WHO IS A JEW?

AN ANALYSIS AND COMPARISON OF

ISRAELI AND AMERICAN REFORM ANSWERS

by

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DIGEST

The traditional, halakhic definition of a Jew is someone born of a Jewish mother or someone who converted according to traditional, halakhic standards. Two Israeli Supreme Court decisions departed from that definition and established other criteria for determining Jewish identity. The Court, seeking to interpret the word "Jew" in the Law of Return (1950), defined it by standards not coincidental with the halakhic definition. The "Brother Daniel" and "Shalit" cases forced the Jewish State -- its courts, legislature, and its citizens -- to decide who was a Jew and who was not, what shall be the determining factors, and which authorities are to be recognized.

On March 15, 1983, the Central Conference of American Rabbis adopted the "Report of the Committee on Patrilineal Descent on the Status of Children of Mixed Marriages," which also departed from the centuries-old halakhic definition of Jewish identity, this time to include, potentially, a child born of a Jewish father and non-Jewish mother. The resolution also declared that the child of a Jewish mother and a non-Jewish father is not <u>necessarily</u> Jewish. Thus, the Reform Movement, as well, has declared itself to be at odds with the halakhah.

The situations faced by the Israeli Courts and the CCAR were similar because they arose from contexts in which a

Jewish community felt the need to reach a new definition of Jewishness. Both groups argue and justify their positions on the basis of particular bodies of law and tradition.

This thesis, then, proposes to examine, analyze, and compare the two Court decisions which have defined Jewish identity in Israel, and the Patrilineal Descent decision of the CCAR, which is the official position of that body. Why the departure from halakhah? What were the thought processes, reasoning tactics, and conclusions arrived at by the Court Judges and the CCAR? What are the points of contact between the Rabbinic position and these new definitions? What is "Jewish" about these definitions? Answers to these questions may shed light on how Israel views itself as the Jewish State and how the CCAR sees Reform as a Jewish movement.

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ACKNOWLEDGMENTS

Though the many names mentioned on this page will be unknown to many of the people who ever read it, I consider this page to be the most important one of this thesis. Without those mentioned, not only would I not have written this thesis, but I would be a very different person and rabbi than I am and hope to be.

I begin with those in whose memory this thesis is dedicated: Melvin Sprecher, Jack Zwerling, Theodore and Ada Sharfman. These whose lives touched and influenced mine, and whose memories and names will always be for a blessing in all that I do.

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INTRODUCTION

The "Who is a Jew?" Question

Who is a Jew? A simple question on the surface, but when given a considerable amount of thought, it is a very complicated, detailed, and "loaded" question. It is fraught with ideological, political, religious, national, cultural, and historical overtones, which makes it such a difficult question to address. One cannot simply discuss one angle or point which the issue raises without having to confront others.

Are Jews collectively and Judaism in general a race, religion, nation, people, culture, heritage, language, ethnic group, tradition, civilization, or any combination of the above? Is it perhaps easier to define who and what a Jew is not? Who is to decide and for what purpose is the decision to be made? Is there only one answer to these questions? Should there be just one answer, or can there be different answers without disturbing the supposed unity of the Jewish people? Again, these are incredibly difficult questions -- question which since the establishment of the State of Israel have plagued Israeli society, and which have troubled the liberal Jewish community outside of the Jewish State.

The "Who is a Jew?" question first came about, though, after the French Revolution, once the Jews were politically emancipated. The question, however, was not asked by any Jewish community itself, but rather by the National Assembly

of France, which was debating whether or not to give the Jews equal status with the rest of France's citizens. The liberals in the National Assembly argued that like Catholics and Protestants, the Jews were simply a religious community, and that the designation "Jew" simply implied one's religion. This meant that the Jews were entitled, therefore, to the same rights as France's other religious groups.

On the other side of the issue were the nationalists and reactionaries who argued that the Jews were a separate nation, and that the designation "Jew" applied to one's nationality. This meant that the Jews were not entitled to the same rights as a religious group, but rather that they should be viewed as aliens by French law. This debate was repeated by the Constitutional Assembly of the State of Bavaria (now Holland) once it became an independent nation.

When Christianity became the official state religion in Rome, the Church Fathers decided that the Church policy would be to regard the Jews as an ethnic group -- a nation unto itself. No Christian (or even pagan) could join the Jewish religion. Though Jews were permitted to remain Jewish, intermarriage was strictly forbidden and punished. At different times throughout history, whether the Church had a hostile or favorable attitude towards the Jews, they were always considered to be an ethnic group, and their religion an ethnic, not universal, religion: "The Church did not exterminate the Jews as it did the pagans who did not embrace

Christianity, because the Jews were the guardians of the Bible in which the Christians found evidence that Jesus was the messiah. The Church permitted the Jews to exist in order to demonstrate the truth of Christianity. The Jews who rejected Jesus were subjugated and suffered."[1] Nevertheless, the Jews maintained their own notion of a universal religion even though they did not ask who they were. Anyone who had Jewish parents and anyone who embraced Judaism was a Jew.

Before Emancipation, which eventually led to the redefining of the essence and nature of Judaism, the "Who is a Jew?" question was hardly ever asked. In the Diaspora, there were attempts to modify the halakhic definition of Jewishness, but on the whole, the Jewish religion remained monolithic in that the halakhic definition was universally accepted as being the normative Jewish definition:

> The foundation of Judaism was the Covenant between God and His people; it was a faith granted to or accepted by a defined group. Thus the practice of Judaism became the exclusive possession of one people only. Consequently, one could not be a member of the Jewish people without professing the Jewish religion, while by the profession of this religion one became a Jew.[2]

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[1]Solomon Zeitlin, "Who is a Jew? An Halakhic-Historic Study" in Baruch Litvin and Sidney B. Hoenig, ed. Jewish Identity: Modern Responsa and Opinions on the Registration of Children of Mixed Marriage (New York: Feldheim, 1965), p. 366. [Original text and Greek sources may be found in Jewish Quarterly Review, 44:4 (April 1959), pp, 241-70.]

[2]S. Zalman Abramov, Perpetual Dilemma: Jewish Religion in the Jewish State (Cranbury, New Jersey: Associated University Press. 1976), p. 271.

Even if the Jew forsook his religion, he nevertheless continued to be counted among the Jewish people. The Talmudic maxim, "A Jew, even if he has sinned, remains a Jew" (*Sanhedrin* 44a) became universally accepted and implemented. To join the Jewish people, one needed to adopt its religious principles and practices. If both parents were Jewish, then their children were Jewish; where only one parent was Jewish, the children followed the status of the mother. For centuries, Jewish identity was unquestionably composed of both the religious and national characteristics of Judaism.

