

CLASSICAL RELIGIOUS PERSPECTIVES OF ADOPTION LAW

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INTRODUCTION

Ancient¹ and modern-day adoption statutes balance the interests of children, birth parents, adoptive parents, states, and countries. In the United States, adoption statutes were first passed in 1851,² and earnestly revisited and revised following the “Baby Jessica” case in the early 1990s³ to reflect the need to obtain nonidentifying health information to be shared with prospective adoptive parents.⁴ The guiding legal principle of the

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1 See Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744 (1956) (discussing adoption in ancient Roman, Egyptian, Jewish, and Hindu law, as well as in the Code of Hammurabi).

2 See Mary L. Saenz Gutierrez, Comment, *Oklahoma's New Adoption Code & Disclosure of Identifying Information*, 34 TULSA L.J. 133, 139 (1998).

3 *DeBoer v. Schmidt (In re Clausen)*, 501 N.W.2d 193 (Mich. Ct. App. 1993); *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992).

4 ALA. CODE § 26-10A-19 (1992 & Supp. 2001); ALASKA STAT. § 18.50.510 (Michie 2002); ARIZ. REV. STAT. ANN. § 8-129 (West 1999); ARK. CODE ANN. § 9-9-505 (Michie

states is that the rights of birth parents are terminated and a subsequent adoption is sanctioned by the state.⁵ The federal government, aware of the positive economic impact of adoption, has enacted legislation granting tax incentives.⁶ Over time, other countries have revised their adoption laws in keeping with international mandates⁷ and conventions, including the need

1998); CAL. FAM. CODE §§ 8608, 8706, 8801.3, 8817, 8818, 8819, 8909, 9202 (West 1994 & Supp. 2003); COLO. REV. STAT. ANN. §§ 19-5-207, 19-5-402 (West 1999 & Supp. 2002); CONN. GEN. STAT. ANN. §§ 45a-746, 45a-749 (West 1993 & Supp. 2003); FLA. STAT. ANN. § 63.162 (West 1997 & Supp. 2003); GA. CODE ANN. § 19-8-23 (1999 & Supp. 2003); HAW. REV. STAT. ANN. § 578-14.5 (Michie 1999 & Supp. 2002); IDAHO CODE § 16-1506(3) (Michie 2001 & Supp. 2003); 20 ILL. COMP. STAT. ANN. 505/22.3 (West 2001); 750 ILL. COMP. STAT. ANN. 50/18.4, 18.4a (West 1999 & Supp. 2003); IND. CODE ANN. §§ 31-19-2-7, 31-19-18-1 to 31-19-21-6, 31-19-23-1 to 31-19-24-13 (West 1999); IOWA CODE ANN. § 600.8 (West 2001 & Supp. 2003); KAN. STAT. ANN. §§ 59-2122, 59-2130 (1994); KY. REV. STAT. ANN. § 199.520 (Banks-Baldwin 1998); LA. CIV. CODE ANN. art. 214 (West 2003); ME. REV. STAT. ANN. tit. 18-A, §§ 9-304 to 9-310 (West 1998 & Supp. 2002); MD. CODE ANN., FAM. LAW §§ 5-328 to 5-329.1 (1999); MASS. ANN. LAWS ch. 210, § 5D (Law. Co-op. 1994); MICH. COMP. LAWS ANN. §§ 710.27, 710.68 (West 2002); MINN. STAT. ANN. §§ 259.27, 259.43, 259.47 (West 2003); MISS. CODE ANN. § 93-17-205 (1999); MO. ANN. STAT. § 453.121 (West 2003); MONT. CODE ANN. §§ 42-3-101, 42-3-102, 42-6-102, 42-6-105 (2001); NEB. REV. STAT. § 43-107 (1998); NEV. REV. STAT. ANN. 127.152 (Michie 1998 & Supp. 2001); N.H. REV. STAT. ANN. § 170-B:19 (2001); N.J. STAT. ANN. § 9:3-41.1 (West 2002); N.M. STAT. ANN. §§ 32A-5-3, 32A-5-12, 32A-5-14 (Michie 1978 & Supp. 2003); N.Y. SOC. SERV. LAW § 373-a (McKinney 2003); N.Y. DOM. REL. LAW §§ 112, 114, 115a (McKinney 1999 & Supp. 2003); N.Y. PUB. HEALTH LAW § 2782 (McKinney 2002); N.C. GEN. STAT. §§ 48-3-205, 48-9-103 (2001); N.D. CENT. CODE § 14-15-16 (1997 & Supp. 2003); OHIO REV. CODE ANN. §§ 3107.091, 3107.12, 3107.17, 3107.60, 3107.65, (Anderson 2003); OKLA. STAT. ANN. tit. 10, §§ 7504-1.1, 7504-1.2 (West 1998); OR. REV. STAT. § 109.342 (2001); 23 PA. CONS. STAT. ANN. §§ 2101, 2503, 2504, 2511, 2533, 2905, 2909 (West 2001); S.D. CODIFIED LAWS §§ 25-6-15.2, 25-6-22, 25-6-23 (Michie 1999); TENN. CODE ANN. § 36-1-133 (2001); TEX. FAM. CODE ANN. §§ 162.005 to 162.008, 162.018 (Vernon 2002); UTAH CODE ANN. § 78-30-17 (2002); VT. STAT. ANN. tit. 15A, § 2-105 (2002); WASH. REV. CODE ANN. §§ 26.33.350, 26.33.380 (West 1997); W. VA. CODE ANN. § 48-22-701 (Michie 2001); WIS. STAT. ANN. § 48.432 (West 2003); WYO. STAT. ANN. § 1-22-116 (Michie 2003).

⁵ See Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 154 (1999); Claudine R. Reiss, Comment, *The Fear of Opening Pandora's Box: The Need to Restore Birth Parents' Privacy Rights in the Adoption Process*, 28 SW. U. L. REV. 133, 135-37 (1998).

⁶ Economic Growth and Tax Reconciliation Act of 2001, Pub. L. No. 107-16, § 202, 115 Stat. 38, 47 (codified at I.R.C. §§ 23, 137 (2000)).

⁷ See E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 3-35 (1998); Joan Heifetz Hollinger, *Introduction to Adoption Law and Practice*, in 1 ADOPTION LAW AND PRACTICE 1-19 (Joan Heifetz Hollinger ed., 2000). See generally BEREND HOVIUS, FAMILY LAW: CASES, NOTES AND MATERIALS 915-78 (3d ed. 1992) (discussing Canadian adoption law); Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL LAW. 181 (1996) (describing the problems with international adoptions and how international law attempts to balance the interests of those countries that demand adoption and those countries that supply the children to be adopted); Huard, *supra* note 1, at 746-49 (noting the evolution of

to address the intersection of adoption and child abduction.⁸

Adoption law has tried to keep pace with cultural developments and trends. In the latter part of the past century, the number of American children adopted declined dramatically. Today, the exact number of adoptions is unknown because the federal government does not have an established methodology.⁹

At first blush, religion seems to play a minor role in adoption and custody disputes. In fact, the role of religion in family law generally and in adoption law particularly reveals a complex nexus of societal, familial, and individual interests. As tumultuous as recent adoption law changes appear, all of them have deep roots¹⁰ in historical religious conceptions of adoption law. By examining classical religious texts, this Article hopes to inform the reader of the most fundamental underpinnings of adoption law. Part I discusses Jewish law (also known as *halacha*); Part II discusses Canon law; and Part III discusses Islamic law.¹¹

I. ADOPTION IN JEWISH LAW (*HALACHA*)

Although adoption as a social phenomenon was well known in

American adoption law and demonstrating how it was influenced by the law in England, France, and Spain).

⁸ African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999); Hague Conference on Private International Law: Final Act of the 17th Session, Including the Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, *reprinted in* 32 I.L.M. 1134; *see* Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 514 U.N.T.S. 97, *reprinted in* 51 Fed. Reg. 10,493 (Mar. 26, 1986); Bureau of Consular Affairs, U.S. Dep't of State, *International Parental Child Abduction*, at <http://travel.state.gov/abduct.html> (last visited Nov. 21, 2003).

⁹ Hollinger, *supra* note 7, 1-53 to 1-59. Best estimates are between 140,000 and 160,000 adoptions annually. *Id.* at 1-4.

¹⁰ Notwithstanding the provisions of the Multiethnic Placement Act (MEPA) of 1994, Pub. L. No. 103-382, §§ 551-555, 108 Stat. 4056, *amended by* Interethnic Adoptions Provisions of 1996 (MEPA-IEP), Pub. L. No. 104-188, § 1808, 110 Stat. 1755 (eliminating discrimination on the basis of the race, color, or national origin of the child or the prospective parent), consideration of the birth parent's religious preference in placement decisions is still legal and is allowed in Arkansas, Delaware, Florida, Maine, Maryland, Massachusetts, Minnesota, Oregon, and Rhode Island. *See* ARK. CODE ANN. § 9-9-102(b) (Michie 2001), for typical statutory language. In many other states, taking into account religious preference is the standard, informal practice.

¹¹ It is academically dangerous to attempt to draw firm comparisons based solely on references to primary sources of religious law. It is not our intention, nor do we profess the competence to rule on any questions that are left unanswered. The reader is therefore urged to consult with recognized experts in order to clarify the legal and theological nuances and implications of this discussion. We have quoted extensively from many different sources, some more authoritative than others. This was done to assist the reader in researching the topic further—the real object of our endeavor.

Talmudic times and halachic ramifications of that practice have been frequently addressed in rabbinic literature over a span of centuries, questions surrounding the issues of adoption have been explored only in recent times. The *Talmud* expresses high esteem for individuals who adopt children.¹² The *Gemara* declares that one who rears an orphan in his own home is considered as if he has given birth to that child.¹³ A classic commentator on the *Talmud*, Rabbi Samuel Edels, observes that the Talmudic accolade bestowed upon one who rears an orphan is not limited to the rearing of children bereft of their parents but also applies to children whose parents are alive but cannot care for them.¹⁴ In such circumstances as well, the person who rears the child is considered as if she actually gave birth to the child. However, technically speaking, references to the “rearing” of a nonbiological child that occur in halachic writings appear to connote the legal equivalent of foster care rather than adoption. Indeed, adoption as a formal legal institution does not exist in Jewish law. Nevertheless, as a social reality, adoption always existed in Jewish societies and was acclaimed.¹⁵

Despite the *Talmud*'s ringing endorsement of adoption, the statement recorded in *Sanhedrin* 19b cannot be understood as establishing foster care, or even adoption, as the equivalent of parenthood in a literal sense or even in a narrow legal sense. According to Jewish law, males are obligated to sire children.¹⁶ That obligation is discharged upon the birth of two children, one of each gender.¹⁷ Thus, if he is physiologically capable of siring a child, a person who raises or adopts an orphan, despite the great merit attached to that deed, remains fully obligated to engage in procreation.¹⁸

¹² *Talmud Sanhedrin* 19b.

¹³ *Id.*

¹⁴ *Maharsha Sanhedrin* 19b.

¹⁵ For an extensive discussion of resultant halachic liability for child support as well as the procedures that might engender such liability, see Baruch M. Ezrachi, *Gidrei Hithayevut be-Imutz Yeladim*, in 4 NO'AM 94 *passim* (1961). See also ELYAKIM DEWORKAS, ZIKHRON YEHUDIT: KUNTRES IMUTZ YELADIM BE-ASPAKLARYAT HA-HALAKHAH 22–25 (1991); CHAIM DAVID HALEVI, MAYIM HAYYIM no. 62 (1991); Mordecai Cohen, *Imutz Yeladim le-fi ha-Halakhah*, in 3 TORAH SHE-BE'AL PEH 73–75 (1961).

¹⁶ See JOSEPH KARO, SHULHAN ARUKH, EVEN HA-EZER 1:5 [hereinafter SHULHAN ARUKH]. The *Shulhan Arukh*, composed during the middle of the sixteenth century, serves as the authoritative Code of Jewish Law. The *Shulhan Arukh* is divided into four subdivisions, which are further broken down into chapters and laws. Citations to the *Shulhan Arukh* are to the work itself, the subdivision, chapter, and law.

¹⁷ *Id.*

¹⁸ Rabbi Shlomo Kluger, in his glosses to *Shulhan Arukh, Even ha-Ezer* 1:1, argues that, because one who rears an orphan is considered as if he has given birth to that child, a male may indeed fulfill his obligation to sire children by raising such children as his own.

A. *Historical Background*

Although halachic issues regarding the rights of adopted children have been discussed throughout the ages, the questions associated with the issue of open or closed adoption and sealed records have been dealt with only in the post-medieval period. The earliest discussion of this topic appears in the work of the seventeenth century authority, Rabbi Yair Chaim Bacharach, in his collected response.¹⁹ In that work, the discussion of closed adoption is presented in a somewhat tangential and incidental manner.

An anonymous interlocutor presented a question to Rabbi Bacharach concerning the apportionment of an estate.²⁰ The writer described a pious gentleman who was also a *kohen* (priest). This gentleman had fathered two sons. The older son, preparing for his nuptials, requested that his father continue to support him after his marriage.²¹ The father, pleading that he did not have the means to continue to support a married son, refused to do so.²² Upon being rebuffed, the son engaged in a vicious physical attack upon his father.²³ As a result of the altercation, the entire family became estranged from the elder son.

Some time later, the father approached the younger son and told him the following story. He stated that at the time his wife gave birth to their first child a non-Jewish maid who lived with the family also gave birth to a baby boy.²⁴ A week after the birth, on the night before the baby's circumcision, the Jewish mother found a dead baby. She claimed that it was not her child who had died, but the child of the maid, and that the maid had switched the children.²⁵ The maid echoed the mother's version of the events. Nevertheless, the father insisted that he had never been convinced of the truth of the story and had always believed that his own son had died and that the child he had reared was, in reality, the child of the non-Jewish maid.²⁶ Consequently, he believed that the older son's reprehensible

Id. The view of Rabbi Kluger is a novel, minority opinion. Most authorities maintain that fulfillment of the obligation of procreation requires the siring of biological children. See DEWORKAS, *supra* note 15, at 5. Those authorities regard the Talmudic statement to the effect that rearing a child is tantamount to having given birth to a child as a figurative expression indicating that, in terms of merit, and for purposes of divine reward, such deeds are equivalent to raising one's own children. *Id.*

¹⁹ YAIR CHAIM BACHARACH, TESHUVOT HAVVOT YA'IR nos. 92–93 (n.d.).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

behavior at the time of his marriage could be attributed to inherited genetic traits.

The father further related that, at the time of the original incident, he had asked a “pious rabbi” for guidance regarding the perplexing situation.²⁷ That rabbi counseled him to circumcise the child and raise him as his own. He was advised that if, in reality, the child was not his, but was indeed the child of the non-Jewish maid, the circumcision would serve to effect conversion of the child and the child would be a Jew.²⁸ The father concluded the account by stating that, in light of the son’s subsequent behavior, he was convinced that the child was not his biological son.²⁹ Accordingly, he wished his younger son, whose paternity was not in doubt, to be declared his sole heir.³⁰

The interlocutor solicited Rabbi Bacharach’s advice with regard to the halachic status of the older son and the validity of his claim to a share of the estate of the deceased.³¹ Applying accepted principles of Jewish family law, Rabbi Bacharach responded that paternal-filial comportment between the two individuals over a period of time, and the fact that they held themselves out as father and son and were accepted as such by the community at large, served to establish presumptive evidence of the existence of such a relationship.³² The alleged subsequent statement of the father, he asserted, was not sufficient to rebut that presumption, particularly because it was not based upon an assertion of personal knowledge but merely reflected a conjecture based on circumstantial evidence.³³ Accordingly, Rabbi Bacharach ruled that the older son was entitled to the privileges and prerogatives of a biological heir.³⁴

Many years later, Rabbi Moses Sofer, a preeminent authority, questioned the cogency of the advice of the “pious rabbi” who suggested that the (substituted) child be circumcised and raised as the husband’s own child.³⁵ Rabbi Moses Sofer enumerates several problems inherent in such a procedure. In the first place, if, in reality, the child is not the child of the father, and people assume that the child is indeed a biological child, the child will share in his adopted father’s estate.³⁶ As from the perspective of

27 *Id.*

28 *Id.*

29 *Id.*

30 According to Jewish law, adoptive children do not automatically enjoy rights of inheritance with regard to the estate of their adoptive parents.

31 BACHARACH, *supra* note 19, nos. 92–93.

32 *Id.*

33 *Id.*

34 *Id.*

35 2 MOSES SOFER, TESHUVOT HATAM SOFER EVEN HA-EZER no. 125 (n.d.).

36 Hatam Sofer, however, provides technical advice designed to avoid that result. 2 *id.* For example, Hatam Sofer suggests giving the adopted son his portion of the inheritance as

Jewish law, he is not entitled to do so, the putative father has, in effect, contributed (albeit unwittingly) to the perpetration of a fraud upon the rightful heirs.³⁷

Secondly, he notes, if the father were to die and leave no other living issue, a complication would arise with regard to his wife's eligibility to contract a second marriage.³⁸ Biblical law stipulates that the widow of a childless husband must either enter into marriage with a brother of her deceased husband, an institution known as levirate marriage (*yibbum*), or undergo a ceremony of release known as *halitzah*.³⁹ No such requirement exists if the deceased husband is survived by a living child. Hence, if the adopted child is erroneously regarded as a biological child of the deceased husband, the wife would improperly be permitted to remarry without either levirate marriage or *halitzah*. Rabbi Sofer remarks that this issue had already been noted at an earlier time.⁴⁰ He refers to a fourteenth century authority, Rabbenu Jerucham, who remarked upon the propriety of the institution of adoption in general.⁴¹ Rabbi Sofer cautions that the adopted child and the community at large may be led to believe that the adopted child is a biological child and the wife, lacking expertise in this arcane area of Jewish law, may assume that she is exempt from levirate marriage and *halitzah* in the event that her husband dies without a biological descendent.⁴²

Thirdly, *Hatam Sofer* notes that, in the case discussed by Rabbi Bacharach in *Havvot Ya'ir*, the father was a *kohen*.⁴³ The sanctity, privileges, and duties that devolve upon a *kohen* are transferred only to genealogical descendants; an adopted child does not share in priestly status.⁴⁴ Since the "pious rabbi" advised the husband to rear the child as if the child were his own, it would inevitably follow that the child would improperly aspire to the privileges, rights, and obligations of priesthood. In light of these considerations, *Hatam Sofer* concludes that the advice of the "pious rabbi" was entirely inappropriate.⁴⁵

Although *Hatam Sofer* does not expressly say so, it is clear from Rabbi Sofer's comments that if the father had not raised the boy as his own biological child (closed adoption), but had instead informed him that he

an outright gift during his lifetime. 2 *id.*

37 2 *id.*

38 2 *id.*

39 See *Deuteronomy* 25:5–10.

40 2 SOFER, *supra* note 35, no. 125.

