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Recommended Citation

J. D. Bleich, *Support of Non-Biological Children in Jewish Law*, 3 Intl. J. Jurisprudence Fam. 61 (2012).
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Support of Non-Biological Children in Jewish Law

by J. David Bleich[1]

It is almost axiomatic that the fundamental distinction between Jewish law and Western legal systems is the former's emphasis upon duties rather than rights. That dichotomy serves to explain many aspects of divergence between those systems with regard to provisions governing extended and blended families.

In Western societies, virtually all aspects of family life, including support and custody, are ultimately determined by provisions of law. In Jewish law, legal regulations governing such matters are sparse. Lacunae are filled with extensive and detailed moral duties that are not necessarily judicially enforceable. Apart from reciprocal claims that spouses have against one another and rather limited monetary claims for child support, there are few enforceable rights associated with familial status. On the other hand, obligations predicated upon the fourth commandment exist, in part, to grandparents, parents-in-law, and an older brother.

Since, in Jewish law, many areas of intrafamilial interaction are governed by moral, rather than legal, obligations, the parameters and exact nature of those duties are not always precisely defined. In practice, a paucity of case law and precedent results in the emergence of social conventions and mores that are born of cultural factors and applied with varying degrees of uniformity. There is, however, one issue that has received particular attention on the part of rabbinic scholars because it often becomes the subject of litigation in instances of separation or divorce, which is the support of non-biological children.

I.

As is the case in common law, adoption as a legal institution giving rise to duties and benefits or to a juridically recognized change in personal status is unknown in Jewish law. Although statutes establishing adoption as an institution recognized by law were enacted in various American states during the

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latter half of the nineteenth century,[2] there was no provision for formal adoption in England until it was introduced by statute in 1926.[3]

Ancient roots of adoption as a legal institution can be traced to the earliest period of Roman law. Notably, the motivation for establishing adoption as a legal institution was neither the need to provide for nurturing the adoptee, nor to assure support and economic stability for unfortunate children who would otherwise become wards of the state, nor to regularize and thereby cement a filial–parental relationship in order to satisfy the emotional and psychological needs of the parties. Rather, the institution arose because the cultic practices of ancient Rome included a form of ancestor worship. The family *sacra* conducted in honor of the ancestors of the family could be performed only by

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[2] The first U.S. adoption law was enacted by Massachusetts in 1851 as "An Act to provide for the Adoption of Children," Acts and Resolves passed by the General Court of Massachusetts, ch. 324 (1851), *available at* http://archives.lib.state.ma.us/actsResolves/1851/1851acts0324.pdf. See Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851,* 73 NW. U. L. REV. 1052 (1979). The act predicated adoption upon child welfare rather than adult interests and directed judges to assure that adoption decrees were "fit and proper."

[3] *See* note 16, *infra.* The absence of adoption legislation prior to 1926 has been described as a legacy from Roman times. Common law, like the law of ancient Rome, was grounded in the rights and duties of the individual. Vestiges of the doctrine of *patria potestas,* despite its abolition by Justinian in 560 CE, remained the common law of England. The father was guardian of his children as a matter of right. As expressed in Re Agar-Ellis, 317 Ch. D. 71–72 (1883), his rights included custody and virtually unlimited control of the child based upon a notion of ownership of the child. Moreover, those rights were regarded as inalienable. See generally KERRY O'HALLORAN, THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY & PRACTICE 14–17 (2006).

Family law was governed by paternal rights and duties rather than by considerations of child welfare. Children born out of wedlock carried the stigma of illegitimacy and were often abandoned or entrusted to individuals who neglected and abused them. Persons who informally adopted such infants were often confronted with demands for the return of the children when those children became old enough to contribute to the financial needs of their natural parents. *See* N. Lowe, *English Adoption Law: Past, Present and Future, in* CROSS CURRENTS: FAMILY LAW POLICY IN THE UNITED STATES AND ENGLAND 308–310 (S. Katz, J. Eekelaar, & M. MacLean eds., 2001). In the aftermath of World War I, legal protection for persons who voluntarily raised war orphans became a matter of general concern. The reasons for that concern were twofold: (1) the sheer numbers involved; and (2) many of those who entered into such informal relationships as well as many of the surviving relatives of the orphans involved were individuals possessing social and political influence. *See* O'HALLORAN, *supra,* at 20–21. The Adoption Act of 1926 was designed neither to promote interests of natural parents nor to protect the welfare of the children involved, but to provide legal protection for those who in the course of providing benevolent care had forged emotional ties with the children. *See id.* at 25.

progeny. Thus, if a last remaining family member died childless, ancestors would be denied such memorials. The remedy was the introduction of adoption as a legal fiction creating lineal continuity for religious purposes.[4] Since the motivating purpose was continuation of memorial rituals, adoption was not limited to children of tender age; a childless man was permitted to adopt a person of any age, even an adult.[5] Moreover, since the concern was to prevent extinction of cultic practices of a family nature, it is not unlikely that an elderly person would have preferred to adopt a mature adult rather than a young child. A childless adoptive father might have felt confident that he could rely upon an adult to perform such religious ceremonies in preference to a child who would probably be relatively young at the time of the demise of the adoptive father and hence less likely to discharge those responsibilities.[6]

As a legal fiction, adoption in Roman law was thoroughly consistent. The adoptee's legal ties with his natural family were sundered and he became a legal member of his adopted family. The effect was most pronounced with regard to inheritance: The adopted son lost the right to inherit property from blood relatives but had full rights of succession to the estates of the members of his adopted family.[7]

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[4] *See* CHARLES P. SHERMAN, 2 ROMAN LAW IN THE MODERN WORLD 84 (2d ed., 1922); W. W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE 42 (F. H. Lawson revision, 2d ed., 1952).

[5] However, Gaius, writing in the second century, remarks that although in his day whether a younger person could adopt an older individual was a matter of controversy; 400 years later Justinian decreed that the adopter must be older than the adoptee "by the full term of puberty or 18 years." JUSTINIAN, 1 INSTITUTES 11:4 (J. B. Moyle trans., 1911). *See* SHERMAN, *supra* note 4, at 85; BUCKLAND & MCNAIR, *supra* note 4, at 42.

[6] This is not to imply that adoption was not, at times, designed to achieve other benefits such as the psychological gratification of nurturing children, continuation of the family line, a need for affection and care in old age, as well as other social and economic advantages. *Cf.* SUZANNE DIXON, THE ROMAN FAMILY 111–113 (1992). Dixon concedes that the adoptees were usually adults, which tends to confirm the insistence of earlier writers that the primary concern was provision for memorial rituals. *Id.* at 112.

[7] This aspect of inheritance was later modified under Justinian to permit the adopted son to retain rights of inheritance in the estate of his natural father as well as to acquire rights of intestate succession in the estate of the adopted father. *See* W. W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 123 (1921); SHERMAN, *supra* note 4, at 90; J. A. C. THOMAS, TEXTBOOK OF ROMAN LAW 441 (1976). In the United States, the Uniform Adoption Act §§ 1-104 and 1-105 (1994) reflects the pre-Justinian model. Nevertheless, in many jurisdictions the adoptee retains a right to inheritance from a natural relative who dies intestate. *See* Admin. for Children & Families, U.S. Dep't of Health & Human Serv., *Child Welfare Information Gateway: Intestate Inheritance Rights for Adopted Persons: Summary of State Laws* (2009), http://www.childwelfare.gov/systemwide/laws_policies/statutes/inheritanceall.pdf

More striking is the fact that adoption served to establish a barrier, mirroring that of consanguinity, between the adoptee and any member of the adopted family within the prohibited degrees of kinship.[8] Some writers assert that, in early Roman law, the adoptee was permitted to enter into a marital relationship with a blood relative until that provision of adoption law was later revoked in the sixth century by Justinian.[9] But that does not seem to be correct. As one Roman law scholar writes: "In both Roman and modern law, marriage is absolutely prohibited between lineal relatives, ascendants or descendants, whether the kinship be the blood tie or fictitious (founded on adoption)."[10]

With the ascendancy of Christianity in the Roman Empire, adoption became almost obsolete.[11] Economic and political factors certainly played a role in that phenomenon. However, the now-forgotten *odium theologicum* born of the pagan religious significance of adoption at the time of its origination undoubtedly contributed significantly to a bias against adoption as a legal institution that persisted well into modern times, long after its origins were no longer remembered.