Before the French Revolution and Emancipation, to be a secular Jew was an oxymoron. To be a Jew, one did more than just passively belong to a group by virtue of birth -- active observance of the commandments as spelled out in the halakhic literature was expected, demanded, and enforced by the Jewish community. If one did not observe to community standards, the rabbinical courts could excommunicate that person. The choice was between complying with the court order to observe the Mitzvot or to be ostracized. To be non-observant and to remain within the community was an impossibility. Those who were non-observant intended to leave the Jewish community since there was not yet the category of non-observant Jews; and these people created no halakhic problem since by leaving the Jewish community they removed and resolved the problem itself.

By the nineteenth century, though, realities in the outside and inside world of the Jews had changed. The halakhic definition was in jeopardy. The rise of Reform Judaism shattered the closed, monolithic structure of Judaism. While those who remained true to the halakhah claimed legitimacy, so too did those who abandoned some of the rabbinically ordained Mitzvot. For the first time in Jewish history, one could be non-halakhically observant and not have to leave the Jewish fold. A new sense of religious plurality was forwarded in which many different interpretations of Jewish identity could be accepted. In the attempt to gain acceptance and inclusion into the general citizenry, there were Jews (and Gentiles as well) who distinguished the religious from the national character of Judaism. These were mainly Reform Jews, but some Orthodox Jews advocated this view as well. Moreover, the governmental authorities who ruled the countries in which the Jews were living preferred to deal with the Jews as a religious group rather than as a nation: "Consequently, at the end of the nineteenth century the definition of a Jew acquired religious emphasis -- though often for somewhat different reason than in the past."[3]

That is not to say, however, that the Jewish community was unified on a definition of Jewish identity or national affiliation. Another group arose which considered itself

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[3]ibid., p. 272.

nationalistic, while its members abandoned almost all of the religious observances. Some Jews even professed to be agnostics and atheists. The notion of a secular Jew was no longer a contradiction in terms. Folkism (which advocated a Jewish national existence in the Diaspora), the socialist Bund, and Zionism all became legitimate expressions of secular Jewish identity. Even though the religious, cultural, and ethnic components of Judaism remained a part of these new expressions, it was the national factor which emerged as the principal element.

All of this opened up new and uncharted avenues and options for the Jew. A Jew could join the Orthodox, Conservative, or Reform communities, or s/he could remain a Jew without religious affiliation while at the same time expressing his/her Jewishness in other ways: "One could now be a committed Jew, although uncommitted in terms of religion. This latter type, the secular Jew, became increasingly conspicuous following the establishment of the State of Israel."[4]

The question of "Who is a Jew?" took on new and different meaning after the Jewish State was established. Even though the Legislature and the Israeli Supreme Court were created as secular bodies, there has remained an intrinsic link with traditional Judaism and particularly the Orthodox community.

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[4]ibid., p. 273.

The very fact that there is a Chief Rabbi of Israel speaks to the political and vocal presence which the halakhic community has. When the issue of "Who is a Jew?" was brought to the forefront in Israeli society, it created much debate and polarization. On the one hand there is the halakhic position. But on the other hand, Israel is a secular state, to be governed by secular laws.

Outside of Israel, the issue has likewise been debated, disputed and discussed, especially by the American Reform Movement. Though Reform Jews are not bound by the halakhah, there is a desire, nevertheless, not to be cut off from the rest of "mainstream" Judaism. Reform does not want to be a fringe group or merely a sect. Reform proclaims its legitimacy as a form of Judaism and as the natural continuation and progression of Judaism as it developed throughout history.

This thesis will not solve the "Who is a Jew?" question. My purpose here is to look at two Jewish communities -- Israel and Reform America -- and to see how and why in three instances they both decided the question while departing from the traditional halakhic position. We will see that how Jewish history is understood and outlined is very important as a determining factor and as an explanatory feature. We begin, then, with an historical look at the halakhic definition of Jewish identity and an historical look at answers to the "Who is a Jew?" question.

CHAPTER ONE

Halakhah: The Traditional -- But Not The Only -- Answer

There is no question that Jewish Law is succinct in its determination of Jewish status. For the past two thousand years, a Jew has been one born of Jewish parents, or one converted according to halakhic standards. In the case of an intermarried couple, a distinction is made: offspring of a Jewish mother and non-Jewish father are Jewish, while offspring of a Jewish father and non-Jewish mother are not.

This distinction was made by the Rabbis of the Talmud on the basis of the following Torah verses: "You shall not intermarry with them: do not give your daughters to their sons or take their daughters for your sons. For they will turn your son (*binkha*) away from Me to worship other gods." (Deuteronomy 7: 3-4) The Rabbis argued that since Scripture specifically states, "for they will turn your son away from Me," your son by a Jewish woman is called <u>your</u> son, but your son by a non-Jewish woman is not called your son, but <u>her</u> son. (*Kiddushin* 68b) Rashi points out that the rule is not derived from this verse, but rather that the law is an assumption based on a text having nothing to do with either paternity or maternity. His comment on the verse notes that "your son" is meant to imply "your grandson:"

> The son of a non-Jew, if he should marry your daughter, will turn away your son, which your daughter will bear him, from following Me. Hence we learn that your daughter's son that is born of a non-Jew is con-

> sidered your son; but the son of your son that is born of a non-Jewish woman is not considered your son, but her son, for it is not stated regarding his daughter: You shall not take, for she will take your son from following Me.

Rabbeinu Tam elaborates further on Rashi's interpretation in saying that all agree that only the son of your Jewish daughter is to be regarded as your son since only he is Jewish.

In a 1976 article entitled "Who is a Jewish Child?" Rabbi Solomon D. Goldfarb was quick to point out two problems with the halakhic explanation:

> 1. Are we to assume that the biblical term *binkha* (your son) was intended by the Rabbis to be rendered your son's son, rather than its literal meaning of your son? Or was that a device to provide biblical authority for the halakhic ruling (for determining Jewish status according to matrilineality)? Rashi's comment on this verse deepens our doubt about the validity of this halakhically motivated interpretation.
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> 2. Reading the verse as it stands, the prohibition is based on the fear that if a Jewish daughter marries a non-Jew, the son resulting from this marriage will be exposed to idolatrous practices of the father. This is a natural fear. But according to the Rabbinic interpretations, a son born of such a marriage presents no problems since he derives his identity from his mother and is therefore Jewish.[5]

Goldfarb also notes that to interpret *binkha* as meaning "your grandson" is in contrast to another biblical passage on the issue of intermarriage: "lest you make a covenant with the inhabitants of the land . . . and you take of their daughters for your sons . . . and their daughters mislead your sons

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[5]Solomon D. Goldfarb, "Who is a Jewish Child?" in Conservative Judaism, Vol. 30, No. 4 (1976), pp. 3-4.

after their gods . . . (Exodus 34:15-16) Here, the text is understood literally and taken to mean "your sons," not "your grandsons." Goldfarb maintains that the injunction was established out of the fear that foreign wives would exert pressure to commit idolatry upon their husbands, not on their children.