41 2 *id.*

42 2 *id.*

43 2 *id.*

44 2 *id.*

45 2 *id.*

was, in truth, not his son and publicized that fact, the problems identified by *Hatam Sofer* would have been totally obviated. Accordingly, open adoption of the child would have been unobjectionable.⁴⁶

In light of the fact that, in Jewish law, adopted children do not have the halachic status of biological children, Rabbi Ben-Zion Uziel, a former Sephardi Chief Rabbi of Israel, has noted that the Hebrew term for adoption, *imutz*, is a misnomer.⁴⁷ Rabbi Uziel points out that the word *imutz* connotes the attachment of a branch to a tree.⁴⁸ Applied to adoption, the term signifies that the adopted child has become part of the family tree. Since, halachically, that is clearly not the case, use of the word *imutz* is inappropriate. Rather, suggests Rabbi Uziel, adopted children should be known as *beni amunim*, literally, “the children of people who rear them.”⁴⁹ The point is instructive, but entirely academic, since Rabbi Uziel, bowing to widespread contemporary usage, himself employs the term *imutz* for the sake of clarity.⁵⁰

B. Contemporary Opinions

One of the most prominent halachic decisors of our age, Rabbi Moses Feinstein, also addressed the issue of open versus closed adoption. In a responsum, Rabbi Feinstein discusses the issue without citing any of the earlier noted sources.⁵¹ Rabbi Feinstein declares that if the adopted child is of Jewish parentage it is imperative that the identity of the natural parents

46 Rabbi Meir Steinberg notes that some authorities cite 1 SOFER, *supra* note 35, no. 76, as a source for the position that an adopted child enjoys a right to inheritance in the estate of the adoptive father. MEIR STEINBERG, LIKKUTEI ME'IR ch. 18, § 2, at 112 (1970). If that is indeed the correct interpretation of the position expressed by *Hatam Sofer*, it is contradicted by *Hatam Sofer's* comments in 2 SOFER, *supra* note 35, no. 125. Rabbi Steinberg himself and Rabbi Ben-Zion Uziel maintain that an adopted child does not inherit from the adoptive father. See 2 BEN-ZION UZIEL, SHA'AREI UZI'EL 1851 (1991); see also DEWORKAS, *supra* note 15, at 18–22. Furthermore, as noted by Rabbi Deworkas, if an adopted child does inherit from his adopted parent, it is not on the basis of a relationship recognized as a matter of law. *Id.* at 18–22. Rather, the right of inheritance is grounded upon a general presumption (*umdena*) that the father does indeed wish the child to inherit as a son but, because an adopted child does not inherit according to *halakhah*, the adoptive parent wishes him to receive the inheritance as an inter vivos gift effective shortly before the father's death. *Id.* Thus, the results that would flow from the operation of laws governing inheritance are avoided. See also Cohen, *supra* note 15, at 77–79; Rabbi Moshe Findling, *Imutz Yeladim*, in 4 NO'AM, *supra* note 15, at 93.

47 2 UZIEL, *supra* note 46, at 193.

48 2 *id.* (citing *Psalms* 80:16).

49 2 *id.* (citing *Esther* 2:7; *Lamentations* 4:5).

50 2 *id.*

51 1 MOSES FEINSTEIN, IGGEROT MOSHE, YOREH DE'AH no. 162 (1959).

not be suppressed.⁵² Rabbi Feinstein notes that, according to Jewish law, the issue of an adulterous or incestuous liaison is a *mamzer* (bastard).⁵³ In order to permit marriage to a person of legitimate birth it is necessary to determine the child's lineage.

More significantly, Rabbi Feinstein contends that even if it is known that the mother was unmarried and that the child was not born of an incestuous relationship, and hence is entirely legitimate, it is nevertheless necessary to determine the identity of the father.⁵⁴ Based on the comments of the *Talmud Yevamot* 37b, and on *Shulhan Arukh, Even ha-Ezer* 2:11, Rabbi Feinstein asserts that it is necessary for a child to know the identity of his or her natural parents in order to ensure that the child will not inadvertently enter into an incestuous union with a biological sibling.⁵⁵

A child who does not know the identity of his or her father may, quite innocently, marry a paternal half-brother or half-sister. For that reason, the *Talmud* declares that it is forbidden for a man to maintain wives in different cities lest their children grow to maturity without being aware of the existence of their half-siblings.⁵⁶ Ignorant of their biological relationship, they may enter into an incestuous relationship. Exactly the same concern exists, observes Rabbi Feinstein, in situations in which a child does not know the identity of his or her mother.⁵⁷ In such instances there is a distinct possibility that the child may marry a maternal half-brother or half-sister. To be sure, the chance that such a marriage will actually take place is extremely remote. Yet the *Talmud* regards conduct that may lead to such an eventuality as a violation of a biblical prohibition.⁵⁸ Rabbi Feinstein regards any act having the effect of suppressing parental identity as constituting a violation of that stricture.⁵⁹ Accordingly, Rabbi Feinstein advocates an adoption in which the child knows the identity of the biological parents.⁶⁰

52 1 *id.*

53 1 *id.*

54 1 *id.*

55 1 *id.*

56 *Talmud Yevamot* 37b.

57 1 FEINSTEIN, *supra* note 51, no. 162.

58 The verse "lest the land become filled with licentiousness," *Leviticus* 19:29, is understood by the *Talmud*, not as a mere explanation of the preceding injunction, "Profane not your daughter by delivering her to harlotry," *id.*, but as establishing an all-encompassing prohibition. Rabbi Samuel Ben Uri, in one of the standard commentaries on *Shulhan Arukh*, appears to consider the fear of marrying one's sibling to be rabbinic in nature and views citation of this biblical verse to be in the nature of a mnemonic device (*asmakhta*). See SAMUEL BEN URI, BET SHMU'EL, SHULHAN ARUKH, EVEN HA-EZER 13:1 (1698).

59 1 FEINSTEIN, *supra* note 51, no. 162.

60 1 *id.* A contemporary scholar, Dr. Abraham S. Abraham, reports that the late Rabbi

Nevertheless, despite the halachic cogency of the concern expressed by Rabbi Feinstein, the adopted child need not have actual knowledge of the identity of his or her natural parents. As Rabbi Feinstein himself observed, the basic requirements of Jewish law may be fulfilled by having a responsible individual maintain a record of the identity of the birth parents of the adopted child.⁶¹ This would enable the adopted child to consult the person privy to that information before entering into a marriage.⁶² With such an arrangement in place, the identity of the biological parents need never be revealed to the child. In order to satisfy the requirements of Jewish law, it is sufficient for the child to know that there is no barrier to the marriage on grounds of incest.⁶³

The late Rabbi Joseph B. Soloveitchik, an eminent Talmudist and religious spokesman, similarly disapproves of withholding facts concerning

Shlomo Zalman Auerbach, a foremost Jerusalem rabbinic decisor, similarly ruled that it is obligatory to inform an adopted child that he or she is adopted and to disclose the identity of the biological parents in order to assure that the child does not marry a sibling. 34 ABRAHAM S. ABRAHAM, ZEFANIAH no. 1, at 33 (1994); see also JUDAH GERSHUNI, KOL TZOFAYIKH 372 (1980) (same).

It is significant to note that such considerations are not at all beyond the realm of serious practical concern. The prospect of adoptees ignorant of their biological background marrying a sibling is not so remote. In their well known book, *The Adoption Triangle*, Arthur Sorosky, Annette Baran, and Reuben Panner cite a documented real-life 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. ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON BIRTH PARENTS, ADOPTIVE PARENTS & ADOPTEES* 124 (3d ed. 1989). These writers describe how the engagement was broken with much pain and anguish on the part of the couple. *Id.* A similar incident was more recently described in the press. See Bob Herbert, *A Family Tale*, N.Y. TIMES, Dec. 31, 2001, at A11. Sorosky, Baran, and Panner add the general comment that the fear of falling in love with a biological sibling is an anxiety experienced by many adoptees. SOROSKY ET AL., *supra*, at 124. Accordingly, the halachic obligation to inform may engender a psychological benefit.

61 1 FEINSTEIN, *supra* note 51, no. 162.

62 The prohibition is, however, attendant only upon performance of an act that leads to suppression of knowledge of biological origin. However, once the circumstances have been created in which it is impossible to establish paternity, Jewish law assumes that the prospective matrimonial partner belongs to the great majority of individuals with whom there exists no consanguineous relationship. 1 *id.*

63 Rabbi Joseph E. Henkin also stresses the need to inform an adoptee of the absence of a biological relationship with the adoptive parents. 2 JOSEPH E. HENKIN, KITVEI HA-GRIYA HENKIN 98 (1989). Rabbi Henkin suggests that an appropriate manner in which the adoptee addresses adoptive parents is “Aunt” and “Uncle” rather than “Father” and “Mother.” 2 *id.* In this manner, he asserts, one can assure that the adoptee will not be mistakenly perceived as the biological child of the adoptive parents. 2 *id.*

natural birth from an adopted child.⁶⁴ Moreover, he finds no reason for a desire on the part of Jewish parents to do so.⁶⁵ Roman law, Rabbi Soloveitchik maintains, could conceive only of a physical relationship and hence was constrained to develop a legal fiction to encompass cases of adoption.⁶⁶ Jewish tradition, on the contrary, posits a spiritual relationship between teacher and student, and mentor and disciple, that is of even greater transcendental significance than a physical relationship.⁶⁷ Adoptive children and adoptive parents stand in a “covenantal” relationship with one another and hence no legal fiction is either necessary or desirable.⁶⁸

The late Rabbi Meir Steinberg, a member of the Rabbinical Court (*Bet Din*) of Britain’s United Synagogue, authored a monograph entitled *Likkutei Me’ir* devoted to a discussion of the laws of adoption.⁶⁹ Rabbi Steinberg notes that, at the time of the publication of his book in 1970, it was the practice of adoption agencies in England to insist that there be no contact whatsoever between the birth mother and her child,⁷⁰ and that no information concerning either party be conveyed to the other.

Rabbi Steinberg reports that it is the policy of the London *Bet Din* to ascertain certain information with regard to each adopted child.⁷¹ The *Bet Din* solicits the following information: (1) whether the natural mother is Jewish and whether the mother is herself not a *mamzeret*; (2) whether the mother is single or married; (3) the identity of the biological father; (4) whether the child’s status is that of a *mamzer*; (5) whether the child is a *kohen*, Levite, or Israelite; (6) whether the mother has placed other siblings for adoption (this information is significant since, under such circumstances, the possibility of sibling marriage is enhanced); (7) whether the mother is non-Jewish (in such instances, since Jewish identity is determined by maternal descent, the child is also non-Jewish and requires conversion); and (8) in the case of a female child, whether she is permitted to marry a *kohen*.⁷²

The *Bet Din* does not endeavor to inform the child of his or her status

64 JOSEPH B. SOLOVEITCHIK, FAMILY REDEEMED: ESSAYS ON FAMILY RELATIONSHIPS 60–61, 109 (David Shatz & Joel B. Wolowelsky eds., 2000).

65 *Id.*

66 *Id.* at 60, 109.

67 *Id.* at 59–61, 109.

68 *Id.* at 60–61, 109.

69 STEINBERG, *supra* note 46.

70 *Id.* at 19. Later, Rabbi Steinberg reports that, following a change in British law, it became obligatory to impart to an adopted child the limited information that he or she was not the biological child of the adoptive parents. *Id.* at 27.

71 *Id.*

72 *Id.* at 20–21.

as an adoptee. However, Rabbi Steinberg states that the information regarding the lineage and status of adopted children is preserved by the London *Bet Din*.⁷³ A special record, known as the *Pinkas Meyuhad*, is maintained in which the identity of each child and his or her halachic status is recorded together with the identity of the biological parents, when that information can be determined.⁷⁴ In England, prior to the marriage of any person celebrated under the aegis of the United Synagogue (an association of Orthodox synagogues in England), this record is checked in order to determine if the child is adopted and, if so, to ascertain that the person is not about to enter into marriage with a sibling.⁷⁵

This procedure ensures that the adoption remains a closed one as far as the child is concerned (as was required by local law). The adopted child is not informed of the identity of his or her parents, but to ensure that halachic pitfalls are avoided, essential information is maintained by the *Bet Din*.⁷⁶ By the same token, maintenance of these records serves to thwart the goal that adoption legislation was designed to achieve, namely, the establishment of a form of legal fiction designed to foster the illusion that an adopted child is identical in all respects to a biological child.⁷⁷ The existence of official communal records serves to reinforce the concept that, from the point of view of Jewish law, the relationship established with adopted children does not at any time become identical to the relationship with biological children.

Rabbi Steinberg concedes that keeping a child's status as an adoptee concealed from the child is somewhat problematic.⁷⁸ If the adoptive father of a male child is a *kohen* or a Levite and the child is not, the child is bound to become aware of his status when he is not also called to the reading of the Torah as a *kohen* or Levite. Moreover, in the drafting of legal documents, such as a marriage contract or *ketubah*, Jewish law requires use

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ The concept of a communal ledger for genealogical purposes is not at all novel. Rabbi Gedaliah Felder cites *Givat Pinhas* no. 5, a responsum by the eighteenth century authority, Rabbi Phinehas Horowitz, who reports that the communal ledgers were frequently maintained in order to record the status of individuals purported to have been born of a union that would have prohibited them to marry freely. 1 GEDALIAH FELDER, NAHALAT TZVI 37 (1959) (citing PHINEHAS HOROWITZ, GIVAT PINHAS no. 5 (n.d.)). *Givat Pinhas* rules that, where such ledgers are maintained, failure of an individual's name to be recorded in the communal ledger may be taken as evidence of legitimate birth. See also JUDAH ASHKENAZI, BE'ER HEITEV, EVEN HA-EZER 2:4 (n.d.).

⁷⁶ STEINBERG, *supra* note 46, at 20–21.

⁷⁷ See Murray Ryburn, *Openness in Adoption*, 14 ADOPTION & FOSTERING 21 *passim* (1990).

⁷⁸ STEINBERG, *supra* note 46, at 20–21.

of the patronym.⁷⁹ Use of the adopting father's name for that purpose, without clarification, would render the instrument invalid for reason of misidentification. Rabbi Steinberg advises that such documents may utilize the name of the adoptive parent provided that the name is accompanied by the explanatory term "*ha-megadlo*—who has reared him."⁸⁰

It is noteworthy that adopted siblings who engage in sexual intercourse may be deemed guilty of incest.⁸¹ According to biblical law, it is clear that a marriage between adopted siblings is permissible since these individuals are not blood relatives.⁸² However, there is some disagreement with regard to whether or not there exists a rabbinic prohibition forbidding adopted siblings to marry. Some authorities have argued that since outside observers may be unaware of the fact that there is no biological relationship, it may appear as if these individuals are committing an act of incest.⁸³ Accordingly, they raise the issue of the possibility of a rabbinic prohibition based on *marit ayin*, i.e., the perception of wrongdoing in the eyes of a beholder. Interestingly, Rabbi I.J. Weiss, originally a rabbinic judge (*dayan*) in Manchester, England, and later Presiding Justice (*Av Bet Din*) of the *Bet Din* of the *Eidah ha-Haredit* in Jerusalem, reaches the

79 *Id.*

80 *Id.* at 32. Rabbi Deworkas appears to take note only of Rabbi Steinberg's initial statements and not of his later comments in which this problem is addressed. DEWORKAS, *supra* note 15, at 8. Other contemporary scholars have discussed whether and how paternity should be acknowledged when the adoptee is called to the *Torah*, and in religious documents, such as the marriage contract and bill of divorce. See 1 FELDER, *supra* note 75, at 122–26; Cohen, *supra* note 15, at 68–70; Findling, *supra* note 46, at 74–78.

81 See UNIF. MARRIAGE & DIVORCE ACT § 207(a)(2) cmt. (amended 1973), 9A U.L.A. 183 (1998) (prohibiting marriage between adopted siblings "because of the social interest in discouraging romantic attachments between such persons even if there is no genetic risk"). Some states prohibit marriage only between adoptive parents and their adopted children, but not between adopted siblings or with relatives of the adoptive parents. See Walter J. Watkins, III, *The Adopted Child and Intra-Family Marriage Prohibitions*, 49 VA. L. REV. 478, 478–91 (1963). In some states, no relationships involving adopted children are considered incestuous. *Id.* For a discussion of the psychological and social grounds for regarding such relationships as incestuous, see Margaret Mead, *Anomalies in American Postdivorce Relationships*, in *DIVORCE AND AFTER* 97, 104–08 (Paul Bohannon ed., 1970). For a critique of the decision of a Colorado court declaring restrictions against adopted sibling marriages unconstitutional, see George I. Katz, *Adopted Sibling Marriage in Colorado: Israel v. Allen*, 51 U. COLO. L. REV. 135, 135–51 (1979).

82 Rabbi Steinberg explains that under Jewish law adoptive parents are not viewed as biological parents and, hence, halachic prohibitions with regard to incestuous marriage apply only to biological relatives, not to adoptive ones. STEINBERG, *supra* note 46, at 19.

83 See STEINBERG, *supra* note 46, at 19; 4 I.J. WEISS, *MINHAT YITZHAK*, no. 49, § 2 (1967); Findling, *supra* note 46, at 90.

tentative conclusion that, in the case of an open adoption in which members of the community are aware that the individuals are not siblings, a marriage between adopted children is permitted as there is no reason for people to presume that a transgression is taking place.⁸⁴ However, Rabbi Weiss argues that, in instances of closed adoption, the marriage of adopted siblings should not be countenanced since it may appear to members of the general public that the marriage is an incestuous one.⁸⁵

In a responsum written to Rabbi Steinberg in 1965, Rabbi Weiss disagrees sharply with one aspect of the procedure adopted by the London rabbinic court. Rabbi Weiss's responsum appears as an introduction to Rabbi Steinberg's *Likkutei Me'ir* and was also later published in the fourth volume of Rabbi Weiss's own responsa, *Minhat Yitzhak*.⁸⁶ Rabbi Weiss emphatically maintains that failure to disclose to a child the fact of his or her adoption is forbidden.⁸⁷ Rabbi Weiss cites the previously noted view of *Hatam Sofer*, which enumerates a series of halachic problems that may arise if the adopted child is not informed of the fact of his or her adoption.⁸⁸

Rabbi Weiss further cites the position of the late Rabbi Menachem Mendel Schneerson, the *Lubavitcher Rebbe*, who notes that Jewish law prohibits males and females, other than spouses, mothers and sons, or fathers and daughters, to hug or kiss one another.⁸⁹ Similarly, there is a prohibition in Jewish law with regard to *yihud*: members of the opposite gender, other than close biological relatives, may not seclude themselves with one another unless others have access to the area to which they are confined.⁹⁰ Rabbi Schneerson declares that the father-daughter and mother-son exceptions with regard to these prohibitions apply only to biological children but not to adopted children.⁹¹ Rabbi Schneerson expresses astonishment that many individuals who are meticulous with regard to observance of other commandments are lax with regard to these prohibitions as they apply to adopted children.⁹² Similarly, Rabbi

84 4 WEISS, *supra* note 83, no. 49.

85 4 *id.*

86 4 *id.*

87 4 *id.*

88 In a second responsum, Rabbi Weiss asserts that an individual who is an adoptee is obligated to disclose his or her adoptive status to a prospective marriage partner before marriage, and that failure to do so may render the marriage nugatory on grounds of error (*kiddushei ta'ut*). See 5 *id.* no. 44.

89 Menachem Mendel Schneerson, *Letter*, in 9 OTZAR HA-POSKIM 130, 130 (1969).

90 The parameters of, and exceptions to, this prohibition are discussed in the *Shulhan Arukh*. See SHULHAN ARUKH, *supra* note 16, EVEN HA-EZER 22.

91 Schneerson, *supra* note 89, at 130.

92 *Id.*

Menasheh Klein, a contemporary authority and author of the responsa *Mishneh Halakhot*, lists fourteen reasons why it is imperative that the adopted child be informed of the fact of adoption.⁹³ Most compelling of these reasons is the possibility that an adopted child who is not informed of his or her adoptive status will violate prohibitions against intimate physical contact and seclusion with members of the opposite gender.⁹⁴

93 4 MENASHEH KLEIN, MISHNEH HALAKHOT no. 49 (1970).