Curiously, adoption provided a remedy for a sociolegal situation, a remedy that the Church did not wish to renounce despite its discomfort with the origin of the practice. With the introduction of adoption, the status of a child born out of wedlock could readily be regularized by means of adoption. Hence, there was no need for any further remedy. When adoption became defunct, other solutions were necessary. To fill that lacuna, canon law introduced the doctrine

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[8] *See* BUCKLAND & MCNAIR, *supra* note 4, at 45. In England, the Adoption of Children Act of 1926, 16 & 17 Geo. 5, ch. 29, following the guidance of the report of a parliamentary committee, did not bar marriage between the adoptive parent and the adoptee. *See* Child Adoption Committee, First Report, 1925, [Cmd.] 2401, ¶ 20. Barriers to marriage with the adoptee within the prohibited degrees were introduced in the Adoption of Children Act of 1949, 12, 13 & 14 Geo. 6, ch. 98. For a survey of the law in the various U.S. jurisdictions, see Daniel Pollack, Moshe Bleich, Charles J. Reid, Jr., & Mohammad H. Fadel, *Classical Religious Perspectives of Adoption Law,* 79 NOTRE DAME L. REV. 705 n.81 (2004). The Jewish law issue is solely that of *ma'arit ayin,* that is, appearance of incest in the eye of the beholder, and arose originally in the context of marriage between stepsiblings. Sources discussing that issue are analyzed *id.* at 705–706. *See also* R. Mordecai Hakohen, *Imuz Yeladim lefi ha-Halakhah,* 3 TORAH SHE-BE-AL PEH 80 (1981), who suggests that the entry of an (unsealed) order of adoption renders the relationship a matter of public knowledge and thereby obviates the problem entirely in instances of adoption.

[9] *See, e.g.,* Hakohen, *supra* note 8, at 79.

[10] SHERMAN, *supra* note 4, at 51.

[11] *See* H. F. JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 196 (1957).

of legitimation,[12] according to which children born out of wedlock become legitimate upon the marriage of the parents.[13] With the introduction of legitimation into Roman law by Constantine in 335 CE, adoption fell into disuse.[14]

In the modern age, adoption arose as a response to the needs of orphaned, illegitimate, and destitute children. In the United States, the "ever present plight of homeless, neglected, and delinquent children" provided impetus for enactment of adoption statutes.[15] In England, the Adoption of Children Act of 1926 was a response to the social upheavals of World War I, as a result of which many children were orphaned and large numbers were left homeless.[16] In addition, the war spawned many illegitimate births. Concomitantly, numerous middle-aged parents, finding themselves childless as a result of war casualties, sought to adopt children.[17] Remarkably, such concerns do not appear to have served as a spur for regularization of adoption in earlier periods or in other countries. Thus, for example, France did not institute "adoptive filiation" until 1966.[18]

II.

In decades of teaching Jewish law, I have often introduced classes with comments such as, "Jewish law does not recognize contracts, but, of course, it does provide for contracts"; "Jewish law does not recognize wills, but, of course, it has wills"; "Jewish law does not recognize intellectual property, but, of course,

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[12] For a discussion of legitimation in canon law, see JOLOWICZ, *supra* note 11, at 199–200. Legitimation is provided for in the most recent Code of Canon Law, promulgated in 1983, by Canons 1139 & 1140. *See* http://www.vatican.va/archive/ENG1104/_INDEX.HTM

[13] For a relatively short period of time, legitimation, as recognized in canon law, was accepted in British common law. *See* 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND xv & xiii (S. Thorne trans., 1977). Legitimation was abolished by statute in 1235. *See* Statute of Merton, 1235–1236, 20 Hen. 3, ch. 9. Legitimation by act of Parliament remained a possibility but occurred only rarely. *See* MAY MCKISACK, THE FOURTEENTH CENTURY 1307–1399 (1959) at 475.

[14] *See* C. M. A. McCauliff, *The First English Adoption Law and Its American Precursors,* 16 SETON HALL L. REV. 658–659 (1986).

[15] M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 271 (1985).

[16] N. KORNITZER, CHILD ADOPTION AND THE MODERN WORLD 348 (1952). *See also* O'HALLORAN, *supra* note 3.

[17] *Id.*

[18] Harry D. Krause, *Creation of Relationships of Kinship,* INT'L ENCYC. COMP. L. 74 (1976).

it does protect rights to intellectual property." To this list I might add "Jewish law does not provide for adoption, but, of course, it does recognize adoption."[19]

Teachers of Jewish law in the world of academia tend to focus on elements common to Jewish law and other legal systems; rabbinic students are much quicker to grasp doctrinal disparities underlying even those common elements. Thus, for example, to an external observer, contracts in Jewish law and contracts in common law appear to be remarkably similar. Yet, in Jewish law, there is no notion of a contract in the sense of a vehicle for generating a duty of performance. Instead, a contract is the conveyance of a servitude and subject to provisions of law governing transfer of property. In other instances, existing provisions of law are harnessed and innovatively applied in order to achieve the desired legal effect. There are no wills for the simple reason that a corpse cannot be seized of property; hence Jewish law cannot recognize capacity to devise or otherwise transfer property after death. But with a bit of skillful lawyering it is possible to draft an instrument to effect an *inter vivos* transfer effective a moment before the death of a putative testator. Such arrangements are best described as "devices."

Jewish law had no need of adoption to effect legitimation of progeny born out of wedlock. In Jewish law, no stigma or disqualification attaches to such offspring unless born of an adulterous or incestuous relationship. Nor is there the slightest hint that the Sages of the Talmud spurned adoption because of its early association with pagan cultism.

Adoption did not exist in the Jewish legal system simply because it is not integral to the Sinaitic corpus of law. Quite apart from other considerations that will be discussed presently, there seems to have been no impetus for either promulgation of a rabbinic decree giving effect to adoption as a legal institution or for perfecting a device guaranteeing an adoptee rights of inheritance because Jewish law, in general, discourages tampering with statutory provisions governing succession. Nor was adoption necessary in order to protect against disruption of custody by extinguishing the parental rights of biological parents in order to prevent them from reclaiming their child. In Jewish law, custody of children is not a recognized right; it is a duty and a privilege (i.e., a privilege to discharge the duty) governed by the best interests of the child.[20]

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[19] For a survey of adoption in Jewish law, canon law, and Islamic law, see Pollack et al., *supra* note 8, at 693–753.

[20] *See, e.g.,* R. Samuel di Medina, *Teshuvot Maharashdam, Even ha-Ezer,* no. 123, and *Hoshen Mishpat,* no. 434; R. David ibn Zimra, *Teshuvot Radvaz,* I, nos. 123, 263, & 460; R. Meir Ratzenellenbogen, *Teshuvot Maharam Padua,* no. 53; R. Moshe Isserles, *Shulhan Arukh, Even ha-Ezer, Rema* 82:7, *Piskei-Din Rabbaniyim,* I, 66 and 75, and III, 358–359.