This thesis, says Goldfarb, is supported by chapters nine and ten of the book of Ezra: "for they have taken as wives their daughters, for themselves and for their sons, so that the holy seed has become intermingled with the peoples of the land." (Ezra 9:2) Here intermarriage is only spoken of as referring to a Jewish man taking a non-Jewish wife. Now, although Ezra also speaks of Jewish women taking non-Jewish husbands as being among Israel's sins (Ezra 9:12), the primary focus of the episode is the removal of foreign wives and children from their Jewish husbands and fathers: "Now, what can we say in the face of this, O our God, for we have forsaken your commandments." (Ezra 9:10) The sin, then, was for a Jewish man to marry a non-Jewish woman.

The prophet Nehemiah accents this notion: "It was just in such things that King Solomon of Israel sinned! Among the many nations there was not a king like him, and so well loved was he by his God that God made him king of all Israel, yet foreign wives caused even him to sin. How, then, can we acquiesce in your doing this great wrong, breaking faith with our God by marrying foreign wives?" (Nehemiah 13:26-27)

Goldfarb notes that neither of these two prophets tried in any way to change the biblical prohibitions. Since they did not yet know of conversion, the overriding consideration must have been the fear that foreign wives would turn the husbands and children to idolatry. It was only later that the halakhah considered new social realities and legitimized "intermarriage" after proper conversion. In a radical departure from tradition, and even the Conservative movement's thinking, Rabbi Goldfarb argues in his article for patrilineality.

All of this notwithstanding, the Talmudic definition of Jewish status was certainly not always in effect throughout Jewish history.[6] In fact, those sections of the Hebrew Bible dealing with pre-exilic Israel are totally unfamiliar with the matrilineal principle: a foreign woman who married an Israelite was supposed to leave her god(s) with her father, but even if she did not, there was never any consideration that her children were not Israelites. Since there was not yet any process of conversion, the mere fact that a foreign woman was joined by marriage to an Israelite was in effect her connection with the House of Israel.

With respect to the relevant verses in Ezra, Shaye J. D. Cohen notes that:

> The likelihood that Ezra (or a contemporary) introduced the idea that the offspring of a Jewish father

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[6]For a complete discussion of this issue, see Shaye J. D. Cohen, "The Origins of the Matrilineal Principle in Rabbinic Law," in AJS Review, Vol. X, No. 1 (Spring 1985), pp. 19-53.

> and a gentile mother is a gentile is further diminished by the fact that this half of the matrilineal principle is never attested explicitly, and is frequently contradicted implicitly, by the later literature of the Second Temple Period.[7]

Cohen further attests that neither the Apocrypha, the pseudepigrapha, the Dead Sea Scrolls, Philo, Paul, Josephus, nor the Book of Acts know of the matrilineal principle. Only with the Mishnah do we get the principle that the offspring of a Jewish woman and non-Jewish man is of impaired status, while the Talmud holds such children to be full and legitimate Jews. On this issue, Cohen says:

> Both decisions, at least in cases of patrilocal marriage, contradict the Bible. In biblical times many Israelite men married foreign women, and there was never any doubt that the children were Israelite. The offspring of a slave mother and an Israelite father did, apparently, suffer from some disabilities, but no one questioned its Israelite status. The Mishnah, however, explicitly states that such offspring follow the mother, and this ruling is not disputed by the Talmudim.[8]

Cohen says that this is little evidence to support Goldfarb's notion that social factors played an enormous role in the need for the matrilineal principle to be implemented. At the time of the Rabbis, intermarriage was not rampant, and even if it was, to implement a matrilineal principle would not have been the logical solution. Cohen concludes that the Rabbis were acting like philosophers, not legislatures bowing to the

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[7]ibid., p. 25.

[8]ibid., p. 52.

demands of their constituency, in forwarding and maintaining the matrilineal principle.

In his halakhic-historic study of Jewish identity, Solomon Zeitlin says that to form a definition of the term "Jew," one must look at the issue historically. He notes that, originally, the term "Jew" had a genealogical meaning as well as a geographic one. The designation *Y'hudim* (Judeans) meant to imply those descendants of Judah, the son of Jacob. At the time of the First Temple, the Kingdom was divided into a Northern and Southern state. In the South, there was the Judaean state; its inhabitants were called *B'nei Y'hudah* (The People of Judah), and they spoke Judaean. Those in the North were called *B'nei Yisrael* (The People of Israel), living in *Eretz Yisrael* (The Land of Israel). These were two distinct and separate nations, each with their own gods. In 722 BCE, when the Assyrians conquered the Northern Kingdom, many of its inhabitants were exiled to the South. When King Cyrus of Persia allowed the Northerners to return to their own land, Zeitlin says that a revolution occurred which would forever shape Jewish and civilized history:

> The Judaeans who were polytheists and hethonists became monotheists -- recognizing but one God, the God of the people of Israel, regardless of whether they lived in the land of Judaea or elsewhere. The Judaeans belonged to one community, the followers of the God of Israel. In Judaea, where a new Jewish community was organized, a theocracy was established, i.e. the rule of

> God. The Judaeans were governed by a priest under the authority of God.[9]

Following the destruction of the Second Temple, and particularly with the rise of Christianity, when this new sect claimed to be the true Israelites, the term "Judaeans" was abandoned. In order to contest Christian assertions, the Jews henceforth called themselves Israelites. The term "Judaean" was replaced in the Talmud with "Israel," and the designations "Jew" and "Judaism" were forwarded as the proper terms for the followers and for the religion itself.

Zeitlin is steadfast in maintaining that the religion of the Jews -- and nothing else -- ensured their survival:

> In the ancient times there were many nations, many empires. The Jews were a small people. Most of the old nations, even the empires, are extinct. We learn of them only from the museums and from archaeologists who have discovered some remnants of their culture. The Jews still live in spite of all the persecutions which they had undergone throughout the ages. *The survival of the Jews lies only in their religion.* The nations who have disappeared had national gods. When they were conquered their gods were also conquered and ceased to be their gods. Their gods were placed in captivity in a pantheon. The Jews worshiped the God of the Universe regardless of their country. When the Jewish state was conquered their God was not conquered. They continued to worship Him no matter where they lived and this is the reason for their continuation.[10]

As mentioned in the previous section, at first Christianity considered Judaism to be an ethnic religion, simply the religion of a people called Jews. Later, when the Christians

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[9]Zeitlin, p. 369.

