THE MORALITY OF ADOPTION

Social-Psychological, Theological, and Legal Perspectives

Edited by

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6. Adoption, Personal Status, and Jewish Law

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> 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: . . . 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.
>
> RABBI JOSEPH B. SOLOVEITCHIK[1]

1. Rabbi Joseph B. Soloveitchik, *Family Redeemed: Essays on Family Relationships,* ed. David Shatz and Joel Wolowelsky (New York: Meorot Harav Foundation, 2002), pp. 60-61.

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There are two basic models of adoption found in legal systems. One framework has a full legal category of adoption, by which children become – as a matter of law – as if they were born to the adoptive parents. The other construct has no legal category of adoption at all and denies that children become as a matter of law as if they were born to the adoptive parents, but instead views such situations as a form of raising the children of another, or long-term foster care. Jewish law (like Islamic law[2] and the common law[3]) does not have a category of adoption,[4] but merely of foster care. Modern American law[5] (like the Code of Hammurabi,[6] Roman law,[7] and the Napoleonic code[8]) has full legal adoption. The differences between these two approaches are quite dramatic. This chapter will focus on Jewish law, and will allow the reader to see how Jewish law – with no legal category of adoption – addresses situations where children need a new home.

Why Is There No Adoption in Jewish Law?

Jewish law *(halakha)*[9] did not and does not have a court system with its juridical authority grounded in the right to change people's family law sta-

2. D. Marianne Brower Blair, "The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination," *Michigan Journal of International Law* 22 (2001): 646.

3. C. M. A. McLauliff, "The First English Adoption Law and Its American Precursors," *Seton Hall Law Review* 16 (1986): 659-60. It was not until the late 1920s that adoption became possible in England without a special act of Parliament.

4. Indeed, as noted by Rabbi Ben Tzion Uziel, 2 *Sha'arei Uziel* 185(7), the Hebrew term for adoption *("imutz")* (derived from Ps. 80:16) connotes the grafting of a branch onto a tree and is a misnomer in Jewish law. The classical term used in Jewish law ought to be *benai amunim,* which means "the children of people who raise them."

5. See for example, Ruth Arlene W. Howe, "Adoption Practice, Issues and Law, 1958-1983," *Family Law Quarterly* 17 (1983): 123-97.

6. *The Code of Hammurabi, King of Babylon: About 2250 B.C.,* ed. Robert Francis Harper (Chicago: University of Chicago Press, 1904), §§185-86.

7. See John Francis Brosnan, "The Law of Adoption," *Columbia Law Review* 22 (1922): 332-42; Leo Albert Huard, "The Law of Adoption: Ancient and Modern," *Vanderbilt Law Review* 9 (1956): 743 (summarizing various ancient adoption laws).

8. Huard, "Law of Adoption," p. 743.

9. "Jewish law," or *halakha,* is used herein to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the Torah) is the touchstone document of Jewish law and, according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writ-

tus. When disputes arise in family matters, they are treated as factual disputes under the law – but basic status issues cannot be changed by the legal system or judicial decree. Mother and father (and, by extension, brothers and sisters), once determined at birth, remain parents (and blood relatives), and cannot have that status removed. Indeed, the inability of the court system to change personal status is a general theme of all of Jewish family law.

Four examples – from dramatically different areas and eras of Jewish family law, but all sharing the basic model of family law as status issues – make this clear within Jewish law. The first example is from the most basic area of family law, namely, marriage and divorce. As the Talmud explains, marriage and divorce are essentially private acts (or contracts) which do not require a court system, permission from a judge, or a license from government.[10] Courts cannot create marriages or end them. Court-ordered annulments or divorce are essentially beyond the reach of Jewish law or a Jewish law court.[11] A Jewish court can, in exceptional situations, order a husband to give a Jewish divorce, and a wife to accept one, but it cannot grant the writ of divorce itself. Marriage and divorce are private status issues and fundamentally beyond the reach of the Jewish court systems to change.[12]

Another example is in the modern Jewish law discussion of artificial insemination. Although there is a wide-ranging debate within Jewish law about the propriety of such conduct, no one proposes that a husband who consents to the artificial insemination of his wife with sperm other than his own is the father of the resulting baby, as he is not such as a matter of fact.[13] A similar discussion takes place in the area of surrogate

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ings, the other two parts of the Hebrew Bible, were written over the next seven hundred years, and the Jewish canon was closed around the year 200 B.C.E. The time from the close of the canon until 250 C.E. is referred to as the era of the *Tannaim,* the redactors of Jewish law, whose period closed with the editing of the *Mishnah* by Rabbi Judah the Patriarch. The next five centuries were the epoch in which the two Talmuds (Babylonian and Jerusalem) were written and edited by scholars called *Amoraim* ("those who recount" Jewish law) and *Savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

The post-Talmudic era is conventionally divided into three periods: (1) the era of the *Geonim,* scholars who lived in Babylonia until the mid eleventh century; (2) the era of the *Rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the *Aharonim* (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo, called the *Shulhan Arukh,* as the basis for modern Jewish law. The *Shulhan Arukh* (and the *Arba'ah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orah Hayyim* is devoted to daily, Sabbath, and holiday laws; *Even Ha-Ezer* addresses family law, including financial aspects; *Hoshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matter. Many significant scholars – themselves as important as Rabbi Karo in status and authority – wrote annotations to his code, which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the *Shulhan Arukh* (Vilna: Ha-Almanah veha-Ahim Rom, 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Besides the law codes and commentaries, for the last twelve hundred years Jewish law authorities have addressed specific questions of Jewish law in written *responsa* (in question and answer form). Collections of such *responsa* have been published, providing guidance not only to later authorities but to the community at large. Finally, since the establishment of the State of Israel in 1948, the rabbinical courts of Israel have published their written opinions deciding cases on a variety of matters.

10. For a discussion of this, see Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (Hoboken, N.J.: KTAV, 2001).

11. The Talmud recounts six cases of annulment, three of which were pre-consummation, and thus suspect, and three of which involved duress in the creation of the marriage, thus causing the marriage to be naturally void. (The absence of court jurisdiction in marriage and divorce created the problem of abandoned wives and husbands who were stuck in a marriage where their spouse was not present; this is beyond the scope of this chapter.)