In Victorian England, foster parents often became victims of extortion. A couple took a child born to impoverished parents into their home, reared him as their own, provided him with material benefits, and showered love and affection upon him. Often, after strong emotional bonds had been forged, the natural parent appeared and demanded money from the guardian upon pain of legal proceedings to recover custody of the child.[21] Such threats were credible because, prior to passage of the Custody of Children Act in 1891,[22] the rights of natural parents were inalienable other than by a court order in cases of abuse.[23]

In Jewish law such a scenario would be impossible. To be sure, there are carefully formulated rules governing custody arrangements.[24] But those rules are applied only *ceteris paribus* (i.e., all things being equal) with regard to the well-being of the child.[25] It is the well-being of the child that is the paramount and determining factor in decisions affecting child custody; the rabbinic court in its capacity as "the father of orphans"[26]—a notion akin to the *parens patriae* doctrine—is charged with making decisions consistent with the welfare of the child. It is the child—not the parent—who has inalienable rights.[27] For that reason, a custody agreement entered into by divorced parents may be set aside by a *bet din*.[28]

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[21] *See* Report of the Committee on Child Adoption, 1921, [Cmd.] 1254, at 5.

[22] 1891, 54 & 55 Vict., ch. 3. It is against this backdrop that, in his *Pygmalion,* George Bernard Shaw portrays Elisa's father as going to the home of Professor Higgins and demanding money because Elisa was living in Higgins's abode as the latter's ward.

[23] Brooks v. Bount, (1943) 1 K.B. 257 (C.A.), at 266. In *Brooks,* the Court of Appeals ruled that a separation agreement entered into by the couple giving custody of their child to the natural mother was not binding because the father's right to custody was inalienable. Jewish law similarly regards such agreements as non-binding. *See infra,* notes 27–28 and accompanying text.

[24] *See Shulhan Arukh, Even ha-Ezer* 82.

[25] *Teshuvot ha-Rashba ha-Meyuhasot le-ha-Ramban,* no. 38; R. David ibn Zimra, *Teshuvot ha-Radvaz,* I, nos. 126 and 263; R. Moses di Trani, *Teshuvot Mabit,* II, no. 62; R. Mordecai ben Judah ha-Levi, *Teshuvot Darkei No'am,* no. 26; R. Abraham Zevi Eisenstadt, *Pithei Teshuvah, Even ha-Ezer* 82:6–7; as well as *Piskei-Din shel Batei ha-Din ha-Rabbaniyim be-Yisra'el,* I, 66 and 75 (Oct. 4, 1954) and III, 358–359 (Dec. 27, 1959). In some circumstances, that consideration warrants assigning custody to a person other than one of the parents. *See Piskei-Din Rabbaniyim,* I, 75.

[26] *Gittin* 37a.

[27] *See* R. Samuel di Medina, *Teshuvot Maharashdam, Even ha-Ezer,* no. 123.

[28] R. Moses di Trani, *Teshuvot Mabit,* II, no. 2; R. Joshua Ashkenazi, *Be'er Heitev, Even ha-Ezer* 82:6; and *Piskei-Din Rabbaniyim,* III, 358. A person cannot dispose of or renounce that which is not his. Custody, even of one's own child, is not a matter that can be irrevocably renounced or revoked. Similarly, a release of the father from obligations of child support by a mother who has been awarded custody is of no effect. *See Piskei-Din Rabbaniyim,* XI, 167 (Jan. 15, 1978).

"He who raises a male or female orphan in his home is accounted as if he has given birth to him [or her]," declares the Gemara, *Megillah* 13a and *Sanhedrin* 19b.[29] Nevertheless, the Sages did not find it necessary to formalize such an arrangement as a legal relationship. As noted, they found no reason to promulgate a decree to that effect because, at least until quite recent times, there was no pressing need to do so. Hence, to quote from the opinion of a U.S. appellate court, "if it ain't broke, don't fix it."[30] Moreover, from the vantage point of a Jewish value system, Occam's razor[31] applies to legal categories no less so than to metaphysical entities.

Adoption is a legal fiction. The very fact that it is fictive in nature and there is no countervailing superior purpose recognized by the Jewish value system is more than ample to explain why adoption as a formal institution was never introduced into Jewish law.[32]

Notably, the Islamic legal tradition prohibits the use by an adoptee of his adopter's patronymic precisely because to do so promulgates a fiction.[33] In the pre-Islamic era, adoption was a common practice among Arabs. Mohammed himself had a freed slave by the name of Zayd bin Hâritha whom he adopted prior to the advent of Islam. Upon Mohammed's declaration that he had adopted Zayd, the latter became known as Zayd, the son of Mohammed, rather than Zayd, the son of Hâritha.[34] Later, as recorded in the Qur'an, Mohammed reports that it was revealed to him:

> ... nor has He made your adopted sons your real sons. That is but saying with your mouths. But Allah says the truth, and He guides to the (Right) Way. Call them (adopted sons) by (the names of) their fathers, that is more just with Allah (Qur'an, Al Ahzab 33:34).[35]

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[29] The Talmud is composed of two parts. The Mishnah, redacted in the first century CE, became the text studied in the academies. The Gemara is a record of the discussions conducted in those academies and serves to elucidate and amplify the statements of the Mishnah.

[30] *See* United States v. Natanel, 938 F.2d 302, 310 (1st Cir. 1991).

[31] *See* WILLIAM OF OCCAM, 1 SENTENCES 27, 3, H-I, and 30, I-5; 2 SENTENCES 15, 9; and 1 COMMENTARY ON PERIHERMENSIAS Q-R.

[32] One eminent contemporary scholar, R. Joseph Elijah Henkin, *Kol Kitvei ha-Griya Henkin,* II, 99 (1989), counseled that adopted children be trained to address their adoptive parents as uncle and aunt rather as father and mother. His primary concern, however, was evidence of possible consanguineous marriage.

[33] See the Islamic sources cited in Pollack et al., *supra* note 8, at 723 n.263.

[34] *Id.* at 723.

[35] THE NOBLE QUR'AN (Mohammed Muhsin Khan & M. Taqi-ud-Din Al-Hilali trans., 1999).

Following promulgation of this teaching rejecting the then-accepted practice of adoption, Zayd's original name, Zayd, son of Hâritha, was restored.[36]

Jewish law, however, has entirely different and quite serious reasons to frown upon adoption, at least in the manner in which it was practiced during much of the modern period. Adoption purports to supplant a biological relationship with a legal relationship and in the process gives rise to an unacceptable danger, that is, the possibility of an incestuous marriage. Closed adoption, which was very much in vogue until recent years, has been decried by Jewish legal authorities as subsumed in the prohibition against maintaining "a wife in every port." Even prior to the tenth-century edict of Rabbenu Gershom banning polygamy, it was forbidden to maintain separate families in different locales who were unaware of each other's existence, "lest the earth become filled with licentiousness" (Leviticus 19:29).[37] The concern was avoidance of an inadvertent consanguineous relationship between half-siblings. For that reason, many contemporary rabbinic scholars have contended that any attempt to suppress awareness of a parental–filial relationship is proscribed.[38]

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[36] *Id.* at 734. Although the fictive relationship reflected in the employment of a contrafactual patronym was rejected by Islam, adoption, at least in a limited form, continued to exist and was greeted with approbation. Although the various schools of Islamic jurisprudence rely on different verses of the Qur'an and upon diverse later sources, they are in agreement that there is an obligation to raise foundlings. It is remarkable that a number of the proof-texts relied upon have Jewish antecedents. The Hanbalîs and Shâfi'îs cite Qur'an Al Ma'ida 5:2, which provides, in a translation by Mohsin Khan, "Help you one another in AlBirr and AtTaqwa (virtue, righteousness, and piety)" which echoes "and you shall do the righteous and the good" (Deuteronomy 6:18). Qur'an Al Ma'ida 5:32 (as translated by Mohsin Khan) declares that "If anyone saved a life, it would be as if he saved the life of all mankind." The Talmudic text appearing in the Mishnah, *Sanhedrin* 37a, reads, "Whosoever preserves a single life of Israel is accounted as if he has preserved an entire world." *Cf.* Pollack et al., *supra* note 8 at 731–38.