[10]ibid., p. 382-3.

conquered the Roman Empire, Judaism was considered "odious and abominable."[11] Though the Christians believed Judaism to be a superstition which could "rub off" onto anyone who came in contact with it, the Jews did not surrender their notion of a universal religion. Because of this, Zeitlin argues that the term "Jew" is plain and simple a religious-historical designation:

> The Jews are a religious community, united with their brethren throughout the world by religion. Thus there are American Jews, French Jews, English Jews and Israeli Jews. Since Judaism represents the genius of one people, the people of the Children of Israel, they are united not only by religion but also by historical bonds.[12]

The obvious question this theory raises is: If Judaism is to be defined as a religious community, what about those Jews who do not practice the Jewish religion, or those who are atheists? Zeitlin says that the answer is simple in that since Judaism is a universal religion, it accepts even the atheist into the folds of the community. This is reflected in the halakhic principles that a converted Jew remains a Jew, and that a woman must still receive a *get* from her husband, even if he has converted to another religion. Zeitlin attempts to draw an analogy:

> A person who was born in the United States, or who has become a citizen, must follow the laws of his country

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[11]Zeitlin refers us to his previous book, Judaism as a Religion.

[12]ibid., p. 384.

> and if he does not he is punished but he is still a citizen. He cannot renounce his citizenship unless he relinquishes it in another country. States have boundaries. Judaism, as a universal religion, *has no boundaries*. Therefore one born a Jew, or one who has accepted Judaism, cannot renounce Judaism. He may be a sinner in the eyes of God, but he is still a Jew.[13]

This religious definition of Jewish identity, says Zeitlin, "is the verdict of Jewish history." It, therefore, cannot be ignored nor passed over. Because of this, Zeitlin seeks to maintain the traditional-halakhic definition of Jewishness; his is also a political argument.

An argument can also be made for other definitions of Jewishness. One can describe a religious definition, a spiritual definition, a "people" or "civilization" definition, or even an ethnic definition. In any definition, though, Rabbi Morris N. Kertzer is quick to point out that it is vital to define what a Jew is not: "To begin with, the Jews are not a race . . . (and) it would be equally misleading to speak of the Jews as a nation, though in antiquity they were, . . . (since) there are no national ties (today) that unite all Jews throughout the world."[14] That is not to say, however, that there have not been those who have not forwarded their own definitions of Jewish identity. Some were for political reasons, others were for anti-Semitic reasons, and still

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[13]ibid., p. 385.

[14]Rabbi Morris N. Kertzer, revised by Rabbi Lawrence A. Hoffman, What is a Jew? (New York: Macmillan Publishing Company, 1993), p. 8.

others were simply personal definitions not meant to be construed broadly. It is interesting to sample a few of the definitions of Jewishness which have been penned over the centuries:[15]

> JEW, noun, 1. A person of the Hebrew race; an Israelite.
> 2. (transferred sense) As a name of opprobrium or reprobation; specifically applied to a grasping or extortionate money-lender or usurer, or a trader who drives hard bargains or deals craftily.
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> JEW, verb, colloquially: To cheat or overreach, in the way attributed to Jewish traders or usurers. Hence, JEWING.
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> (-- The Oxford English Dictionary, at least as late as 1955)

> The Jew is one whom other men consider a Jew; that is the simple truth from which we must start. . . . It is neither their past, their religion, nor their soil that unites the sons of Israel. If they have a common bond, if all of them deserve the name of Jew, it is because they have in common the situation of a Jew, that is, they live in a community which takes them for Jews.
>
> (-- Jean Paul Sarte)

> ARTICLE 5. A Jew is anyone descended from at least three grandparents who are fully Jewish as regards race.
> ARTICLE 6. Also deemed a Jew is a Jewish Mischling subject who is descended from two fully Jewish grandparents and (a) who belonged to the Jewish religious community . . . (b) who was married to a Jew when the law was issued or has subsequently married one; (c) who is offspring of a marriage concluded by a Jew . . . (d) who is the offspring of extramarital intercourse with a Jew.
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> (-- "Law for the Protection of German Blood and Honor," Nuremberg Laws, September 1935)

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[15]These definitions were edited and compiled by Daniel Spitzer, Seth Schulweis, and Stan Beiner for the lesson entitled "Believing, Behaving, Belonging: The Process of Jewish Identification," published by the Jewish Federation Council of Greater Los Angeles for the Havurat Noar program (1988 Revised Edition), pp. 6-8.

> . . . Judaism is more than a religion. It is an evolving religious civilization. . . . What really is the point in describing Judaism as a civilization? The point is that to live as a Jew one has to want to belong to the Jewish people and help it to become morally and spiritually great. That is a prerequisite to believing what one should, as a Jew, concerning God, man, and the world. In other words, contrary to the usual assumption, in the normal experience of Jewish life, belonging takes precedence over believing, in the same way as feeding a hungry man takes precedence over reading poetry to him.
>
> (-- Mordechai Kaplan)

> Judaism is a way of life; its test of a man is not what he believes but how he lives, what he does, how he treats his fellow man. . . . Judaism rejects passing the buck to God. . . . Judaism lays its stress on social justice, knowing that no man can be without sin if the total society is violent, mean, cold to the poor and the indifferent. Judaism is a call to moral action.
>
> (-- Albert Vorspan)

It is immediately obvious that none of the above definitions is in concert with the halakhic criteria for inclusion into the Jewish people or religion. They were each written at a specific time, and in the case of some, for a specific reason and purpose. Perhaps it is also possible to say that the halakhic definition was also written for a specific reason and purpose, but to do so would be to neglect the fact that once a principle is accepted as authoritative by halakhah, it is almost impossible to change it, since it itself is seen as having been given by God at Sinai, even if it is a Rabbinically ordained law.

This thesis will examine three cases where two distinct bodies also departed from the halakhic definition of Jewishness. The first two examples were cases which were brought

before the Supreme Court of Israel, a secular body. The second is the Patrilineal Descent Resolution passed in 1983 by the Central Conference of American Rabbis, a religious-rabbinic body. The issue for us here will be to examine how and why both groups departed from the traditional-halakhic definition if Jewishness. By doing so, did they in essence create a new definition, or can the halakhic definition be viewed as historically, whereby it is seen as just one of many definitions throughout history.

As we will see, how Jewish history is conceptualized by the various Court Justices and the Reform Rabbinate will play a large part in determining how and why they feel justified in departing from the halakhic standard. For the Israeli Supreme Court cases, the additional variables of how the history of the State of Israel and the ideological conception of the Jewish State itself is viewed will come into play. For the American Reform Rabbinate, a body which has consistently reacted to situational change over the decades, how it viewed the reality and issue of intermarriage in the early 1980s will be relevant.

We move, then, to the cases of Oswald Rufeisen, also know as Brother Daniel (1962), Benjamin Shalit (1969), and the CCAR's Patrilineal Descent Decision of 1983.

CHAPTER TWO

Israel

A.

The Law of Return: The Ambiguity of the Word "Jew"

On July 5, 1950, the anniversary of the death of Theodore Herzl, the founder of political Zionism, the Knesset passed the Law of Return. In essence, it stated that a Jew (undefined), upon arrival to the State of Israel, has full rights to immediate citizenship if desired. "A Jew immigrating to Israel for settlement," was the definition given to an *oleh*. By expressing the desire to settle in the newly established State, a Jew acquired the legal right to receive the visa of an *oleh*. The Law gave legal credence to the centuries-old yearning of the Jew to return to Zion, a yearning which heretofore had been represented in the 1897 Basle Program,[16] in Article 6 of the 1922 Mandate for Palestine,[17] and in Israel's May 14, 1948 Declaration of Independence.

