, *A Reconsideration of the Religious Element in Adoption*, 56 CORNELL L. REV. 780, 780-81 (1971).

<sup>6</sup> Don F. Vaccaro, Annotation, *Religion as Factor in Adoption Proceedings*, 48 A.L.R. 3D 383 (1973). “Religious beliefs and affiliations of the parties in adoption proceedings, while not controlling, are ordinarily proper matters for consideration in the determination of what action with respect to a proposed adoption will best serve the interests of the child.” Tracy Farrell et al., 2 AM. JUR. 2d *Adoption* § 140 (2013). Some courts have looked at religious faith to varying extents as an indicium of suitability in and of itself; see, e.g., *In re Neusche*, 398 S.W.2d 453 (Mo. Ct. App. 1965); *In re Adoption of “E.”*, 59 N.J. 36 (1971).

<sup>7</sup> For an excellent summary of the relevant case law, see ALAN D. SCHEINKMAN, WEST’S MCKINNEY’S FORMS: MATRIMONIAL AND FAMILY LAW § 22:27 (2013).

<sup>8</sup> See Thomas J. Cunningham, *Considering Religion as a Factor in Foster Care in the Aftermath of Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 28 U. RICH. L. REV. 53, 56 (1994); see also Michael P. Kennedy, *In the Best Interest of the Child: Religious and Racial Matching in Foster Care*, 3 GEO. MASON U. C.R. L.J. 299 (1993).

of secular legal adoption.<sup>9</sup> For those religiously observant people who see themselves as operating within a dual system—i.e., bound by both the laws of their religions and the laws of their secular states—adoption may present a set of additional questions and challenges. Like courts and adoption agencies, religious practitioners may face questions of whom is in their best religious interests to adopt, including questions of male versus female; younger versus older children; the benefits of open versus closed adoptions; how much religion should matter in the choosing of a child; and how to go about dealing with potential interfaith placements. This article attempts to fill in that gap in the adoption literature, at least for the Jewish tradition. In doing so, it will also hopefully highlight the fact that besides just providing input regarding placement decisions, religion has much wisdom to add to the discussion of adoption generally.

It will begin with a general background discussion of adoption and family status according to Jewish law, before moving into the ideas of parenthood and practical considerations of adoptive parenting. It will also discuss the laws of the State of Israel, whose participation in intercountry adoption is directly related to its status as a Jewish state.

## II. BACKGROUND

Judaism, as it has traditionally been practiced for thousands of years, is a normative system based on a sanctified canon that is read and understood in conjunction with an authoritative legal tradition of interpretation.<sup>10</sup> Jewish law denotes the entire subject matter of the Jewish legal system, including public, private, ritual and civil law.<sup>11</sup> It includes obligations both interpersonal and between Man and his Maker, and encompasses practically all aspects of human behavior and experience: lifecycle events, joy and grief, agriculture, commerce, personal, social, national and international concerns. Still, despite its broad jurisdiction and application, it is almost impossible to speak about

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<sup>9</sup> There have, however, been some articles about the religious laws of adoption. See Melech Schachter, *Various Aspects of Adoption*, 4 J. HALACHA & CONTEMP. SOC'Y 93 (1982); Pollack et al., *supra* note 1. There have also been some that have touched upon Jewish law's different understanding of adoption. See Michael J. Broyde, *Adoption, Personal Status, and Jewish Law*, in *THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES* 128 (Timothy P. Jackson ed., 2005).

<sup>10</sup> See MOSES MAIMONIDES, *MISHNEH TORAH* 1; see generally MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* (Bernard Auerbach & Melvin J. Sykes trans., 1994).

<sup>11</sup> See generally Michael J. Broyde, *Forming Religious Communities and Respecting Dissenters' Rights: A Jewish Tradition for a Modern Society*, in *HUMAN RIGHTS IN JUDAISM* (Michael J. Broyde & John Witte, Jr., eds., 1998).

adoption under Jewish law; in fact, if one were to read through the entire legal corpus of the Talmud, the centerpiece and foundation of the Jewish legal system, there is not a single discussion of adoption (in modern Hebrew *imutz yeladim*) at all.<sup>12</sup>

And yet there is almost a paradox here, because if you were to read through the *non*-legal portions of the Talmud, it is clear that when an adoption *process* (as opposed to what we might think of as a formal adoption) conforms to *halakhic* (Jewish legal) guidelines, the sages considered such an adoption to be an extremely noble and rewarding deed. In numerous places throughout the Talmud, the sages praise one who raises another person's child as his or her own. The Talmud in *Tractate Megillah*, for instance,<sup>13</sup> describes Moses' relationship with Batyah, the daughter of Pharaoh in the following manner:

[It is written<sup>14</sup>] "And his wife the Jewess bore Jered the father of Gedor, and Heber the father of Socho, and Jekuthiel the father of Zanoah, and these are the sons of Bithya the daughter of Pharaoh, whom Mered took." [The Talmud asks] . . . "Bore": But she only brought him [Moses] up? — *This tells us that if anyone brings up an orphan boy or girl in his house, the Scripture accounts it as if he had begotten him.*<sup>15</sup>

<sup>12</sup> The Hebrew word for adoption, *imutz*, does have Biblical connotations; it comes from *Psalms* 80:16: "And the stock which thy right hand hath planted, and the branch that thou madest strong (*imatza*) for thyself." It denotes the grafting of a branch onto a tree, and also invokes the idea of strengthening, as in the phrase *chizku ve'imtzu*, "be strong and resolute." *Deuteronomy* 31:6. See Rabbi Ben Tzion Uziel *Shaarei Uziel* 185 (7) (quoted in Broyde, *supra* note 9, at 129 n.4).

<sup>13</sup> BABYLONIAN TALMUD, *Megillah* 13a.

<sup>14</sup> 1 *Chronicles* 4:18.

<sup>15</sup> BABYLONIAN TALMUD, *Megillah* 13a, *supra* note 13 (emphasis added). Similarly, the Talmud in Tractate Sanhedrin records the following discussion:

Now as to R. Joshua b. Korha, surely it is written, "And the five sons of Michal the daughter of Saul whom she bore to Adriel." — R. Joshua [b. Korha] answers thee: Was it then Michal who bore them? Surely it was rather Merab who bore them! But Merab bore and Michal brought them up; therefore they were called by her name. This teaches thee that whoever brings up an orphan in his home, Scripture ascribes it to him as though he had begotten him.

BABYLONIAN TALMUD, *Sanhedrin* 19b.

Specifically in regard to the reward for those who choose to take in a child, the Talmud in *Tractate Ketubot* attributes to them great and everlasting merit:

[The verse states:] “Happy are they that keep justice; that do righteousness at all times.”<sup>16</sup> [The Talmud asks:] Is it possible to do righteousness at all times? . . . R. Samuel b. Nahmani said: This refers to a man who brings up an orphan boy or orphan girl in his house and enables them to marry.<sup>17</sup>

It is important here to point out (as the widely influential Talmudist Rabbi Shmuel Eidels (1555-1631), commonly known by his acronym *Maharsha*, does in his commentary to *Sanhedrin*<sup>18</sup>) that lest one think too narrowly, the Talmud does not reserve its praise here only to those who take in and care for *orphans* in particular. Rather, the category should be thought of expansively as including any child whose parents are unable to take care of them, even if those parents are still alive.<sup>19</sup>

Less well-known perhaps, but still very important for the purposes of our discussion, the *Midrash* (another collection of statements and teachings attributed to the Talmudic rabbis) in *Exodus Rabbah* derives from the verse in *Isaiah* 64:8, “You, O God, are our Father,” the idea that “anyone who *raises* a child is called ‘father,’ not the one who has begotten them.”<sup>20</sup> Elsewhere in the Bible and Jewish history, some see the story of Abraham and his servant Eliezer as some form of a proto-adoption relationship.<sup>21</sup> This theory begins with the premise that many ancient civilizations, including most famously the Romans, saw adoption as an alternative method of establishing a proper heir to inherit a person upon death, in the absence of a natural child.<sup>22</sup> In *Genesis* 15:2, when Abraham is talking to God about his future, he asks, “Sovereign Lord, what can you give me since I remain childless and the one who will inherit my estate is Eliezer of Damascus?” The implication of course, is that Abraham had adopted Eliezer for that very

<sup>16</sup> *Psalms* 106:3.

<sup>17</sup> BABYLONIAN TALMUD, *Ketubot* 50a.

<sup>18</sup> It is important to note here that ‘Maharsha’s commentary on the Talmud attained unprecedented popularity. . .[and] has been included, since 1860, in most printed editions of the Talmud. To this day, the study of his work is considered essential for students training for the Orthodox rabbinate.’ Abraham P. Bloch, *ONE A DAY: AN ANTHOLOGY OF JEWISH HISTORICAL ANNIVERSARIES FOR EVERY DAY OF THE YEAR 336* (Ktav Publishing House 1987).

<sup>19</sup> SHMUEL EIDELS, CHIDDUSHEI AGGADOT (construing BABYLONIAN TALMUD, *Sanhedrin* 19b).

<sup>20</sup> MIDRASH RABBAH, *Exodus* 46:6 (Vilna ed.).

<sup>21</sup> See Tikva Frymer-Kensky, *Patriarchal Family Relationships and Near Eastern Law*, 44 *THE BIBLICAL ARCHAEOLOGIST* 209, 211 (1981).

<sup>22</sup> See Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 *VAND. L. REV.* 743, 744 (1955).

purpose. As it turns out, there is in fact an ancient Near Eastern practice attested to in various non-Biblical sources of a childless couple adopting a slave who would serve them in their lifetime and bury them when they died, and in return the child would be designated their ultimate heir.<sup>23</sup>

Later on in the *Genesis* narrative, both Sarah and Rachel give their husbands their maidservants to have children for them. As Sarah said to Abraham, “Perhaps I will be built up (*ibaneh*) through her.”<sup>24</sup> While the word *ibaneh* is usually translated as related to the root word *baneh*, “to build,” it could also be related to the Hebrew word *ben*, which means “son” or sometimes “child.” In that reading, Sarah says to Abraham that he should take her maidservant, for perhaps she will have sons through her. Either way, it is clear that she wishes Hagar to serve as a surrogate mother for what will legally be her child. This is yet another adoptive practice that was not uncommon for that place and time period.<sup>25</sup>

The Bible is resplendent with other adoption-style tales and ethos. Some, for instance, see levirate marriage<sup>26</sup> as a form of posthumous adoption in regard to the firstborn son of the living brother. The verse in *Deuteronomy* declares that “the firstborn that she bears shall succeed in the name of his brother who is dead, that his name be not put out of Israel”<sup>27</sup> (i.e., he is referred to as the son of the dead brother, even though he is not biologically a son). This was yet another way to establish an heir for a childless person.<sup>28</sup> Several times throughout the Old Testament we find a phrase or a comment about a child being “born upon the knees” of another.<sup>29</sup> While most assume that this phrase just refers to some kind of nursing or bringing up,<sup>30</sup> as it turns out, in both ancient European and Asiatic cultures, as well as in the ancient Near East, placing a child on a man’s knees signified various important aspects of a familial relationship; in some places acknowledgement of

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<sup>23</sup> VICTOR H. MATTHEWS & DON C. BENJAMIN, *OLD TESTAMENT PARALLELS: LAWS AND STORIES FROM THE ANCIENT NEAR EAST* 47-49 (Paulist Press 2d ed. 1997).