94 4 *id.* Citing the counsel of his father, Rabbi Ovadiah Yosef, Rabbi Yitzchak Yosef explains that from a pragmatic standpoint it is preferable to adopt a girl rather than a boy because it is the woman who is usually at home on a regular basis. YITZCHAK YOSEF, SEFER OTZAR DINIM LE-ISHAH U-LE-BAT ch. 37, § 38 (1988). If a male child is adopted, the mother, who is at home alone with the boy, will more frequently encounter problems of *yihud*. Moreover, in referring to oral communications between two Jerusalem decisors, the late Rabbi Shlomo Zalman Auerbach and Rabbi Yosef Shalom Eliashiv, Dr. Abraham prohibits both physical contact and *yihud* with adopted children. ABRAHAM, *supra* note 60, no. 1, at 33. Other contemporary scholars have discussed this issue extensively. *See, e.g.*, Aaron Jacobowitz, *Gloss to Even Ha-Ezer 22:4*, in 9 OTZAR HA-POSKIM, *supra* note 89, at 132 (listing an array of scholars who concur with the opinion of Rabbi Schneerson); *see also* DEWORKAS, *supra* note 15, at 38–39; 2 M. STERNBUCH, TESHUVOT VE-HANHAGOT no. 677 (1994); David Taharani, *Note*, in MINHAT SHMU'EL: BA'AYOT HA-ZMAN BE-HALAKHAH 329–31 (S. Khoshkeraman ed., 1993) (reporting that this is also the opinion of Rabbi Ovadiah Yosef).

However, Rabbi Eliezer Yehudah Waldenberg argues that there are grounds for leniency in this regard. 6 ELIEZER YEHUDAH WALDENBERG, TZITZ ELI'EZER no. 40, § 21 (1961); 7 *id.* nos. 44–45 (1963). Rabbi Waldenberg limits his permissive ruling to instances in which the child was adopted before the age of three in the case of a girl and before the age of nine in the case of a boy. 7 *id.* His ruling is based upon considerations found in SHULHAN ARUKH, *supra* note 16, EVEN HA-EZER 22. It should be noted that Rabbi Feinstein is also somewhat lenient in this regard. *See* 4 MOSES FEINSTEIN, IGGEROT MOSHEH, EVEN HA-EZER, no. 64, § 2 (1985); Moses Feinstein, *Be-Dvar ha-She'elot ha-Merubot be-Inyan Yihud*, in 2 NEHORA'1 56 (1985).

Rabbi Waldenberg's leniency is strongly contested by Rabbi Yehoshu'a Menachem Aaronberg. 3 YEHOSHU'A MENACHEM AARONBERG, SHE'ELOT U-TESHUVOT DVAR YEHOSHU'A, EVEN HA-EZER nos. 16–17 (1998). As is evident from Rabbi Waldenberg's response to a communication from Rabbi Iser Yehudah Unterman, 7 WALDENBERG, *supra*, no. 44, Rabbi Unterman also questions Rabbi Waldenberg's leniency in this matter. *See also* 2 ISER YEHUDAH UNTERMAN, SHE'ELOT U-TESHUVOT SHEVET MI-YEHUDAH, EVEN HA-EZER no. 21 (1993). Rabbi Eliezer Brizel also sharply disputes Rabbi Waldenberg's leniency and notes that Rabbi Yeheskel Sarna concurred with his view that one may not be permissive in this regard. ELIEZER BRIZEL, SEFER ZIKHRON AKEIDAT YITZHAK 33–37 (1961). Rabbi Brizel notes that he obtained a letter signed by Rabbi Dov Berish Weidenfeld, author of *Teshuvot Dovev Mesharim*, Rabbi Ya'akov Yisrael Kanievsky, known as the *Steipler*, Rabbi Benjamin Mandelkorn, Rabbi of Kommemiyut, and Rabbi Ezra Atyeh, Dean of Yeshivat Porat Yosef, in which these authorities stated that they forbade *yihud* or any physical contact with adopted children. *See* ZEVI ABRAHAM WEIL, PETAH HA-BAYIT: YIHUD 45 (1987). Furthermore, Rabbi Samuel ha-Levi Woszner also prohibits *yihud* with adopted children. 5 SAMUEL HA-LEVI WOSZNER, SHEVET HA-LEVI no. 205, § 8 (1983). He explained, "I know that the *Rav Tzitz Eli'ezer* wrote thus [to be lenient], but he only did so as an apologia [for those who act in this manner], as he himself notes at the conclusion of his article." 6 *id.* no. 120 (1986).

Rabbi Weiss refers to the comments of Nahmanides, who explains that the Bible prohibits adultery because, if adulterous unions were to be permitted, paternity would always be in doubt and it would not be possible to preserve the integrity of the biological family.⁹⁵ A similar view is expressed by an early-day authority in the *Sefer ha-Hinnukh*.⁹⁶

At the root of this precept lies the purpose that the world should be settled as the Eternal Lord desired; and the Lord blessed is He wished that everything in His world should produce its fruit (offspring), each according to its species, and no one species should become intermingled with another. And so did He wish that about a human child it should always be known whose it is, and they should not become intermingled with one another.⁹⁷

Accordingly, Rabbi Weiss underscores the very strong emphasis placed in Jewish teaching on the integrity of the biological family and the need to know one's biological roots. Even when it is not possible for the adopted child to know the identity of his or her biological parents, Rabbi Weiss maintains that the adoptee must nevertheless be informed of his or her adoptive status, because society is obligated not to compromise the integrity of biological families by allowing false perceptions to arise.⁹⁸

Rabbi Feinstein adopts a position contrary to that of these authorities in asserting that, in cases in which it is not possible to determine the identity of the adoptee's biological parents, but it is known that they are of

It is important to note that Rabbi Feinstein is more permissive with regard to physical contact than with regard to *yihud*. 4 FEINSTEIN, *supra*, no. 64, § 2. He maintains that physical contact with adopted children does not have a sexual connotation (*ein zeh derekh ta'avah ve-hibbat bi'ah*). 4 *id.* Although Rabbi Feinstein regards the problem of *yihud* with adopted children to be problematic, he also finds grounds for leniency with regard to that issue. 4 *id.* However, Rabbi Nahum Yarov, the author of a highly regarded contemporary compendium on the laws of *yihud*, *Divrei Soferim: Hilkhot Yihud*, disputes Rabbi Feinstein's view and asserts that "[i]t is perfectly obvious that the prohibitions regarding *yihud* apply to an adopted boy or girl." 1 NAHUM YAROV, *DIVREI SOFERIM: HILKHOT YIHUD* 16–17 (1991).

Rabbi Chaim David Halevi rules leniently with regard to the questions of *yihud* and physical contact with adopted children. 3 CHAIM DAVID HALEVI, *ASEH LEKHA RAV* no. 39 (n.d.). Although Rabbi Halevi permits *yihud* with adoptive parents in all cases of adoption, he maintains that *yihud* is permitted with adoptive siblings only in cases of closed adoption in which the children believe themselves to be biologically related. 3 *id.*

95 RAMBAN (NACHMANIDES): COMMENTARY ON THE TORAH—LEVITICUS 18:20, at 257–58 (Charles B. Chavel trans., 1974).

96 Authorship of this work is usually attributed to Rabbi Aharon ha-Levi, although some scholars debate whether this attribution is correct. For an extensive discussion of this debate, see David Metzger, *Sefer ha-Hinnukh u-Mehabro*, in 1 JOSEPH BABAD, *MINHAT HINNUKH* 15–19 (1988).

97 AHARON HA-LEVI, *SEFER HA-HINNUKH mitzvah* 35 (n.d.).

98 4 WEISS, *supra* note 83, no. 49.

the Jewish faith, one is not obligated to inform the adoptee of the fact that he or she is adopted.⁹⁹

C. Adoption of a Non-Jewish Child

Non-Jewish youngsters who are adopted by Jewish parents retain their status as non-Jews unless they undergo conversion to Judaism. As discussed by the *Talmud* and accompanying commentaries, minor children may be converted if they are presented to the *Bet Din* by the biological parents for that purpose.¹⁰⁰ Alternatively, when the biological parents are deceased or they have abandoned the child, the *Bet Din* may carry out the conversion on its own initiative.¹⁰¹ In each of those circumstances, the child retains the right to renounce the conversion upon reaching the age of legal majority (twelve years of age for a girl and thirteen years of age for a boy). Upon renunciation of the conversion, the child returns to his or her original status as a non-Jew. However, if the child does not renounce the conversion immediately upon reaching the age of legal capacity, the conversion is regarded as having been confirmed and cannot subsequently be rescinded. Failure to renounce the conversion in a timely manner is considered to be tantamount to acceptance of the conversion.¹⁰² Accordingly, the religious status of a minor child cannot be fully clarified until the child reaches the age of legal majority.

Rabbi Moses Feinstein takes note of the fact that the right to renounce the conversion is lost if it is not exercised immediately only because failure to renounce the conversion constitutes tacit acceptance of its effect.¹⁰³ Accordingly, argues Rabbi Feinstein, acceptance can be imputed only if the child is aware of the fact that a conversion has taken place; failure to renounce a conversion of which one is in ignorance can hardly be construed as acceptance.¹⁰⁴ Therefore, argues Rabbi Feinstein, in instances of closed adoption, the child who was adopted and converted as a minor retains the right to protest and renounce the conversion upon becoming aware of the fact, even if those events take place at a much later age.¹⁰⁵ As a result, the religious status of such an individual might remain in a state of doubt for a considerable period of time. Hence, since such an

99 1 FEINSTEIN, *supra* note 51, no. 162.

100 *Talmud Ketubot* 11a.

101 *Id.*

102 *Id.*

103 1 FEINSTEIN, *supra* note 51, nos. 161–62.

104 1 *id.*

105 1 *id.* Although not noted by Rabbi Feinstein, this position was also enunciated at a much earlier time by the sixteenth century authority, Rabbi Solomon Luria. SOLOMON LURIA, YAM SHE'EL SHLOMOH, KETUBOT 1:35.

individual, when informed of his or her status as a convert, may decide to renounce Judaism, that person may not be permitted to enter into a marital relationship until informed of his or her adoptive status, lest he or she renounce the conversion at a later time and the marriage retroactively become a union between a non-Jew and a Jew. Consequently, Rabbi Feinstein forcefully asserts that not only is it imperative that non-Jewish children be informed that they are adopted and have undergone conversion, but also that this information be shared with them before they reach the age of legal majority.¹⁰⁶ In that manner, their religious status can be determined with finality upon reaching the age of legal capacity.¹⁰⁷

A further problem arises in the adoption of non-Jewish females by virtue of the halachic regulation prohibiting a female convert from marrying a *kohen*.¹⁰⁸ Accordingly, Rabbi Feinstein regards that factor as constituting yet another reason for mandating that a non-Jewish girl who is adopted and converted to Judaism be informed of her status, since only in that manner can she be prevented from subsequently entering into a marriage with a *kohen*.¹⁰⁹

106 1 FEINSTEIN, *supra* note 51, nos. 161–62.

107 Rabbi Feinstein's position has been endorsed by Rabbi Weiss and Rabbi Klein. 4 KLEIN, *supra* note 93, no. 167; 3 WEISS, *supra* note 83, no. 99, § 13 (1962). However, Rabbi Azariah Berzon, a contemporary scholar, argues that minor children who are adopted cannot renounce a conversion initiated by adopted parents on their behalf. Azariah Berzon, *Be-Inyan Ger Katan*, in 4 BARKA'I 197–208 (1987); *see also* 2 MOSHE STERNBUCH, TESHUVOT VE-HANHAGOT no. 678 (1988) (adopting a similar position). Rabbi Berzon's argument is based on an interpretation of Maimonides (author of the *Mishneh Torah*, a classic formal code of Jewish law) that he cites as having heard from Rabbi Joseph B. Soloveitchik in the name of the latter's grandfather, Rabbi Chaim Soloveitchik. According to this line of interpretation, Maimonides is understood as asserting that a minor child is to be considered as having the status of a "captive" and may be forced to convert without his or her approval. *See* MAIMONIDES, MISHNEH TORAH, HILKHOT AVADIM 8:20 (n.d.). Although Rabbi Soloveitchik suggests this line of reasoning in elucidating the position of Maimonides, it is not at all evident that other authorities would agree. *See* Berzon, *supra*, at 197–208. Rabbi Berzon contends that Maimonides's view is not disputed by any other authority, *id.*, however, that contention is, at best, an *argumentum ad silencium* and certainly cannot be invoked in support of a novel thesis not formulated in any other source.

108 *See* SHULHAN ARUKH, *supra* note 16, EVEN HA-EZER 6:8.

109 1 FEINSTEIN, *supra* note 51, no. 162. It should be added that, not only is a convert prohibited from marrying a *kohen*, but a Jewish girl who is the child of a non-Jewish father is also prohibited from marrying a *kohen*. *See* SHULHAN ARUKH, *supra* note 16, EVEN HA-EZER 4:19. Accordingly, Rabbi Feinstein notes that if the adopted child is the biological child of a non-Jewish father, the child must be informed of that fact. 1 FEINSTEIN, *supra* note 51, no. 162. For a further discussion concerning the status of such an individual with regard to ramifications pertaining to marriage to a *kohen*, *see* 1 FEINSTEIN, *supra* note 94,

II. ADOPTION IN THE TRADITION OF CATHOLIC CANON LAW

Canon law is a discipline that must be understood historically, as part of an unfolding and ongoing tradition. Each of the four sections in this Part addresses a different epoch in Church history. The epoch in Part II.A, dealing with developments in the first five centuries of ecclesiastical history, witnessed St. Paul's appropriation of the Greco-Roman legal concept of adoption to describe the relationship of the believing Christian to Christ. This early period also saw the flourishing of a Roman system of adoption, whose legal forms would shape the canonistic understanding of this legal institution for centuries to come.

Part II.B, then, addresses developments in the early Middle Ages, roughly the period from 500 to 1050 A.D. In Western Europe, this was a period of social breakdown and chaos, as various Germanic kingdoms which supplanted Roman authority in the West rose and fell with disturbing regularity. The Church proposed various informal and formal means of taking in children as means of alleviating some of the suffering of this socially disorganized era.

Part II.C starts with the end of the eleventh century. By this time, a new political order was beginning to emerge on the European continent, one that guaranteed at least a modicum of stability. It was in this context, during the twelfth through fifteenth centuries, that Church lawyers turned to Roman law sources to build a basic law of adoption.

Finally, Part II.D addresses developments of the last five hundred years. These centuries featured the European discovery of the new world and the growth of an American Church, the gradual emergence of new secular political entities on the European continent, and the development of new motives to adopt.

A. Adoption in the Earliest Period of Church History (First to Fifth Centuries)

The concept of adoption is as old as Catholicism itself. It is traceable to the writings of St. Paul, who taught that all who are led by the Spirit of God are sons of God.¹¹⁰ This relationship was created by adoption and allows God's children, the followers of Christ, to call upon God with the epithet "Abba, Father."¹¹¹ It is through adoption that the followers of Christ, like God's chosen people, the Jews, have been made heirs of God's kingdom and recipients of His grace and love.¹¹²

no. 5.

¹¹⁰ *Romans* 8:14–15.

¹¹¹ *Id.* at 8:15.

¹¹² *See id.* at 9:1–13.

Paul employed a Greek legal term—*huiiothesia*—to describe this relationship.¹¹³ In so doing, Paul imparted to the legal category a new meaning: while in the Greco-Roman world, adoption was seen as serving the needs of the adoptive parents,¹¹⁴ in the Christian conception, it would be seen above all as an act of love by the one adopting. As one commentator put it, adoption became “the supreme expression of God’s love and grace.”¹¹⁵ Although it would take centuries for the full implications of this teaching to be realized, this manner of speaking and thinking about adoption was present from the foundation of the Christian tradition.

The Roman law of the classical period, whose legal forms canonists would borrow in the course of the great juristic revival which occurred in the twelfth century, had a well developed body of adoption law. This law was intended primarily to meet the dynastic needs of aristocratic Romans, not to meet pressing social needs such as child abandonment. Indeed, child abandonment, a practice known generally as “exposure,” was a regular and depressing feature of Roman life during the first, second, and third centuries.¹¹⁶

The Christian emperors of the fourth and fifth centuries sought with only limited success to outlaw the practice of exposure. Emperor Constantine inveighed against the “right of life and the power of death” fathers once held over their children, with the implication that such ultimate power no longer belonged to heads of household.¹¹⁷ Even Constantine conceded that such children might be exploited as slaves,¹¹⁸ although the Emperor Justinian in the sixth century decreed that children taken in by new parents were to enjoy free status, even if their original status had been servile.¹¹⁹

The actual structure the Roman lawyers built during the classical and

113 For St. Paul's use of *huiiothesia*, consult the Greek New Testament at the following verses: *Romans* 8:14–15; *Romans* 8:23; *Romans* 9:14; *Galatians* 4:4–5; and *Ephesians* 1:4–5. See THE GREEK NEW TESTAMENT (Kurt Aland et al. eds., 3d. ed. 1966).

114 For information on adoption in the ancient Greek world, see LENE RUBINSTEIN, ADOPTION IN IV CENTURY ATHENS 62–76 (1993); and JAMES M. SCOTT, ADOPTION AS SONS OF GOD 3–5 (1992).

115 James I. Cook, *The Concept of Adoption in the Theology of Paul*, in *SAVED BY HOPE* 133, 139 (James I. Cook ed., 1978).

116 See, e.g., W.V. Harris, *Child Exposure in the Roman Empire*, 84 *J. ROMAN STUD.* 1, 1–9 (1994) (documenting exploitation of abandoned children as slaves); Beryl Rawson, *Adult-Child Relationships in Roman Society*, in *MARRIAGE, DIVORCE, AND CHILDREN IN ANCIENT ROME* 7, 8–11 (Beryl Rawson ed., 1991) (detailing various motives for Roman women to abandon, abort, or kill their newborn or unborn children).

117 *CODE JUST.* 8.46.10.

118 *CODE THEOD.* 5.9.1.

119 *CODE JUST.* 1.4.24.

post-classical periods to accommodate adoption distinguished between two types of adoption. Gaius's *Institutes*, which were written in the mid-second century, described the first form of adoption, *adrogatio*, as involving the adoption by a *paterfamilias* (head of household) of someone who was already *sui iuris*, a "master of his own affairs," who had been emancipated by his biological father.¹²⁰ It was called *adrogatio*, Gaius noted, because the one who adopts must be asked whether he wishes the one who is to be adopted as his son, while the one who is being adopted is similarly asked whether he approves of the adoption.¹²¹ This form of adoption required the "authority of the people," meaning approval by the imperial authority itself.¹²² Presumably, it could occur only within the presence of the emperor and only in Rome.¹²³

The second form of adoption, which came to be known as "simple adoption," did not involve these formalities. This form of adoption might take place in the provinces before the provincial governor or some other imperial official. Daughters could not be adopted by *adrogatio*, but might be adopted by simple adoption.¹²⁴ Children of any age might be adopted by simple adoption, and while *adrogatio* was typically reserved to sons above the age of puberty, this rule could be relaxed for sufficient reasons.¹²⁵

This basic outline came to shape the way in which later Roman law would treat adoption. The *Institutes* of Justinian modified Gaius's *Institutes* in some particulars, but retained these essential elements. Adoption, Justinian wrote, was of two types: by rescript issued by the emperor, or by inferior provincial magistrates; the former was known as *adrogatio*, and the latter was known simply as adoption.¹²⁶ Some aspects of Gaius's rules were modified: daughters as well as sons, Justinian taught, might be adopted by *adrogatio*.¹²⁷ But in the main, the old rules were kept. It is this conception of adoption that would shape future canonistic treatment of the subject, particularly beginning in the twelfth century.