The Law of Return, in fact though, merely sanctioned that which was already in practice, since in 1948, the Israel

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[16]Named for the city in northern Switzerland where the first Zionist congress took place in 1897, the Program was the official policy of the Zionist organization, calling for the legal establishment of a Jewish homeland in Palestine.

[17]Following the 1917 Balfour Declaration which stated the British Government's support to create a Jewish homeland in Palestine, the Council of the League of Nations approved the Mandate in 1922 which subsequently created favorable conditions for the establishment of the Jewish State. Among other things, it charged the Mandatory power (Britain) with the responsibility of instituting political, administrative, and economic conditions to secure the creation of the Jewish homeland. The civil and religious rights of those residing in Palestine were also to be protected.

Provisional Council of State passed the Law and Administration Ordinance as its first official act. That Ordinance invalidated all restrictions on Jewish immigration and retroactively certified the immigration of every Jew (again undefined) who had ever, at any time, entered the country. When then-Prime Minister David Ben-Gurion presented the bill (which became the Law of Return) to the Israeli Legislature for the first time, he remarked:

> This law lays down not that the State accords the right of settlement to Jews abroad but that this right is inherent in every Jew by virtue of his being a Jew if it be his will to take part in the settling the land. This right preceded the State of Israel, it is that which built the State.[18]

The principle provision of the Law stated that, "every Jew has the right to come to this country as an *oleh*." Any Jew who immigrated before the enactment of the Law, any Jew ever born in the country, before or after the Law's enactment, and any Jew who came to Israel not as an immigrant but who later expressed desire to stay and settle, was given the immediate status of an *oleh*. This status was a privileged one, since unlike most countries where an immigrant's status is raised to that of the native-born, in Israel, the status of the native was raised to that of the immigrant.

The Minister of Immigration (later the Minister of the Interior) was given the authority to deny an *oleh*'s visa on

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[18]"Law of Return" in Encyclopedia Judaica, Vol. 10 (Jerusalem: Keter Publishing, 1971), col. 1486.

account of certain circumstances: if the person was engaged in activities directed against the Jewish people, or if the person was likely to threaten the health of the public (by means of an illness contracted before immigrating) or the security of the State. Another category of persons developed to whom it was undesirable to give citizenship: wanted criminals who sought refuge in the Jewish State or criminals who intended to continue their unlawful ways. However, Members of Knesset were hesitant to restrict in any way the inherent right of every Jew (undefined) to immigrate, as they were aware of the possible rehabilitation once in Israeli society. Nevertheless, the Law of Return was amended on August 23, 1954, giving the Minister of the Interior the additional authority to not grant immediate citizenship to "a person with a criminal past, likely to endanger the public welfare."

The Nationality Law of 1952 gave Israeli citizenship to every *oleh* under the Law of Return. Also of importance was the Registration of Inhabitants Ordinance, enacted on February 4, 1949, which required every adult (above the age of sixteen) in the State to carry an identity card noting his or her nationality, religion, and citizenship. Its significance was that entry into the country under the Law of Return meant entitlement to Israeli nationality and registration as a Jew on the identity card.

Either by design or by accident, the Knesset did not build into any of these ordinances a definition of the term "Jew." Initially, each person decided how to define him/herself for purposes of registration. In March 1958, the then-Minister of the Interior, Israel Bar-Yehudah, issued the following directive which corresponded to this practice: "Any person declaring in good faith that he is a Jew shall be registered as a Jew and no additional proof shall be required." With respect to children, the directive instructed: "If both parents declare that the child is Jewish, the declaration shall be regarded as though it were the legal declaration of the child itself." In response to these directives, the Chief Rabbinate directed all rabbis officiating at marriages not to rely on identity card entries, but to personally investigate the couple's status to insure that it corresponded to the halakhah. Members of Mafdal, the National Religious Party, which represented the Orthodox Chief Rabbinate, argued that the Minister was acting contrary to the halakhic definition of Jewishness, which recognizes as Jewish only a person born of a Jewish mother or a person who has converted (according to Orthodox standards) to Judaism.

A Ministerial Committee was established at their insistence consisting of the Minister of the Interior, the Minister of Religious Affairs, and the Minister of Justice. Some three months later, on the basis of the report of this Committee, the Israeli Cabinet adopted the ruling that a person who

declares in good faith to the registration official that "he is a Jew and professes no other religion" is to be registered as a Jew. The same rule held for the declaration of parents as regards their children. This, however, was totally unacceptable to those Mafdal members of the Cabinet; so as a sign of their protest, the National Religious Party resigned from the coalition government.

Following this governmental crisis, the Orthodox community in Israel and around the world became more and more agitated. In the attempt to calm the rising tide of pressure, and, no doubt as a delaying tactic, the Government appointed Prime Minister David Ben-Gurion, Minister of the Interior Ben-Yehudah, and Pinkhas Rosen of the Progressive Party as a committee of three to decide how the children of mixed marriages were to be registered. They were directed to solicit the opinions of Jewish scholars around the world. (This action is detailed in the next section.) Additionally, three days after the establishment of this committee, the Government announced that on the identity cards of children of mixed marriages, no entries should be made.

These actions were highly unusual for the Government for the following reasons:

> It was bypassing the Chief Rabbinate in a matter of distinct halakhic import, and was soliciting opinions not only from the Orthodox, but from the non-Orthodox as well. It was the first time that the Government took official cognizance of non-Orthodox religious trends. It was also significant that the Government stressed the importance of the problem in relation to *kibbutz galuyot*,

and to the special conditions prevailing in a Jewish state.[19]

The question was submitted to Jewish scholars and writers, both religious and non-religious, as well as rabbis. Jewish life in a Jewish state required there to be a fresh look at Jewish identity.

This was especially the case since the Israeli Legislature had not defined the term "Jew" in any of its laws. Resulting were many stormy incidents which polarized the Israeli public. Two incredibly dividing cases will be detailed thoroughly in this thesis, but a third case deserves brief mention here. It became known as the Eitani Affair. Rita Eitani was the daughter of a Jewish father and non-Jewish mother. Since she was considered Jewish under the Nazi Nuremburg Laws, she was persecuted and later interned by the British in Cyprus. In 1947, she was brought to Israel as an "illegal" immigrant. She subsequently married a Jew and lived a settler's life. Despite all of that, in 1964, the Ministry of the Interior suddenly decided that she could not be considered a Jew under the Law of Return. Not only she, but the non-Orthodox world as well was shocked by this ruling. One had to ask whether the Law of Return needed revising.

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[19]S. Zalman Abramov, Perpetual Dilemma: Jewish Religion in the Jewish State (Cranbury, New Jersey: Associated University Press, Inc., 1976), pp. 291-2.