[37] The probability of an adoptee inadvertently entering into marriage with a sibling may appear remote. There is, however, a documented instance of a young man who brought his fiancée home to meet his parents only to discover that his fiancée was the daughter his mother had surrendered for adoption twenty years previously. *See* A. D. SOROSKY, A. BARAN & R. PANNOR, THE ADOPTION TRIANGLE: THE EFFECT OF THE SEALED RECORD ON ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS 124 (3d ed., 1989). Those writers describe the pain and suffering of the parties attendant upon breaking their engagement. A more recent report of the severance of a similar serious relationship was described by B. Herbert, *A Family Tale,* NEW YORK TIMES, December 31, 2001, at A11.

[38] *See* R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De'ah,* I, no. 162; R. Joseph Eliyahu Henkin, *Kol Kitvei ha-Griya Henkin,* II, 98 (1989); R. Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yizhak,* IV, no. 49; and R. Menasheh Klein, *Mishneh Halakhot,* IV, no. 49 (1970). See also the view of R. Shlomoh Zalman Auerbach as reported by Abraham S. Abraham, *Zefaniah,* I, 372 (1994) and R. Judah Gershuni, *Kol Zofayikh* 33 (1980). Other halakhic

The Talmudic statement equating a foster parent with a natural father should not be understood literally. The foster parent is praised for having performed an act of rescue; his expenditures on behalf of the child are in the nature of charity.[39] Judaism, unlike the Roman cults or Christianity, regards procreation, not simply as a desideratum, but as a binding obligation. Fulfillment of the commandment to "be fruitful and multiply" (Genesis 9:7) is discharged only by siring biological children.[40] An infertile person incapable of procreating children is exempt from the obligation by reason of *force majeure* and is under no obligation to seek opportunities for adopting a child. Rather, the Talmudic dictum reflects recognition that raising an orphan constitutes charity *par excellence* because, just as the progenitor is responsible for the child's coming into being, the guardian in a concrete way assures the very existence of the child. In contradistinction, formalization of the adoptive relationship must perforce have the effect of assimilating the natural and the adoptive relationships into a single juridical relationship much in the manner of Leibnitz's theory regarding the identity of indiscernibles.[41]

As a general rule of human psychology, persons prompted to undertake charitable commitments do not fail to fulfill those commitments. In rabbinic responsa there are few, if any, examples of persons in ages past who have

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concerns born of blurred paternity are voiced by R. Moshe Sofer, *Teshuvot Hatam Sofer, Even ha-Ezer,* II, no. 125. *See also* R. JOSEPH B. SOLOVEITCHIK, FAMILY REDEEMED: ESSAYS ON FAMILY RELATIONSHIPS 60–61 & 109 (David Shatz & Joel B. Wolowelsky eds., 2000). For a comprehensive discussion of closed adoption in Jewish law, see Moshe A. Bleich, *Open Versus Closed Adoption: Social Work and Jewish Law Perspectives,* 73 J. JEWISH COMMUNAL SERV. 308–318 (1997).

[39] Islamic law similarly posits an obligation to rescue the foundling but does not impose a financial obligation upon the rescuer to provide for all the child's material needs comparable to duties vis-à-vis a natural child. Financial responsibility devolved upon the community at large and in the event that the community lacked funds, members of the community might be compelled to lend the necessary funds on a per capita basis. Islamic authorities seem to differ with regard to whether a rescuer who voluntarily expends his own funds on behalf of the foundling is deemed to have performed acts of charity or whether and in what circumstances he has recourse against the foundling later in life or against the foundling's father, when and if he is identified, for recovery of such funds. See Pollack et al., *supra* note 8, at 739–43. For an analysis of the rescuer's claim in Jewish law to recover expenses voluntarily incurred in preserving the life of another, see J. David Bleich, *Be-Netivot ha-Halakhah,* IV, 140–44 (2011).

[40] The sole opinion to the contrary is that of R. Shlomoh Kluger, *Hokhmat Shlomoh, Even ha-Ezer* 1:1, and is rejected by subsequent authorities. *See* R. Elyakim Deworkas, *Zikhron Yehudit: Kuntres Imuz Yeladim be-Aspaklariyat ha-Halakhah* 5 (1991).

[41] *See* GOTTFRIED LEIBNITZ, DISCOURSE ON METAPHYSICS § 9 (George R. Montgomery trans., 1962).

agreed to "support an orphan in his household" and later reneged on that undertaking. Not so in the modern period. In an age of ever-rising divorce rates, it is not unheard of for a couple to adopt a child (often in a predictably doomed attempt to revive a failing marriage), later to separate, and for the wife to seek both custody and child support. Sadly, the non-custodial, non-natural father often responds by seeking to evade obligations of child support.

III.

It may be illuminating to preface elucidation of the question of support of adopted children in Jewish law with a rather startling discussion of that Jewish law issue by a New York court. In a 1969 decision, *Wener v. Wener,*[42] the court found grounds both in New York law and in Jewish law to hold the father responsible for child support even though adoption proceedings had not been completed. The parties married in 1952 but, despite the desire of both parties to become parents, there was no issue of the marriage. They successfully identified a child available for adoption and shortly after her birth brought the child into their home with the intention of instituting adoption proceedings. Sometime afterward, but before instituting adoption proceedings, the couple separated. The child remained with the wife, who proceeded to sue her husband for child support. The husband demurred on the grounds that he had never adopted the child nor agreed to adopt the child. The court found that, even absent an agreement to adopt the child, the husband was liable for child support. The Court stated that "[u]nder the Laws of Moses and Israel, the head of every household who takes a child into his household puts himself In loco parentis and is as liable for the support of such infant as though it were his own."[43]

For this remarkable conclusion the court adduced three biblical citations, the previously cited statement of the Babylonian Talmud, *Megillah* 13a, and *Sanhedrin* 19b, as well as a ruling of Maimonides (known in rabbinic literature as Rambam), *Mishneh Torah, Hilkhot Nahalot* 2:14. The biblical passages cited are Ruth 4:17, Psalms 77:16, and Leviticus 19:34.[44] Ruth 4:17 reports that

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[42] 301 N.Y.S.2d 237 (N.Y. Sup. Ct. 1969), *aff'd* 312 N.Y.S.2d 815 (N.Y. App. Div. 1970).

[43] 301 N.Y.S.2d at 240–41. Inconsistent with its statement referring to "the head of every household," the Court actually held that "both parties must support the child." *Id.* at 240. That statement is an incorrect formulation of Jewish law. Jewish statutory law assigns responsibility solely to the father; the mother, under appropriate circumstances, may have an obligation in charity or arising from an agreement of a contractual nature. *See infra* note 75 and accompanying text.