B. *Adoption in the Early Middle Ages (500–1050 A.D.)*

The collapse of Roman political authority in the Western empire, traditionally ascribed to the year 476, was followed by the emergence of

120 G. INST. 1.97–1.99 (F. De Zulueta trans.).

121 *Id.* at 1.99.

122 *Id.* at 1.99–1.100.

123 *Id.*

124 *Id.* at 1.101.

125 *Id.* at 1.102.

126 J. INST. 1.11.1.

127 *Id.*

various small Germanic principalities and kingdoms scattered throughout what is now Western Europe. These groups brought with them many customary practices, although with the passage of years, they amalgamated their practices with the newer Christian ideas and ideals that survived in the early medieval West, largely through the medium of the Latin clergy and monks. One occasionally saw the rise of mighty empires, such as Charlemagne's Frankish kingdom in the eighth century and Ottonian Germany in the years before 1000, but these were temporary affairs unable to survive the turmoil of the age.

It is against this backdrop that the Church's law and practice of adoption needs to be understood. Law at this time was rudimentary. The Church, however, did not vary in its commitment to protect society's most vulnerable members, although the means at its disposal were modest. Throughout these centuries, the Church continually struggled against the evil of child abandonment and viewed adoption and other less formal means of taking children in as an alternative to near certain death.

Infanticide was a crime that was regularly condemned in the canonistic sources. As early as 490, one finds the Council of Vaison declaring those who exposed children to be guilty of homicide.¹²⁸ Infanticide was even a problem for the institutional Church. A letter of St. Boniface, the great eighth century Anglo-Saxon missionary to the Germans and the English, reported that he was horrified upon visiting one English monastery for women.¹²⁹ The women he encountered were more "prostitutes than nuns," who willingly killed their newborn children, choosing "not to fill the churches of Christ with adopted sons, but instead filling the graveyards with the corpses of infants and the netherworld with their pathetic souls."¹³⁰

Church law, however, stood firmly against the practice of exposure and other forms of infanticide. The early medieval penitential literature, which developed to "provide[] guidance for confessors in dealing with sinners who wished to be reconciled with God and to make their peace with

128 *Concilium Vasense Primum*, in 84 PATROLOGIA LATINA 259, 262 (J.-P. Migne ed., Paris, Montrouge 1850).

129 *Letter of Boniface and Five German Bishops to Ethelbald, King of Mercia, Urging Him to Reform*, in 3 COUNCILS AND ECCLESIASTICAL DOCUMENTS RELATING TO GREAT BRITAIN AND IRELAND 354 (Arthur West Haddan & William Stubbs eds., Oxford, Clarendon Press 1871) [hereinafter *Letter of Boniface*]; see also JOHN BOSWELL, *THE KINDNESS OF STRANGERS* 210–11 (1988) (analyzing and translating the text of the letter).

130 *Letter of Boniface*, *supra* note 129, at 354 ("[N]on implentes Christi ecclesias filiis adoptivis, sed tumulos corporibus et inferos miseris animabus satiantes."); see also BOSWELL, *supra* note 129, at 210–11 (interpreting the source to read "[f]or when these harlots, whether in the world or in convents, bear in sinfulness their ill-conceived offspring, they also for the most part kill them, not filling the churches of Christ with adopted children, but rather filling tombs with their bodies and hell with their pitiful souls").

the Church,” contained numerous provisions on infanticide.¹³¹ This body of literature, which had its origins in Ireland but which quickly spread throughout Western Europe, imposed harsh punishments on infanticide. Thus, a woman who killed her son, the *Canons of Gregory* taught, was subject to fifteen years’ penance; however, the next canon qualified this assertion: where the killing was done by a “poor little girl” (*paupercula*), she should be liable to seven years’ penance.¹³² These provisions would be repeated in the *Penitentiale* of Theodore.¹³³

Early medieval canonical collections echoed these rules. Thus, one finds in the early tenth century collection of Regino of Prüm a text declaring that a woman who willfully (*voluntarie*) killed her son or daughter should be accounted a homicide and serve a ten year penance.¹³⁴ A second text asserted that women who conceive in fornication and try to conceal this fact through infanticide should in justice be deprived of communion until the end of their days, but in mercy may be returned to the table after ten years.¹³⁵

The institutional Church not only condemned infanticide but actively sought to protect children’s lives. An informal system of adoption developed to facilitate the transfer of children from birth parents who could not provide for their upbringing to parents who could provide at least a modicum of support. The same Council of Vaison which legislated against exposure also laid down rules by which a parent might expose a child with some hope of that child being found and raised.¹³⁶ Noting in a preamble that children, who should be the objects of human mercy, must not be left in the elements to be torn apart by dogs, the Council enacted the following rules: (1) finders of such children are encouraged to take them in and raise them; (2) finders should furthermore notify their pastor of their discoveries; (3) pastors are to announce such discoveries at Sunday Mass; (4) should the children then be claimed by those responsible for the abandonment, compensation should be made to the finders; and (5) if no one came forward to make such a claim, the finders were presumably free to raise the children as their own.¹³⁷

131 JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 152 (1987).

132 *Canones Gregorii*, in *DIE BUSSORDNUNGEN DER ABENDLÄNDISCHEN KIRCHE* 172 (F.W.H. Wasserschleben ed., 1958).

133 *Poenitentiale Theodori*, in *DIE BUSSORDNUNGEN DER ABENDLÄNDISCHEN KIRCHE*, *supra* note 132, at 200.

134 *Libri Duo De Synodalibus Causis* bk. 2, in *132 PATROLOGIA LATINA*, *supra* note 128, at 298 (1853).

135 *Id.*

136 *Concilium Vasense Primum*, *supra* note 128, at 261–62; *see also* BOSWELL, *supra* note 129, at 201–02 (reviewing this text).

137 *Concilium Vasense Primum*, *supra* note 128, at 261–62; *see also* BOSWELL, *supra* note

This sort of informal adoption persisted throughout the early Middle Ages. Thus, one finds a similar set of rules repeated in the course of the hagiographic *Life of St. Goar*.¹³⁸ At Trier, the *Life* records, a young woman who did not want to raise her child, either because she did not want the parentage to become known or because she lacked resources for the proper nurturance and care of the child, might leave the infant in a specially designated marble sink at the cathedral.¹³⁹ Should someone see the child, he or she was free to take the child home and raise it as his or her own. Otherwise, Church officials would make an effort to place the child with willing parents from within the congregation.¹⁴⁰

The historical record makes clear that adoptions of a more formal nature also occurred throughout the early Middle Ages. Gregory of Tours recorded that in 577, King Guntramnus of the Franks, who was childless, assembled the realm's notables so that he might obtain their advice and consent.¹⁴¹ He had sinned, he announced to the gathered nobility, and so God had punished him by leaving him without issue. He now wished to remedy the situation by seeking the assembly's approval "that my nephew be made my son," and his request was honored.¹⁴² Childebert, Guntramnus's nephew, was made heir to the kingdom, succeeded his adoptive father on the throne,¹⁴³ and subsequently repeated the process by adopting his nephew as his son.¹⁴⁴

C. The Later Middle Ages: Scholasticism and Canon Law (1050–1500 A.D.)

A legal revolution swept Western Europe beginning in the latter years of the eleventh century and gathering force in the twelfth.¹⁴⁵ After centuries of neglect, this revolution saw the revival of interest in the Roman

129, at 172–73 (noting that the purpose of this legislation was to "encourag[e] people to pick up and rear abandoned children without fear of unpleasant consequences or of losing the child in whom they invest time and money").

138 *De Vita et Miraculis Sancti Goaris*, in 121 PATROLOGIA LATINA, *supra* note 128, at 649 (1852); *see also* BOSWELL, *supra* note 129, at 217–19 (analyzing and translating this text).

139 *De Vita et Miraculis Sancti Goaris*, *supra* note 138, at 649; *see also* BOSWELL, *supra* note 129, at 217–18 (analyzing and translating this text).

140 *De Vita et Miraculis Sancti Goaris*, *supra* note 138, at 649; *see also* BOSWELL, *supra* note 129, at 218 (analyzing and translating this text).

141 GREGORY OF TOURS, HISTORIA FRANCORUM, in 1 MONUMENTA GERMANIAE HISTORICA bk. 5, pt. 17, at 208 (W. Arndt & Br. Krusch eds., Hannover, Hahn 1885).

142 *Id.* ("[U]t hic nepus meus mihi sit filius . . .").

143 DANIELE ALEXANDRE-BIDON & DIDIER LETT, CHILDREN IN THE MIDDLE AGES 19 (Jody Gladding trans., 1999).

144 GREGORY OF TOURS, *supra* note 141, bk. 9, pt. 20, at 379.

145 *See generally* HAROLD J. BERMAN, LAW AND REVOLUTION (1983) (arguing that the Western legal tradition began in the eleventh century with the systemization of Canon law).

law books of Justinian and the systematization of the Canon law.¹⁴⁶ The system of Canon law that emerged as a result of this process borrowed Roman concepts and ideas where it seemed fit to do so, but also retained its own independence.¹⁴⁷ Canon law also acquired a vigorous new life as an instrument by which Church leaders proposed to reform European life.¹⁴⁸ A system of courts was put into place, supervised generally by local bishops and papal judges-delegate, ambassadors in a sense, who were answerable to the Pope.¹⁴⁹ This is the necessary context when we consider the changes that occurred in the Canon law of adoption in the course of these later centuries.

At the level of speculative theology, new life was given to the concept of adoption by writers like Peter Lombard and Thomas Aquinas. The twelfth century writer, Peter Lombard, whose *Sentences* formed the obligatory starting point for scholastic writing for the rest of the Middle Ages, began his inquiry into adoption by asking whether Jesus Christ was God's adopted son.¹⁵⁰ No, Lombard responded, Jesus must be considered God's natural son because He shares God's very nature and divinity.¹⁵¹ Thanks to God's boundless grace, we mortals, the "sons of wrath" (*irae filii*), have been adopted as God's sons, but only Jesus participates in God's divinity by His very nature.¹⁵²

Thomas Aquinas developed these ideas further. Commenting on Lombard's text, Aquinas emphasized the importance of divine love to the idea of adoption and in the process connected the ideas of love and adoption in a way in which they had not previously been attached. "Adoption," Aquinas wrote, "depends upon the kindness of the one adopting and the one adopted. God is especially kind and the greatest lover of humankind. Therefore God is uniquely competent to adopt."¹⁵³

The canonists, in giving effect to the notion of adoption, borrowed from the Roman lawyers of the classical and post-classical era. Rufinus, a particularly precocious canonist of the latter twelfth century, distinguished between three types of relationships a parent might have with children: one

146 R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* 17–20 (1996).

147 *Id.*

148 JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 70 (1995). James Brundage has observed, concerning the canonists of this era: "They believed that they had not merely the right but the duty to repress any religious or moral ideas that departed from orthodox norms." *Id.*

149 *Id.* at 120–28.

150 PETER LOMBARD, *SENTENTIARUM LIBRI QUATTUOR* bk. 3, at 442 (Paris, Louis Vivès 1892).

151 *Id.*

152 *Id.*

153 LUC-THOMAS SOMME, *FILS ADOPTIFS DE DIEU PAR JÉSUS CHRIST: LA FILIATION DIVINE* 16 (1997) ("Adoptio contingit ex benignitate adoptantis et adoptatum. Sed Deus maxime benignus et amator est hominum. Ergo ipsi maxime competit adoptare.").

might be the natural parent of natural offspring; one might have a “spiritual” relationship with someone else’s children through sponsorship at baptism; or one might have adopted children, “who are not one’s own by natural childbirth, but are made into one’s own children so as to be installed as heirs.”¹⁵⁴

By the thirteenth century, one discovers canonists who have borrowed many of the details of the Roman law of adoption. Adoption, the canonist Tancred asserted, was “the legitimate assumption of a ‘foreign person’ [*extranaeae personae*] as one’s own son or grandson.”¹⁵⁵ There are two types of adoption, Tancred continued, “arrogation” and “simple adoption.”¹⁵⁶ Arrogation occurred when one who has no father, or who is not under paternal power, is transferred to the paternal power of the adoptive father.¹⁵⁷ Simple adoption, on the other hand, occurred when an adoptive father adopts one who is under someone else’s paternal power.¹⁵⁸

Having borrowed from Roman law for these general features, Tancred set out a series of more specific rules governing the process of adoption. An adoptive father must himself be the head of a household and capable of procreation.¹⁵⁹ In other words, he must not be a eunuch or impotent.¹⁶⁰ An adoptive father must not be over the age of seventy; an adoptive child must still be in his or her minority.¹⁶¹ Following Roman law, Tancred declared that women ordinarily may not adopt, but they could be given permission to do so by the emperor.¹⁶²

Tancred also laid down rules concerning who might be adopted. Anyone, either male or female, may be adopted so long as he or she does not exceed the age limits.¹⁶³ The effect, at least of adoption by arrogation, meant that one would be considered in all respects a son or daughter of the one adopting and would receive a child’s portion of the inheritance, should the father die intestate.¹⁶⁴

The rules that Rufinus, Tancred, and other early canonists laid down would help give definitive shape to the Canon law of adoption. But in addition to the rules governing formal adoption, the canonists still retained the possibility of informal adoption, so widely endorsed in the early Middle

154 RUFINUS, *SUMMA DECRETORUM* 462 (Heinrich Singer ed., 1963).

155 TANCRÉD, *SUMMA DE MATRIMONIO* 39 (Agathon Wunderlich ed., Göttingen, Vandenhoeck und Rupprecht 1841).

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at 39–40.

162 *Id.* (following CODE JUST. 8.47.5 closely).

163 *Id.* at 40.

164 *Id.*

Ages.

Gratian's *Decretum*, the mid-twelfth century systematization of Canon law that scholars view as the starting point of the classical age of Canon law, retained the practice of informal adoption that it had inherited from early medieval sources.¹⁶⁵ Gratian included in the massive collection he assembled an excerpt from the Fourth Council of Toledo, which provided that a child abandoned in front of a church might, "out of mercy," be picked up by anyone.¹⁶⁶ A relative had ten days to contest the informal adoption, after which time the new parent might rest secure.¹⁶⁷

While one should always be aware of the distinction between the sources Gratian collected and his analysis of these sources, it seems that Gratian's inclusion of this text in the *Decretum* was without controversy. Indeed, it became a focal point for subsequent commentary about the rights of parents to retrieve and raise children in desperate need.¹⁶⁸ By the time one reaches the early twelfth century, the ten day waiting period had largely disappeared, replaced by a presumption that such cruel treatment merited an immediate termination of parental rights. Johannes Teutonicus, for instance, who authored the ordinary or received gloss on Gratian's *Decretum*, asserted that the ten day time period applied only where the exposure was effectuated by some underling and the parents of the child were themselves unaware of it.¹⁶⁹

The *Liber Extra*, the great compilation of papal law promulgated in 1234 by Pope Gregory IX, contained similar legislation. If a father, Pope Gregory wrote, has taken leave of all parental responsibility by abandoning a child, either personally or through agents, that child was thereby freed of paternal power.¹⁷⁰ There was no possibility of the father reclaiming the child.¹⁷¹ Furthermore, a child born into servile status was freed of that status upon abandonment.¹⁷² No one who subsequently claimed the child had any claim on that child's enforced labor.¹⁷³ Gregory concluded that

165 See, e.g., BRUNDAGE, *supra* note 148, at 47–49 (discussing the importance of Gratian's work); John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 TRADITIO 145 (1979) (examining what we know about Gratian, the person and the lawyer).

166 See D.87 c.9.

167 *Id.*

168 See CHARLES J. REID, JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW (forthcoming 2004) (manuscript at 455–59, on file with author).

169 See JOHANNES TEUTONICUS, GLOSSA ORDINARIA, D.87 c.9, v. *expositus*. On Teutonicus' career, see BRUNDAGE, *supra* note 148, at 219–20.

170 See X 5.11.1.

171 *Id.*

172 *Id.*

173 *Id.*

the same rule regarding the termination of paternal rights applied where a child has been “impiously” denied nourishment, thereby threatening his or her health.¹⁷⁴

It has been contended by Jack Goody that the Middle Ages largely lacked the practice of adoption because of the Canon law’s perceived opposition to leaving inheritances to children instead of the Church.¹⁷⁵ In fact, adoption remained deeply embedded in the law and reality of medieval Christendom.

D. The Modern Canon Law of Adoption

A treatment of the modern Canon law of adoption needs to take account of three different streams of development. The first concerns the operation of Canon law in this field of family life in the changed circumstances of early-modern and modern Europe, in which secular, not Church, courts had taken the lead in the administration of domestic relations law. The second concerns the emergence of a distinctively American Catholic system of adoption, which resulted from the Church’s resistance, in the nineteenth and early twentieth centuries, to Protestant efforts to use the adoption laws as a means of removing children from “unfit” Catholic parents and placing them with evangelical families. The third stream, which has become especially strong in the last thirty years, flows from the Church’s commitment to protecting innocent human life, especially against the evil of abortion.

Canonists of the early-modern and modern period by and large retained the Roman law framework that developed in the twelfth and thirteenth centuries. Tomás Sánchez, whose work on marriage law, *De Sancto Matrimonio (On Holy Matrimony)*,¹⁷⁶ remains one of the leading canonistic treatises on the subject, retained the same vocabulary and set of ideas one found in Roman law on the subject and from Canon lawyers such as Tancred. Thus, Sánchez asserted that there were two types of adoption—*arrogatio* and *simplex adoptio* (“simple adoption”).¹⁷⁷

Arrogatio, Sánchez declared, was “perfect adoption,” in which the one adopted was placed under his or her new father’s paternal power and made

¹⁷⁴ *Id.*

¹⁷⁵ JACK GOODY, THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE 99–102 (1983). Goody’s views have now been effectively refuted by James Brundage. See James A. Brundage, *Adoption in the Medieval Ius Commune*, in PROCEEDINGS OF THE TENTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 889, 891–93, 897 (2001).

¹⁷⁶ On Sánchez and his contribution to marriage law, see JOHN T. NOONAN, JR., POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA 31–41 (1972).

¹⁷⁷ 2 TOMÁS SÁNCHEZ, DE SANCTO MATRIMONIO bk. 7, at 207–12 (Lyon, Societas Typographorum 1637).

his necessary heir.¹⁷⁸ In contrast, simple adoption did not result in a child being transferred from the authority of one's natural parents to the adoptive parents.¹⁷⁹ Rather, the child remained subject to his or her natural father's paternal power and had the right to share in the natural father's estate, not that of the adoptive parents.¹⁸⁰ *Arrogatio*, Sánchez further stipulated, required the consent of both the child being adopted and the adoptive father.¹⁸¹ For this reason, Sánchez made clear, an infant might be the subject of simple adoption but could never be adopted by means of *arrogatio*.¹⁸²

These rules were repeated, with a few elaborations, by subsequent generations of canonists. Anacletus Reiffenstuel, unmindful it seems of early medieval and canonistic traditions of informal adoption, declared that adoption was defined by Roman law and was afterwards received into the Canon law.¹⁸³ Following Sánchez and the generations that had come before him, Reiffenstuel distinguished between the "perfect adoption" of *arrogatio* and the "less perfect" adoption of *adoptio simplex*.¹⁸⁴ Franciscus Schmalzgrueber in many respects simply followed these teachings.¹⁸⁵

Pope Benedict XIV (who reigned from 1740 to 1758), one of the genuinely great Canon lawyers to serve on the papal throne, drew upon this heritage to promulgate an adoption law for the universal Church. Adoption, Benedict asserted, was a Roman law concept that the Church had "canonized," that is, made its own.¹⁸⁶ He recognized that in many places adoption was a matter for the civil law, by which he meant the Romanist

178 2 *id.* A necessary heir was one empowered to take a share of that one-quarter of the father's estate that Roman and Canon law required a father to bequeath to his children. *Id.* Sánchez's conception of "necessary heir" thus differed from the way this term was employed in classical Roman law. According to W.W. Buckland:

Necessarii heredes: These are slaves of the testator freed and instituted by his will, *heredes* with no power of refusal. The name applied to all such slaves freed and instituted, but its most important application was in insolvency. An insolvent might name a slave as one of his *heredes*, so that, if others refused, the slave would be *heres* and the disgrace of insolvency would fall on him and not on the deceased.