12. This stands in sharp contrast to American law. As is noted in American Jurisprudence (American Jurisprudence 2d Criminal Law, 21A §1034), civil death (the depriving of one's rights as a citizen) as a punishment for a crime whose sentence is life imprisonment historically included the dissolution of one's marriage, *whether or not either spouse wished the marriage to be dissolved.* Even if neither spouse wished the marriage to be dissolved, it could still be dissolved. As is stated in American Jurisprudence:

> Some statutes provide that when either spouse is sentenced to life imprisonment the marriage is automatically dissolved, without any judgment or legal process, and that a subsequent pardon will not restore conjugal rights. The same result has been reached under a statute merely declaring such persons civilly dead, where the statutes declaring a marriage of one who has a living spouse to be void, and to constitute the crime of bigamy, expressly except cases in which the living spouse has been sentenced to life imprisonment. *It has been held that dissolution of the marriage takes place without the necessity of any election on the part of the other spouse.* (Emphasis added)

It is part of the punishment for the crime that causes the marriage to be dissolved.

13. Four basic positions exist:

The first position, referred to as the position of Rabbi Moses Feinstein as a result of his vigorous advocacy of this position, is that artificial insemination is permitted and that

motherhood (and cloning).[14] Biological fatherhood and motherhood are status issues in Jewish law and beyond judicial re-ordering.

Yet another example is the discussion of child custody (which will be elaborated in the section on "Jewish Law and Adoption" in this chapter). Although there is a wide-ranging and intense dispute among various Jewish law decisors of the medieval era as to whether Jewish law can ever take custody of children away from fit parents and give the children to more fit "strangers" (such as grandparents), it is always made clear in the discussion that the basic issue is of "mere" custody, and not who is the parent. Fundamental notions of parenthood are immutable.[15]

A further example is sex-change surgery. According to Jewish law, the removal of sexual organs is prohibited; hence, sex-reassignment surgery is prohibited for men according to biblical law,[16] and it is disputable whether the removal of sexual organs is a biblical or rabbinic prohibition for women.[17] What is the status of a person who actually has such an operation? Jewish law is clear that a person who has a sex-change operation does not, in fact, change his or her gender according to Jewish law. Gender, too, is immutable. The earliest discussion concerning the sexual status of a transsexual is found in the twelfth-century commentary of Rabbi Abraham Ibn Ezra,[18] where he, quoting eleventh-century authority Rabbenu Hananel, states that intercourse between a man and another man in whom the sexual organs of a woman have been fashioned constitutes a violation of the biblical prohibition of homosexuality, despite the presence of apparently female sexual organs. Thus, Ibn Ezra rules that sexual status cannot be changed surgically, for if this person were now legally a woman, no violations of the sodomy laws could occur. This view is, indeed, the view accepted by Jewish law authorities.[19] Sexual status

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the paternity of the child is established by the genetic relationship between the child and the father (sperm donor). Thus he who donates the sperm is the father. Furthermore, Rabbi Feinstein is of the opinion that the act of artificial insemination does not violate Jewish law, and does not constitute an act of adultery by the woman, if she is married. See Moses Feinstein, *Iggrot Moshe, 1 Even Ha-Ezer* 10, 71; 2 *Even Ha-Ezer* 11; 3 *Even Ha-Ezer* 11. For another vigorous defense of his position, see M. Feinstein, *Dibrot Moshe, Ketubot* 233-48.

The second position, of Rabbi Joel Teitelbaum, is identical to that of Rabbi Feinstein's in acknowledging that the genetic relationship is of legal significance and the paternity is established solely through the genetic relationship. He also maintains, however, that the genetic relationship predominates to establish illegitimacy and the legal impropriety of these actions. Thus, heterologous artificial insemination is an act of adultery. See J. Teitelbaum, 2 *Divrei Yoel* 110, 140. (Both Rabbi Feinstein and Rabbi Teitelbaum agree on how paternity is established; however, they differ as to how illegitimacy is established.)

A third view is that of Rabbi Eliezer Waldenberg. He is of the opinion that an act of adultery occurs, not through the genetic mixing of sperm that is not the husband's with the wife's egg, but rather by the act of heterologous insemination itself; this act is physically analogous to adultery and is not permitted. This view is not based on the presence or absence of genetic relationships between child and husband but rather upon Rabbi Waldenberg's belief that the injection of sperm into another man's wife is, itself, a prohibited form of adultery. Furthermore, Rabbi Waldenberg maintains that this conduct is also a violation of the rules of modesty, which are of rabbinic origin. See E. Waldenberg, "Test Tube Infertilization," *Sefer Asya* 5 (1986): 84-92, and 9 *Tzitz Eliezer* 51:4.

A fourth position is advocated by Rabbi Jacob Breish, who maintains that heterologous insemination is not an act of adultery, and no biblical violation occurs; the sperm donor is the father. Nonetheless, he maintains that "from the point of view of our religion these ugly and disgusting things should not be done, for they are similar to the deeds of the land of Canaan and its abominations." See Jacob Breish, 3 *Helkat Yakov* 45-48 (quote on 46); similarly, see Rabbi Yehiel Yaakov Weinberg, 3 *Sredai Aish* 5.

Indeed, the outlier position in Jewish law is that the person who injects the sperm is the legal father, since he or she is committing the adultery (see Yoram Shapiro, "Artificial Insemination," *Noam* 1 [1957]: 138-42). This position has been widely attacked as it seems to be based on what on its face is an illogical position – that neither the genetic father nor the husband of the wife would be considered the father of the child; see Menachem Mendel Kasher, "Artificial Insemination," *Noam* 1 (1957): 125-28, and Jacob Breish, 3 *Helkat Yakov* 47. Even this view, however, is consistent with the basic model of Jewish law: fatherhood, once established, is unchangeable.

14. See Michael Broyde, "Cloning People: A Jewish View," *Connecticut Law Review* 30 (1998): 503-35, and "The Establishment of Maternity and Paternity in Jewish and American Law," *National Jewish Law Review* 3 (1988): 117-52.