[44] To those biblical sources the court might have added, "She raised the child and brought him to the daughter of Pharaoh and he became her son" (Exodus 2:10) and "He raised Hadassah … for she had no father or mother … and with the death of her father and mother

Naomi raised a child born to Ruth who became known as Naomi's son. Psalms 77:16 refers to the fact that the needs of the sons of Jacob were provided for by Joseph and that they were thereafter known as "the sons of Jacob and Joseph." It is the same concept that finds expression in the dictum of the Gemara declaring that support of an orphan is tantamount to rearing him. Each of those sources refers only to an encomium arising from noble and laudable acts; none of those sources can be construed as authority for establishing a normative obligation. Moreover, Joseph did not take his brothers into his own household; he provided sources of sustenance for them in the Land of Goshen, far from the royal palace. Maimonides' ruling, recorded in his *Hilkhot Nahalot* (Laws of Inheritance), is quoted by the court as stating that "even if a child is a pagan, he is a member of the family with the rights and duties pertaining to such membership."[45] Imprecise translation and citation out of context may give a global aura to the ruling. In context, the reference is to the right of inheritance, not to the duties of a progenitor. Even in this translation it is difficult to read the statement as referring to anyone other than a natural child. Moreover, as accurately rendered, "even if a child is an idolater," it is clear that the statement declares only that the natural filial relationship and hence the right of inheritance is not extinguished by even the most ignoble miscreant behavior. There is certainly no reference to the duties of a progenitor in that source. In a final flourish, we are told that Jewish teaching regarding the matter is summed up in Leviticus 19:34: "A stranger that sojourneth with you shall be as the home-born among you and thou shalt love him as thyself."[46] Although that passage does refer to a *ger,* translated as a "stranger" or "sojourner," it makes no mention of a guardian–ward relationship; nor can it be construed, as the court assumed, as establishing a quasi-paternal, as distinct from a quasi-maternal, obligation.

Despite the foregoing, the judge recognized full well that New York courts cannot enforce biblical law, or any other religious law, upon adherents of a particular faith. Elucidation of the presumed provisions of Jewish law was necessary in order to construe a voluntary contractual undertaking that allegedly binds the husband to child support in such cases. The *ketubah*, or marriage contract, does provide that the couple has entered into marriage "according to the laws of Moses and Israel" and that the husband has taken upon himself all

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Mordecai took her to himself as a daughter" (Esther 2:9). In addition, according to rabbinic exegesis, the references to sons in 2 Samuel 21:8 and 1 Chronicles 4:18 are not to natural progeny but to children raised in the household. There are numerous references of that genre in rabbinic writings as well. *See, e.g., Sanhedrin* 32a; *Tosafot, Sanhedrin* 21a, s.v. *de-i*; and NAHMANIDES, COMMENTARY ON THE BIBLE, Numbers 26:46.

[45] 301 N.Y.S.2d at 241.

[46] Quoted *id.*

those obligations "as are prescribed by our religious statutes." Jewish law does indeed posit a duty making it incumbent upon the father to support his minor children. But the *ketubah* speaks only of obligations vis-à-vis a wife; it does not speak of obligations with regard to future children, much less so to adopted or foster children. The court seems to construe a contract to marry "in accordance with the law of Moses and Israel" as a contract to abide by Jewish law in its entirety or, *de minimis*, to abide by all aspects of Jewish family law including those not directly bearing upon the spousal relationship.

Assuming there is an obligation in Jewish law to support a foster child, there must be at least constructive evidence of an undertaking to enter into such a relationship. The court found evidence of such intention in the contextual circumstances of the child's entry into the marital domicile:

> ... the wife then went to Florida for [the purpose of acquiring the child]. The husband bought the round-trip transportation tickets, escorted his wife to the airport in New York and communicated with her by telephone about the child while she was in Florida. When the child was born, the mother made arrangements at the hospital to take the child to Brooklyn where the parties had resided. Shortly after the child's birth, in November, 1958 the wife did bring the child with her to New York. The husband together with His [*sic*] mother met his wife and the child at the airport and escorted them to the apartment where the husband and wife had theretofore lived together. Upon arrival at their home, the wife found a bassinet, diapers and baby bottles. The baby continued to reside there with the husband and wife until they separated.
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> ... When he received them into his home in New York, and supplied the child with the necessities of life, that is, food, clothing and shelter, in his home, and acknowledged the child as his "darling daughter" and called himself its father, he fully ratified and confirmed and adopted as his own acts everything his wife had done for and with the child.[47]

To this scenario the appellate court added even more salient facts:

> ... The plaintiff made arrangements for his wife to go to Florida and bring the infant back to New York. He picked them up at the airport upon their return and drove them back to the parties' apartment, where a bassinet, bottles and diapers were waiting. Subsequently, the plaintiff went to a nearby synagogue and named the child in accordance with Jewish tradition.
>
> The plaintiff supported the child until December, 1959 and claimed her as a dependent, under the category of 'children', on his 1958 Federal income tax return. After the parties' separation, the plaintiff wrote his wife a letter in which he stated he

[47] 301 N.Y.S.2d at 241–42.

> loved the child dearly. He also sent the child an Easter card in April, 1960 which was signed, 'Love Dad'.[48]

At the same time, in a few short sentences, the trial court found grounds in New York law, entirely independent of the *ketubah*, to impose liability for breach of a contractual obligation to adopt the child:

> We are not here dealing with an adoption but rather with the rights, if any, that flow from a failure to comply with a contractual obligation, express or implied. Liability for the breach of such an agreement to adopt has been imposed by our courts on the estates of decedents in favor of the children who are not adopted.[49]

On appeal, the Appellate Division found that existing case law on formal agreements to adopt does not support a conclusion that would compel support from a living foster parent. Nevertheless, the Appellate Division did recognize the existence of a contractual undertaking to that effect:

> We cannot ignore the realities of this infant's plight and blindly apply a rule which was never meant to encompass her situation. This infant was taken from her natural mother when but a few days old ... and she has never been legally adopted.[50]

At the same time, in a concluding paragraph, the appellate court found it necessary to rebuke the trial court for its invocation of Jewish law, which it regarded as judicially inappropriate:

> Although the trial court correctly held the plaintiff liable for the child's support, its reliance on Jewish law as an alternative ground of decision was erroneous. The court looked to Jewish law only when it assumed, Arguendo, that the plaintiff had never agreed to adopt the child. ... Its choice of such law was dictated by the fact that the parties were Jewish and had entered into a 'ketuba', or Jewish marriage contract. However, New York cannot apply one law to its Jewish residents and another law to all others. If our law does not require a husband to support a child whom he has never agreed to adopt, the court cannot refuse to apply such law because the tenets of the parties' religion dictate otherwise. Application of religious law would raise grave constitutional problems of equal protection and separation of church and State ... .[51]

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[48] 312 N.Y.S.2d at 817.

[49] 301 N.Y.S.2d at 242. The quoted passage continues, "That such liability in a proper case might be imposed is expressly recognized in Forman v. Forman, 17 N.Y.2d 274, at 280 ... ."

[50] 312 N.Y.S.2d at 818.

[51] *Id.* at 819.

In an article published in the *Israel Law Review,* the judge in the lower court decision described above, Judge Abraham Multer, took the highly unusual step of defending his invocation of Jewish law.[52] His arguments may be characterized as follows: The appellate court misconstrued his reasoning. The result of the decision in *Wener* was not to apply "one law to [New York's] Jewish residents and another law to all others." The *ketubah* is a binding instrument enforceable in a court of competent jurisdiction only if it is found to be in conformity with New York's contract law. If it does incorporate Jewish law by reference, and if those incorporated provisions of law do not offend the First Amendment because their enforcement is permitted under a neutral principles doctrine,[53] it is a single law that is applied to all citizens. It happens to be the case that Jews customarily execute a *ketubah* in conjunction with the solemnization of a marriage but, as a New York subway advertisement of yesteryear put it, "You don't have to be Jewish to love Levy's rye bread." Rye bread may be an ethnic food but it is readily available to all and sundry. The *ketubah* and its provisions are mundane rather than religious. The *ketubah* happens to be in vogue within the same ethnic group that chooses rye bread as the staff of life. There is nothing to prevent a Christian, Moslem, Hindu, heretic, or atheist from entering into the same or similar antenuptial agreement. In enforcing such an agreement, a court need not examine theological tenets of any faith or inquire into the religious commitments of the parties; the court's concern is solely with determining financial obligations posited by a foreign legal system which, under the provisions of New York contract law, may be voluntarily undertaken by the parties without reference to foreign law. Incorporation of foreign law by reference is merely a form of legal shorthand for stipulating and designing such obligations.