W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 304 (3d ed. 1963).

179 2 SÁNCHEZ, *supra* note 177, bk. 7, at 207–12.

180 2 *id.*

181 2 *id.*

182 2 *id.*

183 5 ANACLETUS REIFFENSTUEL, *JUS CANONICUM UNIVERSUM* 458 (Paris, Louis Vivès 1889).

184 5 *id.*

185 See 4 FRANCISCUS SCHMALZGRUEBER, *JUS ECCLESIASTICUM UNIVERSUM* pt. 2, at 74–75 (Rome, Ex Typographia Reverendae Camerae Apostolicae 1845).

186 2 POPE BENEDICT XIV, *OPERA OMNIA* 324–25 (Prato, Typographia Aldina 1844).

legal systems then flourishing on the European continent.¹⁸⁷ He accepted the distinction between *arrogatio* and simple adoption, but conceded that most questions concerning the administration of adoption law should have as their starting point the civil law.¹⁸⁸

The second stream of thought shaping the modern Catholic law of adoption has been the peculiarly American experience of the latter nineteenth and early twentieth centuries. Although present in North America from the sixteenth and seventeenth centuries, Catholics began to arrive in large numbers in the United States with the great immigrant influx of the nineteenth and twentieth centuries.¹⁸⁹ The Irish were the first to arrive in substantial numbers, followed by Germans, both groups beginning their immigrations in the years before the Civil War.¹⁹⁰ Following the Civil War, Catholics from the rest of Europe, including Poland, Lithuania, Hungary, Italy, and elsewhere, arrived in significant numbers.¹⁹¹

Many members of these groups suffered extreme social dislocations, made worse by the horrid conditions of urban life and the demands of laboring in the least attractive jobs and occupations of industrializing America.¹⁹² Orphaned children, children born in broken homes, and children born to unwed mothers, were a regular feature of this sort of disorganized life.

The leadership of Protestant and Catholic churches alike sought to alleviate the worst aspects of this life. Especially important to stimulating the direction Catholic adoption took were the efforts of the Protestant minister Charles Loring Brace, who, in 1854, created the “placing-out” system to assist in the placement of the children of the urban poor in “more desirable” family settings in the Midwest and West.¹⁹³ Brace considered Catholicism to be “an inferior, superstitious, servile religion.”¹⁹⁴ Not surprisingly, his efforts were perceived as an attempt to break up Catholic homes and to protestantize Catholic children.¹⁹⁵

It was with the explicit purpose of countering Brace’s effort that there was “founded in 1863 the Society for the Protection of Destitute Roman Catholic Children in the City of New York to ensure that dependent or

187 2 *id.*

188 2 *id.*

189 For an important account of the years between 1820 and 1920, see JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT* 127–57 (Univ. Notre Dame Press 1992) (1985).

190 *Id.* at 128–31.

191 *Id.* at 131–36.

192 *Id.* at 148–57.

193 MIRIAM Z. LANGSAM, *CHILDREN WEST: A HISTORY OF THE PLACING-OUT SYSTEM OF THE NEW YORK CHILDREN’S AID SOCIETY 1853–1890*, at 11, 17–32 (1964).

194 LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 11 (1999).

195 *Id.*

delinquent Catholic children would be brought up within the faith.”¹⁹⁶ The New York Society was not the first attempt to protect Catholic children in the United States. Even before the Civil War, a foundling home was established in Buffalo in 1852,¹⁹⁷ and another in St. Louis in 1853.¹⁹⁸

Catholics, as well as Protestants, made use of the placing-out system to place children from the urban Northeast into new homes in rural America. Linda Gordon’s *The Great Arizona Orphan Abduction* is an important history of the interaction of Catholic attitudes toward placing-out and adoption, the regnant Protestant belief system of turn of the century America, and the hostility, in many parts of Protestant America, to Hispanic Americans in the desert Southwest.¹⁹⁹ Interested in preserving the Catholic faith of children entrusted to their care, the Sisters of Charity, who ran a major New York foundling home, placed a group of largely Irish immigrant children with largely Hispanic Catholic parents in an Arizona mining town in the fall of 1904.²⁰⁰ The arrival of the Irish orphans split the town between Mexican Catholics, who were to serve as adoptive parents, and Protestant “Anglos” suspicious of all things Catholic and Mexican; it also led to a mass kidnapping of the children, the legality of which was sustained by the United States Supreme Court.²⁰¹

196 CARP, *supra* note 7, at 14.

197 JOHN O’GRADY, *CATHOLIC CHARITIES IN THE UNITED STATES: HISTORY AND PROBLEMS* 129–31 (1930).

198 *Id.* at 131–32.

199 *See* GORDON, *supra* note 194.

200 *Id.* at 13–19, 34–43.

201 *N.Y. Foundling Hosp. v. Gatti*, 203 U.S. 429, 435–36, 441 (1906). The United States Supreme Court upheld the decision of the Supreme Court of the territory of Arizona, which condemned the Sisters’ placement of “white, Caucasian child[ren]” with “half-breed Mexican Indians of bad character.” *Id.* at 435–36. The Supreme Court stressed that at common law “the guardianship of infants” was “one of the eminent prerogatives of the crown.” *Id.* at 439. The Court rejected an argument that the children were entitled to relief by writ of habeas corpus and stressed instead that the continuing plenary power of the State for the welfare of these children permitted their detention:

It was in the exercise of this jurisdiction as *parens patriae* that the present case was heard and determined. It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements. Such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court’s view of the best interests of those whose welfare requires that they be in custody of one person or another.

Id.

The Court used this principle to justify the vigilante-style way in which the Protestant-Anglo townspeople removed the children from their placements with Mexican Catholics: “[A] committee was appointed from the citizens resident of the vicinity, who visited the homes of the persons having possession of the children, stating to them that they

An important legacy of Catholic efforts to preserve the faith of the children of the urban poor was the creation of a large network of adoption agencies and child placement services under the umbrella of Catholic social services.²⁰² The creation of this network has had the effect of shaping not only Catholic attitudes and law on adoption, but also that of the larger culture.

In the years after World War II, this network of adoption agencies and the guidelines and practices they established for themselves helped to shape American law and culture of adoption, particularly with respect to the adoption of handicapped children and children of diverse races and backgrounds. In an article describing the adoption practices utilized by Catholic Charities of Omaha, Nebraska, in the years 1949 and 1950, caseworker Betty Hannigan proposed means by which children who were “socially handicapped” might be adopted.²⁰³ She suggested that caseworkers consider suggesting to prospective parents “the idea of a specific child with special needs.”²⁰⁴ In this way, Hannigan indicated, children with such special needs as cerebral palsy, partial blindness, and other handicaps were adopted.²⁰⁵ Almost off-handedly, Hannigan noted that where appropriate, Catholic Social Services of Omaha also sought to place children of mixed racial backgrounds with parents of different ethnic backgrounds “who match in other essential ways.”²⁰⁶

Hannigan’s article would prove the first of many in Catholic social service literature identifying means by which Catholic agencies might act to meet the needs of children entrusted to their care. A second article published in 1952 explored in greater detail the efforts being made by Omaha Catholic Charities in the placement of handicapped children.²⁰⁷ A third article, written by Katherine Price of the Archdiocese of Denver and published in 1956, stressed the importance of social workers looking for parents who manifest a “sincere love” in order to provide homes for physically handicapped children and children of interracial or entirely

had been appointed by American residents to take possession of the children, who were then voluntarily surrendered by such persons.” *Id.* at 436. It is, of course, the alleged voluntary nature of this whole episode that Gordon’s book is intended to refute.

202 GORDON, *supra* note 194, at 41–43, 71–79.

203 See Betty Hannigan, *Adoption for Exceptional Children*, 34 CATH. CHARITIES REV. 142 (1950).

204 *Id.* at 143.

205 *Id.* at 144–45.

206 *Id.* at 143.

207 Henry R. Evans, *Placing the Handicapped Child for Adoption*, 36 CATH. CHARITIES REV. 33 (1952). Evans noted: “Between January 1, 1946, and December 31, 1950, a total of 237 placements for adoption were made by Catholic Charities of the Archdiocese of Omaha, Inc. Of this total 22 or slightly less than 10 percent were physically handicapped children . . .” *Id.* at 34.

different racial backgrounds.²⁰⁸ Subsequent articles struck similar themes.²⁰⁹

Many of these early articles suggested the need not just to find loving parents to adopt children with handicaps, but also to find parents who might consider interracial adoptions.²¹⁰ These articles suggest that Catholic adoption programs began vigorously recommending interracial adoptions of minority children by white parents around 1960, focusing at first on the adoption of refugee children.²¹¹ Korean War orphans were a particular concern of early efforts,²¹² and, of course, there were vigorous efforts to place child victims of the Vietnam War in homes in the United States.²¹³

American Catholic adoption agencies were also early in promoting the adoption of African-American children by white parents. An article

208 Katherine A. Price, *The Challenges of Adoption*, CATH. CHARITIES REV., Dec. 1956, at 12, 12.

209 See, e.g., Mildred Hawkins, *Opening Doors for Hard-to-Place Children*, CATH. CHARITIES REV., Feb. 1962, at 4 *passim* (explaining that the adoptive parent's own desire to become a parent to a minority child is the motivation social workers sought to strengthen and mobilize); John J. Kane, *Adoption*, U.S. CATH., June 1967, at 49, 53 (noting that parents who adopt "non-adoptable" children must possess "considerable courage and deep love of children"); Alice Ogle, *Children in Search of a Home*, MARRIAGE, May 1960, at 17, 19 (arguing that couples should not just look to adopt the "perfect" child, but also the hard-to-place child).

210 "If people can learn to look beyond the proverbial blue-eyed baby they dream about, their chances of adopting a child are much greater." Ogle, *supra* note 209, at 17 (quoting Joseph H. Reid, executive director of the Child Welfare League). Similarly, Sidney Callahan has explained:

If the ideal family image in America could become one in which families opened their hearts and lives to adopt children without families, then a dreadful social problem could be lessened. The hard-to-adopt racially mixed child or handicapped child needs adoptive parents who are not only generous but courageously so.

Sidney Callahan, *Have Some, Adopt Some*, U.S. CATH. & JUBILEE, Aug. 1970, at 14; see also Joseph A. Owens, *Frontier in Catholic Adoption*, VOICE ST. JUDE, Oct. 1960, at 10 (reviewing early developments and noting that "in recent years adoption practices have taken dramatic and enormous forward strides, with the 134 Catholic agencies spotted from coast to coast generating much of the thrust").

211 Of course, there was the earlier experiment in the adoption of Caucasian children by Hispanic parents foiled by the "great Arizona orphan abduction." See GORDON, *supra* note 194 *passim*.

212 See Rose Lucey, *Our Daughter Wore a Tag*, SIGN, Aug. 1961, at 13; Robert E. McDermott, *In Focus: Oriental Adoptive Placements*, CATH. CHARITIES REV., Apr. 1965, at 24; Daniel P. Quinn, *The Placement of Refugee Orphans in the United States*, CATH. CHARITIES REV., Sept. 1965, at 13; Betty Simmons, *Korean Adoption*, ST. ANTHONY MESSENGER, July 1964, at 15.

213 See, e.g., Thomas C. Fox, *A Few Viet Orphans Escape Their Hard Life*, NAT'L CATH. REP., Nov. 2, 1973, at 1 (detailing the experience of adopting a Vietnamese child in the post-war climate). This article contained a sidebar entitled *How to Adopt a Vietnamese Child*, referring readers to the Catholic Committee for Refugees. *Id.* at 6.

published in 1964 gave an affirming picture of a transracial adoption.²¹⁴ This article was followed by a number of others in the 1960s and early 1970s strongly endorsing interracial adoption.²¹⁵ In this way, the Catholic belief in the sanctity of life and family and in the universal message of Christ helped to push the development of adoption as a possibility for many children who might otherwise have spent their formative years in institutions.

The American Catholic experience of adoption, it is fair to say, has also influenced the attitude of the universal Church toward this means of forming a family. There is little in the way of formal law on the subject in contemporary Canon law. The 1983 Code of Canon Law recognizes that children “who have been adopted in accordance with the civil law are considered the children of that person or those persons who have adopted them.”²¹⁶ A second provision requires the recording of children’s names and the names of adoptive parents in baptismal registers.²¹⁷ A third provision prohibits marriage between those related by adoption, as well as those related by blood.²¹⁸

But even though the law is not especially well developed, the Catholic *magisterium*, the “teaching authority” of the Church to which Catholics are obliged to yield due respect and obedience,²¹⁹ has had much to say about adoption in recent years.

The *Catechism of the Catholic Church* takes up the subject of adoption under the heading “The Gift of a Child.”²²⁰ Scripture and the Church’s own tradition, the *Catechism* proclaims, “see in *large families* a sign of God’s blessing and the parents’ generosity.”²²¹ Catholic couples “who discover that they are sterile suffer greatly.”²²² They are deprived of the benefits of this gift and despair with Rachel, “Give me children, or I

214 See Joe Bartelme, *A Home for Billy*, CATH. DIG., Aug. 1964, at 48 (detailing the success story of a white family who adopted a part African-American son).

215 See Diane Martin, *Transracial Adoptions*, 126 AMERICA 171 (1972); Betty Mazzacano, *Hard to Place, but Easy to Love*, LIGUORIAN, June 1971, at 29; Wayne R. McKinney, *Adoption Can Be Color Blind: Children Need Parents More Than They Need Racial Experience*, CATH. DIG., June 1974, at 112; Ruth Moynihan, *Interracial Adoption*, MARRIAGE, May 1965, at 10; Ruth B. Moynihan, *Love is Color Blind*, MARRIAGE, Aug. 1968, at 42.

216 1983 CODE c.110. This canon essentially brings up to date the teaching of Pope Benedict XIV “canonizing” the civil law of adoption. See *supra* notes 186–88 and accompanying text. It is not, however, bound to the Roman law forms in the same way as Benedict’s teaching.

217 See 1983 CODE c.877, §§ 1, 3.

218 *Id.* c.1094.

219 *Id.* c.212, § 1; c.218.

220 CATECHISM OF THE CATHOLIC CHURCH §§ 2373–2379 (2d ed. 2000).

221 *Id.* § 2373.

222 *Id.* § 2374.

shall die!”²²³

One response to sterility, the *Catechism* continues, has been the development of artificial means of conception. These methods are problematic morally. “Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral.”²²⁴ These methods “betray the spouses’ ‘right to become a father and a mother only through each other.’”²²⁵ In this context, the *Catechism* emphasizes, a child is a *gift*, not a right.²²⁶ Physical sterility may indeed open other doors. Spouses confronting infertility “can give expression to their generosity by adopting abandoned children”²²⁷

The teaching of the *Catechism* built upon Pope John Paul II’s *Apostolic Exhortation on the Family*, issued in 1981, which also praised the importance of adoption.²²⁸ In that document, the Pope stressed that adoption serves the needs of both adoptive families and children. “Christian families [should] show greater readiness to adopt and foster children who have lost their parents or have been abandoned by them.”²²⁹ Children so adopted will “rediscover[] the warmth of affection of a family” and thus be enabled “to experience God’s loving and provident fatherhood,” while “the whole family will be enriched with the spiritual values of a wider fraternity.”²³⁰

Recent Church teaching has also stressed, however, that adoption should ordinarily take place within the context of traditional married life. The Pontifical Council for the Family has recently taught that marriage “is a union between a man and a woman, precisely as such, and in the totality of their male and female essence.”²³¹ Marriage embraces the complementary natures of male and female.²³² It demands total self-giving of each partner and serves as a sign to the world of Christ’s own love.²³³

It is impossible, the text continued, that homosexual unions should

223 *Id.* (quoting *Genesis* 30:1).

224 *Id.* § 2376.

225 *Id.* (quoting 2 SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DONUM VITAE [THE GIFT OF LIFE] 1 (1987)).

226 *Id.* § 2378.

227 *Id.* § 2379.

228 POPE JOHN PAUL II, FAMILIARIS CONSORTIO [THE APOSTOLIC EXHORTATION ON THE FAMILY], reprinted in 11 ORIGINS 437, 451 (1981).

229 *Id.*

230 *Id.*

231 PONTIFICAL COUNCIL FOR THE FAMILY, FAMILY, MARRIAGE AND “DE FACTO” UNIONS 40 (2000).

232 *Id.*

233 *Id.*

share these features.²³⁴ It is impossible for such unions to become “fruitful through the transmission of life according to the plan inscribed by God in the very structure of the human being.”²³⁵ These unions also frustrate “that interpersonal complementarity between male and female willed by the Creator at both the physical-biological and the eminently psychological levels.”²³⁶ It would be wrong to confer on such unions the title or dignity of marriage.

The document further made clear that “the attempts to legalize the adoption of children by homosexual couples add[] an element of great danger.”²³⁷ This is because “[t]he bond between two men or two women cannot constitute a real family and much less can the right be attributed to that union to adopt children without a family.”²³⁸ The Council concluded that “the common good of society . . . requires the laws to recognize, favor and protect the marital union as the basis of the family,” and this common good would be violated by extending the adoption laws in this fashion.²³⁹

Pope John Paul II’s encyclical *Evangelium Vitae* (*The Gospel of Life*) is famous for its denunciation of the culture of death that the Holy Father sees expanding its grasp in the western world.²⁴⁰ The encyclical begins with a reflection on Cain’s murder of Abel.²⁴¹ Neighbors perpetrate violent acts against neighbors. Cain denied responsibility for his wrongdoing, just as today “people . . . refuse to accept responsibility for their brothers and sisters.”²⁴² And the fruits of this moral indifference abound: in the forms of abortion, mass murder, genocide, euthanasia and other acts of “willful self-destruction.”²⁴³

In this context, the Pope sees adoption as one palliative to the destructive trends of the larger culture. The family should serve as an incubator for a culture and a Gospel of life.²⁴⁴ The family should be engaged in daily prayer, in giving glory to God, and in support for one another.²⁴⁵ Parents are obliged to teach their children, and the lessons they inculcate should include “an example of the true meaning of suffering and

234 *Id.* at 40–41.

235 *Id.* at 41.

236 *Id.*

237 *Id.* at 42.

238 *Id.* (quoting Pope John Paul II, Address Before the Angelus (Feb. 20, 1994)).

239 *Id.* at 43.

240 POPE JOHN PAUL II, *EVANGELIUM VITAE* [THE GOSPEL OF LIFE], reprinted in 24 *ORIGINS* 689, 691–92 (1995).

241 *Id.* at 692–93.