B.

An Appeal to the "Sages of Israel" For A Better Answer

The committee comprised of Ben-Gurion, Bar-Yehudah, and Rosen sought to solicit from the world's Jewish scholars answers to the question "Who is a Jew?" With these answers, they would create instructions on how to register people with doubtful Jewish status in connection with "the accepted traditions in all circles of Jewry, including all religious trends both Orthodox and non-Orthodox."[20] Consequently, Prime Minister Ben-Gurion sent out a letter dated 13 Heshvan 5719 (October 27, 1958) to forty-five "khakhmei Yisrael," which included Israeli, European, and American rabbis and scholars, Israeli jurists and authors, and American-Hebrew essayists.[21] Nearly half of those who received the letter were Orthodox rabbis, ranging from the moderate to the extreme. Others included Jewish philosophers, poets, scientists, and Reform and Conservative rabbis. In the letter, Ben-Gurion asked the respondents to carefully consider the following four considerations:

> (1) The principle of freedom of conscience and religion has been guaranteed in Israel both in the Proclamation of Independence and in the Basic Principles

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[20]*Knesset Record*, 25:432.

[21]The full text of this letter as well as the full text of every response received and a detailed analysis of this issue may be found in the documentary compilation edited by Baruch Litvin and Sidney B. Hoenig (1965).

of the governments that have held office until now, which have included both "religious" and "secular" parties. All religious or anti-religious coercion is forbidden in Israel, and a Jew is entitled to be either religious or non-religious.

(2) Israel serves in our time as a center for the in-gathering of the exiles. The immigrants come from East and West, from both progressive and backward countries, and the merging of the various communities and their integration into one nation is one of Israel's most vital and difficult tasks. Every effort must therefore be made to strengthen the factors that foster cooperation and unity, and to root out as far as possible everything that makes for separation and alienation.

(3) The Jewish community in Israel does not resemble a Jewish community in the Diaspora. We in this country are not a minority subject to the pressure of a foreign culture, and there is no need here to fear the assimilation of Jews among non-Jews which takes place in many prosperous and free countries. On the contrary, here there are, to a slight extent, possibilities and tendencies making for the assimilation of non-Jews among the Jewish people, especially in the case of families coming from mixed marriages who settle in Israel. While mixed marriages abroad are one of the decisive factor making for complete assimilation and the abandonment of Jewry, mixed marriages among those who come here, especially from Eastern Europe, result in practices in the complete merging with the Jewish people.

(4) On the other hand, the people of Israel do not regard themselves as a separate people from Diaspora Jewry; on the contrary, there is no Jewish community in the world that is inspired by such a profound consciousness of unity and identity with the Jews of the world as a whole as the Jewish community in Israel. It is no accident that the Basic Principles of the Government lay it down that the Government shall take measures for "the intensification of Jewish consciousness among Israeli youth, the deepening of their roots in the past of the Jewish people and its historic heritage, and the strengthening of their moral attachment to world Jewry, in the consciousness of the common destiny and the historic continuity that unites Jews the world over of all generations and countries."[22]

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[22]Baruch Litvin and Sidney B. Hoenig ed., Jewish Identity: Modern Responsa and Opinions (New York: Feldheim, 1965), pp. 14-15.

Even though over half of the letters were addressed to people living outside of the land of Israel, all but four of the replies received were written in Hebrew, the language of the modern Jewish State. Those not responding in Hebrew were Professors Isaiah Berlin and Leon Simon of London, who apologized for their English, Professor Henri Baruk of France and Professor Chaim Perelman of Brussels, and Rabbi Solomon Freehof, Chairman of the Central Conference of American Rabbis' Responsa Committee and then-President of the World Union for Progressive Judaism.

With respect to the length of the replies, there was no uniformity whatsoever: Israeli author Shmul Y. Agnon wrote two sentences with an apologetic addendum, "so as not to leave the paper blank;" Professor Baruk wrote a twenty-page dissertation on the lessons of Jewish history.

In his analysis and evaluation of the responses, Aryeh Newman notes that:

> The overwhelming majority of the replies assume that the Jewish people form a religious community with national characteristics, an exception upon the international arena, and that to become a full member of the Jewish people some kind of religious conversion is necessary, and that it behooves the Jewish State authorities not to do anything which might affect detrimentally the integrity of the Jewish people as a whole. The changing of the traditional definition of a Jew as one born of a Jewish mother or someone formally accepted into the faith would have this effect.[23]

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[23]ibid., p. 302.

Thus the compelling majority opinion was that Jewish nationalism and religion were inseparable: Since exit from the Jewish people could only be affected by means of conversion to another religion, so too was the case with respect to admission into the Jewish fold. Most agreed that subjective criteria and personal feelings of a person born of a non-Jewish mother were irrelevant. Using the same standard, a person (born of a Jewish mother) who severed all links to the Jewish people and even took action against its vital interests remained a Jew. Even Rabbi Solomon Freehof agreed that the religious status of the mother was the determining factor for the status of her child.

Though there were respondents who favored a secular, as opposed to halakhic, definition of Jewishness, they thought that the time was not right to pursue such a change in the Jewish world, and they sought to avoid confrontation. Sir Leon Simon and Sir Isaiah Berlin proposed compromise solutions: one suggested a "provisional registration" for those born of a non-Jewish mother, while the other recommended that such people be registered as Jews by nationality but not by religion.

Former Jewish Theological Seminary professor and founder of the Reconstructionist movement, Rabbi Mordechai Kaplan, advocated a more radical approach. He did not believe that a solution could be found which would be acceptable to religious and non-religious circles at the same time. He also

believed that the Jewish State did not guarantee the right of freedom of conscience and religion. His solution was that the question "Who is a Jew?" be determined by the Knesset in their Law of Return in harmony with the national interest:

> In consequence, we are led to the conclusion that in the case where the parents of a child of a non-Jewish mother wish to register him as a Jew, the Israeli Government has the right to recognize him as a Jew, if it is its considered judgment that such recognition will aid and abet the creation of a decisive majority of Jews in Israel.[24]

Kaplan also advocated that a distinction be made between "Jew" and "Jewish resident," and that a child of a non-Jewish mother be registered as the latter with the opportunity to have it changed to the former upon maturity.