15. For more on this, see Eliav Shochatman, "The Essence of the Principles Used in Child Custody in Jewish Law," *Shenaton LeMishpat HaIvri* 5 (5738): 285-301 (Hebrew), and Ronald Warburg, "Child Custody: A Comparative Analysis," *Israel Law Review* 14 (1978): 480-503.

16. See Lev. 22:24 and Babylonian Talmud, *Shabbat* 110b.

17. Compare Tosaphot, commenting on Babylonian Talmud, *Shabbat* 110b, s.v. *v'Hatanya* (rabbinic violation), with Maimonides, *Mishneh Torah, Sefer Kedushah, Hilkhot Isurei Biah* 16:11 (biblical prohibition).

18. Ibn Ezra (1089-1164) of Toledo, Spain, was a well-known biblical commentator; see his commentary on Lev. 18:22.

19. A contrary view is taken by Rabbi Eliezer Waldenberg, 10 *Tzitz Eliezer* 25:26, 6, but his analysis is difficult to accept and might be limited to this person's ability to stay married, rather than a general gender classification. Rabbi Waldenberg's view is widely disagreed with. See, e.g., F. Rosner and M. Tendler, *Practical Medical Halacha* (New York: Rephael Society, Medical-Dental Section of the Association of Orthodox Jewish Scientists, 1980), p. 44.

When discussing transsexual surgery, it is important to note that the law concerning children born with ambiguous sex status is different from that of sex-reassignment surgery in an adult. When a child is born genetically of one sex but with the outward physiological

cannot be changed.[20]

Thus, understanding how Jewish law has consistently viewed its own judicial and legal power in the area of family law allows adoption to be placed in context. Jewish law views status issues as matters of natural law, which can be adjudicated by a Jewish law court when in dispute,[21] but cannot be changed once established.[22]

signs of another sex, it is permitted to remove the outward sex organs and to harmonize the physiological appearance of the sex organs with the genetic sex status. That is not considered a violation of Jewish law, as the sex organs are not in fact genuine sex organs capable of reproduction. This would also be the case for a person whose general physiological appearance is not in harmony with his genetic status. It is not true, however, of a person whose genetic and physical appearance is not in harmony with his perceived psychological status. See Rosner and Tendler, *Practical Medical Halacha,* pp. 43-45; Moshe Steinberg, "Change of Sex in Pseudo-Hermaphroditism," *Asya* 1 (1976): 142-53.

20. American law does allow for sex change. One of the first American cases to discuss the status of such persons is a New Jersey case, *M.T. v. J.T.,* 355 A.2d 204, 140 N.J. Super. 77 (1976), where a wife filed a complaint for support and maintenance against the husband she was now separated from. In defense to the action for nonsupport, the husband asserted that his wife was a male and hence their marriage was void. He maintained that his wife was a former male who had "successfully" undergone sex reassignment surgery before the marriage. He maintained, however, that the law still categorized "her" as a male. Thus, since New Jersey does not recognize marriages between two members of the same sex, the marriage was void. The New Jersey Superior Court ruled that "where a transsexual was born with physical characteristics of a male, but successful sex reassignment surgery harmonized her gender and genitalia so that she became . . . a woman, such transsexual thereby became a member of the female sex for marital purposes and subsequent marriage to a male was not void" (American Jurisprudence 2d Marriage, 52 §50 [citing *M.T. v. J.T.,* 355 A.2d 204, 140 N.J. Super. 77 (1976)]). The New York Supreme Court agreed with this view in ruling in the famous case of *Richards v. United States Tennis Association,* 93 Misc. 2d 713, 400 N.Y.S.2d 267 (Sup. Ct. 1977), in which Richards sued the U.S.T.A. over its denial of permission for "her" to play professional tennis as a woman, after she underwent sex-reassignment surgery. The court ruled that the law must reflect the successful sex-reassignment surgery when it is done properly and for an appropriate medical reason. This is now the accepted law; see *In re Heilig,* 816 A.2d 68 (Md. 2003) and *In re Estate of Gardiner,* 22 P.3d 1086 (Kan.App., 2001).

21. Such as uncertain paternity; see *Shulhan Arukh, Even Ha-Ezer* 3:8.

22. This is not the model with which Jewish law views monetary matters, where a Jewish law court has the right of eminent domain to transfer property (thus providing a basis for regulating all financial matters), or ritual law, where decisors of Jewish law are allowed to add observances or suspend them. Although this matter is far beyond the reach of this chapter, grasping when and in what areas of law any given legal system perceives activism as a value is quite crucial to understanding the values of the system.

The Theoretical Basis for Parental Custody: The Predicate to Adoption

The initial question in all adoption determinations is frequently unstated: by what "right" do natural parents have custody of their children? As explained below, two very different theories, one called "parental rights" and one called "best interest of the child," exist in Jewish law. These two theories are somewhat in tension, but they lead to similar results in many cases, as the best interests of the child will often coincide with granting parents rights. Asking by what right parents have custody of their children is simply another way of considering when they should not.

There is a basic dispute within Jewish law as to why and through what legal claim parents have custody of their children. Indeed, this dispute is crucial to understanding why Jewish law accepts that a "fit" parent is entitled to child custody – even if it can be shown that others can raise the child in a better manner.[23] It also sets parameters for when adoption is proper.

Rabbi Asher ben Yehiel (R. Asher),[24] in the course of discussing the obligation to support one's natural children, advances what appears to be a naturalist theory of parental rights. R. Asher asserts two basic rules. First, there is an obligation (for a man)[25] to support one's children, and this obligation is, at least as a matter of theory, unrelated to one's relationship – or lack thereof – with the child (custodial), with one's wife (marital), or with any other party.[26] A man who has children is biblically

23. This chapter will not address the extremely important question of *how* Jewish law determines parental fitness; for an excellent discussion of that topic, see Rabbi Gedalya Felder, 2 *Nahalat Tzvi* 282-87 (second ed.), where he discusses the process that should be used by a beth din to make child custody determinations. Rabbi Felder discusses the practical matters involved in such determinations, and he adopts a format and procedure surprisingly similar to that used by secular tribunals in making these determinations. He indicates that the beth din should interview the parents, consult with a child psychologist, and conduct a complete investigation.