242 *Id.* at 693.

243 *Id.* at 691.

244 *Id.* at 721.

245 *Id.*

death.”²⁴⁶

Families should be models of love. This love should include attention to “the humble, ordinary events of each day.”²⁴⁷ It must also embrace “solidarity” with other families engaged in the same spiritual journey. “A particularly significant expression of solidarity between families is a willingness to adopt or take in children abandoned by their parents or in situations of serious hardship.”²⁴⁸ The Pope stresses: “True parental love is ready to go beyond the bonds of flesh and blood in order to accept children from other families, offering them whatever is necessary for their well-being and full development.”²⁴⁹

In sermons, the Pope has made clear that adoption must be seen as a singular act of love that stands as witness against the dominant trends of the culture, and that it is also a means by which familial love can be expanded and extended. Thus, in a sermon delivered to a gathering of adoptive families, the Pope proclaimed that “adoptive families provide a valuable witness in the face of self-centered ‘contradictions’ found in modern society.”²⁵⁰ Where infertile couples are concerned, adoption is preferable to “morally reprehensible practices.”²⁵¹ Adoption, which is a “gift of self,” is also a recognition “that the relationship between parents and children is not measured solely by genetic parameters.”²⁵²

Catholic theologians have begun in recent years to suggest new frontiers on the subject of adoption. In particular, it has been debated whether the adoption of embryos is permissible, perhaps even recommended, in light of the sanctity with which their lives, too, should be regarded. William E. May of the Pope John Paul II Institute for Studies on Marriage and the Family has written one of the more extensive treatments of this topic.²⁵³ May concludes:

A married couple can licitly have as their moral object the *adoption* of a frozen embryo, a human child abandoned by those who have generated it. This freely chosen act *commits* them to further actions, of which the basic one is *to give their adopted child a home*, which they do, first, when the wife/mother *chooses* to have the frozen embryo transferred into her womb, and which they continue to carry out by giving their adopted child, once born, the home provided by both wife and

246 *Id.*

247 *Id.*

248 *Id.*

249 *Id.*

250 *Adoptions Are Hailed as “Work of Love,”* NAT’L CATH. REG., Sept. 17, 2000, at 4.

251 *Id.*

252 *Id.*

253 WILLIAM E. MAY, CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE 94–108 (2000).

husband.²⁵⁴

In closing, one must take note of the prophetic witness of Mother Teresa of Calcutta.²⁵⁵ Mother Teresa saw in the West a crisis of love. Although materially wealthy, western children all too often turn to drugs and other forms of escape because of the spiritual emptiness of too many homes.²⁵⁶ The collapse of home life threatens not only the social fabric but peace itself. And abortion is among the greatest threats to peace: “I feel that the greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child”²⁵⁷ In this way, Mother Teresa represents a direct connection to the writers of the early Middle Ages who condemned the infanticide of the age and recommended adoption as the remedy.

In India, Mother Teresa made vigorous use of adoption as an alternative to abortion.²⁵⁸ “The child is God’s gift to the family. Each child is created in the special image and likeness of God for greater things—to love and to be loved.”²⁵⁹ Such a creation should not be killed in the womb. Welcoming such a child into one’s home is like welcoming Jesus Himself: “Jesus said, ‘Anyone who receives a child in my name, receives me.’ By adopting a child, these couples receive Jesus; but by aborting a child, a couple refuses to receive Jesus.”²⁶⁰

III. ADOPTION IN ISLAMIC LAW

To speak of an Islamic law of adoption may strike some as an oddity or a radical doctrinal innovation. After all, it is well known that Islamic law prohibits adoption, at least insofar as it would entail a notion of fictive kinship. In this case, however, popular perceptions simplify, mask and distort a complex and subtle body of legal doctrine that deals with children of unknown parentage. By analyzing the legal rules articulated during the pre-Modern period which govern foundlings (s. *laqîṭ* / pl. *luqatâ*’), this Part will (1) show that the Islamic law of foundlings functions as a near substitute for adoption and (2) point the way to a more robust set of rules that would be more friendly to quasi-adoptive relationships. It will proceed by describing in broad outline the principal doctrinal features governing

254 *Id.* at 107.

255 Mother Teresa, *Spiritual Poverty and the Breakdown of Peace*, 23 *ORIGINS* 615 (1994).

256 *Id.* at 616.

257 *Id.*

258 *Id.* “Please don’t kill the child. I want the child. Please give me the child. I am willing to accept any child who would be aborted and to give that child to a married couple who will love the child and be loved by the child.” *Id.*

259 *Id.*

260 *Id.*

foundlings. This Part will then attempt to explain the doctrine as a result of a series of compromises among competing substantive values within the pre-modern legal system, not all of which could be simultaneously vindicated. Finally, it will conclude with a reassessment of the pre-modern jurists' interpretation of the foundational revelatory texts upon which they built their doctrines, thus pointing the way for a reformulation of Islamic law's prohibition of adoption.

A. Basic Doctrine

Certain well known facts within the Islamic legal tradition buttress the notion that Islam categorically prohibits adoption. First, the revelatory sources of Islamic law, the *Qur'ân* and the Prophetic traditions, seem to reject the notion that a person other than the biological parent of the child can be a parent to that child. Thus, in the case of mothers, the *Qur'ân* states “[t]heir mothers are only those who have given birth to them,”²⁶¹ and in the case of fathers, it states,

God did not make those whom you call your sons your sons [in reality]. That is no more than an expression from your mouths and God speaks the truth and He guides to the [correct] way. Attribute them to their fathers: That is more just in the eyes of God, but if you know not the names of their fathers, then they are your brothers in faith and your dependents.²⁶²

In commenting upon this verse, exegetes were in agreement that the verse prohibits a man from adopting a child, at least where adoption is understood to entail the introduction of a fictive relationship of descent between the child and the adoptive father.²⁶³

Indeed, the verse's prohibition was first applied to the adopted son of the Prophet Muhammad. The Prophet Muhammad had a freed slave by the name of Zayd b. Hâritha, whom he chose to “adopt” (*tabannâ*) prior to the advent of Islam.²⁶⁴ As was the Arab custom of the pre-Islamic era, Muhammad declared to his fellow tribesmen that he had adopted Zayd, and from that moment until this verse was revealed, he became known as Zayd, the son of Muhammad, instead of Zayd, the son of Hâritha.²⁶⁵ Adoption

261 *Qur'ân Al-Mujâdila* 58:2.

262 *Qur'ân Al-Ahzâb* 33:4–5.

263 See, e.g., 14 MUHAMMAD B. AHMAD AL-QURTUBÎ, AL-JÂMI‘ LI-AHKÂM AL-QUR’ÂN 118–19 (1967); 3 ABÛ AL-QÂSIM MAHMÛD B. ‘UMAR AL-ZAMAKHSHARÎ, AL-KASHSHÂF ‘AN HAQÂ’IQ AL-TANZÎL WA ‘UYÛN AL-AQÂWÎL WA WUJÛH AL-TA’WÎL 225–26 (n.d.).

264 14 AL-QURTUBÎ, *supra* note 263, at 118–19; 3 AL-ZAMAKHSHARÎ, *supra* note 263, at 225–26.

265 14 AL-QURTUBÎ, *supra* note 263, at 118–19; 3 AL-ZAMAKHSHARÎ, *supra* note 263, at

according to pre-Islamic usage meant that, for all practical purposes, the adopted child and the adoptive father acceded to all the rights and obligations that were incident to a parent-child relationship, including rights of inheritance as well as obligations of mutual defense.²⁶⁶ Upon the revelation of the verse that rejected this pre-Islamic practice, Zayd's name was restored to Zayd, son of Hâritha, but he remained a dependent (*mawlâ*) of Muhammad.²⁶⁷ And, with the dissolution of the adoptive relationship between the two men, their mutual rights of inheritance also dissolved, as confirmed by the *Qur'ân* which states, “[with respect to] close relatives, some are more deserving than others under the command of God than the believers and the emigrants, except that you may choose to do good to your dependents.”²⁶⁸

The verses in *Qur'ân* 33:4–5 could suggest on one reading that as between a stranger and the biological father, the biological father will always have a superior claim to being the legal father of the child. Islamic jurists, however, did not adopt this reading, for the legal designation of father in Islamic law was not solely a biological matter. Instead, fatherhood derived from the concept of legitimate sexual intercourse—a man could not become the “father” of a child unless the child was the product of lawful intercourse—and thus combined a presumption of biological descent with the requirement of a legal marriage.²⁶⁹ This rule was based on a report attributed to the Prophet where two men came to him, disputing the custody of an orphaned child.²⁷⁰ One claimed as the brother of the deceased biological father, while the other claimed the child in his capacity as the heir of the master who owned the child's mother. The Prophet is reported to have ruled in this case that “[t]he child belongs to the bed, and the male adulterer gets nothing.”²⁷¹ Muslim jurists applied this principal—that the male adulterer gets nothing—to prohibit adulterous males from subsequently gaining status as the legal “father” of the child.²⁷² Thus, even if an adulterous male married the mother of his child, he would

225–26.

266 14 AL-QURTUBÎ, *supra* note 263, at 119.

267 3 AL-ZAMAKHSHARÎ, *supra* note 263, at 227.

268 *Qur'ân Al-Ahzâb* 33:6.

269 *See infra* notes 270–75 and accompanying text.

270 12 AHMAD B. ‘ALÎ B. HAJAR AL-‘ASQALÂNÎ, FATH AL-BÂRÎ SHARH SAHÎH AL-BUKHÂRÎ 36 (1989).

271 12 *id.* Although in this case the mother was a slave girl, and the child was ultimately awarded to the master's son, the same rule was also applied to marriages, with the legal husband being entitled to the child, even if the child was in fact a result of an adulterous relationship.

272 *See infra* note 273.

not become the legal father of a child illicitly conceived.²⁷³ Accordingly, the Islamic “prohibition” on adoption is a result of the interaction of two principles: first, that a male adulterer has no rights in a child born of an illicit relationship,²⁷⁴ and second, that a stranger to the child cannot, by mere social convention, accede to the legal rights and responsibilities of the child’s legal father.²⁷⁵

Given this background, the immediate question is how Islamic law treated children who were legally fatherless, and because of the prohibition against adoption, could not legally be recognized as the offspring of any man. The law governing foundlings, I believe, provides at least part of the answer.

B. *The Law of Foundlings as a Substitute Law of Adoption*

Given the social stigma of illegitimacy in medieval Muslim societies, it is not an unreasonable assumption that most children who were conceived outside of wedlock were abandoned at birth. Indeed, ancient Mālikī texts explicitly differentiated between a child who is abandoned at birth, presumably as a result of the stigma associated from adultery, and one abandoned by his lawful parents as a result of straitened circumstances in the hope that others better able to provide for her would find her and take care of her.²⁷⁶ These ancient authorities, therefore, reserved the term *manbūdh* for the former category, whereas they limited the term *laqīṭ* to the

273 This principal was embodied in the maxim that “the sperm of adultery is of no standing” (*mā’ al-zinā muḥdar*). Other rules reinforced this prohibition. For example, adulterous couples were required to wait three months (*istibrā’ al-zinā*) from the last day in which they had intercourse prior to marrying to insure that any child born to them was conceived as a result of lawful intercourse. Mālikīs and Hanafīs, for example, interpreted revelation as prohibiting any relationship of descent between the adulterous father and his illegitimate offspring (*al-shar’ qata’a nasabahu ‘an al-zānī*). 3 MUHAMMAD AL-KHARSHĪ, SHARH MUKHTASAR KHALĪL LI-L-KHARSHĪ pt. 2, at 101 (n.d.); see also 17 MUHAMMAD B. AHMAD AL-SARAKHSĪ, AL-MABSŪT 154 (1993) (“When a man commits adultery with a woman who gives birth as a result thereof, and the male adulterer claims [paternity of] the child, no parent-child relationship is established because of the absence of a licit relationship.”).

274 In contrast to the rule depriving the adulterous male of any rights in the child, the adulterous female is given the status of legal mother of any child born of an adulterous relationship. See 17 AL-SARAKHSĪ, *supra* note 273, at 154–55.

275 These could be significant, including, inter alia, the right to receive financial support from the child upon the father’s incapacity and need as well as the right to inherit from the child if she predeceased the father. Conversely, paternity was also a source of monetary liability, as the father was responsible to provide for his children during their minority, and was required to answer monetarily for their torts, even after their emancipation.

276 See 6 MUHAMMAD B. MUHAMMAD AL-HATTĀB, MAWĀHIB AL-JALĪL LI-SHARH MUKHTASAR KHALĪL 299 (n.d.).

latter.²⁷⁷ Whether the foundling was illegitimate or legitimate, however, was immaterial from the perspective of Islamic law, and to a significant extent, there was broad agreement among the various Sunnî schools of law regarding the mutual relationships of the foundling, the rescuer (*al-multaqit*), and the state.²⁷⁸

In this respect, three doctrinal principles were virtually universally recognized by Muslim jurists in the Middle Ages. First, caring for foundlings was legally obligatory (*wâjib*), but the obligation was societal (*fard kifâya*), not individual, unless (1) the child was found in a life-threatening situation, or (2) a person voluntarily took custody of the foundling. In the first case, the person so finding her becomes individually obliged to take custody of the child and care for her. In the second case, the caregiver remains individually obliged to tend to the child's needs until: (1) another caregiver (*kâfil*) is found; (2) the child reaches the age of majority and is able to fend for himself; or (3) in the case of a female, the foundling marries.²⁷⁹ Second, the rescuer, while he could become the caregiver of the child, could not become the legal parent of the foundling simply by virtue of caring for the child. Accordingly, the financial rights, e.g., inheritance (*irth*), and obligations, e.g., maintenance (*nafaqa*) and insurance (*'aql*), that are incident to parenthood in the case of the foundling devolve upon the state.²⁸⁰ Third, a foundling was free, and in the absence of compelling evidence, could not be enslaved.²⁸¹ A closer look at these three doctrines is in order.

C. *Definition of the Foundling and the Obligation to Care for Foundlings*

The various schools of Muslim jurisprudence²⁸² were in general

²⁷⁷ 6 *id.*

²⁷⁸ See *infra* notes 283–301 and accompanying text.

²⁷⁹ See, e.g., 4 AL-KHARSHÎ, *supra* note 273, pt. 1, at 130 (“Caring for the abandoned child and maintaining her are legal obligations of her rescuer until she reaches the age of majority and becomes independent.”).

²⁸⁰ See *infra* notes 302–19 and accompanying text.

²⁸¹ See *infra* note 320 and accompanying text.

²⁸² Islamic law has been cited as a classic example of a “jurists’ law.” Prior to the nineteenth century, Muslim legal scholars developed a vast legal literature that set forth applicable rules of ritual law, private law, constitutional law, and to a lesser extent, criminal law. One of the consequences of the centrality of scholarship in the development of Islamic law was the rise of “legal schools” that arose out of the teachings of particularly learned early authorities, all of whom died in the second and third Islamic centuries. Historically, four such schools came to dominate legal doctrine for Sunni Muslims: (1) the Hanafî school, named after Abû Hanîfa al-Nu’mân b. Thâbit; (2) the Mâlikî school, named after Mâlik b. Anas; (3) the Shâfi’î school, named after Muhammad b. Idrîs al-Shâfi’î; and (4) the Hanbalî school, named after Ahmad b. Hanbal. Abû Hanîfa lived in Iraq and subsequently his

agreement regarding the definition of the foundling. The Mâlikîs defined the foundling as “a lost child of unknown parentage.”²⁸³ The Hanbalîs defined the foundling as “a child, up to the age of discernment, whose paternity (*nasab*) and [status as] slave [or free] are unknown, who has been abandoned, or is lost.”²⁸⁴ The Shâfi’îs’ definition included all abandoned children who have not reached the age of majority and have no caregiver.²⁸⁵ The Hanafî definition states that “the foundling is a name for a baby, born alive, whose family has cast her aside, either out of fear of poverty or suspicion of adultery.”²⁸⁶ While not explicitly stated by all the jurists, abandonment of the child is a sinful act, while taking custody of the foundling is deemed an act of piety.²⁸⁷

Interestingly, the different schools of jurisprudence relied on different proof-texts in the *Qur’ân* to support the obligation to care for foundlings. The Hanbalîs and the Shâfi’îs quote the general obligation to “cooperate [in all things] good and pious.”²⁸⁸ Similarly, the *Qur’ân* later states that

teachings became the dominant legal school for Muslims living in Iraq, Eastern Europe, Central Asia, and the Indian subcontinent. Mâlik b. Anas lived in the sacred city of Madîna, in the western Arabian province known as the Hijâz. His teachings became the dominant legal school throughout North and Sub-Saharan Africa, Islamic Spain, and Upper Egypt. Al-Shâfi’î was born in Gaza, Palestine, and studied with the leading authorities of Madîna, including Mâlik b. Anas, and Iraq, including the leading students of Abû Hanîfa. He finally settled and died in Egypt. His doctrines prevailed in Lower Egypt (including Cairo), much of Syria, Yemen, and in contemporary times, Southeast Asia and East Africa. Ahmad b. Hanbal lived and taught in Baghdad, and his followers were limited primarily to that city as well as some Syrian cities. Followers of this school are numerically the least significant of the four Sunni schools of law, but it is the official school of law applied in the Kingdom of Saudi Arabia. For a general history of the formation of Muslim schools of law, see CHRISTOPHER MELCHERT, *THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH–10TH CENTURIES C.E.* (1997).

283 4 AL-KHARSHÎ, *supra* note 273, pt. 1, at 130. One commentator noted that whether or not the child’s lineage is known is irrelevant to his status as a foundling. ‘Alî al-‘Adawî, *Hâshiyat al-‘adawî*, in 4 AL-KHARSHÎ, *supra* note 273, pt. 1, at 130 (margin comment).

284 4 MANSÛR B. YÛNUS B. IDRÎS AL-BUHÛTÎ, *KASHSHÂF AL-QINÂ’ ‘AN MATN AL-IQNÂ’* 226 (1982) [hereinafter AL-KASHSHÂF]. Many in the Hanbalî school permit a child to be treated as a foundling until she reaches the age of majority.

285 5 ZAKARIYYÂ B. MUHAMMAD AL-ANSÂRÎ, *ASNÂ AL-MATÂLIB SHARH RAWD AL-TÂLIB* 612 (Muhammad Tamir ed., 2001) [hereinafter *ASNÂ AL-MATÂLIB*].

286 5 Muhammad b. Mahmûd al-Bâbartî, *Al-‘Inâya sharh al-hidâya*, in FATH AL-QADÎR 342 (1970) (margin comment).

287 See, e.g., 4 ‘UTHMÂN B. ‘ALÎ AL-ZAYLA’Î, *TABYÛN AL-HAQÂ’IQ SHARH KANZ AL-DAQÂ’IQ* 200 (Ahmad ‘Inaya ed., 2000) (“[T]he one who takes custody of the foundling is rewarded, while the one who abandons him is a sinner.”).

288 *Qur’ân al-Mâ’ida* 5:2. See, e.g., 6 ZAKARIYYÂ B. MUHAMMAD AL-ANSÂRÎ, *AL-GHURAR AL-BAHIYYA FÎ SHARH MANZÛMAT AL-BAHJA AL-WARDIYYA* 508 (Muhammad ‘Ata ed., 1997) [hereinafter AL-GHURAR]; 4 AL-KASHSHÂF, *supra* note 284, at 226.