<sup>24</sup> *Genesis* 16:2.

<sup>25</sup> See MATTHEWS & BENJAMIN, *supra* note 23 at 47; see also Stuart A. West, *The Nuzi Tablets: Reflections on the Patriarchal Narratives*, 10 *BIBLE & SPADE* 66, 68 (1981).

<sup>26</sup> Detailed in *Deuteronomy* 25:5-10.

<sup>27</sup> *Deuteronomy* 25:6.

<sup>28</sup> See Eryl W. Davies, *Inheritance Rights and the Hebrew Levirate Marriage: Part 1*, 31 *VETUS TESTAMENTUM* 138, 138-44 (Apr. 1981); see also Millar Burrows, *The Ancient Oriental Background of Hebrew Levirate Marriage*, 77 *BULL. AM. SCH. ORIENTAL RES.* 2, 2-15 (1940).

<sup>29</sup> See *Genesis* 30:3, 50:23.

<sup>30</sup> See, for instance, the use of the phrase in Babylonian Talmud *Sotah* 30b. See also Midrash *Sechel Tov* (Buber Edition) *Genesis*, Parshat Vayeitze Chapter 30 Siman 3; Ibn Ezra, *Commentary to Genesis* 25:19.

paternity, in others of legitimacy, and in still other places it signified adoption.<sup>31</sup> Finally, in what many consider the one unequivocal adoption ceremony in the Bible, before giving Joseph's two sons Ephraim and Manasseh a share in his inheritance, Jacob calls all three of them in and makes the following declarative statement: "[A]nd now thy two sons, Ephraim and Manasseh, which were born unto thee in the land of Egypt before I came unto thee into Egypt, are mine; as Reuben and Simeon, they shall be mine."<sup>32</sup>

Despite the fact that both the historical examples and the Talmudic references to raising orphans mentioned above are not *halakhic*, i.e., Jewish legal statements (in that they neither command nor proscribe action), they are part of the *aggadic*, or poetic/homiletic sections of the Talmud, meant to convey a set or system of values. The truth remains that nowhere in the Jewish *legal* literature do we find any mention of adoption, but it is also obvious that these additional references and traditions look and sound a lot like what we might call adoption. Certainly, beyond a shadow of a doubt, statements such as the one declaring him who raises the child of another a "perpetual doer of righteousness,"<sup>33</sup> indicate a climate of rabbinic opinion that would seem to be in favor of the practice. And so seeing as both the Bible and even the rabbinic literature have such an obviously supportive view of the practice, why *doesn't* Jewish law, the primary vehicle for the transmission of Jewish values throughout the ages, have any legal discussions or policy frameworks to put a system of adoption in place? Why doesn't the Talmud even have a *word* for adoption?

To answer that question we need to take a step back and look at the historical practice of adoption in the context of family law more broadly.

### III. THE JEWISH LAW APPROACH TO FAMILY STATUS

In order to frame the discussion of adoptive practices in Jewish law, it is important to understand that there are two basic ways societies have tended to think about adoption.<sup>34</sup> In one framework, adopted children become, as a matter of *law*, the actual children of the adoptive

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<sup>31</sup> See John Van Seters, *The Problem of Childlessness in Near Eastern Law and the Patriarchs of Israel*, 87 J. BIBLICAL LITERATURE 401, 401-08 (1968).

<sup>32</sup> Genesis 48:5.

<sup>33</sup> See BABYLONIAN TALMUD, *Ketubot* 50a, *supra* note 17.

<sup>34</sup> See, for instance, Madelyn Freundlich, *A Legal History of Adoption and Ongoing Legal Challenges*, in HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONERS, AND FAMILIES 44-45 (Sage ed., 2007). See also Mandy Schulman Roman, *Rethinking Revocation: Adoption from a New Perspective*, 23 HOFSTRA L. REV. 733, 736 (1995).

parents, for all intents and purposes. Society, in incorporating the child into his or her new family, simply pretends that a biological fact did not happen. And so, for instance, in the Code of Hammurabi,<sup>35</sup> in Roman law,<sup>36</sup> in the Napoleonic code,<sup>37</sup> and even in modern day American law inspired by the Roman counterpart,<sup>38</sup> we see a system of adoption where there is absolutely no legal difference between an adopted child and a biological child.

There is another approach, however, and that is *not* to treat adopted children as completely identical to biological children, but rather to see adoption as something else; as a form of loving-kindness. This is the approach that normative Jewish law follows, and it is important to understand why. It should be noted at the outset, however, that Judaism is not alone among legal systems in thinking this way: this is also the approach of Islamic law<sup>39</sup> and the common law of England.<sup>40</sup>

In its approach to adoption, Jewish law follows the same pattern that it does for all issues of personal status. Whether it involves a complicated legitimacy question,<sup>41</sup> issues of artificial insemination<sup>42</sup> or cloning,<sup>43</sup> or even simple marriages and divorces,<sup>44</sup> a court cannot just

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<sup>35</sup> See Isaac Mendelsohn, *A Ugaritic Parallel to the Adoption of Ephraim and Manasseh*, 9 ISRAEL EXPLORATION J. 180, 180-83 (1959); see also CHILPERIC EDWARDS, *THE HAMMURABI CODE AND THE SINAITIC LEGISLATION* (1904); STANLEY ARTHUR COOK, *THE LAWS OF MOSES AND THE CODE OF HAMMURABI* (Adam & Charles Black eds., 1903).

<sup>36</sup> See John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 332 (1922); see also Huard, *supra* note 22, at 743.

<sup>37</sup> See Sanford N. Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 38 SOC. SERV. REV. 26, 26 n.1 (1964); see also Elizabeth S. Cole & Kathryn S. Donley, *History, Values, and Placement Policy Issues in Adoption*, in *THE PSYCHOLOGY OF ADOPTION* 273, 273-94 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); Emilio S. Binavince, *Adoption and the Law of Decent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L.Q. 152, 155 n.9 (1966).

<sup>38</sup> See Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 443, 446, 453 (1971).

<sup>39</sup> See JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 166 (2d ed. 1990). See also Amira al-Azhary, *Adoption in Islamic Society: A Historical Survey*, in *CHILDREN IN THE MUSLIM MIDDLE EAST* 45 (Elizabeth Warnock Fernea ed., Univ. of Tex. Press 1995).

<sup>40</sup> See W.W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* 41 (Cambridge University Press 1936). See also Presser, *supra* note 38, at 452.

<sup>41</sup> See, e.g., MISHNA, *Kiddushin* 3:12; MISHNA, *Yevamot* 4:13 and commentary therein. See also David Katz, *The Mamzer and the Shifcha*, 28 J. HALACHA & CONTEMP. SOC'Y 73, 98 (1994).

<sup>42</sup> For a detailed discussion on status issues in regard to artificial insemination, see Michael J. Broyde, *The Establishment of Maternity and Paternity in Jewish and American Law*, 3 NAT'L JEWISH L. REV. 117, 119 (1988).

<sup>43</sup> See Michael J. Broyde, *Cloning People: A Jewish Law Analysis of the Issues*, 30 CONN. L. REV. 503, 507 (1998).

change a person's *status*. In the case of marriage or divorce, for instance, while it is true that these ceremonies often take place in the presence of a Jewish court (*beth din*) or witnesses, it is not the act of the *beth din* that effectuates a change, but rather it is a *private* act that a *beth din* witnesses.<sup>45</sup> A *beth din* cannot, for example, marry or divorce someone against his or her will, or without his or her knowledge.<sup>46</sup> This is conceptually very different from an American law model, which acknowledges the fundamental possibility of a judicial dissolution of a marriage against a party's wishes, perhaps because one party deserves it,<sup>47</sup> in which case we ignore the wishes of the "guilty" party, or even against both parties' wishes, as part of a judicial punishment.<sup>48</sup> Jewish law is different in that while judges might try by various means to convince a person to consent to a change in personal status, they cannot change one's personal status in the absence of consent. What Jewish law allows a court to do with regard to status issues in family law is very narrow: Jewish courts can adjudicate questions when a status is in dispute, but they cannot change a status on their own volition once it is actually and factually established.<sup>49</sup> The same is true for adoption. While adoption as a *process* of caring for children in need is viewed as deeply admirable and to be encouraged in the rabbinic view, it is not transformative of the facts of lineage in any formal sense, as it is in many Western legal systems.<sup>50</sup>

Before we explore this concept of adoption in the alternative and see what kind of system Judaism developed, it is most important to highlight one more fact. While adoption in Jewish law does not mean

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<sup>44</sup> LOUIS M. EPSTEIN, *THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW* 46 (Jewish Theological Seminary 1927).

<sup>45</sup> See PHILIP GOODMAN & HANNA GOODMAN, *THE JEWISH MARRIAGE ANTHOLOGY* viii (Jewish Publication Society of America 1971).

<sup>46</sup> See JOSEPH CARO, *SHULHAN ARUKH, Even HaEzer* 52:1, 134:5.

<sup>47</sup> See, e.g., *Richardson v. Richardson*, 524 S.W.2d 149, 152 (Mo. Ct. App. 1975) (plaintiff seeking divorce must show both injury by husband and her own innocence of any offence giving grounds for divorce); *Shapiro v. Shapiro*, 298 N.Y.S.2d 785, 788 (N.Y. Sup. Ct. 1969) (only innocent spouse may initiate divorce proceedings); *Brewies v. Brewies*, 27 Tenn. App. 68, 72 (Tenn. Ct. App. 1943) (divorce is "a remedy for the innocent against the guilty").

<sup>48</sup> Broyde, *supra* note 9, at 131 n.12 (quoting 21A AM. JUR. 2d *Criminal Law* § 1034, providing that, historically, a sentence of life imprisonment included the dissolution of one's marriage, whether or not either spouse actually wished the marriage to be dissolved).

<sup>49</sup> See Broyde, *supra* note 9, at 129-34.