24. Known by the Hebrew acronym "Rosh," R. Asher (1250-1327) was a late Tosaphist who emigrated from Franco-Germany to Barcelona, then Toledo, Spain.

25. R. Asher might claim that the Talmudic rule which transferred custody of children (of certain ages) from the husband to the wife did so based on a rabbinic decree, and that this rabbinic decree gave the custodial mother the same rights (but not duties) as a custodial father; for a clear explication of this, see Rabbi Shemuel Alkalai, *Mishpatai Shemuel* 90.

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

obligated to support them. Following logically from this rule, R. Asher further states[27] that, *as a matter of law,* the parents are always entitled to custody against all others.[28] Of course, R. Asher would agree that in circumstances in which the father or mother are factually incapable of raising the children – are legally unfit as parents – they would not remain the custodial parents.[29] He appears to adopt the theory, however, that the father and mother are the presumptive custodial parents of their children based on their obligations and rights as natural parents, subject to the limitation that even natural parents cannot have custody of their children if they are factually unfit to raise them.[30] While this understanding of the parents' rights is not quite the same as a property right, it is far more a right (and duty) related to possession than a rule about the "best interest" of the child. The position of R. Asher seems to have a substantial foundation in the works of a number of authorities.[31]

27. *Responsa of R. Asher,* 82:2.

28. In any circumstance in which a marriage has ended and the mother is incapable of raising the children, the father is entitled to custody of his children, even if one were to agree that the children would be "better off" being raised by grandparents. Much of this basic dispute can be found in American law as well. *Painter v. Bannister,* 140 N.W. 2d 152 (Iowa 1966) typifies the best interest of the child cases, in that the court removed a child from the custody of a fit father and gave custody to more fit grandparents. The tradition of this form of custody determination is quite old and can be found in the English common law; see *Shelly v. Westbrooke,* 37 Eng Rep 850 (1817). A contrary view is found in *Pusey v. Pusey,* 728 P2d 117 (Utah 1986), and can be implied from the recent Supreme Court decision in *Troxel v. Granville,* 120 Sct 2054 (2000).

29. This could reasonably be derived from the Babylonian Talmud, *Ketubot* 102b, which mandates terminating custodial rights in the face of life-threatening misconduct by a guardian.

30. In cases of divorce, in situations where the Talmudic rabbis assigned custody to the mother rather than the father, that custody is based on a rabbinically ordered transfer of rights, and the mother gets custody, even if the children are best served by another. For a longer discussion of this issue, see *responsa* of Rabbi Ezekiel Landau, *Nodah BeYehudah, Even Ha-Ezer* 2:89, and Rabbi Yitzhak Weiss, *Minhat Yitzhak* 7:113, where these decisors explicitly state that even in cases where the mother was assigned custodial rights, the father has a basic right to see and educate his male children, and if this right is incompatible with the mother's presumptive custody claim, his rights and obligations supersede hers and custody by the mother will be terminated.

31. See, e.g., Rabbenu Yeruham ben Meshullam, *Toldot Adam veHava* 197a in the name of the *Geonim,* Rabbi Isaac deMolena, *Kiryat Sefer* 44:557 in the name of the *Geonim,* and Rabbi Joseph Gaon, *Ginzei Kedem* 3:62, where the theory of custodial parenthood seems to be based on an agency theory derived from the father's rights. R. Asher, in his theory of parenthood, seems to state that typically the mother of the children is precisely that agent. When the marriage ends, the mother may – by rabbinic decree – continue, if she wishes, to

There is a second theory of parental custody in Jewish law, the approach of Rabbi Solomon ben Aderet (Aderet).[32] Aderet indicates[33] that Jewish law always accepts – as a matter of law – that child custody matters be determined according to the "best interest of the child." Thus, Aderet rules that in a case where the father is deceased, the mother does not have an indisputable legal claim to custody of the children. Equitable factors, such as the best interest of the child, are the *sole* determinant of custody. This *responsum* is generally read as a theory for all child custody determinations.[34] Aderet maintains that all child custody determinations involve a single legal standard – the best interest of the child – regardless of the specific facts involved, and this is the standard to be used to place children in the custody of nonparents as well. According to this approach, the "rules" that one encounters in the field of child custody are not really "rules of law" at all, but rather the presumptive assessment by the Talmudic Sages as to what generally is in the best interest of children.[35]

An enormous theoretical difference exists between R. Asher and Aderet. According to R. Asher, parents[36] have an intrinsic right to raise their progeny, unless unfit. In order to remove children from parental custody, it must be shown that these parents are unfit to be parents and that

be the agent of the father, because Jewish law perceives being raised by the mother (for all children except boys over six) as typically more appropriate than being raised by the father.

Interestingly, a claim could be made that this position was not accepted by Rabbi Yehuda ben R. Asher, one of Rabbi Asher's children; see *Zikhron Yehuda* 35 quoted in *Beit Yosef, Tur, Hoshen Mishpat* 290.

32. Known by the Hebrew acronym "Rashba," Rabbi Aderet (1235-1310) of Barcelona, Spain, was an eminent and prolific decisor.

33. *Responsa of Rashba Traditionally Assigned to Nahmanides,* 38. Throughout this chapter, the theory developed in the *responsa* is referred to as Rashba's, as most latter Jewish law authorities indicate that Rashba wrote these *responsa* and not Nahmanides; see Rabbi David Halevy, *Turei Zahav, Yoreh Deah* 228:50, and Rabbi Hayyim Hezekiah Medina, *Sedai Hemed, Klalai Haposkim* 10:9 (typically found in volume nine of that work).

34. For example, see *Otzar HaGeonim, Ketubot* 434, where this rule is applied even when the father is alive.

35. See Warburg, "Child Custody," pp. 496-98, and Shochatman, "Essence of the Principles Used in Child Custody," pp. 308-9.