Assuming *arguendo* that the *ketubah* does incorporate Jewish family law in its entirety and renders it binding upon the parties by virtue of their antenuptial agreement, the issues are (1) whether formal adoption, although not recognized by Jewish law as a legal institution per se, does serve to establish an obligation with regard to children who may be adopted in the future, and (2) whether, in the circumstances of *Wener*, even absent formal adoption, the actions of the husband served constructively to establish a contractual undertaking for child support. If yes, the results under Jewish law and under New York law are identical. If not, invocation of provisions of Jewish law was inapt and inconsequential.

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[52] Abraham J. Multer, *Further Comment on* Wener v. Wener, 5 ISR. L. REV. 463–66 (1970).

[53] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1–35 (1959).

IV.

Those issues have been the subject of litigation before Israeli rabbinical courts[54] and of scholarly papers authored by experts in Jewish law.[55] Adoption of a stepchild has always been, and remains, the most common form of adoption.[56] A stepparent who adopts his spouse's child becomes fully responsible for support of the child. It is thus not at all surprising that the Talmudic discussion of support of informally adopted children as recorded in *Ketubot* 102b occurs in the context of support of stepchildren. A widow or divorcée contemplating remarriage had reason to be concerned with regard to support of her children, particularly daughters who, throughout the Talmudic period and long beyond, had few realistic employment opportunities and hence would be bereft of support until their marriage, at which time obligations of support and maintenance would devolve upon their husbands. In stark contradiction to Judge Multer's assumption that a man becomes responsible for the maintenance of persons whom he takes into his household, the Gemara (1) recognizes no such legal obligation and (2) makes it clear that Jewish contract law ordinarily regards a mere promise of support as unenforceable.

An exception to the unenforceability of a promise of support is recognized by the Mishnah, *Ketubot* 102b, which declares "One who marries a woman and she stipulates with him that he will provide food for her daughter for five years is obligated to provide her with food for five years." The Mishnah does not posit a requirement for *kinyan* (i.e., an overt symbolic act indicative of determination to consummate a transfer of property or assumption of an obligation).[57] Maimonides, *Hilkhot Ishut* 23:17, explains the absence of a need for *kinyan* in this situation, comparing it to the case of a financial obligation undertaken by the parents of a bride or groom at the time of betrothal. Such an

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[54] *See, e.g., Piskei-Din Rabbaniyim,* III, 109–12 (Aug. 15, 1957) and *Piskei-Din Rabbaniyim,* IV, 374–84 (Jan. 30, 1963).

[55] *See, e.g.,* R. Mordecai Hakohen, *supra* note 8; R. Moshe Findling, *Imuz Yeladim,* 4 NO'AM 65 (1961); R. Abraham A. Rudner, *Imuz Yeled u-Mithayev la-Zun Haveiro,* 4 NO'AM 51–56 (1961); Rabbi B. N. Ezrachi, *Gidrei ha-Hithayvut le-Imuz Yeladim,* 4 NO'AM 94–172 (1961); R. Elyakim Deworkas, *Zikhron Yehudit: Kuntres Imuz Yeladim be-Aspeklaryat ba-Halakah* (1991); and R. Chaim David Halevi, *Mayim Hayyim,* no. 62 (1991).

[56] *See* Admin. for Children & Families, U.S. Dep't of Health & Human Serv., *Child Welfare Information Gateway: Intestate Inheritance Rights for Adopted Persons: Stepparent Adoption* (2009), http://www.childwelfare.gov; Admin. for Children & Families, U.S. Dep't of Health & Human Serv., *supra* note 7.

[57] For a fuller discussion of the nature and function of *kinyan*, see J. David Bleich, *The Metaphysics of Property Interests in Jewish Law,* 43 TRADITION 49 (Summer, 2010).

obligation is binding even in the absence of *kinyan*:[58] the Gemara, *Ketubot* 120a, explains that such obligations constitute an exception to the general contract law in that "they are matters consummated by a [mere] declaration." Rashi, *ad locum*, explains that the marriage of a child is a matter of joy and satisfaction made possible only by the agreement of the other party. In effect, the pleasure of marriage is so intense that it is regarded as reified and sufficiently tangible to be treated as consideration or, more precisely, as an object of barter.[59] Hence, unlike lesser forms of pleasure, marriage satisfies the requirement of *kinyan*. Maimonides cogently extends this reasoning to the case of an obligation undertaken by a groom, recognizing that the joy and pleasure of the bride and groom are no less intense than those of the parents; accordingly, Maimonides rules that marriage itself serves as *kinyan* for the groom's undertaking to support his wife's daughter. The underlying concept is reflected in common law in its recognition of marriage as consideration supporting a contractual undertaking.[60]

The theory relating to "matters consummated by a [mere] declaration" is limited in its application. That legal theory applies only to enforcement of undertakings entered into at the time of betrothal or marriage. A similar undertaking entered into at a subsequent time is enforceable only if accompanied by *kinyan*. Maimonides himself rules that, even with *kinyan*, an obligation in the nature of an undertaking to support the wife's daughter for five years is effective only if entered into at the time of *nisu'in*, that is, the second and final part of the marriage ritual.[61] Later authorities affirm the validity of an undertaking accompanied by *kinyan* entered into even subsequent to marriage.

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[58] The Jewish marriage ceremony is divided into two parts that in earlier ages were conducted at two separate times. The first part, *eirusin*, generally translated as "betrothal," is not a mere engagement to be married but involves the conveyance of a ring or of one of the other modes recognized by Jewish law as a means of acquiring a bride and serves to establish the marital bond. The subsequent ceremony, known as *nisu'in*, involves pronouncement of blessings and constitutes the actual entry of the bride into the marital domicile.

[59] *Cf.* R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah, Hoshen Mishpat, Mahadura Kamma,* no. 26, s.v. *hineh* and no. 28, s.v. *ve-hineh*, who offers an entirely different theory in support of the validity of such undertakings. This theory proposes that in such situations there is no *kinyan* in the usual sense but instead a rabbinically enacted statute that gives effect to the obligation was promulgated during the Talmudic period.

[60] *See, e.g.,* Shadwell v. Shadwell, 142 E.R. 62 (1860).

[61] Maimonides agrees that *kinyan* establishing an obligation of support in a fixed amount is effective at any time. He, however, maintains that a broad obligation of support is indeterminate in the sense that the amount required for such needs is not precisely determinable. For that reason, according to Maimonides, it is not actionable because of a lack of "*gemirat da'at*" (i.e., finality of determination, or meeting of minds). Nevertheless,

It may readily be concluded that Jewish law enforces an obligation to support an adopted child where the obligation is undertaken explicitly. As to instances where there is no explicit undertaking, the late Sephardic Chief Rabbi of Israel, Rabbi Ben-Zion Uziel, in a compendium on adoption included in his *Sha'arei Uzi'el,*[62] states that none is required for the parent to become halakhicly liable for the child's support. He offers only the cryptic explanation that parents who have entered into an adoptive relationship are regarded as if they have expressly declared that they obligate themselves jointly and severally to all of the obligations of parents vis-à-vis their children.[63] It should be noted that, unlike Judge Multer[64] and, indeed, unlike financial obligations to natural children recognized by statutory Jewish law, Rabbi Uziel regarded both the adoptive mother and the adoptive father as partners to the contract and hence equally liable.[65]

Rabbi Uziel clearly maintains that an express undertaking to provide for the adoptee is unnecessary but does not explain his reasoning. Even assuming that such is the intention of every adoptive parent, it would seem that, absent formal *kinyan*, an adoptive parent might renege on what, in Jewish law, is a mere promise. It seems quite likely that Rabbi Uziel regarded usual parental responsibilities as implicit in the term *adoption* and its modern Hebrew counterpart.[66] Formal adoption proceedings require a signed application by the prospective adoptive parents. Thus, the application for an "order of adoption" may itself be construed as an agreement, contingent upon granting the petition, to provide for the needs of the child. This document might thus be viewed as a promissory instrument effective as a *shtar*, that is, as one of the forms of *kinyan*.