<sup>50</sup> See, generally, Michael Fessler, *Adoption and Jewish Families: A Proposal*, *THE RECONSTRUCTIONIST: RECONSTRUCTIONIST RABBINICAL ASS'N (RRA)* 52-59 (Fall 2011), available at <http://www.bjpa.org/Publications/details.cfm?PublicationID=4363>. Adoption in American law, for instance, assumes that the law has agency to terminate the legal relationship of one parent in favor of another, while Jewish law believes that it has agency to make custody decisions, but not to terminate relationships.

that the child and parent have the exact same relationship as a biological child and parent, it also does *not* mean they have a *lesser* relationship. An adoptive home with this mindset is no less loving than an adoptive home that sees the child as exactly equivalent to a biological child, and putting a child into this environment is no more or less in his or her best interest.

Per the Jewish tradition, the act of taking in and caring for a person in need is tantamount to providing that person life. According to the *Midrash*, Moses, in fact, makes this very point to God Himself. Moses was talking to God before leaving his father-in-law Jethro's house in Midian in order to return to his brethren in Egypt, and the *Midrash* relates the following snippet of their conversation:

At the time the Holy One, blessed be He, said to Moses: Come now, therefore, and I will send thee unto Pharaoh (Exod. 3:10), Moses replied: "Master of the Universe, I cannot leave, for Jethro welcomed me and opened his home unto me, and I am like a son unto him." If one opens his door to his fellowman, the latter owes him his very life.<sup>51</sup>

Rabbi Dr. Joseph B. Soloveitchik, the former head of Yeshiva University's Rabbi Isaac Elchanan Theological Seminary, and one of the foremost Jewish philosophers of the twentieth century, described the adoptive relationship in this way:

Judaism did not recognize the Roman institution of adoption since the Roman concept is directed toward substituting a legal fiction for a biological fact and thus creating the illusion of a natural relationship between the foster parents and the adopted son. Judaism stated its case in no uncertain terms: what the Creator granted one and the other should not be interfered with; the natural relationship must not be altered. Any intervention on the part of some legal authority would amount to interference with the omniscience and original plan of the Maker. The childless mother and father must reconcile themselves with the fact of natural barrenness and sterility. Yet they may attain the full covenantal experience of parenthood, exercise the fundamental right to have a child, and be united within a community of I-thou-he. There is no need to withhold from the adopted child information concerning his or her natural parents. The new form of parenthood does not conflict with the biological relation. It manifests itself in a new dimension, which may be separated from the natural one . . . . In order to become Abraham [a spiritual parent], one does not necessarily have to live through the stage of Abram [a biological

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<sup>51</sup> MIDRASH TANCHUMA, *Parshat Shemot* ch. 16.

parent]. The irrevocable in human existence is not the natural but the spiritual child; the three-fold community is based upon existential, not biological unity. The existence of I and thou can be inseparably bound with a third existence even though the latter is, biologically speaking, a stranger to them.<sup>52</sup>

His main points are twofold. The first is that, reflecting the Jewish belief in the eternity of the soul—the irrevocable, i.e., the permanent and transcendental in human existence—is not the natural or the biological relationship, but rather the spiritual. By taking a child in and providing for his or her needs, including his or her moral and religious development, nurture beats out nature in its importance. The second point is that the adoptive relationship is *covenantal*, in that it involves a meeting of the minds, and a formal, solemn, agreement. What is lacking in a biological relationship is the element of *choice*, which is why the relationships that we do form by choice—i.e., husband and wife, adoptee and adopter—are so incredibly close.<sup>53</sup> In this light, the adoptive relationship is special not *in spite of* but *because of* the fact that it is not exactly the same as the biological parental relationship. To put it a bit more poetically, real familial ties are made up of love, not blood.

The truth is that both of these understandings—adoption as both a deeper spiritual relationship, and as a more covenantal relationship—find echoes in a much earlier teaching. On the very same page in *Tractate Sanhedrin* that the Talmud told us that “whoever brings up an orphan in his home, Scripture ascribes it to him as though he had begotten him,”<sup>54</sup> the Talmud also records the following discussion:

R. Samuel b. Nahmani said in R. Jonathan’s name: He who teaches the son of his neighbour the Torah, Scripture ascribes it to him as if he had begotten him, as it says, “Now, these are the generations of Aaron and Moses”;<sup>55</sup> whilst further on it is written, “These are the names of the sons of Aaron”;<sup>56</sup> thus teaching thee that Aaron begot and Moses taught them; hence they are called by his name.<sup>57</sup>

Similarly, the Talmud in *Sanhedrin* 97b writes: “Resh Lakish said: He who teaches Torah to his neighbour’s son is regarded by Scripture as

<sup>52</sup> Broyde, *supra* note 9, at 128, 140.

<sup>53</sup> Perhaps that is why the Jewish prophets preferred to analogize the relationship between God and His people to that of a husband and a wife, not a father and a son, because the covenantal relationship, the relationship of choice and not of chance, is in some ways so much closer. *Id.* at 142 n.50.

<sup>54</sup> See *supra* note 41; BABYLONIAN TALMUD, *Sanhedrin* 19b, *supra* note 15.

<sup>55</sup> *Numbers* 3:1.

<sup>56</sup> *Numbers* 3:2.

<sup>57</sup> BABYLONIAN TALMUD, *Sanhedrin* 19b, *supra* note 15.

though he had created him, as it is written,<sup>58</sup> [in regard to Abram and Sarai] ‘and the souls which they had made in Haran.’”<sup>59</sup>

The model of the student and the teacher that the Talmud describes is most similar to the model of the adoptee and adopter. In both, the child/student is raised to a higher plane of existence by dint of physical/spiritual care and instruction, and in both, the relationship is covenantal. Not only does a teacher choose a student, but, in several places, the Talmud reciprocally instructs students to make sure that they find a proper mentor for themselves, someone who can teach *them* properly.<sup>60</sup> It is because of this special closeness that a person’s students are also in some ways considered like his or her children.<sup>61</sup>

#### IV. ADOPTION IN THE ALTERNATIVE: PARENTHOOD IN JEWISH LAW

Turning back to the technicalities of Jewish law, while it is true that the Jewish tradition does not have full adoption in the American legal sense, it does recognize that, even from a legal perspective, certain aspects of parenthood turn on custody rather than biology. For instance, although the Talmud tells us in *Tractate Bava Metzi’a*<sup>62</sup> that the possessions, earnings and findings of a minor child belong to his or her father, the *halakhic* authorities make it clear that this is true for adoptive parents as well.<sup>63</sup>

At the most basic level, many legal systems (Judaism included) focus mostly on rights and custody with regard to parenthood. Therefore, to better understand the laws and limits of a Jewish approach to adoption, we first need to ask ourselves the following question: What right does Jewish law give a natural parent to have custody over his or her own biological child?

For the purposes of this article, I will refer to the two main theories of custody in Jewish law as the “parental rights” theory, and the “best

<sup>58</sup> *Genesis* 7:5.

<sup>59</sup> BABYLONIAN TALMUD, *Sanhedrin* 97b. See also EIDELS, *supra* note 19 (construing BABYLONIAN TALMUD, *Sanhedrin* 99b; explaining that by providing moral instruction, the teacher helps the student reach his or her ultimate level of creation and purpose, thus becoming in the fullest sense a *person* and not just a living thing.).

<sup>60</sup> See MISHNA, *Avoth* 1:6 and commentaries there (“Make for yourself a teacher . . .”). See also BABYLONIAN TALMUD, *Moed Katan* 17a.

<sup>61</sup> This is the source for the custom of childless couples giving charity to and supporting Jewish schools; through the children they are helping to learn, such couples will have some fulfillment of the commandment to be fruitful and multiply. See Herschel Schachter, *Halachic Aspects of Family Planning*, in HALACHA & CONTEMP. SOC’Y 13 n.36 (Alfred F. Cohen ed., 1984).

<sup>62</sup> BABYLONIAN TALMUD, *Bava Metzi’a* 12b.

<sup>63</sup> See BA’ER HEITEV (construing CARO, *supra* note 46, *Hoshen Mishpat* ch. 270).

interests of the child” theory.<sup>64</sup> Usually there is no practical difference between the two, because in the vast majority of cases the best interests of the child are to grant the natural parents their parental rights. However, the underlying theories are in fact quite different. The medieval Talmudist and universally respected *halakhic* decisor Rabbi Asher ben Yechiel (1250-1327) (commonly known as the *Rosh*) believes that a parent, or at the very least, a father, has an obligation to *have* children, pursuant to the Biblical commandment to “be fruitful and multiply”<sup>65</sup> and to support those children so that they survive. Therefore, as a matter of law, based on this commandment and corresponding commitment to care for the children, the parent is presumptively entitled to custody as against all others.<sup>66</sup> This does not mean that parents *always* have the right to custody; it is clear from the Talmud in *Ketubot* that parental rights can be terminated if the parents are deemed unfit.<sup>67</sup> However, according to this theory, it is fair to say that natural parents are the presumptive custodial parents of their biological children, based simply on their obligation to have the children and care for them, and subject to the limitation that they must be fit to raise them.<sup>68</sup>

The second theory of parental custody can be found in the approach of Rabbi Shlomo ben Aderet, known as the Rashba, who says that Jewish law *always* accepts that the standard for child custody determinations is the best interest of the child.<sup>69</sup> While the Talmud

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<sup>64</sup> For an in-depth discussion of these views, see Michael J. Broyde, *Child Custody: A Pure Law Analysis*, in *JEWISH LAW ASSOCIATION STUDIES VII: THE PARIS CONFERENCE VOLUME* (S.M. Passamaneck & M. Finley eds., 1994).

<sup>65</sup> *Genesis* 1:22, 1:28.

<sup>66</sup> ASHER BEN YEHIEL, *RESPONSA OF THE ROSH*, 17:7, 82:2; see also RABBI JUDAH BEN SAMUEL ROSANNES, *MISHNEH LAMELEKH, Hilkhoh Ishut* 21:17; SHMUEL ALKALAI, *MISHPETEI SHMUEL* ch. 90 (according to the Rosh, the custodial mother would have the same rights as the custodial father by rabbinic decree).

<sup>67</sup> BABYLON TALMUD, *Ketubot* 102b. For a discussion of what it means for a parent to be unfit, see Rabbi Gedaliah Felder, 2 *NAHALAT TZVI* 282-87 (2nd ed.), cited with approval in Broyde, *supra* note 9, at 135 n.23.

<sup>68</sup> A number of other authorities also seem to take the same or a similar approach, one in which custodial parenthood is based on the father’s rights, with the mother as a presumptive agent of the father in fulfilling those rights. See RABBEINU YERUHAM BEN MESHULAM, *TOLDOT ADAM V’HAVA* 197a (quoting the Geonim (the rabbinic leaders of the early Middle Ages)); RABBI ISAAC DEMOLENA, *KIRYAT SEFER* 44:557 (quoting the Geonim); see also RABBI JOSEPH GAON, *GINZEI KEDEM* 3:62, cited in Broyde *supra* note 9, at 136 n.31.