“whosoever saves a human life, it is as though he has saved humanity in its entirety,” which was also cited as authority for the merits of caring for foundlings.²⁸⁹ The Hanafīs also point to a report that during the reign of ‘Alī b. Abī Tālib, the fourth Caliph and the Prophet Muhammad’s son-in-law, a man came to him with a foundling, and ‘Alī said to him: “He is free, and I would rather have participated in his affairs to the same degree that you [have participated] than this, this, and this [i.e., a laundry list of pious acts],” thus demonstrating the great religious merit of caring for foundlings.²⁹⁰ The Hanafīs also cited a tradition of the Prophet Muhammad, in which he was reported to have excluded those who are cruel to children from the ranks of the Muslim community.²⁹¹

The principal policy imperative giving rise to the obligation to rescue abandoned children was to save life. Thus, Ibn Rushd, an Andalusian Mālikī jurist, stated that “taking [custody] of a foundling is obligatory because were he to be left [in his condition], he would be lost and die.”²⁹² Similarly, the Hanafī author of the *Tabyîn* notes that rescuing the foundling becomes an individual obligation of anyone who discovers the foundling in life-threatening circumstances.²⁹³ The Shāfi’īs cite the same principal, e.g., saving life,²⁹⁴ in support of the rule that rescuing a foundling who has been abandoned in life-threatening circumstances is obligatory. This is in contrast to their ruling that taking possession of lost property, while meritorious, is not a legal obligation. The two cases are distinguishable in that the law already provides individuals with sufficient incentives to take possession of lost or abandoned property, since in due course, finders might become the lawful owners of such property. In the case of abandoned children, however, no economic benefit will accrue to a rescuer, and thus introducing the threat of legal liability is appropriate.²⁹⁵

289 *Qur’ān al-Mā’ida* 5:32. See, e.g., 6 AL-GHURAR, *supra* note 288, at 508; 4 AL-ZAYLA’Ī, *supra* note 287, at 200.

290 See *infra* note 291.

291 4 AL-ZAYLA’Ī, *supra* note 287, at 200 (quoting the Prophet Muhammad as saying, “Whosoever does not show mercy to our children . . . is not one of us.”).

292 6 MUHAMMAD B. YŪSUF AL-MAWWĀQ, AL-TAJ WA-AL-IKLĪL 71 (n.d.).

293 4 AL-ZAYLA’Ī, *supra* note 287, at 200–01. The Hanafī author explained:

[Taking custody of the foundling] is commendable if the [foundling] is discovered in circumstances in which it is unlikely that she would die, as is the case were she to be found in a city . . . but [taking custody of the foundling] becomes obligatory if it is likely the foundling will perish [if she is not immediately rescued], as is the case were she to be discovered in the desert or some other dangerous location, in order to protect her from death.

4 *id.*

294 6 AL-GHURAR, *supra* note 288, at 508.

295 See 3 AHMAD B. AHMAD AL-QALYŪBĪ, HĀSHIYATĀ QALYUBĪ WA ‘UMAYRA 188 (1997) (“[The foundling] differs from lost property insofar as taking custody of the latter is not

Upon taking custody of a foundling, whether or not legally obligatory, the majority of Muslim jurists concluded that the rescuer became obliged to care for the foundling until such time as another caregiver could be found (including a judge as representative of the state) or the child reached the age of majority.²⁹⁶ The Mâlikîs' position is unique. They permit the rescuer to return the foundling to the place where he was found if (1) the rescuer took custody of the foundling for the sole purpose of delivering him to the judge, i.e., the responsible public authority; (2) the responsible public authority refused to accept the foundling; and (3) the foundling will not be abandoned in a location in which his life would be threatened.²⁹⁷ Although the rescuer is obliged to care for the foundling, this obligation does not entail more than providing physical protection and educational direction.²⁹⁸ The rescuer is always free, but is not obliged, to provide for the financial needs of the foundling. If he does so provide, he generally acts as a volunteer²⁹⁹ with no recourse against the foundling or the foundling's

obligatory . . . because profit is the primary motive [with respect] to [taking custody of] it and human nature is disposed to [taking custody] of it, so it was unnecessary to make it obligatory.”).

²⁹⁶ See, e.g., 5 *ASNÂ AL-MATÂLIB*, *supra* note 285, at 614.

[I]f he [the rescuer] is unable to care for him [i.e., the foundling] . . . then . . . he delivers him to the judge. Indeed, he can turn him over [to] the judge solely because he has grown tired of caring for him or for any other reason, even if he is still able to care for him . . . but it is illegal for him to abandon him or to return him to where he was [found].

⁵ *id.*

²⁹⁷ See, e.g., 6 *AL-MAWWÂQ*, *supra* note 292, at 82.

[H]e [i.e., the rescuer] shall not return him [i.e., the foundling] after taking custody of him unless he took custody of him solely to deliver him to the state, which did not accept him, and the place [where he leaves the foundling] is well-traveled. . . . The judge Abû al-Walîd said, ‘This means in my opinion that the place must be one where there is no fear that he [i.e., the foundling] would perish because of the throngs of people therein and that he [i.e., the rescuer] is certain that people will hasten to take custody of him [i.e., the foundling].’

⁶ *id.*

²⁹⁸ See, e.g., 5 *ASNÂ AL-MATÂLIB*, *supra* note 285, at 614.

The rescuer is obliged to protect the foundling and oversee his development, i.e., raise him, because those are the purposes of taking custody of him, not to provide for his financial needs or to provide him with a nurse [in his infancy] . . . for those are a tremendous burden and great expense.

⁵ *id.*

²⁹⁹ 3 *MÂLIK B. ANAS, AL-MUDAWWANA AL-KUBRÂ* 382 (n.d.) [hereinafter *MÂLIK*].

I said, ‘‘What is the rule if a person rescues a foundling, takes him to the public authorities, and they order him to care for him and provide for him financially?’’

Mâlik said, ‘‘The foundling, amounts spent on him are for the sake of God, and the one who maintains him does so only expecting divine reward.’’

³ *id.*; see also 10 *AL-SARAKHSÎ*, *supra* note 273, at 210 (‘‘[I]f the rescuer supports [the

father, if and when he is identified, to recover amounts advanced to maintain the foundling. However, recourse against the child's father is permitted if (1) the rescuer, at the time he advanced the funds, had subjectively intended to seek repayment from the foundling's father for those expenses, and (2) the father, at the time the rescuer advanced the funds, was solvent.³⁰⁰ The Hanafis also contemplated recourse against the foundling if funds advanced by the rescuer for the benefit of the foundling were approved by a court.³⁰¹

D. Supporting the Foundling: Who is Responsible?

If Muslim jurists were in general agreement that the rescuer was not legally obliged to maintain the foundling out of his own funds, how were the health, welfare and education of the foundling to be financed? In the first instance, any property of the foundling, including property found on or near his person, was to be spent upon his upkeep.³⁰² Likewise, any gifts that were given to the foundling, or any funds received from trusts established for the benefit of foundlings, could be applied by the foundling's caregiver toward the foundling's expenses.³⁰³ The general rule was that the rescuer could accept such charitable sums given to the foundling on her behalf, but the Shâfi'is obliged the rescuer to notify the court of any such property and to seek the judge's permission prior to spending the foundling's property.³⁰⁴ The rescuer could also spend reasonably from his own funds for the maintenance of the foundling, with the expectation of recovering from the foundling in the future with the permission of a judge. However, in these circumstances, the foundling could not, upon reaching majority, expect an accounting from the rescuer, or sue to recover from the rescuer amounts unreasonably spent in the absence of evidence of the rescuer's negligence.³⁰⁵

foundling] financially, he is a volunteer with respect to such support."); 4 AL-ZAYLA'Î, *supra* note 287, at 201 ("[I]f the rescuer were to support [the foundling] from his own property, it is a gift, for he has no authority to compel.").

300 See 6 AL-HATTÂB, *supra* note 276, at 193–94.

301 6 ABÛ BAKR B. MAS'ÛD AL-KÂSÂNÎ, *BADÂ'Î' AL-SANÂ'Î' FÎ TARTÎB AL-SHARÂ'Î'* 199 (1974) ("If [the rescuer] maintains [the foundling] out of his own property, he has recourse against him if he did so with the permission of the judge, but if he did so without his permission, then he has no recourse against him because he is a volunteer.").

302 See 3 MANSÛR B. YÛNUS AL-BUHÛTÎ, *SHARH MUNTAHÂ AL-IRÂDÂT* 482 (1979) ("[H]e is to be maintained from that which is [found] with him."); 6 AL-GHURAR, *supra* note 288, at 518; 6 AL-KÂSÂNÎ, *supra* note 301, at 199 (explaining that there is no public obligation to support the foundling if she has her own property); 4 AL-KHARSHÎ, *supra* note 273, pt. 1, at 131.

303 4 AL-KHARSHÎ, *supra* note 273, pt. 1, at 131.

304 6 AL-GHURAR, *supra* note 288, at 518.

305 See 4 AL-KASHSHÂF, *supra* note 284, at 228.

If the foundling's private resources, as supplemented from time to time by private charity, were not sufficient to maintain him, the jurists obliged the state to provide sufficient funds to meet the foundling's financial needs.³⁰⁶ In support of this proposition, the jurists of all schools relied upon a precedent established during the reign of the Caliph 'Umar b. al-Khattâb, the second Caliph of Islam. Imam Mâlik b. Anas, the eponym of the Mâlikî legal school, reported that a man found an abandoned child during the reign of 'Umar b. al-Khattâb.³⁰⁷ He appeared before 'Umar who asked him why he had taken custody of that child. He replied that the child was lost, so he took him.³⁰⁸ At this point, the man's commanding officer cried out, "Oh Commander of the Faithful, he is a virtuous man!" 'Umar asked him whether this was so, and when he replied yes, 'Umar said, "Go! He [i.e., the foundling] is free, and you are in charge of his upbringing, and we are obliged to provide for him."³⁰⁹

Islamic law therefore provided that the expenses associated with raising foundlings was an obligation that belonged to the entire community,³¹⁰ and accordingly, a portion of the resources of the public fisc were to be dedicated to that task. The jurists differed, however, in what to do when the fisc *lacked* adequate resources to maintain a foundling. For the Hanbalîs and the Shâfi'îs, the public fisc, if it lacked funds, was obliged to borrow money from the public in order to meet its obligation to foundlings.³¹¹ Indeed, the Shâfi'îs went so far as to suggest that, in the event the public fisc could not find someone who would voluntarily lend money to the state for this purpose, the government could compel, on a per capita basis, wealthy individuals—including the ruler in his personal capacity—to lend money to the state to fund the financial needs of a foundling.³¹² Mâlikî doctrine, however, did not contemplate public borrowing to fund the needs of foundlings. Instead, the jurists of this school obliged the rescuer in these circumstances to provide for the financial needs of the foundling in his custody.³¹³

306 See *infra* notes 310–13 and accompanying text.

307 7 WALÎD B. SULAYMÂN AL-BÂJÎ, *AL-MUNTAQÂ SHARH AL-MUWATTA'* 328 (1999).

308 7 *id.*

309 7 *id.*

310 See 6 AL-GHURAR, *supra* note 288, at 510 (protecting and raising the foundling, after she has been rescued, is also a societal obligation).

311 See, e.g., 5 ASNÂ AL-MATÂLIB, *supra* note 285, at 617; 6 'ALI B. SULAYMÂN AL-MARDAWÎ, *AL-INSÂF FÎ MA'RAFIT AL-RÂJIH MIN AL-KHILÂF 'ALÂ MADHHAB AL-IMÂM AL-MUBAJJAL AHMAD B. HANBAL* 433 (Muhammad Fiqî ed., 1980).

312 5 ASNÂ AL-MATALIB, *supra* note 285, at 617 ("If the fisc lacks funds . . . the ruler borrows [from those willing to lend] but if that fails, he divides the obligation . . . among the wealthy (to be treated as a loan to the fisc), including himself, or among those whom he selects in his good-faith discretion, if they are numerous . . .").

313 4 AL-KHARSHÎ, *supra* note 273, pt. 1, at 130 (stating that taking care of the foundling

The public was not only responsible in the first instance for providing for the foundlings' material needs, the Muslim jurists also held that it was monetarily responsible for torts committed by the foundling while in the custody of his rescuer.³¹⁴ Additionally, the public was the foundling's legal heir until such time as the foundling became an adult and produced heirs of her own.³¹⁵ The Hanafis, however, treated this rule as a default rule, and thus provided the foundling with an option to opt out of her status as a ward of the state by entering into a contractual relationship of guardianship (*walâ'*) with an individual member of the Muslim community.³¹⁶ So long as this relationship was created prior to a time when the public was called upon to answer for the foundling's torts, the contract was valid.³¹⁷ In this case, the foundling's private contract displaced the public from its twin roles as insurer of the foundling's torts and its legal heir. The party with whom the foundling contracted then became answerable monetarily for the foundling's torts, and became the foundling's legal heir if the foundling died without another heir.³¹⁸

It should be understood, however, that the duty of providing for the foundling was ultimately derivative of the father's obligation to provide for his children. For that reason, if and when the foundling's father was found, the foundling was returned to him and the father resumed his duty of providing for the foundling's material and emotional well being. The jurists disagreed, however, on what kind of proof was needed to establish the paternity of a foundling. The Mâlikîs were the strictest, requiring third party witnesses to testify to the fact that the foundling was the legitimate child of the claimant; however, the other schools were more accommodating, and would simply accept an admission of paternity from the claimant, in light of the foundling's need for a legal father who would become legally obligated to provide for him.³¹⁹

and maintaining her financially are obligatory upon her rescuer, if funds are not provided from the public fisc).

314 See, e.g., 6 AL-GHURAR, *supra* note 288, at 532 ("compensation of the foundling's torts (negligent and reckless) are an obligation of the public fisc"); 6 AL-KÂSÂNÎ, *supra* note 301, at 199 (noting that unless the foundling establishes a relationship of dependency (*walâ'*) with a specific person, the public treasury is liable for his torts); 6 AL-MAWWÂQ, *supra* note 292, at 81 (attributing to 'Umar b. al-Khattâb the view that the public fisc is liable for the torts of foundlings).

315 See 3 AL-BUHÛTÎ, *supra* note 302, at 485 (stating that the public is the foundling's heir); 6 AL-KÂSÂNÎ, *supra* note 301, at 199 (stating that the government is the foundling's successor).

316 6 AL-KÂSÂNÎ, *supra* note 301, at 199.

317 6 *id.*

318 In effect, the contractual guardian would be guaranteed to inherit something from the foundling unless the foundling died with legitimate male offspring.

319 See 6 AL-MAWWÂQ, *supra* note 292, at 82 ("[T]he foundling does not become the

E. The Freedom of the Foundling

A fundamental feature of the doctrine of foundlings in Islamic jurisprudence was that the foundling was free.³²⁰ The fear that an abandoned child might become enslaved clearly haunted the thoughts of Muslim jurists. Indeed, this fear—in addition to the possibility that the child could die—was one of the concerns that drove the jurists to describe the duty of rescuing foundlings as obligatory. Because there were no legitimate domestic sources of slaves other than the offspring of slaves,³²¹ the legal assumption with respect to all births within the territories in which Islamic law reigned supreme was that persons were free.³²² Accordingly, distinguishing between foundlings and enslaved children was an evidentiary problem of the first order, a problem that was perhaps never adequately resolved. Also, because slaves could be lawfully imported into Islamic territory, a moral hazard existed with respect to foundlings: instead of taking custody of a foundling to save her life, the would-be rescuer might be tempted instead to claim the child as a slave.

Muslim jurists attempted to prevent the enslavement of foundlings by their rescuers through the use of legal presumptions of freedom, differing only in regard to the strength of such presumptions.³²³ To buttress the presumptions of freedom, rescuers of foundlings were either encouraged or required to appear before a court in order to memorialize the identity of the foundling, thereby establishing binding evidence of the foundling's freedom.³²⁴

The Shâfi'is' position in this respect was the most protective of the

child of his rescuer or of anyone else in the absence of the testimony of witnesses or other convincing evidence [explaining how the child was lost].”).

320 See, e.g., 2 MĀLIK, *supra* note 299, at 398 (“Mālik said: ‘The foundling is free’”); 4 MUHAMMAD B. MUFLIH AL-MAQDISĪ, *KITĀB AL-FURŪ’* 574 (‘Abd al-Latif al-Subki ed., 1982) (“He [i.e., the foundling] . . . is free.”); 8 AL-SARAKHSĪ, *supra* note 273, at 113 (“The foundling is free, the public is his heir and it is liable for his torts.”); 4 MUHAMMAD B. IDRĪS AL-SHĀFI’Ī, *AL-UMM* 70 (stating that the foundling is free) (n.d.).

321 If the father of the child was also the master of the slave who gave birth to the child, the child was deemed free.

322 Slaves under Islamic law must originate outside the territory of the Islamic state, for enslavement of a free person within Islamic territories was strictly forbidden. See 10 AL-SARAKHSĪ, *supra* note 273, at 209 (“[T]he foundling is presumptively free in light of the [legal] presumption [of freedom] and [the law of Islamic] territories [in which he was born].”). A free person residing outside of the domains of the Islamic state, however, could be legitimately enslaved if he were not a Muslim. The person could then be imported into the territories of an Islamic state as a slave, just as any other property acquired outside of the borders of an Islamic state could be imported by its owner to an Islamic state.

323 See *infra* notes 325–28 and accompanying text.

324 See 3 AL-BUHŪTĪ, *supra* note 302, at 478 (noting that it is desirable for the foundling's rescuer to notify the court that he discovered the foundling so that he does not enslave her in the future).

freedom of foundlings. Not only did the Shâfi'is presume that all minors were free, they would also reject evidence to the contrary unless the witnesses could testify in detail as to the manner by which such minor became a slave.³²⁵ The Shâfi'is also required rescuers to appear before a court with the foundling in order to receive any of the legal benefits of a rescuer.³²⁶ Likewise, if a rescuer failed to appear before a judge in this manner, the judge was entitled to remove the child from the rescuer's custody.³²⁷ At the opposite end of the spectrum were the Hanafis, who were more indulgent of claims of slavery than were the Shâfi'is. Thus, while the Hanafis agreed that all foundlings were free, if the possessor of a child claimed the existence of a master-slave relationship rather than a rescuer-foundling relationship, the Hanafis were inclined to accept the claim.³²⁸

F. Tensions Within the Legal Doctrine

Despite the broad agreement they enjoyed among medieval Muslim jurists, the legal doctrines governing the foundling were characterized by a profound tension between two competing paradigms—a tension that is reflected more broadly in Islamic family law generally. The first approach

³²⁵ See al-Muzanî, *Mukhtasar al-muzanî*, in 8 AL-SHÂFI'Î, *supra* note 320, at 137. The author, al-Muzanî, quotes al-Shâfi'î as saying:

If a man claims that a foundling is his slave, I do not accept his witnesses unless they testify that they saw the slave-girl of so-and-so give birth to him . . . I am reluctant to accept the testimony of witnesses [who testify simply that he is his slave] because [the child] might be seen in the man's possession, and the witnesses might testify on that basis [alone].

Id. Note, however, that al-Muzanî also quotes al-Shâfi'î as holding a contrary opinion, which al-Muzanî described as the stronger position. *Id.*

³²⁶ See 5 ASNÂ AL-MATÂLIB, *supra* note 285, at 611; 6 AL-GHURAR, *supra* note 288, at 509–10.

³²⁷ 5 ASNÂ AL-MATÂLIB, *supra* note 285, at 611 (“When [the foundling] is rescued . . . giving notice to the court of the foundling . . . and of any property [found] with him, is obligatory . . . and if [the rescuer] does not give such notice, the court may remove the child and whatever property is with him from such rescuer”); 6 AL-GHURAR, *supra* note 288, at 509–10.