Then-Attorney General, jurist and rabbinic scholar, and later Israeli Supreme Court Justice, Haim Cohn also replied to the Ben-Gurion letter. As he will later argue in his decision in the *Brother Daniel* and *Shalit* cases, he maintains that since the Law of Return and Population Registry Law were secular in nature and administered by secular authorities, the term "Jew" (as well as any other term) as used in those laws must therefore be interpreted along secular, not halakhic, lines. Cohn notes that the rabbis of the Talmud were not in agreement as to the status of a child born of a mixed couple, and that a person was generally believed to be a Jew if s/he

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[24]ibid., p. 235.

declared themselves as such. S. Zalman Abramov sums up Cohn's argument:

> In this respect, however, there was a difference between the Diaspora and the Jewish State. The overwhelming body of rabbinic opinion was that in Israel, where the majority of people were Jews, one who declared himself to be a Jew was presumed to be such, until and unless this presumption was rebutted by two qualified witnesses. In the Diaspora such a declaration was insufficient to create a presumption, and supporting evidence was called for. Consequently, it appeared that according to the halakhah a declaration of Jewishness made by a person living in Israel created a presumption of Jewishness. In fact, it was expected of one who had knowledge of a defect in the Jewish ancestry of some particular person not to reveal it, in order not to destroy that presumption. Thus, instead of applying the halakhic differentiation between the different rules applicable to the determination of Jewishness in Israel and the Diaspora, the Israel rabbinate has been ignoring it and has adopted the more rigid norms applicable to the Diaspora situation only.[25]

Cohn argues further that the gates of Israel must be open to all who desire to enter, especially to those Holocaust survivors whose spouses, children and families were persecuted and destroyed by the Nazis.

In final analysis, the issue boiled down to that of identity. More than the question of "Who is a Jew?" is the question "What are the Jews?" A nation, religion, nationality, heritage, language, people, race, or any combination of the above? Is it the role of the Jewish State to create a new category of Jewish status without requiring any of the formalities insisted upon by all the religious groups? Though each of the replies showed consideration and compassion for

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[25]Abramov, pp. 293-4.

prospective converts, Aryeh Newman makes special note of Jewish Theological Seminary Professor Saul Lieberman's brief statement that "no tragedy of parents can warrant a comedy of conversion." Newman also calls Lieberman's following words a kind of *reductio ad absurdum* argument: "let us not bring ourselves to a situation where people will say, you want to get rid of your Gentile wife -- go to Nevada; you want to marry a Gentile girl and have a Jewish child from her, go to the Holy City of Jerusalem."[26]

After receiving and reviewing all the responses, it became obvious to the Committee and the Government that it would not be proper to create a new definition of Jewishness contrary to that of the halakhah. Some of the compromise solutions were not able to be practically implemented, and soon thereafter, new issues arose which diverted the public mind from this issue. New directives were "quietly" issued by the Government on January 1, 1960, which defined Jewish status according to halakhah. The Mafdal party then rejoined the coalition Government and the cabinet. The governmental crisis was resolved for now. But the issue of "Who is a Jew?" was far from being resolved, particularly because the January 1, 1960 directives were merely administrative instructions, not legislative orders, they were subject to judicial review.

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[26]Litvin and Hoenig, p. 303.

That challenge came eight years later when Benjamin Shalit appealed to register his children (born of a non-Jewish mother) as Jews. The first case to be examined here, though, is that of Oswald Rufeisen, also known as Brother Daniel, a Jew (born of two Jewish parents) who converted to Christianity and became a priest, but who nevertheless appealed to the Israeli Supreme Court that he should be considered a Jew under the Law of Return since he conformed to the halakhic definition of Jewishness.

C.

Oswald Rufeisen (*Brother Daniel*):

When A Halakhic Jew Is Not Considered A Jew

i.

Overview

Oswald Rufeisen was born of two Jewish parents in Poland in 1922. He was reared as a Jew and was active in the "Akiva" Zionist Youth Movement. After completing his secondary education in 1939, he trained for two years in pioneering in Vilna. When the German-Russian war broke out in 1941, he was caught and imprisoned by the Gestapo. After escaping, he obtained a certificate proclaiming that he was a German Christian. With this classification, he became -- in due time -- secretary and interpreter at Mir's German police station. In this capacity, he learned of the German's plans against the Jews, and warned the Jews of the town of the impending danger. Upon learning of plans to liquidate the Jewish ghetto, he not only informed the local Jews, but he also supplied them with arms. He was directly responsible for saving some 150 souls who managed to escape to the forest and subsequently survive. A Jew disclosed Rufeisen's actions to the Germans, and upon being questioned by his superiors, he proudly and openly disclosed his true identity. Once again, Rufeisen was imprisoned, and once again, he managed to escape. He found refuge in a convent where he remained for some time. He eventually left the convent and attempted to join the Russian partisans, but they suspected him of being a German spy and condemned him to death. However, he was fully exonerated when a Jewish citizen of Mir suddenly appeared and testified as to

his actual identity. He was even awarded a Russian decoration for having served with the partisans.

In 1942, while in the convent, Rufeisen converted to Christianity, and in 1945, he became a priest and entered the Order of the Carmelites. He chose the Carmelites deliberately, knowing that they had a chapter in what was then Palestine, and hoping one day to join them. During the 1948 War of Independence, and many times thereafter, Rufeisen petitioned his superiors to allow him to immigrate to Israel, stressing to the Polish authorities that although he converted to Christianity, he remained a member of the Jewish people. Finally, in 1959, he was granted such permission.

When Rufeisen was told by Israel's Minister in Warsaw that he could obtain an entry visa to Israel, he petitioned the Polish authorities for a passport to reside in Israel permanently. In the text of his petition which follows in full, Rufeisen makes clear to the Polish authorities that, inside and out, he remained a national Jew, bound up with the Jewish people by heart and soul. This would become an issue of crucial importance once he arrived in Israel since it will be on the grounds of still belonging to the Jewish people -- and thereby to the Jewish nation -- that he will make his petition for citizenship and registry as a Jew under the Israeli Law of Return.

> I, the undersigned, the Rev. Oswald Rufeisen, known in the Monastic Order as Father Daniel, hereby respectfully apply for permission to travel to Israel for permanent residence and also for a passport.

> I base this application on the ground of my belonging to the Jewish people, which I have continued to do although I embraced the Catholic faith in 1942 and joined a monastic order in 1945. I have made this fact clear whenever it has been raised with me officially as, for instance, when I received my military papers and identity card.
>
> I chose an Order which has a Chapter in Israel, having regard to the fact that I would receive the leave of my superiors to travel to the land for which I have yearned since my childhood when I was a member of a Zionist Youth Organization. My national allegiance is known to the Church.
>
> I fully believe that by emigrating I shall be able to serve Poland, which I love with all my heart, by helping her sons scattered all over the globe and in particular those who are in the land to which I am going. I enclose a certificate from the office of the Israel Minister to Poland.[27]

The Polish authorities would only comply with Rufeisen's request if he would surrender his Polish citizenship. He did so, and was issued a travel document, the type only issued to Jews permanently leaving Poland for Israel. In the eyes of Poland, therefore, he had severed all national ties, and had no chance of returning.