<sup>69</sup> SHLOMO BEN ADERET, *RESPONSA OF THE RASHBA* ch. 38 (traditionally attributed to Nahmanides). The Rashba writes this responsa in a case where the father died, and, according to his analysis, the mother does not have an indisputable legal claim to the custody of the children. *Id.* See also OTZAR HAGEONIM, *Ketubot* 434, where this rule is read as a theory for all child custody determinations, even when the father is also alive; see Broyde, *supra* note 9, at 137 n.36.

appears to give hard and fast rules about parental custody, the Rashba explains that these are just presumptive assessments.<sup>70</sup> For example, a parent is usually better than a non-parent; for certain ages usually a mother is better than a father. But at the end of the day, these are just what we would call rebuttable presumptions made by the Talmud about the only legal standard that really matters, i.e., the best interests of the child.<sup>71</sup>

The difference between the two approaches is subtle but huge. Suppose the parents of a child are not doing a great job in raising their child, but are not what the law would deem unfit. According to the Rosh one could not remove the child, even if there were other parental figures available who would be willing to step in and raise him or her in a better way. However, according to the Rashba, one most certainly can remove them, if that is indeed in the best interests of the child.

What is common, however, to both underlying theories of the law is that whenever another person does step in and takes custody of the child—either because the first parent is unfit or just because the second parent can do a better job—the second parent is acting as an *agent* of the first, or original, parent. Because these new parents do not have their own independent *obligations* to support such children, when they do so they are considered to be helping fulfill the obligations of the first parent, whose legal accountability remains in place, unaffected. If the agent fails to fulfill his or her commitment, like elsewhere in the Jewish law of agency, the underlying obligation reverts back to the principal, in this case, the parents.<sup>72</sup> Therefore, although the biological parents never lose their core underlying connection to their child, i.e., their obligation to take care of him or her, if for some reason they cannot fulfill it and give that child up, or if *halakha* (Jewish law) declares them to be unfit (or perhaps just not the best ones for the job), then the *outcome* of their underlying right, the actual custody of the child which, as noted above,

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<sup>70</sup> See Maharashdam, *Even HaEzer*, Responsum 123.

<sup>71</sup> There is also a third theory, that of Rabbeinu Nissim ben Reuven (known as the Ran), who seems to hold in his commentary to Babylonian Talmud, *Ketubot* 65b, that child support obligations derive from the marital contract (the *Ketubah*), as an extension of the obligation to support one's wife. NISSIM BEN REUVEN, HIDDUSHEI HARAN, *Ketubot* 65b. That position, however, has not been accepted in normative Jewish practice, and so as the *Shulhan Arukh*, the normative code of Jewish law, rules in *Even HaEzer* 71:4, for instance, a man has to support his child born out of wedlock, even though in such a case there is no *Ketubah*. See CARO, *supra* note 46, *Even HaEzer* 71:4.

<sup>72</sup> See ISRAEL HERBERT LEVINTHAL, *THE JEWISH LAW OF AGENCY, WITH SPECIAL REFERENCE TO THE ROMAN AND COMMON LAW 58-73* (Conat Press 1923), *cited in* Broyde, *supra* note 9, at 139 n.43.

is the core definition of parenthood,<sup>73</sup> *can* in fact be transferred to another person, i.e., the adoptive parent.

This indeed is the nature of a legal construct known in *halakha* as the law of the *apotropus*, or guardianship law. The word *apotropus* is derived from a Greek word that means the father of minors, or the guardian/custodian of another person's affairs.<sup>74</sup> But while the need for an *apotropus* or a guardian (what we might think of as an adoptive parent) is clear, the legality of how it works still needs to be explained. The underlying question is the following: assuming, as is often the case, that the child in question is under the age of which he or she is able to give lawful consent,<sup>75</sup> how is a court justified/allowed to appoint someone in a fiduciary capacity, with power of attorney, over the child's person and property?

There are two ways to go about answering this question. First, on a meta-*halakhic* level of sorts, the Talmud tells us that under Jewish law the *beth din* is considered the "father of all orphans."<sup>76</sup> To some extent, this is true even for children of biological parents living in a traditional family unit. This is shown by the fact that, as established above, the *beth din* has the right to terminate parental custody if a parent is unfit (or maybe even just not the best fit for the child), as at the end of the day, even a natural parent really only serves at the discretion of the Court. Rabbi David ben Solomon ibn Zimra (known as the Radvaz, 1479-1593) and others<sup>77</sup> assume that what this rule does in fact is establish the Court as the presumptive caretaker of *all* children in a sense.<sup>78</sup> In his glosses on the *Shulchan Aruch*,<sup>79</sup> the Rabbi Moshe Isserles (known as the Rema, 1520-1572) (whose rulings are normative for Ashkenazic Jewry) even refers to the *biological parent* as nothing more than a presumptive *apotropus*.<sup>80</sup> It is through this overriding parental power that the *beth din* can appoint a guardian or adoptive parent for a child, even without the child's consent. In fact, there does

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<sup>73</sup> As opposed to, say, a biological understanding.

<sup>74</sup> See MOSES MAIMONIDES, COMMENTARY ON THE MISHNA, *Bikkurim* 1:5; OVADIAH MIBARTENURA, COMMENTARY ON THE MISHNA, *Bikkurim* 1:5; see also MISHNA, *Gittin* 5:4.

<sup>75</sup> In Jewish law, consent may be given at twelve for a girl and thirteen for a boy. See Maimonides, *Hilchot Ishut* ch. 2.

<sup>76</sup> BABYLONIAN TALMUD, *Gittin* 37a; see also BEN YEHIEL, *supra* note 66, at 85:5, 85:6, 87:1; see also CARO, *supra* note 46, *Hoshen Mishpat* 290:1-2.

<sup>77</sup> See Warburg, *Child Custody: A Comprehensive Analysis*, 4 ISR. L. REV. 494-500 (1979).

<sup>78</sup> DAVID BEN SOLOMON IBN ZIMRA, *RESPONSA OF THE RADVAZ* 1:360.

<sup>79</sup> CARO, *supra* note 46, *Hoshen Mishpat* 285:8.

<sup>80</sup> MOSHE ISSERLES, COMMENTARY ON SHULHAN ARUKH, *Hoshen Mishpat* 285:8; see also BEN YEHIEL, *supra* note 66, at 87:1; see also SAMUEL BEN MOSES DE MEDINA, *RESPONSA OF THE MAHARASHDAM*, *Hoshen Mishpat* ch. 308.

not even have to be an official appointment ceremony at all; the understanding is built into societal law that one who undertakes responsibility for the care and welfare of minors who are dependent on him *automatically* gains the legal standing and accompanying responsibilities of a fully appointed *apotropus*.<sup>81</sup> These include, but are not limited to: being entrusted with the care, upbringing, and education of the child;<sup>82</sup> the proper and responsible administration of the child's assets;<sup>83</sup> and the general good faith requirement to act in all instances on the child's behalf. All of these responsibilities are subject to the court's supervision.<sup>84</sup>

On an even more technical *halakhic* level, there is a well-established principle in Jewish law, "*zachin le'adam shelo b'fanav*," which states that we are allowed to bestow benefit on another person even in their absence (and even without their consent).<sup>85</sup> One is rightfully allowed to assume that every rational person is a self-interested actor, and that if the person was present or capable of consent, he or she would want anything that is to his or her benefit. Since the entire purpose of the caretaker is literally to do what is in the best interests of the child (in other words, to act in the child's benefit), the concept of "*zachin*" allows us to appoint the caretaker even though the minor is not capable of legal consent.<sup>86</sup> The court will seek to appoint someone with personal integrity, competence in worldly affairs and the ability to handle the affairs of the child.<sup>87</sup> If it is in the best interests of the child, two or more people may be invested as co-guardians.<sup>88</sup>

It is worthwhile to mention that as noted in its accompanying explanatory note, the State of Israel's 1961 Capacity and Guardianship

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<sup>81</sup> See BABYLONIAN TALMUD, *Gittin* 52a; RASHI, COMMENTARY ON THE BABYLONIAN TALMUD, *Gittin* 52a; see also VIDAL OF TOLOSA, MAGGID MISHNEH, *Hilchos Nahalot* 11:1; YA'AKOV BEN ASHER, ARBA'AH TURIM, *Hoshen Mishpat* 290:31; CARO, *supra* note 46, *Hoshen Mishpat* 290:24.

<sup>82</sup> BEN YEHIEL, *supra* note 66, at 82:2; DE MEDINA, *supra* note 80, *Even HaEzer* 123; BENZION UZIEL, SHA'AREI UZIEL, 1, 126, 173–76.

<sup>83</sup> BABYLONIAN TALMUD, *Gittin* 52b; see also CARO, *supra* note 46, *Hoshen Mishpat* 290:8–11, 13.

<sup>84</sup> See BABYLONIAN TALMUD, *Gittin* 52a; UZIEL, *supra* note 82, at 170.

<sup>85</sup> See BABYLONIAN TALMUD, *Ketubot* 11a; see also *id.*, *Gittin* 11b–12a, 12b–13a; *id. Kiddushin* 23a; *id. Bava Metzi'a* 10a, 12a, 13a, 19a, 20a, 35b, 71b–72a; *id. Ketubot* 7b; *id. Nedarim* 36b; *id. Eruvin* 46b, 80b, 81a–b, 95a.

<sup>86</sup> See *Piskei Din Rabbani* 2:181.

<sup>87</sup> BABYLONIAN TALMUD, *Bava Metzia* 70a; *id.*, *Ketubot* 109b; see also BEN ASHER, *Hoshen Mishpat* 290:4; JOSEPH CARO, BEIT YOSEF, *Hoshen Mishpat* 290:4.

<sup>88</sup> See BEN YEHIEL, *supra* note 66, at 82:2.

Law was explicitly based on the laws of *apotropos*.<sup>89</sup> In fact, the sense of guardianship in Jewish law is so strong that it was once invoked in a New York Supreme Court case to extend the obligations of an adoptive father beyond the demands of civil law.<sup>90</sup>

#### *A. Practical Issues of Adoptive Parenting under Jewish Law*

Having established the theoretical basis for the practice if not the law of adoption in the Jewish tradition, and as it relates to contemporary norms, it is still important to deal with some of the practical questions that are bound to come up in the practice of religious life. In general, for instance, the Rabbis prohibited two unrelated people of the opposite gender from spending too much time alone together in private.<sup>91</sup> What about an adoptive parent and their child of the opposite sex?