36. It is my opinion that later authorities disagree as to the legal basis of the mother's claim. Most authorities indicate that the mother's claim to custody of the daughter is founded on a transfer of rights from the father to the mother based on a specific rabbinic decree found in the Talmud. On the other hand, many other authorities understand the mother's claim to custody of boys under six to be much less clear as a matter of law and are inclined to view that claim based on an agency theory of some type, with the father's rights supreme should they conflict with the mother's.

some alternative arrangement to raise these children consistent with the parents' wishes and lifestyle (either through the use of relatives as agents or in some other manner[37]) cannot be arranged.[38] According to Aderet, the law allows the permanent transfer of custodial rights (quasi-adoption) in any situation where it can be shown that the children are not being raised in their best interests and that another would raise them in a manner more in line with those interests.[39]

This legal dispute is not merely theoretical: the particular *responsa* of Rabbis Asher and Aderet, elaborating on these principles, present vastly differing rulings as a result. R. Asher rules that as a matter of Jewish law, custody is always to be granted to a parent (unless he or she is unfit); quasi-adoption is a last resort; Aderet rules that when the father is deceased, typically it is in the best interest of the child to be placed in quasi-adoption with male relatives of the father rather than with the mother. To one authority, the legal rule provides the answer; to another, equitable principles relating to best interest do.

These two competing approaches provide the relevant framework to analyze many of the theoretical disputes present in prototypical cases of child custody disputes that often form the predicate to quasi-adoption in the Jewish tradition. According to one theory, children are taken from their parents only in cases of categorical unfitness; according to the other approach, quasi-adoption is *always* proper if it is in the "best interests of the child."

37. For example, sending a child to a boarding school of the parent's choosing; see, e.g., 4 P.D.R. *(Piskai Din Rabbani)* 66 (1959), where the rabbinical court appears to sanction granting custody to the father, who wishes to send his child to a particular educational institution (a boarding school) which will directly supervise the child's day-to-day life.

38. It is possible that there is a third theory also. Rabbenu Nissim (Hebrew acronym "RaN," commenting on Babylonian Talmud *Ketubot* 65b), seems to accept a contractual framework for custodial arrangements. R. Nissim appears to understand that it is intrinsic in the marital contract *(ketubah)* that just as one is obligated to support one's wife, so too one is obligated to support one's children. This position does not explain why one supports children born out of wedlock (as Jewish law certainly requires; see *Shulhan Arukh, Even Ha-Ezer* 82:1-7) or what principles control child custody determinations once the marriage terminates. *Mishneh LeMelekh, Hilkhot Ishut* 12:14 notes that R. Nissim's theory was not designed to be followed in practice.

39. As a matter of practice, this would not happen frequently. Indeed, I have found no *responsa* which actually permit the removal of children from the custody of parents who are married to each other.

Jewish Law and Adoption

Although the institution of adoption, through its widespread use in Roman law,[40] was well known in Talmudic times, the redactors of Jewish law willfully refused to recognize such an institution within Jewish law. Rather, they created an institution which they called "A Person Who Raises Another's Child,"[41] which is quasi-adoption. Unlike either Roman law or current adoption law, this institution does not change the legal parents of the person whose custody has changed.[42] One who raises another's child is an agent of the natural parent; and like any agency rule in Jewish law,[43] if the agent fails to accomplish the task delegated, the obligation reverts to the principal. Thus, the biblical obligations, duties, and prohibitions of parenthood still apply between the natural parents and the child whose custody they no longer have.[44]

This is not to diminish the value of this form of quasi-adoption. Indeed, the same Talmudic statement that denies adoption posits that such conduct is meritorious (and thus encouraged). Rabbi Samuel Eliezer Edels,[45] in his commentary on this passage in the Talmud, notes that the value and importance of raising others' children is not limited to orphans, but applies also in situations where the children's parents are alive but cannot take care of the children.[46] Those who raise the child of another are still obligated in the duty of procreation, however, and do not fulfill their obligation through this quasi-adoption. The rationale for this is clear: while raising the child of another is meritorious conduct, this proper deed is not an act of procreation, and these are not the natural

40. Frederick Parker Walton, *Historical Introduction to the Roman Law,* fourth ed., rev. (Edinburgh: W. Green and Son, 1920), p. 72.

41. See Babylonian Talmud, *Sanhedrin* 19b. This is viewed as a righteous deed; see *Exodus Rabbah,* ch. 4.

42. Although it is true that there are four instances in the Bible in which adoptive parents are called actual parents; see 1 Chron. 4:18, Ruth 4:14, Ps. 77:16, 2 Sam. 21:8. These are assumed to be in a nonlegal context. See Babylonian Talmud, *Sanhedrin* 19b.

43. Israel Herbert Levinthal, *The Jewish Law of Agency, with Special Reference to the Roman and Common Law* (New York: [printed at the Conat Press, Philadelphia], 1923), pp. 58-73.

44. J. Karo, *Shulhan Arukh, Even Ha-Ezer* 15:11.

45. Known by the Hebrew acronym "Maharsha," R. Edels (1555-1631) wrote his famous analytical commentary on the Talmud while an active communal leader of Eastern Europe (in what is now Poland). Interestingly, he adopted the surname Edels in tribute to his mother-in-law Edel, who covered all the expenses of his yeshiva in Posen for some twenty years.

46. *Commentary of Maharsha,* Babylonian Talmud, *Sanhedrin* 19b.

children of the person caring for them and cannot take the place of one's obligation to procreate.[47]

In modern times, the erudite reflections of noted Talmudist and philosopher Rabbi Joseph B. Soloveitchik sum up the Jewish law view, and it is worth quoting at greater length from the passage cited at the beginning of this chapter:

> Judaism saw the teacher as the creator through love and commitment of the personality of the pupil. Both become *personae* because an I-Thou community is formed. That is why Judaism called disciples sons and masters fathers. . . . Our Talmudic sages stated, "Whoever teaches his friend's son Torah acquires him as a natural child" (Sanhedrin 19b). . . . 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 parent]. The irrevocable in human existence is not the natural but the spiritual child; the threefold 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.[48]

47. *Shulhan Arukh, Even Ha-Ezer* 1:3-6. A contrary view is taken by Rabbi Shlomo Kluger in his commentary on *Shulhan Arukh, Even Ha-Ezer* 1:1. He posits that adoption is a form of procreation, since without the adult's actions these children would die. His opinion has been widely discredited.