The Talmudic paradigm concerning support of a stepdaughter speaks of an undertaking in the form of an obligation *lazun et bat ishto*.[67] The literal mean-

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when coupled with the joy of marriage, *kinyan,* according to Maimonides, does generate such determination. The more intense joy of betrothal accomplishes the same result as *kinyan* and hence renders *kinyan* superfluous.

[62] *Sha'arei Uziel,* II, 185 (1991).

[63] *See also* R. Abraham A. Rudner, *Yeladim Bilti Hukkiyim,* 4 NO'AM 62 (1961).

[64] *See supra* note 43 and accompanying text.

[65] According to Rabbi Uziel, the mother is contractually liable for support of an adopted child despite the fact that Jewish statutory law assigns liability for support of natural children solely to the father. *See Shulhan Arukh, Even ha-Ezer* 71:1 and 71:4.

[66] The Hebrew term *immutz* connotes a strong, enduring bond. The term can be traced to multiple biblical occurrences. See, e.g., Deuteronomy 31:7, in which the corresponding verb in its imperative form appears as a synonym for "be strong." The words *hazak ve-ammatz* in that verse should be rendered "be strong and steadfast in strength." The King James Version, "be strong and of a good courage," is a felicitous but hardly literal translation.

[67] *See Ketubot* 101b.

ing of the term *lazun* is "to feed." Accordingly, *Shulhan Arukh, Even ha-Ezer* 114:10 and 114:12, as well as Rema, *Hoshen Mishpat* 60:3, rule that an obligation expressed in those words does not include an obligation to provide clothing or to defray medical expenses. It certainly does not extend to payment of educational expenses.[68] The English term *to support* is somewhat ambiguous and its legal import need not be analyzed at present. There is, however, no impediment to the employment of alternative language that would explicitly include such expenses. Accordingly, Rabbi Moshe Findling[69] advises that a formal undertaking be drafted obligating the adoptive parents to provide for the needs of the adopted child in exactly the same manner and to the same extent as is customary with regard to natural children. Rabbi Findling, not unreasonably, asserts that such language would encompass even wedding expenses customarily borne by parents.

Sema, Hoshen Mishpat 63:15 and *Shakh, Hoshen Mishpat* 60:15 discuss an undertaking to provide support without specification of a *terminus ad quem*. Both authorities distinguish between destitute beneficiaries in need of support and those of independent means for whom support is provided entirely *ex gratia*. With regard to the latter, absent specification of a period of time, the obligation is construed as an undertaking for the lifetime of the beneficiary. However, if the beneficiary is needy, an implied condition is imputed that the benefactor intends to bind himself only until such time as the beneficiary is no longer in need, that is, until he or she becomes self-supporting.[70] Rabbi Findling advises inclusion of the phrase "in the manner of natural children" which, should the need arise, would allow for a precise determination to be made by a *bet din* in light of customary practice among persons sharing the guardian's socioeconomic status.[71]

An adoptee is not an heir and hence will not share in the adoptive parents' estate[72] unless they draft a valid halakhic will.[73] In Israel, it is customary to

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[68] If the obligation does not include basic necessities, *a fortiori* it would not include educational expenses.

[69] Findling, *supra* note 55, at 65.

[70] For the same reason, the obligation terminates if the beneficiary succeeds to an estate of sufficient size to provide for his needs.

[71] *See* Findling, *supra* note 55.

[72] It is also clear that the child's biological relatives remain his heirs to the exclusion of his adoptive parents and their relatives. *See* R. Moshe Sofer, *Teshuvot Hatam Sofer, Even ha-Ezer,* II, no. 125; Hakohen, *supra* note 8 at 77–79; Findling, *supra* note 55. That is also the law in many American jurisdictions when the adoptee dies intestate. *See* Admin. for Children & Families, U.S. Dep't of Health & Human Serv., *supra* note 7.

[73] *But see* R. Joseph Teumim, HA-PARDES, *Nisan* 1950 and *Shevat* 1951, who asserts that an adoptee enjoys a right of succession in Jewish law. His arguments are all based upon

execute such a will simultaneously with the issuance of an adoption decree. The obligation of child support survives the death of adoptive parents as a lien against their estates. If, as conjectured above, the application for adoption constitutes a promissory instrument for purposes of rabbinic law, it also serves to establish a lien against the parental estates. The adopted child then has the status of a creditor.[74]

The status of an adoptive child as a creditor may have ramifications that are counterintuitive. This is illustrated by a case brought before the Tel Aviv–Jaffo Rabbinical Court in 1957.[75] At the time of divorce, the husband obligated himself to make monthly payments of a specified sum for the support of an adopted daughter until she should reach her eighteenth birthday. The husband remarried and contended that his paltry income as a porter was not sufficient both for the support of his new wife and of his adopted daughter. Accordingly, he petitioned the *bet din* for a reduction in his child-support obligations.

The general rule, recorded in *Shulhan Arukh, Hoshen Mishpat* 97:23, is that a creditor is entitled to payment of a just debt even though it leaves the debtor with insufficient funds for the support of his wife and minor children. If the adopted child has the status of a creditor, it would seem to follow that his or her claim to support should be accorded priority over claims of a wife or natural children. The theory underlying a creditor's privileged status is somewhat unclear. A creditor's claim is rooted in a voluntarily assumed contract. The wife's claim, technically termed a *ten'ai ketubah,* that is, a condition of the marriage contract, actually flows from the marital relationship by virtue of statute rather than from a voluntary undertaking. Child support is mandated by a rabbinic ordinance, known as *Takkanat Usha,* promulgated in the middle of the second century and recorded in *Ketubot* 50a. That, however, does not explain why payment of a voluntarily assumed debt is assigned priority when there are multiple claimants.

Sema, Hoshen Mishpat 97:57 explains that a creditor is in a privileged position because he has extended a loan and the creditor's funds are in the hands of the debtor,[76] whereas other claims are the product of rabbinic ordinances. The underlying theory seems to be that statutory obligations were imposed in order to give rise to new duties but were not designed to impair already perfected rights of others.

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assessment of the adoptive parents' intentions. However, in Jewish law, as is the case in common law, intent to devise without a properly executed instrument does not have the effect of a will. *See also* R. Meir Steinberg, *Likkutei Me'ir* 112 (1970).

[74] *See* Hakohen, *supra* note 8, at 77.

[75] *Piskei-Din Rabbaniyim,* III, 109–25 (Aug. 15, 1957).

[76] *Sema* limits the creditor's priority to a debt that is secured by bill.

If *Sema*'s formulation is accepted, it might well be argued that an adopted child's claim to support, albeit arising from a contract, is not deserving of priority because funds of the debtor are not in the hands of the creditor. The distinction is roughly analogous to the legal distinction between a purchaser for valuable consideration and the beneficiary of a gratuitous transfer. If that theory is accepted, *Takkanat Usha* recognizes the superior claim of a creditor who would otherwise be denied recovery of funds advanced, whereas the prior claim of a beneficiary of a voluntary obligation for which no consideration was given was abrogated by the statute.