Although there are those that disagree to various and varying extents,<sup>92</sup> it is widely held that the laws of *yichud* (forbidden seclusion between unrelated members of opposite genders) do not apply in the same way in an adoption scenario. Rabbi Eliezer Waldenburg (known as the *Tzitz Eliezer*, 1915-2006), points out that otherwise the institution of adoption would have to disappear.<sup>93</sup> Take for example the case of a husband and a wife who adopt a baby boy and then ten years later the husband dies. During his life, there was generally no prolonged seclusion, as he was presumably around. Even during those times when there might have been short periods of seclusion, the *halakha* takes into consideration the fact that having a spouse who is readily around is a

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<sup>89</sup> See Ben-Zion Schereschewsky & Menachem Elon, *Apotropos*, in 2 ENCYCLOPAEDIA JUDAICA 278-83 (Michael Berenbaum & Fred Skolnik eds., Macmillan Reference USA 2007) (“The Explanatory Note to the Capacity and Guardianship draft law . . . emphasized the similarity between [it] and Jewish Law, stating that: ‘In substance, its proposals are largely in accordance with Jewish legal rules.’”).

In the Knesset debate over the bill, Justice Minister Pinhas Rosen explained ‘the duty and right to care for the needs of minors’ . . . as follows: ‘. . . the essence of parenthood is the obligation to care for the children. As a practical matter, the parent-child relationship is primarily one that imposes obligations on the parents. This rule has been developed in a long line of Israeli court decisions, and is based upon the principles of Jewish Law.’

*Id.*

<sup>90</sup> *Wener v. Wener*, 301 N.Y.S.2d 237, 240-41 (N.Y. Sup. Ct. 1969).

<sup>91</sup> See CARO, *supra* note 46, *Even HaEzer* 22:2; MAIMONIDES, *supra* note 10, *Hilchos Issurei Biah* 22:3.

<sup>92</sup> See Israel Berzon, *Contemporary Issues in the Laws of Yichud*, 13 J. HALACHA & CONTEMP. SOC’Y 79, 108 (1986). Even amongst those who disagree in theory and maintain that the rules still apply, many find other ways to be lenient practically, by relying on such technicalities as an open door, or a key with a neighbor, or the like.

<sup>93</sup> 6 ELIEZER WALDENBURG, TZITZ ELIEZER 40:21.

general deterrent to inappropriate behavior.<sup>94</sup> Now that the husband is gone, what is the mother of a young adopted boy supposed to do? Likewise, it is generally assumed that it is forbidden for two unrelated people of the opposite gender to engage in *any* kind of touching, certainly intimate touching such as kissing or hugging, both of which are common and healthy displays of affection for a parent to a child and vice versa. How then are the members of the family supposed to develop healthy relationships?

Concerns such as these led the great decisors of the last generation, including Rabbi Dr. Soloveitchik<sup>95</sup> and Rabbi Moshe Feinstein (1895-1986) (perhaps the greatest *halakhic* decisor in American history) to agree with the lenient view of the Tzitz Eliezer,<sup>96</sup> and assume that neither the prohibition of seclusion, nor the ban on *kiruv basar*, (lit. closeness of the flesh; i.e. physical contact) applies as usual in the context of adoption.<sup>97</sup> The Tzitz Eliezer assumes that this is so at least for children adopted before the age when the prohibitions set in, which is age three for a girl and age nine for a boy, presumably because then the feelings develop naturally like that of any other parent towards a child.<sup>98</sup> In his view, an older child may not be adopted unless the laws of seclusion and restrictions of physical contact are all observed.<sup>99</sup> Rabbi Feinstein is even more lenient, noting that no adoptive father would dare commit an inappropriate act with his adoptive daughter lest his wife find out, and that this intimidation factor alone is enough to permit seclusion even with a child that was adopted at a later age.<sup>100</sup> Rabbi Feinstein also says that it is permitted for a parent to kiss and hug an adopted child since the kissing and hugging is done in a fashion that is no different than the kissing and hugging between a biological child and their parent.<sup>101</sup> (Some, however, are less lenient in these areas, and list these concerns as yet another reason why Jewish law would forbid a closed adoption (see *infra*, Part IV.B.); lest the child and/or the parent

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<sup>94</sup> See summary of rulings regarding Hilchos Yichud by Rabbi Moshe Feinstein, *Weekly Halacha*, TORAH.ORG, <http://www.torah.org/advanced/weekly-halacha/5757/achrei.html> (last visited Feb. 12, 2014).

<sup>95</sup> See Schachter, *supra* note 9, at 96.

<sup>96</sup> See MOSHE FEINSTEIN, IGGROS MOSHE, 4 *Even HaEzer* 64:2.

<sup>97</sup> *Id.* See also Rav Chaim David Halevi (Teshuvot Asei Lecha Rav 3:39); Rav Ovadia Yosef (see YALKUT YOSEF, KITZUR SHULCHAN ARUCH 975).

<sup>98</sup> See generally, *supra*, note 92.

<sup>99</sup> *Id.*

<sup>100</sup> FEINSTEIN & MOSHE, *supra* note 96.

<sup>101</sup> The only reason that these rules are suspended for a biological child in the first place is because it is obvious that the touching is being done in a non-sexual way; here too the kissing and hugging is being done only in a safe parental fashion. *Id.*, 2 *Even HaEzer* 14.

end up unwittingly violating the laws of seclusion and physical contact, simply because they did not know to be more careful.)<sup>102</sup>

As for the question of inheritance, in the absence of a will, *halakha* does give preference to those who share blood relations.<sup>103</sup> At the same time though, everyone has the right to bequeath any of their possessions to anyone they desire, and according to some authorities, even in the absence of an actual will, the adoption of a child through the civil court system may be considered the equivalent of writing a will, bequeathing to the adopted child the entire estate or a proportionate percentage thereof.<sup>104</sup>

From a dual systems perspective, while there are other approaches that do deal with the conflict in outlook differently,<sup>105</sup> many, if not most, mainstream rabbinic authorities are content to more or less graft Jewish adoption onto a secular model, using the principles of Jewish law to recreate and approximate the secular definitions and obligations of adoption law to various degrees.<sup>106</sup> Under this approach, to the extent that from an American law perspective, for instance, the child is considered fully and completely the secular child of the adoptive parents, equivalent to any other biological child, Jewish law is not opposed to this in any meaningful way, as this statement makes no religious claim on the relationship.<sup>107</sup> Once the pre-conditions have all been worked out, to an outsider looking in objectively, a Jewish adoptive family looks and acts no different than any other adoptive family.

### *B. Whom to Adopt? When to Tell?*

The most fundamental question that any adoptive parents ask themselves is 'which child should I adopt?' The short answer is that there is no answer. Jewish law, like any other system, maintains that it needs to be a good fit for everyone,<sup>108</sup> and so the best interests of the

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<sup>102</sup> See MOSHE SOFER, TESHUVOT CHATAM SOFER, *Even HaEzer* 125; see also UZIEL, *supra* note 82, at 193.

<sup>103</sup> Schachter, *supra* note 9, at 95.

<sup>104</sup> *Id.* (quoting CHAIM HEZEKIAH MEDINI, S'DEI CHEMED 40:38).

<sup>105</sup> See, e.g., Schachter, *supra* note 9, at 93-115 (for a summary of some of these approaches).

<sup>106</sup> Some of the less accommodationist-minded approaches, for instance, see Jewish adoption in a secular setting more closely resembling a foster home situation. *Id.*; see also JOSEPH E. HENKIN, KITVEI HA-GRIYA HENKIN 98 (1989).

<sup>107</sup> See, generally, *Religion as a Factor in Adoption Proceedings*, 48 A.L.R.3d 383 (originally published in 1973).

<sup>108</sup> See Eliav Shochatman, *The Essence of the Principles Used in Child Custody in Jewish Law*, *Shenaton LeMishpat Halvri* 5 (5738) 285-302 (Hebrew).

child standard is also a factor here. Non-Jewish children are perfectly valid candidates for Jewish family adoption.<sup>109</sup> There are, however, various and different concerns when a family chooses to adopt either a Jewish or non-Jewish child.

One of the issues most frequently raised in terms of adopting a Jewish baby is the issue of legitimacy, since a child that is illegitimate under Jewish law is biblically forbidden to marry most other Jewish people.<sup>110</sup> In the case of an adoption, especially if neither parent's identity is known, it may be impossible to establish the child's legitimacy. Thankfully though, *halakha* has an answer. The greatly influential authority Rabbi Ezekiel Landau (known as the Noda BiYehuda, (1713-1793)) writes that the "majority principle" is enough to consider this child as legitimate. Since most children are born legitimately, this child probably was too, and he or she is therefore permitted to marry into the congregation under this assumption.<sup>111</sup>

With regard to a non-Jewish child, since there will have to be a conversion, and a convert is considered newly born, there are no legitimacy issues.<sup>112</sup> Non-Jewish adoptees have their own set of special requirements, however. Conversion generally requires circumcision (for male children), ritual immersion, and acceptance of the commandments.<sup>113</sup> Unlike the conversion of an adult, however, because of a minor's limited capacity, the Talmud in *Ketubot* allows for the conversion of a child to be done without the child's explicit consent (since they cannot give it) subject to the consent of the rabbinical court—"al da'at beth din"—again based on the concept of *zachin* discussed above.<sup>114</sup> While the exact parameters of what this means are subject to significant dispute, Rabbi Moshe Feinstein maintains that

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<sup>109</sup> See, for instance, Babylonian Talmud *Ketubot* 11a; for a more modern discussion, see Igrot Moshe E. H. 4:26; Teshuvot Beit Yitzchak (Y.D. 2:100:11).

<sup>110</sup> See MISHNA, *Kiddushin* 3:12; *id.*, *Yevamot* 4:13. Illegitimacy results from the union of a man and woman who are unable to contract a legally valid marriage with each other (ex.: a brother and a sister, an adulterous man with an already married woman). See BABYLONIAN TALMUD, *Yevamot* 45b. See also MAIMONIDES, *supra* note 10, *Hilchos Issurei Biah* 15:3; *Shulhan Arukh Even HaEzer* 4:19. See also Schachter, *supra* note 9, at 97-98.

<sup>111</sup> See 1 EZEKIEL LANDAU, RESPONSA OF NODAH BIYEHUDA, 1 *Even HaEzer* 7.

<sup>112</sup> See, e.g., BABYLONIAN TALMUD, *Yevamot* 62a, 97b; *Id.*, *Bekhorot* 47a.

<sup>113</sup> See *id.*, *Keritot* 8b.