48. Soloveitchik, *Family Redeemed,* pp. 60-61.

Contrasting the view of Jewish law with American law is deeply illuminating of both

Rabbi Soloveitchik's view — fully reflective of the Jewish legal tradition — is that the process of quasi-adoption is special, sacred, a manifestation of holiness, and covenantal. It is such precisely because it is one of choice, like a student-teacher relationship,[49] and thus different from (and not to be confused with) natural parenthood, which lacks these basic covenantal components. Biological relationships (such as the parent-child relationship) are less covenantal in nature — because of the absence of choice —

systems. Between 1860 and the end of World War II, all states passed adoption and child welfare acts which closely scrutinized requests for adoption. Their basic theme and thrust was that "[a]doption laws were designed to imitate nature" (Sanford N. Katz, "Re-Writing the Adoption Story," *Family Advocate* 5 [1982]: 9-10). They were intended to put children in an environment where one could not determine that they had been adopted; even the children themselves many times did not know. The law reflected this, and severed all parental rights and duties with an adopted child's natural parents and reestablished them in total with the adoptive parents, as per the Roman model of adoption law. Significant change in adoption practice has occurred in the last thirty years, the most important regarding the ability or propriety of a state to seal its adoption records — an issue which goes to the very heart of the current American approach to adoption. If adoption records cannot or should not be sealed, then it is beyond the state's power to create an adoption system which effectively mimics the creation of a new parental unit, since the children will become aware of the fact that they have biological parents separate from their adoptive parents. Historically, almost all states sealed adoption records and provided virtually no access. The original birth records were sealed, and if, by coincidence, the adopted child was to meet and marry a natural sibling, the state would permit such a marriage since the adopted child would have no legal relationship with his or her natural family. The "right to know" controversy has resulted in a number of states granting adoptees (upon attaining their majority) access to all the information collected. Once children have a right to know who their natural parents are, the adoption law must reflect the dichotomous relationship between one's natural parents and one's adoptive parents; see, e.g., Carol Amadio and Stewart Deutsch, "Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives," *Journal of Family Law* 22 (1983): 59-93. These tensions have not yet been resolved in American law. Most states still ascribe to adoption law the ability to totally recreate maternal and paternal relationships notwithstanding the knowledge of one's biological parents. Along with their ability to completely recreate parental relationships, states also maintain the ability to legally destroy any such relationships. It is well within the power of the state to not only create new parental rights and duties, but also to remove the rights of a parent toward a child and the duties of a parent to a child as well.

49. Rabbi Soloveitchik quotes as a proof-text Maimonides, who states, "This obligation [of teaching Torah] is to be fulfilled not only towards one's son and grandson. A duty rests on every scholar in Israel to teach all disciples, even if they are not his children, as it is said, 'and you shall teach them to your children' (Deut. 6:7). The oral tradition teaches: 'Your children' includes your disciples, for disciples are called children as it is said: 'And the sons of the prophets came forth' (II Kings 2:3)" (*Hilkhot Talmud Torah* [The Laws of Torah Study] 1:2, quoted in Soloveitchik, *Family Redeemed,* p. 60).

than relationships of selection (such as husband and wife, student and teacher, or, as Rabbi Solovietchik highlights, adoptee and adopter) precisely because the central characteristic of covenant is selection and choice.[50]

Quasi-Adoption As Granting Some Parental Rights

Even as the Jewish tradition does not have an institution of real adoption, certain nonbiblical aspects of parenthood established by the rabbis of the Talmudic era have been connected to custody rather than parenthood, and thus have been granted to adoptive parents. For example, in Talmudic times it was decreed that the possessions, earnings, and findings of a minor child belong to his or her father.[51] Although the wording of the Talmud refers only to father, it is clear from later discussions that this law applies to anyone who supports the child, such as adoptive parents.[52] The reason for the rabbinic decree is that it was equitable that one who supports a child should receive the income of that child.[53] Thus, a financially independent minor does not transfer his or her earnings to his or her parents.[54] Similarly, the earnings of an adopted child go to his or her adoptive parents since the rationale for the decree applies equally well to biological and adopted children.[55] A similar line of reasoning allows adoptive parents to redeem their adopted son if he is a first-born (to his natural parents).[56]

One who raises another's child does not assume the biblical prohibitions or obligations associated with having a child of one's own, however. For example, regardless of who is currently raising the child, it is never permitted for a natural parent to marry his or her child; on the other hand, the assumption of custody cannot raise to a biblical level the prohibition of incest between a parent and the adopted child.[57] Indeed, the Talmud explicitly discusses whether or not adopted children raised in the same home may marry each other, and concludes that such marriages are permitted.[58] One medieval authority, Rabbi Judah of Regensberg,[59] decreed that such marriages not be performed,[60] but this decree has not been generally accepted,[61] and in situations where there is a known, open adoption, such marriages are permitted.[62]

Other examples of adoptive parents being treated as natural parents can be found in the areas of ritual law. For example, while the rabbis prohibited two unrelated unmarried people of the opposite sex from rooming together alone (in Hebrew, the laws of *yihud*),[63] it is widely held that these rules do not apply in the adoption scenario. Although some commentators disagree,[64] many maintain that it is permissible for an adopted child to room and live with his adopted family,[65] notwithstanding the *prima facie* violations of the prohibition of isolation.[66] As one authority has noted, without this lenient rule, the institution of raising another's child would disappear.[67] The same is said for the general prohibition of people unrelated to each other engaging in kissing or hugging, which these same authorities permit in situations where the relationship between the adoptive parents and the child is functionally similar to a natu-

50. It is for this reason that the Jewish prophets always analogized God's relationship with the Jewish people to that of a husband and a wife and not a parent and a child.

51. Babylonian Talmud, *Baba Metzia* 12b.

52. J. Karo, *Shulhan Arukh, Hoshen Mishpat* 370:2.

53. J. Falk, *Meirat Einaim,* commenting on J. Caro, *Shulhan Arukh, Hoshen Mishpat* 370:2.

54. J. Karo, *Shulhan Arukh, Yoreh Deah* 370:2.

55. J. Karo, *Shulhan Arukh, Yoreh Deah* 370:2; Z. Mendal, *Ba'er Haytaiv,* §4, on J. Karo, *Shulhan Arukh, Yoreh Deah* 370:2.