The *bet din*, in its decision, countered that obligations of adoptive parents are not assumed gratuitously. They are assumed in exchange for the emotional and social benefits that are accorded the adoptive parents by the adoptee. In effect, the child's function within the relationship serves as a "valuable consideration."[77]

However, *Bet Yosef*, *Hoshen Mishpat* 97 advances an entirely different explanation for the priority assigned a creditor over a wife. *Bet Yosef* points out that, quite apart from rabbinic ordinances, the *ketubah*, which is an undertaking on the part of the husband, expressly binds the husband to provide sustenance for his wife. If so, it should follow that, upon execution of a *ketubah*, the wife acquires the enhanced status of a creditor and hence her claim should have priority equal to that of a creditor. *Bet Yosef* then proceeds to explain that a claim for repayment of a debt in its totality exists from the moment that the debt is incurred, whereas obligations of support and maintenance accrue only on a day-by-day basis. As such, the creditor is entitled to priority because the wife's claim for future maintenance is not yet perfected. If so, it should be concluded that, according to *Bet Yosef*, the obligation to support an adopted child is analogous to the obligation of spousal maintenance, in that a new obligation to provide for that day's necessities arises each day, whereas the creditor's claim has already been perfected *in toto*.[78]

In the case before it, the *bet din* distinguished between a general obligation of support vis-à-vis an adopted child and an obligation to provide a fixed sum per month for a stipulated period. The *bet din* conceded that, according to *Bet Yosef*, in usual circumstances a creditor has priority over support of even adopted children. Nevertheless, the *bet din* argued that an agreement to provide

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[77] *Piskei-Din Rabbaniyim*, III, 113 (Aug. 15, 1957).

[78] It should be noted that a wife's claim is stronger than that of a creditor in another respect. Although a debtor cannot be compelled to seek employment in order to satisfy a debt, according to some early-day authorities, a husband may be compelled to do so in order to support his wife. The difference lies in the fact that spousal support is a personal, rather than a financial, obligation. *See Hazon Ish, Hoshen Mishpat, Bava Kamma* 23:28.

a fixed sum for a specified period of time is not an obligation for ongoing support that is renewed each day, but is, in effect, an immediate obligation for the entire amount coupled with a stipulation that the debt may be satisfied through periodic payments.[79] For that reason, the petition for a reduction in child support was denied. It may be pointed out by way of analogy that real estate leases are often drafted in the same manner. The cogency of that distinction is certainly open to debate.

To return to the original question: Would Jewish law recognize a binding contract had Mr. Wener formally adopted the child? There is a clear consensus of the authorities (other than Maimonides) supporting the conclusion that an explicit contractual undertaking to that effect, accompanied by *kinyan,* would be actionable, much as the *Wener* court recognized an obligation in contract quite independent of any statutory duty. According to Rabbi Uziel, such a contractual obligation would be generated even without further *kinyan.* However, prior to completion of adoption proceedings, there is no semblance of *kinyan* and, hence, no contract. In this respect the holding in *Wener* diverges from Jewish law.

V.

Nevertheless, the husband may be found liable for child support on entirely different grounds. The Gemara, *Ketubot* 50a, declares, "'Happy are those who observe law, who perform charity every moment' (Psalms 106:3). Rabbi Samuel bar Nahmani said, 'that [reference is to] a person who raises a male or female orphan in his home and provides for their marriage.'" Pledges to charity are different from other promises. Charitable obligations do not require a *kinyan.* A pledge to charity constitutes a vow and, unlike an ordinary promise, a vow cannot be retracted.[80] *Mordekhai,* cited by *Bet Yosef, Yoreh De'ah* 258, as well as Rif, Maimonides, *Tosafot* and *Tosafot ha-Rosh,* cited by *Bet Yosef, Bedek ha-Bayit, Yoreh De'ah* 258, quotes the exegetical comment on Exodus 35:22 recorded by the Gemara, *Shavu'ot* 26b: "'That which is uttered by your

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[79] *Id.*

[80] *See Tur Shulhan Arukh, Yoreh De'ah* 258:3. The Restatement of Contracts states that a promise to make a donation to a charity is enforceable even without proof of reliance. Restatement (Second) of Contracts § 90(2) (1979). However, this provision reflects a principle relating to the enforceability of a promise because it rises to the level of a contractual obligation rather than the notion of enforcement of a moral duty to fulfill a vow of charity.

lips[81] you shall heed and perform' (Deuteronomy 23:24)."[82] A mere promise of a donation or a gift to a poor person establishes a binding and enforceable obligation.[83] Hence, since the needy person's claim has already vested, rules *Kezot ha-Hoshen* 290:2, if a person dies after having made such a promise, the heirs cannot divest the promisee of title. Accordingly, the adoptive parents may be required to support their adopted child because to do so is a binding obligation in charity.[84]

According to this line of reasoning, neither a formal undertaking nor a *kinyan* is required to establish a binding obligation in charity for the support of an adopted child.[85] Since support of an orphaned child, or of a child who is otherwise destitute, reflects an obligation to perform a series of ongoing charitable acts, it would suffice to show that Mr. Wener undertook such an obligation "in his heart." It is quite likely that a *bet din* would have found that his conduct and comportment constituted ample evidence of such a determination. Judge

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[81] In a responsum published in *Teshuvot R. Akiva Eger,* no. 29, R. Benjamin Wolf Eger cites conflicting authorities with regard to whether an oath must be verbalized or whether "writing is tantamount to speech." In a decision issued in 1963, one member of the Rabbinical Court of Rehovot, *Piskei-Din Rabbaniyim,* IV, 384 (Jan. 30, 1963), suggested that although a handwritten oath may be efficacious, nevertheless, a signature appended to a prepared text may not constitute a vow. He further suggested that even if "writing is tantamount to speech," that is not the case with regard to vows of charity concerning which, as understood by the Gemara, *Shavu'ot* 26b, scripture says "that which is uttered by your lips" (Deuteronomy 23:24). It should, however, be noted that R. Yair Chaim Bacharach, *Teshuvot Havvot Ya'ir,* no. 194, the leading exponent of the position that a written oath is valid, adopts that position despite the fact that scripture employs similar nomenclature, "to express with lips" (Leviticus 5:4), with regard to oaths.

[82] The passage continues: "I know only that if he utters with his mouth that he is obligated; from where is it derived that even if he [only] determined in his heart [to give charity] that he is obligated? Because it says 'every charitable heart' (Exodus 35:22)." Rema, *Shulhan Arukh, Yoreh De'ah* 248:13, records two opinions with regard to whether mere intention is sufficient to establish a charitable obligation or whether the obligation must be undertaken verbally. Rema himself declares that, even if a mental determination is sufficient to establish an obligation, the *bet din* cannot compel fulfillment by seizing property unless the obligation is verbalized.

[83] *See Shulhan Arukh, Yoreh De'ah* 258:12–13; *Shulhan Arukh, Hoshen Mishpat* 243:2; and *Shakh, Hoshen Mishpat* 87:51.

[84] *See Piskei-Din Rabbaniyim,* IV, 380–84 (Jan. 30, 1963); Hakohen, *supra* note 8, at 74.

[85] It cannot be argued that this was the basis for Rabbi Uziel's statement that no further *kinyan* is necessary to obligate adoptive parents to support of the adoptee, because Rabbi Uziel expressly states that the obligation is binding whether the children are "poor or wealthy." *Cf.*, however, Rabbi Hakohen, *supra* note 8, at 74, who seems to have overlooked that phrase in Rabbi Uziel's discussion.

Multer may well have formulated the applicable Jewish law result correctly, but have reached that conclusion on erroneous grounds!