<sup>114</sup> *Id.*, *Ketubot* 11a; CARO, *supra* note 46, *Yoreh De'ah* 268:7. Some authorities, however, maintain that the *zachin* principle only works when the recipient of the benefit is at least aware of it. See, e.g., AVRAHAM BORENSTEIN, AVNEI NEZER, *Even HaEzer* 194:4. This has bearing on the next discussion point, i.e., when to tell a child that they were adopted. According to the *Avnei Nezer* and his cohort at least, one should tell them right away so that they at least know that they have had the benefit of conversion bestowed upon them, or else the entire conversion might be questionably valid.

every child, when brought before the court at a young age, is eligible for conversion, even if they will not be religious when they become adults.<sup>115</sup>

There is an ongoing debate in America about the relative benefits of open versus closed adoptions—i.e., adoptions where the identities of the birth parents are known versus adoptions where they are not.<sup>116</sup> Under Jewish law children always need to know who their parents are, because many aspects of Jewish law are predicated on an awareness of where a person comes from genealogically.<sup>117</sup> Secretive adoptions, where the children are not told that they are adopted, are even more problematic. *Halakhic* authorities are generally concerned<sup>118</sup> that a biological brother and sister, separated at birth or adoption, will meet and end up getting married, producing illegitimate children.<sup>119</sup> Most *halakhic* authorities therefore assume that when adopting a Jewish child—who will likely end up marrying another Jewish person, whom they could theoretically be related to—it is forbidden to hide the fact of

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<sup>115</sup> The idea behind Rabbi Feinstein's view—the conceptual difference regarding children and the reason why the *beth din* cannot just convert even fully grown adults for their own good—can be understood as follows. While it is true that conversion is theoretically considered theologically beneficial, conversion to Judaism generally does require acceptance of commandments, and most people, even if they wanted to be Jewish at some level, are not in fact prepared to accept that level of commitment. The vast majority of people, therefore, are not eligible for conversion, and indeed the sinning associated with violating Jewish law that would inevitably occur if such a person *were* to become Jewish would in fact outweigh the benefits of conversion. Minors, however, *cannot sin* so long as they are minors, and so at the time of their conversion they *only* stand to benefit from being Jewish. See Michael J. Broyde & Mark Goldfeder, *Who Should be a Jew: The Timely Application of Timeless Principles*, in *WHO IS A JEW?* (Leonard J. Greenspoon ed., Indiana, Purdue Univ. Press 2013).

<sup>116</sup> See, for instance, Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 L. & PSYCHOL. REV. 137 (1992), and Tammy M. Somogye, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619 (1997).

<sup>117</sup> Everything from tribal designation to rights of inheritance. See SOFER, *supra* note 102, 2 *Even HaEzer* 125.

<sup>118</sup> See BEIT SHMUEL, *Even HaEzer* 13:1.

<sup>119</sup> Lest you think that this concern is so far-fetched, such cases occurred in England in the year 2008, in Ireland in 2010, and in America in the year 2013. Michael Brown, *When You Find Out You Married Your Sister*, TOWNHALL.COM (Feb. 26, 2013), <http://townhall.com/columnists/michaelbrown/2013/02/26/when-you-find-out-you-married-your-sister-n1519841/page/full>; Valerie Hanley, *I've Married My Sister—Now We're Having Our Second Baby: Siblings Who Defined Law Plan to Start New Life Abroad*, DAILY MAIL (Sept. 26, 2012), <http://www.dailymail.co.uk/news/article-1315307/Ive-married-sister—having-second-baby-Siblings-defied-law-plan-start-new-life-abroad.html>; Ellen Tumposky & Jonathan Lemire, *Twin Brother, Sister, Marry One Another*, N.Y. DAILY NEWS (Jan. 11, 2008), <http://www.nydailynews.com/news/world/twin-brother-sister-marry-article-1.343118>. The British Parliament used the British case to push for open adoption. See Allegra Stratton, *Twins Separated At Birth Married Each Other*, THE GUARDIAN (Jan. 11, 2008), <http://www.theguardian.com/uk/2008/jan/11/allegrastratton>.

adoption from a child.<sup>120</sup> Although Rabbi Feinstein does regard any act having the effect of suppressing parental identity as forbidden,<sup>121</sup> in a case where the identity of the biological parents *cannot* be determined, and yet it is known that the children are Jewish, Rabbi Feinstein is prepared to take the lenient view that there may be no formal obligation to tell them that they are adopted, although he still maintains that it is a good idea to do so.<sup>122</sup>

On the flipside, when adopting a non-Jewish child and converting him or her to Judaism, one need not be concerned that in the course of marrying into the Jewish community he or she will stumble upon an unknown sibling.<sup>123</sup> The child does, however, need to be told about his or her adoption, for a different reason. Going back to the Talmudic passage in *Ketubot* which allows for the Court to proceed and give constructive consent for the conversion of minors,<sup>124</sup> the Talmud continues and informs us that when this minor grows up and develops the capacity for consent, he or she has the ability to retroactively nullify the conversion and go back to being a non-Jew.<sup>125</sup> A convert also has certain restrictions on which people he or she is eligible to marry.<sup>126</sup> Therefore, at a reasonable time, when the child is old enough and mentally prepared, he or she should be told of the adoption and his or her Jewish status so that all is fully clarified and settled.

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<sup>120</sup> See *Minhat Yitzchak*, 4:49; *Mishneh Halakhot* 4:49. See also Broyde, *supra* note 9, at 146 (citing *Kol Kitvai HaGaon Yosef Eliyahu Henkin* 2:98 (1989); *Nahalat Tzvi*, at 35-40 (2d ed.), and *Lekutei Meir*, at 19-23).

<sup>121</sup> FEINSTEIN, *supra* note 100, *Yoreh Deah* 161-162.

<sup>122</sup> *Id.* Others still think it is forbidden not to, out of concerns for seclusion and the like.

<sup>123</sup> Under Jewish law, converted siblings are not related on a Biblical level. The concern would thus be on a rabbinic level. The minute chance of such a possibility (two closed adopted converted siblings falling in love) is not one we have to be rabbinically concerned with. See *Noda B'Yehudah*, E.H. 7.

<sup>124</sup> BABYLONIAN TALMUD, *Ketubot* 11a, *supra* note 114.

<sup>125</sup> There is a fundamental dispute amongst the early authorities as to whether the conversion takes full effect now but can be rejected later (opinion of the *Shitah Mekubetzet*), or whether it never fully takes effect until he or she gives his or her positive consent upon maturity (opinion of the *Tosafists* and others). This conceptual difference is important in cases where nothing happens when the child matures, they neither affirm nor reject their conversion process. See Schachter, *supra* note 9, at 101-04.

<sup>126</sup> See BABYLONIAN TALMUD, *Kiddushin* 78a; MAIMONIDES, *supra* note 10, *Hilchos Issurei Biah* 18:3.

For both Jewish and non-Jewish adoptive children, some authorities point to a view about family status expressed in the *Sefer HaChinuch*<sup>127</sup> in a different context:

At the root of this precept lies the purpose that the world should be settled as the Eternal Lord desired; and the Lord blessed is He wished that everything in His world should produce its fruit (offspring), each according to its species, and no one species should become intermingled with another. And so did He wish that about a human child it should always be known whose it is, and they should not become intermingled with one another.<sup>128</sup>

Again, in the Jewish tradition, there is nothing shameful in adoption. It is actually quite commonplace; according to the National Jewish Population Survey in 2000-2001, slightly more than five percent of all Jewish families had adopted children, and almost three percent of Jewish children in America under the age of eighteen were adopted—roughly 35,000 children.<sup>129</sup> When the parents, siblings, grandparents, aunts, uncles and other extended family members are added, this number approaches 500,000 Jews in America who have been directly touched by the adoption process.<sup>130</sup>

#### V. ADOPTION IN ISRAEL

Israel represents a fascinating case study because, as a Jewish and democratic state, even its secular laws are meant to embody “traditional Jewish values.”<sup>131</sup> At the same time, it is a party to the Hague Convention on Protection of Children and Co-operation in Respect of

<sup>127</sup> A 13<sup>th</sup>-century work that was published anonymously in Spain. It systematically discusses the 613 commandments in the Torah.

<sup>128</sup> SEFER HACHINUCH, *Commandment 35*. This concept was originally stated in regard to the prohibition of adultery. See also Daniel Pollack et al., *Classical Religious Perspectives of Adoption Law*, 79 NOTRE DAME L. REV. 693, 709 (2004) (quoting NAHMANIDES, COMMENTARY ON THE TORAH, *Leviticus* 18:20, who expresses a similar sentiment).

<sup>129</sup> UNITED JEWISH COMMUNITIES, *THE NATIONAL JEWISH POPULATION SURVEY 2000-01: STRENGTH, CHALLENGE AND DIVERSITY IN THE AMERICAN JEWISH POPULATION* 4-5 (updated 2004), available at [http://www.jewishfederations.org/local\\_includes/downloads/4606.pdf](http://www.jewishfederations.org/local_includes/downloads/4606.pdf).

<sup>130</sup> Kathy Brodsky & Dina Rosenfeld, *Meeting the Needs of Adoptive Jewish Families*, CONTACT MAGAZINE, (Spring 2005) available at [http://www.jccany.org/site/PageServer?pagename=ametz\\_meetingtheneedssofjewishadoptivefamilies](http://www.jccany.org/site/PageServer?pagename=ametz_meetingtheneedssofjewishadoptivefamilies).

<sup>131</sup> See, e.g., Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 art. 1(a), available at [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (“The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.”); Aharon Barak, *The Values of the State of Israel as a Jewish and Democratic State*, JEWISH VIRTUAL LIBRARY (August 2009), <http://www.jewishvirtuallibrary.org/jsource/isdf/text/barak.html>.

Intercountry Adoption<sup>132</sup> and so all adoptions must meet the requirements of the Convention and the laws implementing the Convention, in order to both protect and safeguard the best interests of the child, and to establish a system of cooperation amongst the ninety states that have ratified it, as well as the additional signatories.<sup>133</sup>

Historically, Israel has always operated under the long-standing Ottoman millet system, by which local citizens are governed by their religious community courts and norms in certain family law matters.<sup>134</sup> When Israel declared independence in 1948, in order to avoid a legal vacuum, it absorbed much of the law of Mandatory Palestine (1917-1948), including the Palestine Order in Council (POC) (1922), a document that functioned in some ways like a temporary constitution for the country.<sup>135</sup> Article 51 of the POC explicitly stated that the issue of “adoption of minors” is one of personal status, which would fall under the Millet confessional system’s jurisdiction.<sup>136</sup> This was somewhat problematic though, for the following reason. At the time the State of Israel had no secular adoption law for Jewish law to graft itself onto, and as noted above, traditional Jewish law did not have a native concept of formal adoption. Still, in the early days of the state, both civil and rabbinical courts were regularly issuing adoption orders out of necessity, sometimes explicitly noting that they were doing so to fill an “urgent need” and in “anticipation of the passage of appropriate legislation which would, *inter alia*, validate those orders.”<sup>137</sup> The first time an adoption order was challenged, however,<sup>138</sup> the Israeli Supreme Court had to acknowledge that whatever the court had done could not be considered full adoption, because such a concept did not exist legally. The Supreme Court decided to uphold the proceedings anyways, by reclassifying the adoption order as a long-term custody decision in keeping with the best interests of the child, and in keeping

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<sup>132</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, adopted May 29, 1993, 1870 U.N.T.S. 167, 32 I.L.M. 1134, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69) [hereinafter Hague Convention].