56. David Tzvi Hoffman, *Melamed Lehoil, Yoreh Deah* 97-98.

57. By inference the same can be said of adoptive siblings; see Hoffman, *Melamed Lehoil, Yoreh Deah* 15:11 ("It is permitted to marry one's adopted sister.")

58. Babylonian Talmud, *Sotah* 43b.

59. Also known as Rabbi Judah HaHasid (the Pious). He was a renowned ethicist and scholar of the Rhineland Jewish community (1150-1217).

60. Judah of Regensberg, *Sefer Hasidim,* Comm. 29. See also Babylonian Talmud, *Sotah* 43b.

61. See Moses Sofer, *Responsa 2 Yoreh Deah* 125.

62. See *Minhat Yitzhak* 4:49. Although legally permitted, few such marriages are actually performed; however, there was a time when such was exactly the motive of people who raised children other than their own in their household.

63. J. Karo, *Shulhan Arukh, Even Ha-Ezer* 22:2. According to one commentator, this rabbinic prohibition even included the rooming together of a married woman with a man not her husband. See Maimonides, *Mishneh Torah, Sefer Kedushah, Hilkhot Isurei Biah* 22:2.

64. M. M. Schneersohn, *Zikhron Akedat Yitzhak* 4:33-37. For a complete list of those authorities taking this position, see Israel Berzon, "Contemporary Issues in the Laws of Yichud," *Journal of Halacha and Contemporary Society* 13 (1986): 108.

65. This, for example, occurs when a couple adopts a boy, and the boy's adoptive father later dies, leaving the adopted child living alone with a woman not his natural mother.

66. See E. Waldenberg, 6 *Tzitz Eliezer* 40:21; C. D. Halevi, *Aseh Lekha Rav* 194-201. Rabbi Joseph B. Soloveitchik has also been quoted as permitting this. See Melech Schacter, "Various Aspects of Adoption," *Journal of Halacha and Contemporary Society* 4 (1982): 96. Rabbi Feinstein has also commented on this issue; see M. Feinstein, *Iggrot Moshe* 4 *Even Ha-Ezer* 64:2.

67. E. Waldenberg, 6 *Tzitz Eliezer* 226-28.

ral relationship.[68] The basic argument is simple: One's children are exempt from the general prohibitions of physical interactions with the opposite sex, as no erotic intent is generally present. The same is true for quasi-adopted children.

Another example of a change in Jewish ritual law as a result of the quasi-adoption of a child appears in the obligation of mourning. Adopted children are no longer obligated to, for instance, recite the mourner's prayer *(kaddish)* upon the death of their natural parents — instead, there is an incumbent obligation to mourn upon the death of their adoptive parents.[69] This is so because the institution of mourning as we know it is totally rabbinic in nature, and seems to be a proper reflection of the sadness one feels when the person who raised one passes on.[70] Numerous other examples exist of rabbinic institutions that are not strictly applied in the context of raising another's child, since Jewish law would like to encourage this activity.[71]

Notwithstanding the high praise Jewish law showers on a person who raises another's child,[72] it is critical to recognize that the institution of "adoption" in Jewish law is radically different from the adoption law of American jurisdictions. In Jewish law, adoption operates on an agency theory. The natural parents are always the parents; the adoptive parents never are — they are merely agents of the birth parents (or the rabbinical courts). While a number of incidental areas of parental rights are associated with custody and not natural parenthood, they are the exception and not the law. In the main, Jewish law focuses entirely on natural relationships to establish parental rights and duties. Jewish adoption looks much more like long-term foster care than like classic American adoption.

68. This matter is conceptually easier in my opinion, as nonsexual touching is arguably permitted anyway in Jewish law, and the essential characteristic of this touching is that it is nonsexual. For more on this topic, see Babylonian Talmud *Kiddushin* 81b, and Rashi, Tosaphot, Ritva, and Yam Shel Shlomo *ad locum; Shulhan Arukh, Even Ha-Ezer* 21, 4-7; Gr"a, *Even Ha-Ezer* 21:19; *Pit'hai Teshuva, Even Ha-Ezer* 21:3 and *Iggrot Moshe, 2 Even Ha-Ezer* 14. For an article on this topic in English, see Rabbi Yehuda Herzl Henkin, "The Significant Role of Habituation in Halakha," *Tradition* 34 (2000): 3-40.

69. M. Sofer, *Responsa, 1 Orah Hayyim* 174. Rabbi Sofer also notes the praise Jewish law lavishes upon one who raises another's child.

70. This issue is in dispute. Compare J. Karo, *Shulhan Arukh, Yoreh Deah* 398:1 with M. Isserles, commenting on J. Karo, *Shulhan Arukh, Yoreh Deah* 399:13.

71. See generally J. Karo, *Shulhan Arukh, Orah Hayyim* 139:3. See also A. Auli, *Magen Avraham,* commenting on Karo's *Shulhan Arukh, Orah Hayyim* 139:3, and M. Feinstein, *Iggrot Moshe, 1 Yoreh Deah* 161. For a summary of various laws of adoption, see Schacter, "Various Aspects of Adoption."

72. See Babylonian Talmud, *Sanhedrin* 19b.

Open versus Closed Adoption

Secretive adoptions have always taken place in every society and every culture,[73] and there is a case history of such in the Jewish legal tradition as well.[74] Given the Jewish law view that adoption is really a misnomer, and that quasi-adoption and long-term foster care are better terms, the Jewish tradition favors "open" rather than "closed" adoptions: children always need to know that their current caretakers are not their parents. This point is first addressed directly by Rabbi Moses Sofer,[75] who notes that many different aspects of Jewish law are predicated on an awareness of who one's progeny are, and when people are raising other children in their home, they bear a duty to not hide that fact.[76] Similar views are expressed by many different authorities of the last century.