³²⁸ 7 AL-SARAKHSÎ, *supra* note 273, at 172.

A small boy, who lacks capacity, is in the custody of a man, who says “This is my slave”; it is as he says, so long as the contrary is not known, for the boy has no possession over himself, and therefore there is no claim to the contrary [before the court], so the claim of the man holding him is established [by default] against [the boy]. What is in the man's custody is his property by all appearances, so if he claims what is corroborated by appearances, his claim is given credence just as would be the case if he held in his possession a beast of burden or a dress, and said, “This belongs to me.”

⁷ *Id.*

treats legal questions dealing with the foundling from the perspective of the best interests of the foundling. The second places greater emphasis on the unknown parents of the foundling and is best characterized as a parental rights paradigm rooted in concepts of property law.

Principles of property law permeate the jurists' discussions of issues relating to the financial needs of the foundling and the allocation of the various rights and duties between the rescuer, on the one hand, and the "public" as represented by the state, on the other. For example, in reiterating the notion that the public fisc is the heir of the foundling, as well as the insurer of his torts, some jurists appealed to a well known principal of property law, *al-kharâj bi-l-damân* (profit is only with risk of loss).³²⁹

Once it is assumed that the rescuer cannot become a legal parent by virtue of his custodial relationship with the foundling, this principle becomes the key to understanding many details of the legal doctrine. Because the rescuer is not a legal parent, he is not entitled to inherit from the foundling, nor is he entitled to receive financial support from the foundling in the rescuer's old age.³³⁰ Conversely, because the rescuer, unlike a legal parent, has no claims to the financial assets of the foundling, he cannot be held monetarily liable for the torts of the foundling.³³¹ Another example of the dominance of the parental-property-rights paradigm is the rule regarding the financial liability of the foundling's father. Under Islamic law, a father cannot renounce financial liability for his children.³³² Thus, if the rescuer can show that the father was solvent at the time the rescuer maintained the foundling, then he can potentially recover such funds from the father on the theory that under the circumstances, the rescuer's advance of funds on behalf of the foundling was merely a discharge of the father's indebtedness.³³³ Accordingly, those doctrines of the law of foundlings which allocate economic responsibilities seem to be straightforward applications of fundamental concepts of property law.

On the other hand, the property paradigm also appears in contexts that would seem distant from economic matters. For example, a particularly thorny question that the law of foundlings had to deal with was the foundling's religion. In principle, the foundling took the religion of his parents, a principle that lies comfortably within a vision of the family

329 See 6 AL-KÂSÂNÎ, *supra* note 301, at 199.

330 See *supra* note 315 and accompanying text.

331 See *supra* note 314 and accompanying text.

332 4 AL-KASHSHÂF, *supra* note 284, at 227 (noting that the government has recourse against the foundling's father, if and when he is discovered, for amounts spent in rearing the foundling, assuming the father was solvent, because in that case, he was obliged to provide for the needs of his child).

333 4 *id.*

where children are the quasi-property of the parents.³³⁴ But, because the identity of the foundling's parents was unknown, other techniques had to be used to assign a religion to the foundling. One such technique was to consider the place where the foundling was discovered: If she was found in a church, she would be deemed a Christian, or if in a synagogue, a Jew, but otherwise she would be deemed a Muslim.³³⁵ Others took a probabilistic approach: If the majority of a town or village where the foundling was discovered was of a particular religion, then the parents of the foundling would be assumed to have come from the majority religious group.³³⁶ But in a significant departure from the focus on the parents of the foundling, other jurists insisted that a foundling should be deemed a Muslim if there is any theoretical possibility that one of the child's parents was a Muslim, viz., if even one person in the village was a Muslim.³³⁷ This rule, they said, was necessary to assure that the foundling's interests were fully protected, including his interest in avoiding enslavement.³³⁸ While there is no doubt that this rule also incorporated elements of belief in the religious superiority of Islam to Christianity and Judaism, it would be incorrect to assume that Islamic law systematically privileged Muslims over Christians and Jews. In fact, in many circumstances, the law, at least with respect to foundlings, treated Muslims, Christians and Jews equally.³³⁹ Thus, it

334 See 10 AL-SARAKHSÎ, *supra* note 273, at 62 (quoting the Prophet Muhammad as saying, "Every child is born subject to the natural [faith of primitive monotheism], and his parents make him a Jew, a Christian or a Magian, until such time as he can speak for himself, either giving thanks to God or rejecting Him," in support of the legal presumption that children take the religion of their parents).

335 5 MUHAMMAD B. 'ABD AL-WÂHID IBN AL-HUMÂM, SHARH FATH AL-QADÎR 345 (1970) ("If he [i.e., the foundling] is discovered in a village of non-Muslims, or in a synagogue or a church, he is a non-Muslim.").

336 3 MÂLIK, *supra* note 299, at 384–85.

I believe that if [the foundling] was in a town or city of Islam, or where [Muslims] live, I deem him a Muslim, but if he was discovered in the cities of non-Muslims or those of the protected [non-Muslim] peoples, I deem him to be a non-Muslim, and he should be left alone. If [the rescuer], found him in a village wherein there are both Muslims and Christians, it must be taken into consideration whether there are only one or two Muslims with the Christians . . . in which case he belongs to the Christians and should be left alone.

3 *id.*

337 5 ASNÂ AL-MATALIB, *supra* note 285, at 620 ("If the foundling is discovered in territory subject to the laws of Islam . . . and there is a single Muslim living there who could be the parent, even if he denies it, . . . the foundling is deemed a Muslim.").

338 See 5 *id.*; 7 AL-BÂJÎ, *supra* note 307, at 331 (quoting an early Mâlikî as holding that, in a dispute between a Muslim and a non-Muslim over who should have custody of a foundling, custody should be given to the Muslim "so as to insure that he does not make him a Christian, or that [the foundling's] affairs become forgotten and he becomes enslaved"); 6 AL-GHURAR, *supra* note 288, at 522–24.

339 See, e.g., 6 AL-GHURAR, *supra* note 288, at 512 (stating that priority is not given to a

seems that for those jurists who advocated what was a virtual legal presumption of Muslim descent for foundlings, the determinative consideration, so long as there was no proof of the identity of the true parent, was the perceived best interest of the child.

This was not the only circumstance in which the interests of the child were given greater weight than the putative rights of the missing parents, or the caregiver who was temporarily in charge of the child. In disputes concerning who should be the custodian of the foundling, the first in time principle generally was outcome determinative, so long as that custodian was deemed fit.³⁴⁰ If it was impossible to determine which of the claimants first took custody of the child, or if the first to take custody was not fit, the court would award custody based on its perception of the child's interests.³⁴¹ The foundling could also be removed from the care of an immoral caregiver or one prone to squander property.³⁴² Similarly, it was prohibited for the rescuer, if he was a bedouin, for example, to take the child from a city or village to the desert, or even from a city to a village.³⁴³ The justification given for this rule was straightforward: In addition to the great hardship and deprivation that is attendant to a life in the desert among nomadic people or among villagers, life in a city would assure moral, educational and economic opportunities for the child that could not be found either in the desert or small villages.³⁴⁴ And in cases where the judge could neither determine that the rescuer was of good character or bad character, the Shâfi'îs, while awarding him custody of the child, imposed a duty on the government to surreptitiously monitor the conduct of the caregiver (but under court supervision) to insure that the caregiver did not harm the child.³⁴⁵

Another area of the law of foundlings in which the best interests of the child is the dominant theme concerns the rules dealing with admissions of paternity (*al-iqrâr bi-l-nasab*). The Hanbalîs and the Hanafîs gave force to admissions of paternity without asking for any proof.³⁴⁶ In defense of this

Muslim claimant over a non-Muslim claimant unless the child is deemed to be a Muslim); 3 MÂLIK, *supra* note 299, at 60 (holding that if a non-Muslim claims paternity of a child in the custody of a Muslim, he is awarded the child if he can prove paternity).

340 5 ASNÂ AL-MATÂLIB, *supra* note 285, at 613.

341 5 *id.*

342 See, e.g., 6 AL-GHURAR, *supra* note 288, at 510–11 (stating that the caregiver must neither be immoral nor a spendthrift); 4 AL-MAQDISÎ, *supra* note 320, at 576–77 (noting that the foundling is not to be left in the custody of a caregiver who is immoral, untrustworthy or a spendthrift).

343 See 4 AL-KASHSHÂF, *supra* note 284, at 229; 6 AL-MARDAWÎ, *supra* note 311, at 441.

344 6 AL-GHURAR, *supra* note 288, at 516.

345 6 *id.* at 510; see also 5 ASNÂ AL-MATÂLIB, *supra* note 285, at 613.

346 See, e.g., 6 AL-MARDAWÎ, *supra* note 311, at 452 (“[I]f a person acknowledges that [the foundling] is his child, paternity is established, whether the claimant is a Muslim or a

rule, the Hanafis made an express appeal to the best interests of the child.³⁴⁷ While admitting that rigorous application of legal principles would demand that the party claiming to be the foundling's father produce proof for his claim, Al-Kâsânî argued that compelling policy considerations, in favor of both the child and the putative parent, justified giving force to an admission of paternity unsupported by objective evidence.³⁴⁸ The relative laxity in this regard of the Hanafis and the Hanbalis is to be contrasted with the rigour of the Mâlikîs, who would not admit claims of paternity absent proof that the child was the legal child of the person claiming her.³⁴⁹ Shâfi'î doctrine seems ambiguous on this point, with the same authority implying that admissions of paternity, with respect to foundlings,³⁵⁰ are valid without any proof of paternity, and in another context excluding the possibility that such an admission could be legally effective if the child was illegitimate.³⁵¹

The express commitment to the best interest of the child is clearest in Hanafî doctrine.³⁵² The Hanafis, for example, will take at face value the

non-Muslim, man or woman, and whether the foundling is dead or alive.”); 4 AL-ZAYLA'Î, *supra* note 287, at 202–03 (explaining that the paternity of the foundling can be established equally by the admission of either the rescuer or a third party).

³⁴⁷ 10 AL-SARAKHSÎ, *supra* note 273, at 214 (arguing that a claim of paternity benefits the foundling).

³⁴⁸ 6 AL-KÂSÂNÎ, *supra* note 301, at 199.

Policy justifies [accepting an admission of paternity in this context] because [it] is a report regarding something that may be true and it is obligatory to accept reports that may be true, if only to give [the speaker] the benefit of the doubt, unless accepting the report's truth harms a third party. Here, however, accepting the report and establishing a relationship of paternity is beneficial to both: [It is beneficial for] the foundling by providing him with the dignity of paternity, education and protection from death and injury as well as other benefits. [It is beneficial for] the putative parent by providing him with a child who can assist him in satisfying his religious and secular needs.

⁶ *id.*

³⁴⁹ 6 AL-MAWWÂQ, *supra* note 292, at 82 (stating that the foundling is not deemed the child of his rescuer or anyone else without adequate proof of paternity).

³⁵⁰ 5 ASNÂ AL-MATÂLIB, *supra* note 285, at 626.

Whosoever claims the foundling becomes his parent without the testimony of witnesses or expert testimony because he has admitted an obligation so it resembles [the case of] one who admits a debt, and because requiring witnesses in order to prove paternity is difficult, and were the mere claim of paternity [in these circumstances] not sufficient to establish paternity, the paternity of many would be lost.

⁵ *id.*

³⁵¹ 5 *id.* at 171 (stating that a child conceived as a result of illicit sexual intercourse cannot be attributed to the father).

³⁵² 4 AL-ZAYLA'Î, *supra* note 287, at 203.

[T]he admission [of paternity] of the child is beneficial to him, because he is

claim by any man that he is the father of the foundling, but only to the extent that such a claim benefits the foundling.³⁵³ Thus, if a non-Muslim or a slave were to claim paternity of the child, the Hanafis would recognize the claimant's paternity (*nasab*) for purposes of establishing the parent-child relationship, but would not enforce all the normal incidents of parenthood.³⁵⁴ If the child is claimed by a non-Muslim, but the child has already been deemed a Muslim by virtue of the location in which he was found, he would continue to be raised as a Muslim. Similarly, if the person acknowledging the foundling as his child is a slave, the child would not be enslaved based on that admission, but he would enjoy the benefits of a parent-child relationship.³⁵⁵

G. Conclusions on Islamic Law and Adoption

Although traditional Islamic law prohibits adoption, at least insofar as it creates a fictive relationship of descent between the adoptive parent and the child, it was not indifferent to the plight of abandoned children. The law of foundlings was the principal area of Islamic jurisprudence that dealt with the social problems created by the two main causes of child abandonment: illegitimacy and poverty. Unfortunately, the law's ability to confront these problems directly was hampered by the unresolved tension between a paradigm of parental rights which relied on concepts of property law and a paradigm that put as a priority the best interests of the child. Once this tension is made clear, one can re-read the foundational texts of Islamic law with a view to resolving these tensions and creating new legal doctrine that would be more sympathetic to quasi-adoptive relationships.

The first step in reinterpreting inherited legal doctrine would be a reconsideration of the Prophetic dictum, "the child belongs to the bed, and the male adulterer gets nothing."³⁵⁶ First, one could distinguish this precedent from adoption on its own facts, insofar as this dictum was a ruling in the context of a custody dispute. The precedent then, instead of standing for the proposition that no relationship exists between an adulterous father and his offspring, could be viewed to stand for the

ennobled by the [recognition of] paternity while he is harmed by the absence [of such a relationship], as he will be stigmatized as a result [of being of unknown parentage]. He also gains one who will be responsible to care for him and to provide for his needs out of desire, not [one who is] holding over him his favors.

4 *id.* Thus, the Hanafis will accept the rescuer's claim of paternity even though it contradicts his earlier claim that the child was a foundling. 4 *id.*

353 See 17 AL-SARAKHSI, *supra* note 273, at 128–29.

354 See 17 *id.*

355 See 17 *id.* at 129.

356 See *supra* notes 271–75 and accompanying text.

proposition that notwithstanding adultery, a child born in a legally recognized family is a part of that family, unless the legal father takes steps to disavow paternity.³⁵⁷ One could also point out that the Prophetic ruling speaks only of the rights of the adulterous father, but is silent as to his obligations. If one were to take a “best interest of the child” approach to this precedent, one could argue that the ruling stands for the proposition that the adulterous father enjoys none of the benefits of paternity, but remains accountable for the obligations of paternity, to the extent no legitimate father exists.

It appears that this reading was not countenanced because of the interplay between parental rights and the principles of property law. The medieval jurists must have reasoned that, to the extent the adulterous father gets none of the benefits of the parent-child relationship, it would be unfair to hold him liable for the obligations of the child. But this is a concept of property law, and is ultimately irrelevant to the welfare of the child. Indeed, one could argue that if one of the purposes of the Prophetic ruling was to deter male adulterers by precluding them from benefiting from their illicit sexual relationship, this purpose would be further served by imposing upon the adulterous father the same obligations toward the illegitimate child as would have been the case had the child been the issue of lawful intercourse.

The same approach could be taken with respect to the Qur’anic verse, which seems to prohibit adoption. If the example of the Prophet Muhammad and his adopted son Zayd is taken as paradigmatic, the Prophet Muhammad adopted Zayd after he had already become a young man, and despite the fact that Zayd had a known father. In these circumstances, the best interests of the child are not being vindicated; instead, the goal is the preservation of an already existing father-child relationship. Furthermore, the adoption practiced by the pre-Islamic Arabs and condemned by the *Qur’ân*, was effectively a consensual relationship between the adoptive father and the adopted child that negated an already existing father-child relationship. To the extent an adult child could adopt a new father, as Zayd did with Muhammad, a father’s ability to rely on his children in his old age would be lessened, and therefore a father’s incentive to look after his children when they were young would be reduced. Thus, not only was the pre-Islamic practice not inspired by a concern for children, it also weakened the bonds between fathers and children, and was a custom that was probably detrimental to children. Accordingly, if a best interest of the child approach is taken to interpreting this verse, the prohibition against

³⁵⁷ This is the purpose of the Qur’anic procedure of *li’ân*, whereby a husband, who witnesses the adultery of his wife, can simultaneously terminate the marriage and disavow the paternity of any child resulting from that illicit relationship. *Qur’ân Al-Nur* 24:6–10.

adoption would be restricted to circumstances where the adopted child is already an adult with a known father, or more generally, to situations where the adopted child has a known father, whether legitimate or not.

In light of Islamic law's historical concern for the best interest of the child, one can argue for a principled inclusion of at least a quasi-adoptive relationship within Islamic family law. Space does not allow for the complete elaboration of the details of this relationship, but its main features are clear—an adoptive father would be obliged to perform all the economic obligations that would normally be the duty of the actual father and would correspondingly receive the parental rights of the child's theoretical father. Inheritance could be provided via mandatory testamentary disposition, but fictive kinship need not be recognized. Such a synthesis would be faithful to the revelatory norms of Islam, to the Islamic legal tradition, and to the well being of children.

CONCLUSION

The United States was founded by settlers of diverse religious backgrounds. The subsequent influx of peoples of additional religious affiliations has furthered our well known appellation as a "melting pot." While the First Amendment has created a wall of separation between church and state, it would be incorrect to assume that legal activism and the religious inclinations of the population are absent from our laws.³⁵⁸ Despite the desire and denial of many to the contrary, a cursory survey of the globe reveals the centrality of religion; and none of the totalitarian "isms" of the past century have undone the religious voices. While those who experience the sacred do not agree on the message, their discourse would not think to entirely neglect a shared belief in concerns of ultimate goodness and truth.

Adoption implicates the reciprocal rights and duties that people claim for and from each other. But to limit human interactions to those based solely on duties and rights is to overlook the most essential aspect of being human—genuine concern for one another. Focusing on this communal aspect enhances our most human virtues. Unlike the American legal system, which prides itself on its secular nature, Jewish law, Canon law, and Islamic law are legal systems which present themselves as both religion and social order. Just as the terms "Jewish law," "Canon law," and "Islamic law" have a certain latitude, so too does the term "best interest of

358 See STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* (2000); ROBERT BOOTH FOWLER ET AL., *RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, & STRATEGIC CHOICES* (2d ed. 1999); STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* (1997).

the child.” Because of this, courts unwittingly, or under the pretext of neutrality, gloss over important contexts of a child’s life, including the religious one. How can American adoption law be sufficiently universal³⁵⁹ so as not to invoke the Equal Protection Clause, yet still accommodate the religious diversity of the populace? Were courts more aware of the religious foundations of secular laws, they would be in a better position to render judgments which take into account the full range of a child’s multi-faceted cultural perspective.

The *Bible*, the source common to Judaism, Islam, and Christianity, strives for a sense of harmony between one individual and another, between the individual and society, and between the individual and God. All three religions agree that it is this last relationship that is the foundation of the other two. God has “adopted” Man. It is now up to each society to determine how individual persons will adopt each other. To be sure, comparative law is as much a branch of religious history as it is of legal history, and the religious underpinnings of the adoption decisionmaking process are very apparent.

359 A full discussion of universalism versus relativism as applied to adoption law is beyond the scope of this Article, but it is undoubtedly implicated. See, e.g., Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search For Meaningful Standards*, 27 STAN. J. INT’L L. 345 (1991); Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095, 1101–03 (2000); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1995); Raidza Torres Wick, *Revisiting the Emerging International Norm on Indigenous Rights: Autonomy as an Option*, 25 YALE J. INT’L L. 291 (2000).