<sup>133</sup> See *Hague Convention Status Table*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Jan. 24, 2014).

<sup>134</sup> See Michael J. Broyde & Mark Goldfeder, *Israel*, in CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 604, 606 (Robert E. Emery ed., 2013).

<sup>135</sup> See Daniel Jacobson, *The Legal System of Israel*, 40 A.B.A. J. 1067, 1067 (1954).

<sup>136</sup> The Palestine Order in Council, art. 51, Aug. 10, 1922.

<sup>137</sup> HENRY EDMEADES BAKER, THE LEGAL SYSTEM OF ISRAEL 161 (1968).

<sup>138</sup> See CA 50/55 Hershkovitz v. Greenberger PD 411, 416 [1955] (Isr.).

with the Jewish law mandate.<sup>139</sup> Still, this was a wake-up call for Israel to establish an adoption law, and after a few more such cases, it finally did.<sup>140</sup> In 1960, Israel adopted a modern secular adoption law.<sup>141</sup> Religious courts maintained concurrent jurisdiction, which allowed them to continue granting adoption orders with the parties' consent,<sup>142</sup> as well as allowing for religious matching between adopters and adoptees.<sup>143</sup> Since 1981, the Adoption of Children Law (5741/1981)<sup>144</sup> which repealed the earlier Adoption of Children Law, (5720/1960),<sup>145</sup> has governed adoption in Israel. Maintaining the earlier religious matching provision, Section 5 of the 1981 law also states that the adopter shall be of the same religion as the adoptee.<sup>146</sup>

The religious matching clause has sometimes been understood as reflective of Israel's commitment to religious diversity within the Millet system. As a few scholars have observed;

Respect for religious pluralism is at the base of various laws which reject automatic equality in order to preserve the collective rights of a religious community. Thus, the Law on Adoption [sic], 5741-1981 prescribes that the adopting persons be of the same religion as the adoptee. In the matter of weekly rest, it is provided that non-Jews may choose Sunday or Friday instead of Saturday, which is the Jewish Shabbat.<sup>147</sup>

The law was also designed to protect underprivileged minority groups, especially in terms of their socioeconomic status. Due to their inferior socio-economic position, such groups tend to be disproportionately overrepresented in the pool of children up for adoption and

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<sup>139</sup> *Id.*

<sup>140</sup> *See, e.g.*, CA 179/53 Cohen v. Cohen IsrSC 9 1166 [1955].

<sup>141</sup> *See* Michael M. Karayanni, *In the Best Interests of the Group: Religious Matching under Israeli Adoption Law*, 3 BERKELEY J. MIDDLE E. & ISLAMIC L. 101, 153-54 (2010).

<sup>142</sup> *Id.* at 117.

<sup>143</sup> *Id.* at 101.

<sup>144</sup> Adoption of Children Law, 5741-1981, 35 LSI 360 (1980-81) (Isr.).

<sup>145</sup> Adoption of Children Law, 5720-1960, 14 LSI 93 (1960) (Isr.).

<sup>146</sup> Lit. 'The adopter must be no other than he who belongs to the same religion of the adoptee.' Adoption of Children Law, 5741—1981, 35 LSI 360 (1980-81) (Isr.). Israel also hosts several other religious communities, and requires religious matching for everyone. In fact, the Adoption of Children Law is regarded as the first effort to make a norm applicable in the family law context for all Israelis, irrespective of their religious affiliation. *See* MENASHE SHAVA, HA-DIN HA-ISHI BE-YISRAEL [PERSONAL LAW IN ISRAEL] 190 (4th enlarged ed. 2001) (in Hebrew); Menashe Shava, *Legal Aspects of Change of Religious Community*, 3 ISR. Y.B. HUM. RTS. 256, 257 n.8 (1973).

<sup>147</sup> Karayanni, *supra* note 141, at 42-43 (citing Ruth Lapidoth & Michael Corinaldi, *Freedom of Religion in Israel*, in ISRAELI REPORTS TO THE XIV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 273, 277-78 (Alfredo Mordechai Rabello ed., 1994)).

disproportionally underrepresented in the pool of potential adopters.<sup>148</sup> Unrestricted (i.e. non-matched) adoption between the minority and the majority groups would end up producing a one-way stream of minority children being adopted by majority adopters.<sup>149</sup>

In truth though, on a legislative level, Israel has openly addressed its religious matching requirement in terms of being part and parcel of the best interest of the child standard. In two separate Supreme Court cases, the Court was particularly concerned that a trans-religious setting would effectively be a means for the religious conversion of a minor at an age in which the child is incapable of understanding the meaning of religious identity. The Court was also worried about the repercussions that trans-religious placement might have on the child's self-image after growing up and learning about it. In the first case, *The American European Beit-El Mission v. Minister of Welfare*,<sup>150</sup> a Christian Evangelical foster care institution challenged the condition in its organizational license which required it to only accept Evangelical Christian children. The Court held that the regulations, which were designed to protect young children who are not competent to apprehend religious belief from being subjected to religious education of a different religion, were reasonable, and that they were in the best interest of the child in terms of preventing identity confusion and social conflict.<sup>151</sup> The Court also held that there was nothing discriminatory in the regulations, given that they applied to all religions alike.<sup>152</sup>

In the second case, *Consuelos v. Tourjeman*,<sup>153</sup> a Brazilian baby girl, Bruna Consuelos, was kidnapped from her home when she was only a few months old and handed to a baby trafficking mob. Shortly afterwards, the baby was transferred to an Israeli couple, the Tourjemans, who were seeking to adopt a child.<sup>154</sup> On the advice of their lawyer, they traveled to Brazil and then on to Paraguay where they

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<sup>148</sup> Laura J. Schwartz, *Religious Matching for Adoption: Unraveling the Interests Behind the "Best Interests" Standard*, 25 FAM. L.Q. 171, 188 (1991).

<sup>149</sup> This same concern was the driving force behind the Indian Child Welfare Act (ICWA) of 1978, 25 U.S.C. §§ 1901-1963 (2012), which conferred on Native American tribal courts exclusive jurisdiction to decide on the placement of any Native American child domiciled on a reservation. *Id.* § 1911.

<sup>150</sup> HCJ 103/67 *The American European Beit-El Mission v. Minister of Welfare*, IsrSC 21(2) 325, 327 [1967] (Isr.).

<sup>151</sup> *Id.* at 330 (Witkin, A., concurring/dissenting).

<sup>152</sup> *Id.* at 329.

<sup>153</sup> HCJ 243/88 *Consuelos v. Tourjeman*, 45(2) PD 626, 631-33 [1991] (Isr.).

<sup>154</sup> Karayanni, *supra* note 141, at 75 (quoting HCJ 243/88, *Consuelos v. Tourjeman*, 45(2) PD 626, 633 [1991] (Isr.)).

received the baby.<sup>155</sup> Acting upon the foreign adoption order, the Tourjemans converted Bruna to Judaism and registered her as a Jew and as their daughter in state records.<sup>156</sup> Bruna's biological parents, however, were Catholic, thereby bringing the Court to later conclude that Bruna's original faith was Catholicism as well.<sup>157</sup>

The Brazilian parents did all they could to find their child, and miraculously, with the aid of a British TV producer who was investigating Brazilian baby exports, they managed to track her down in Israel some 18 months after the kidnapping.<sup>158</sup> The Brazilian parents filed a habeas corpus petition before the Israeli Supreme Court seeking to regain custody of their child, and the Court granted the petition, removing the infant from the Israeli adopters' hands.<sup>159</sup> In a lengthy decision delivered by the Deputy President of the Supreme Court, Menachem Elon, it was established that the foreign adoption order and the birth certificate that were issued for little Bruna were forged.<sup>160</sup> Based on expert testimony, Justice Elon concluded that returning the child to her biological parents would not adversely affect her best interests, and only then was he prepared to determine that the child should be transferred to their custody.<sup>161</sup>

In his opinion, Elon reflected on the propriety of the religious conversion of children. A preeminent expert on Jewish law, he turned to the *halakha*, which (as described above) allows the court to give constructive consent when they have due authority, either because the parents have presented the child or because the child has no parents. Under Israeli law as well (Law of Legal Capacity and Guardianship, 1962),<sup>162</sup> the child's biological parents must consent before conversion takes place, or the court must provide approval.<sup>163</sup> Given that the adoption order was forged, the Israeli couple was left with no legal status to consent to the religious conversion, making it ineffective.<sup>164</sup> Even if the child were to be kept by the Israeli couple then, she would grow up in a Jewish home, yet she would keep her original religious identity as a Catholic. Elon resorted once again to the expert testimony in concluding that such a trans-religious upbringing would undoubtedly

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> HCJ 243/88, *Consuelos v. Tourjeman*, IsrSC 45(2) 626, 650-51 [1991] (Isr.).

<sup>158</sup> Karayanni, *supra* note 141, at 75.

<sup>159</sup> *Id.*

<sup>160</sup> HCJ 243/88, *Consuelos v. Tourjeman*, IsrSC 45(2) 626, 650 [1991] (Isr.).

<sup>161</sup> *Id.*

<sup>162</sup> Legal Capacity and Guardianship Law, 5722-1962.

<sup>163</sup> *Id.* § 13a(a).

<sup>164</sup> *Id.* at 652.

cause a severe identity crisis when the child discovered that her biological parents were Catholics and that she herself was born a Catholic.<sup>165</sup> According to Elon, this end result in itself would have been incompatible with the best interests of the child.<sup>166</sup> Indicative in this respect, Elon went on to argue, is the religious matching requirement in Israeli adoption law.<sup>167</sup>

Justice Elon concluded his remarks giving voice to a strong Jewish collective sentiment, which, although it had not ever appeared in the law, had also been raised in the original Knesset adoption debates thirty years earlier:<sup>168</sup>

The question of the minor's severance from her parents' religion may be a further serious consideration to respond affirmatively to the plaintiff's petition in this case, and this is connected to the tragic memories of the European Holocaust a generation ago. We remember the struggle of families and Jewish organizations to restore to their people and to their religion the Jewish children whose parents and entire family, before being sent to the extermination camps and the gas ovens, consigned to Christians to care for and bring up. It is appropriate that we too should act in this manner in similar cases, in the opposite direction, when the background is not extermination camps but gangs of criminals and grasping mercenaries . . . . The interests of the decision and the interests of the minor, born to a mother of the Catholic faith, are to keep her birth religion, and this may not be changed without the consent of the petitioner, her mother and parent.<sup>169</sup>

Based on these two cases, it can be argued that religious matching protects the best interests of the child in two ways. First, ascribing to a child the independent value of human dignity demands that his or her religious identity not become a commodity that can be fixed or transferred, even when the child is transferred from the custody of one couple to the other.<sup>170</sup> Second, in light of the fact that the trans-religious placement can cause an identity crisis for the adoptee after growing up and learning of his or her original religious identity, the child's mental wellbeing requires that he or she be placed with adopters sharing the same religious identity.<sup>171</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See Karayanni, *supra* note 141, at 123-33.