Rabbi Moses Feinstein, one of the leading decisors in America in the last century, notes in his *responsa*[77] that it is obvious that Jewish law mandates that the identity of the natural parents be shared with an adopted child, when the identity is known. Rabbi Feinstein posits that without this knowledge, such a child will never be certain of whom his or her natural siblings are and might[78] enter into an illicit marriage with a natural

73. See, for example, Lucy S. McGough and Annette Peltier Falahahwazi, "Secrets and Lies: A Model Statute for Cooperative Adoption," *Louisiana Law Review* 60 (1999): 13-90.

74. See Rabbi Hayyim Bachrach, *Havot Yair* 92-93. These *responsa,* from just before the dawn of the eighteenth century, recount the story of a couple who (it was claimed) switched children with their maid after one of their own children died. Needless to say, many difficulties and questions arose from these actions. The solution advocated by one of the rabbis in this *responsa* is second-guessed by Rabbi Moses Sofer in *Teshuvot Hatam Sofer, 2 Even Ha-Ezer* 125.

75. In *Teshuvot Hatam Sofer, 2 Even Ha-Ezer* 125. Rabbi Sofer (1762-1839) lived in Hungary.

76. There is a dispute as to whether adopted children inherit from their adoptive parents; see *Lekutai Mair* 18:2. All agree, however, that such children do not inherit by operation of the intestacy rules of Jewish law. Those who argue that such children inherit do so based on the presumptive will of the parents. For more on this, see Rabbi Moshe Findling, "Adoption of Children," *Noam* 4 (1961): 65-93 (Hebrew).

77. *Iggrot Moshe, 1 Yoreh Deah* 162.

78. See *Beit Shmuel, Even Ha-Ezer* 13:1, who notes that this is a rabbinic fear and not grounded in Torah Law.

sibling. Indeed, a contemporary of Rabbi Feinstein, Rabbi Joseph Elijah Henkin, carries this view to its logical conclusion and posits that adoptive children should not call their parents by the term "mother" and "father" (since they are not, and using such titles would be deceptive) but should instead use the diminutive "aunt" and "uncle," which more commonly denote in our society a respectful (but more genetically distant) relationship.[79] Similar such views are posited by many other rabbinic decisors who have written on adoption, including Rabbi Gedalya Felder and Rabbi Mair Steinberg in their contemporary classic works, both of whom concur that adoptions in the Jewish tradition ought to be open adoptions.[80] Most authorities posit that closed adoptions are absolutely forbidden.[81] Rabbi Feinstein, however, is prepared to contemplate the possibility that if the identity of the biological parents cannot be determined, and yet one can ascertain that the children are Jewish, there may be no formal obligation to tell adopted children that they are adopted; it is merely a good idea.[82] Rabbi Solovietchik echoes this formulation when he states, "There is no need to withhold from the adopted child information concerning his or her natural parents."[83]

In those societies where secular law does not permit open adoption,

79. See Y. E. Henkin, *Kol Kitvai Hagaon Rav Yosef Eliahayu Henkin* 2:98 (1989). This letter is undated, but appears to be from the 1950s.

80. See Rabbi Gedalya Felder, *Nahalat Tzvi* 35-40 (2nd ed.), and Rabbi Mair Steinberg, *Lekutai Mair,* pp. 19-23. Both authorities posit that no less than seven distinctly different pieces of information should be shared. They are the following:

1. Is the mother Jewish and eligible to marry in the Jewish community?
2. Is the mother single or married?
3. Who is the father, and is he eligible to marry in the Jewish community?
4. Is the child eligible to marry in the Jewish community?
5. Is the child a Priest, Levite, or Israelite?
6. Does the mother or father have other children (potential siblings) placed for adoption?
7. Is this child Jewish? May she marry a Priest?

81. *Minhat Yitzhak* 4:49. See also Rabbi Menashe Klein, *Mishneh Halakhot* 4:49, who lists more than a dozen reasons why Jewish law directs that children who are adopted be told of that fact, and if their natural parents are known, that such information be shared with them.

82. Moses Feinstein, *Iggrot Moshe, Yoreh Deah* 161-62. Children who are converted to Judaism need to be told such, as minors who convert have the right of refusal (may renounce their Judaism) upon reaching adulthood and being informed of the fact that they are converts. See also *Yam Shel Shlomo, Ketubot* 1:35. A contrary view is provided by Rabbi Moshe Sternbuch, *Teshuvot veHanhagot* 2:678.

83. Soloveitchik, *Family Redeemed,* p. 61.

Jewish law posits that the relevant information needs to be kept in some form of a communal central registry that people have to check before they get married. Such registries were (and still are)[84] kept in many communities in the United Kingdom, where for many years adoptions were closed.[85]

Conclusion

The Jewish tradition has no legal institution called "adoption," even as it recognized that there would be cases where people other than natural parents would care for children. Indeed, Jewish law denied itself the legal authority to authorize the transfer of parental status from the natural parents to the "adoptive" ones. This is consistent with the general rules of status in Jewish family law, where personal status and private acts are beyond the jurisdiction of the legal system. The refusal of Jewish law to create the new legal fiction of an adoptive family stands in stark contrast to Roman and modern American law, both of which recognize the rights of the court system to recast parenthood to fit into the custodial arrangement. The divergence between these law codes on a policy level in fact reflects a fundamental difference between the American and Jewish legal systems in terms of the scope and reach of the law. Jewish law articulates the fundamental inability of a governing body to destroy essential parental relationships created at birth. American jurisprudence grants itself that power; the law can artificially create parental relationships in the best interest of the child. Jewish jurisprudence denies itself that power; families once naturally created cannot ever be destroyed. As Rabbi Soloveitchik observes, however, the relationship between children and their nonbiological custodial parents is one of greater moral, philosophical, and religious significance than a natural parental relationship, as the former is predicated on voluntary choice, which is the hallmark of all sacred covenantal relationships.

84. Meyer Steinberg, *Responsum on Problems of Adoption in Jewish Law,* ed. and trans. Maurice Rose (London: Office of the Chief Rabbi, 1969), pp. 11-12.

85. Although the issues of accidental brother/sister incest seem rare, such cases clearly do arise. Consider, for example, Bob Herbert, "A Family Tale," *New York Times,* 31 December 2001, sec. A, p. 11.