<sup>169</sup> HCJ 243/88, *Consuelos v. Tourjeman*, IsrSC 45(2) 626, 652-53 [1991] (Isr.); Karayanni, *supra* note 141, at 77.

<sup>170</sup> Karayanni, *supra* note 141, at 77.

<sup>171</sup> *Id.*

A recent study<sup>172</sup> by the Evan B. Donaldson Adoption Institute seems to concur with these findings, noting that “[a]ll human beings, as they develop, seek to understand who they are and what their place is in the world. Adopted individuals have the additional overlay of discerning why they are not with the parents who created them and what relevance this has for their own identities.”<sup>173</sup> Those children adopted across cultural or religious divides may have the additional hardship of facing life without input from a family with at least the same shared experience.<sup>174</sup>

The religious matching requirement, combined with the Israeli Jewish reality, has contributed to Israel having some unique characteristics when it comes to intercountry adoption. While there may have been political motivations for originally writing the law this way,<sup>175</sup> what it did in practice was to make it very hard for the predominantly Jewish population in Israel to adopt children from other countries. Because Judaism so favors adoption in practice,<sup>176</sup> and because maintaining a Jewish child’s religious heritage is important, both in and out of Israel, there are not-for-profits that work to immediately place any Jewish children that are put up for adoption with Jewish families,<sup>177</sup> so it is rare to find a healthy Jewish baby in an adoption agency either in Israel or in the Diaspora. For some time now, there have only been (on average) somewhere between seventy and

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<sup>172</sup> HOLLEE MCGINNIS ET AL., EVAN B. DONALDSON ADOPTION INSTITUTE, *BEYOND CULTURE CAMP: PROMOTING HEALTHY IDENTITY FORMATION IN ADOPTION* (2010).

<sup>173</sup> *Id.* at 12.

<sup>174</sup> *See id.*

<sup>175</sup> *See* Allison Kaplan Sommer, *A Family Affair*, THE JERUSALEM POST, Mar. 8, 1996, at 16; *see also* Karayanni, *supra* note 141, at 22.

<sup>176</sup> *See* the Talmudic quotes from Megillah and Ketubot, *supra* notes 15 and 17.

<sup>177</sup> Such agencies include a Torah Infertility Medium of Exchange (A.T.I.M.E.) and the Jewish Children’s Adoption Network (JCAN). *See* Bayla Sheva Brenner, *Adoption: Filling the Void Creating Jewish Families Through Adoption*, JEWISH ACTION, *reprinted with permission at* <http://www.aish.com/jw/s/48908177.html> (last visited Feb. 12, 2014).

eighty healthy Israeli infants available for adoption each year,<sup>178</sup> and the average waiting period is about seven years.<sup>179</sup> In theory then, the thousands of Israeli couples who wanted to adopt after the year 1960 *would* have been looking abroad. But with the restriction of Section 5 in place, which essentially said that Jewish people were only allowed to adopt Jewish babies, the potential for intercountry adoption was in fact extremely limited, and barely any children were available. Finally, in 1996, five years after Israel ratified the Hague Convention,

the legislature resolved this problem by amending section 13A of the Capacity and Guardianship Law, 5722/1962, which now provides that the court may give an instruction for the minor's religious conversion 'to the religion of the person who provided for the minor with the intention of adopting him, during the six months that preceded the filing of the application for conversion.'<sup>180</sup>

This legislative fix has opened the door for much greater numbers in intercountry adoption;<sup>181</sup> between 1998, when the law went into place, and 2007, 2,056 international adoptees entered the country.<sup>182</sup>

The case law of the Israeli Supreme Court on adoption emphasizes the extensive impact of Jewish law on actual adoption procedures. The Law provides, for instance, that "the adoption shall not affect any legal

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<sup>178</sup> See Lara Kislinger, *Inter-country Adoption: A Brief Background and Case Study*, CTR. FOR ADOPTION POL'Y 11-12, <http://www.adoptionpolicy.org/pdf/backgroundCS.pdf> (last visited Jan. 24, 2014). For the sake of comparison, each year in the United States there are approximately four million babies born. Stephanie J. Ventura et al., *Revised Birth and Fertility Rates for the United States, 2000 and 2001*, 51 NAT'L VITAL STATISTICS REPORT 1, 7 (2003), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51\\_04.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_04.pdf). According to a recent PBS documentary, domestically, the percentage of infants given up for adoption has declined from 9 percent of those born before 1973 to 1 percent of those born between 1996 and 2002. Jo Jones, Dep't of Health and Human Servs., *Who Adopts? Characteristics of Women and Men Who Have Adopted Children*, NCHS DATA BRIEF NO. 12, 5 (Jan. 2009), <http://www.cdc.gov/nchs/data/databriefs/db12.pdf>. That still leaves about 40,000 infants a year who are given up for adoption in the United States. Despite their difference in size, the fact remains that while other Western nations were expanding access to intercountry adoptions, Israel was tightening its criteria for adoption in general and avoiding involvement in foreign adoption. See Kislinger, *supra* note 178.

<sup>179</sup> Gail Lichtman, *Adoptions in Israel*, EMUNAH OF AM., [http://www.emunah.org/magazine\\_detail.php?id=52](http://www.emunah.org/magazine_detail.php?id=52) (last visited Jan. 24, 2014).

<sup>180</sup> See Jeffrey Howard Tigay et al., *Adoption*, in 1 ENCYCLOPEDIA JUDAICA, 209, 212 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

<sup>181</sup> See Daphna Birenbaum-Carneli & Yoram S. Carneli, *Adoption and Assisted Reproduction Technologies: A Comparative Reading of Israeli Policies*, in KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS 141 (Daphna Birenbaum-Carneli & Yoram S. Carneli eds., 2010).

<sup>182</sup> Shahar Ilan, *Knesset Increases Costs of Foreign Adoptions by 75 Percent*, HAARETZ (Apr. 15, 2008), <http://www.haaretz.com/news/knesset-increases-costs-of-foreign-adoptions-by-75-percent-1.244006>.

prohibition or permission as to marriage or divorce.”<sup>183</sup> Accordingly, the Adoption Register may be inspected by a marriage registrar in the course of carrying out his official function in order to establish the “legitimacy of his pedigree,” or in other words, to prevent marriages between a brother and sister.<sup>184</sup> As a rule, all possible efforts are made to avoid a closed adoption. Indeed, sometimes in its capacity as the “father of minors,” the court is entrusted with

ensur[ing] the welfare and the future of the minor and order[ing] that the child be severed from his natural family—but this [is] only done when the court is convinced that leaving the minor with his family, or placing him with a foster family or in an ‘open adoption’ will cause him terrible suffering due to his parents’ incompetence.<sup>185</sup>

Israel’s participation in intercountry adoption then must be seen as directly related to its status as a Jewish state, from its focus on open adoptions to its requirement for conversion. Some have even expressed that anti-Semitism may contribute to the embargos that certain countries have put on intercountry adoption with Israel.<sup>186</sup> Still, while critics of intercountry adoption maintain that the practice promotes the “trade of children” by focusing on the potential parents instead of the children, Israel as a Jewish state has made a point of keeping it about the best interest of the child, protected by the father of all orphans, the Court, which represents the Father of all orphans in the Jewish tradition.<sup>187</sup>

When Israeli parents adopt children from another country, they often travel to that country to pick up the children themselves. The letter sent to adoptive parents when they return to Israel sums up Israeli policy on adoption quite nicely. Under letterhead reading: “Prime Minister’s Office—Conversion Administration—Special Rabbinic Tribunals for Conversion,” the letter congratulates the parents with the Talmudic maxim: “He who raises an orphan in his home is regarded as

<sup>183</sup> Tigay, et al., *supra* note 180, at 212 (*citing* Adoption of Children Law, 5720-1960 § 16(c)).

<sup>184</sup> Tigay, et al., *supra* note 180, at 212 (*citing* Adoption of Children Law, 5720-1960 § 30(2)).

<sup>185</sup> Tigay, et al., *supra* note 180 (*citing* C.A. 310/82, 37 (4) P.D. 421 (Elon, M.); C.A. 3763/92, 47 (1) P.D. 869 (Elon, M.)).

<sup>186</sup> See Eric Moss, *The Pediatrician with Two Lives*, THE JERUSALEM POST (Jan. 11, 2002), <http://www.highbeam.com/doc/1P1-49539718.html>.

Since the current escalation of the Israeli-Palestinian conflict, Russia and the Ukraine have put embargos on [inter-country adoption (ICA)] with Israel. The extent of the damage of the embargo—both from the perspective of Israel and of the sending countries—is difficult to pin down right now, but has severely affected ICA in Israel, and most likely a number of babies as well, who otherwise would have had homes.

Kislinger, *supra* note 178.

<sup>187</sup> *Psalms* 68:5.

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if he had actually brought him into this world.”<sup>188</sup>

#### VI. CONCLUSION

Although Jewish law does not have a traditional legal category of adoption, adoption as a social phenomenon has long been a well-regarded part of the Jewish tradition. In the Diasporic setting, Jewish law has developed methods to incorporate and approximate secular legal adoption within the bounds of *halakha*, to the extent that from an outsider or secular perspective, no difference can be felt. As would be expected in the Jewish state, the traditional Jewish concerns are handled openly, with preferences for religious matching, open adoption, and state sponsored conversion proceedings. Both in and out of Israel, Jewish adoption looks to fulfill the best interests of the child.

While we pray to live in a world where even loving adoption is no longer necessary, until such time as that is true, adoption in Judaism remains a wonderful thing, a special covenantal relationship and a perpetual kindness, equivalent to the giving of life itself.

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<sup>188</sup> Orly Vilnai, *Want your adopted son to be Jewish? Act Orthodox*, HAARETZ (Dec. 14, 2009), <http://www.haaretz.com/print-edition/news/want-your-adopted-son-to-become-jewish-act-orthodox-1.2178>.