Once in Israel, Rufeisen applied for an immigration certificate and asked to be registered as a Jew under the Law of Return which stated (Sec. 2(a)): "A Jew who has come to Israel and subsequent to his arrival has expressed his desire to settle in Israel may, while still in Israel, receive an *oleh's* certificate." He thus wanted the term "Jew" to appear

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[27]Quoted by Supreme Court Justice Zvi Berinson in his decision on *Rufeisen v. Minister of Interior* (1962) 16 P.D. 2428. Translated in Asher Felix Landau, ed., Selected Judgments of the Supreme Court of Israel, Special Volume 1962-1969 (Jerusalem: The Ministry of Justice, 1971), p. 26. [Hereafter Special Volume]

under the designation "nationality." His application, however, was refused on the basis of the July 20, 1958 Government decision on the question of Jewish nationality: "Anyone declaring in good faith that he is a Jew, and who does not profess any other religion, shall be registered as a Jew."

Brother Daniel and his lawyers, however, argued against this decision. Their reasons as to why he should be registered as a Jew under the Law of Return were as follows:

1. The notion *l'om* (nation) is not identical with the notion *dat* (religion), since a Jew, according to his nationality is not obligated to also be a Jew according to his religion.

2. He is a Jew according to halakhah, seeing that he is the son of Jewish parents.

3. The decision of the Government on July 20, 1958, the substance of which is the foundation for the refusal by the Minister of the Interior, is without basic law, and therefore it is not binding.

4. The refusal by the Minister of the Interior to grant him exoneration is arbitrary, flowing from considerations which are beyond the limits of the law, and such a violation of the law and the petitioner's rights constitutes discrimination against him.

On account of the aforementioned arguments, an order nisi (*tzav-al-t'nai*) was issued against the Minister of the Interior, obligating him to show just cause as to why Brother

Daniel should not receive an immigration certificate and a certificate of identity.

The standing question before the Israeli Supreme Court in judicial simplicity was: What is the meaning and implication of the term "Jew" in the 1950 Law of Return, and does it also include a Jew who has changed his religion by converting to Christianity, but sees and feels himself as a Jew in spite of his "rebellion?"

ii.

The Opinion of Justice Moshe Silberg

Justice Silberg expresses the "deep sympathy and great sense of obligation" which Jews feel -- as Jews -- towards Brother Daniel. However, such feelings must not be allowed to mislead and profane the concept of "Jew." Silberg feels as though Brother Daniel is asking the court to erase the historical and sanctified significance of the term "Jew," and to deny all spiritual values; he is asking the court to break the unbroken continuity of history. Should this be done, says Silberg, the court would in essence be saying that Jewish history began with tEmancipation, when people-hood and religion were separable concepts. He draws upon the teaching from *B'reshit Rabbah* 55:8, literally "love ruins the line" in arguing that love, in this case, should not lead to the distortion of the history of the Jewish people. Yes, we feel for Brother Daniel; yes, we are indebted to Brother Daniel; yes, we love Brother Daniel; but still no, he cannot be considered a member of the Jewish people having converted to Christianity of his own free will.

The question, says Silberg, is twofold: First, whether or not Brother Daniel is included in the meaning of the term "Jew" as used in the 1950 Law of Return; and second, whether or not that meaning is the same as the Rabbinic Courts (Marriage and Divorce) Jurisdiction Law of 1953, which stated that a Jew is a Jew according to the rules of Jewish Law. If

the answer to this second question is yes, then Silberg would consider granting Brother Daniel's petition (since according to Jewish Law he is a Jew) even though his claim was based upon a legal system which he abandoned. However, it is clear that Silberg would only agree to such a "*sha'atnez*-like" argument begrudgingly and with uncomfortable feelings.

Silberg first presents the prevailing Jewish legal opinion that a converted Jew remains a Jew for virtually all purposes. He quotes from *Sanhedrin* 44a: "A Jew, even if he has sinned, remains a Jew," but he emphasizes that many writers take this maxim to be more homiletic than halakhic. Jacob Katz (1958), for example, notes that it was mainly due to the influence of the eleventh century commentator Rashi, that the *Sanhedrin* rule became halakhic Law. Rashi argued for halakhic status in order to counter the Christian claims of the time that a baptism effected a conversion to Christianity. Prior to Rashi, no Gaonic authorities cited the principle in order to prove that Jewish status could not be terminated. In fact, several Geonim were of the opposite opinion -- that a Jew who converted out did sever all ties to the Jewish people. Additionally, not only was the *Sanhedrin* principle not always cited as a rule of law, but the law itself -- the notion that Jewish status is permanent -- has not always been a halakhic maxim.

Nevertheless, Silberg concedes that *Sanhedrin* 44a has served as a corner stone for halakhic decision and that nearly

all cases of questionable Jewish status sided with the convert. He supports this premise by quoting from the following, all of which basically state or support the supposition. (Those who do not are not considered as reliable or binding). The first set of texts deal with a proselyte and marriage: all are of the opinion that the marriage of a proselyte is legal and binding, and that in order to dissolve the marriage, the proper Jewish legal steps must be taken.

> To what does this rule refer? If he [a proselyte] renounces the Jewish faith and then remarries a Jewish girl, we regard him as a non-conforming Jew and his marriage is legally binding. (*Y'vamot* 47b)

> [A proselyte who after conversion to Judaism is suspected of not conforming to any one of the laws of Moses (the Torah) is suspect with regard to all and] he is regarded as a non-observant Jew, the effect being that if he marries, his marriage is legally binding. (*B'chorot* 30b)

> If a Jew who has converted [to another religion] is married, though he may knowingly practice idolatry, his marriage is wholly binding and [should his wife wish to end the marriage] she will require to obtain a divorce [from him]. (Maimonides, Laws of Marriage IV, 15)

> If a Jew has converted [to another religion] and married, his marriage is valid, [and should the wife wish to end the marriage] she requires to obtain a divorce from him. (*Tur Even ha-Ezer* 44)

The next two texts recapitulate and echo the *Sanhedrin* 44a notion that "a Jew, even if he has sinned, remains a Jew."

> . . . for although he sinned, he is still a Jew. (*Migdal Oz*, Commentary on Maimonides Laws of Marriage IV, 15)

> For even though he has converted to another religion, he nonetheless remains a Jew, as it is written, "Israel has sinned;" though he has sinned, he remains a Jew. (*Prisha*, Commentary on *Tur*, ibid. note 22)

The next set of texts take up the issue of whether the widow of a Jew is exempt from *halitzah* in the case of the woman's late husband's brother being a convert. All except Rashi (whose decision is later discounted) rule that the woman is exempt from marrying the brother who converted.

> It is written in the Responsa of the Geonim: the widow of a Jew who died without issue, her late husband's brother having become a convert (to another religion), is exempt from *halitzah* as well as from the obligation to marry such brother. This opinion was given by the Geonim without citation of supporting authorities. But in one of his Responsa, which we do not follow, Rashi wrote that although he has sinned, he remains a Jew, his marriage is legally binding and he must perform the *halitzah* ceremony but he does not marry her. (*Mordechai* on *Yevamot*, IV, 29)

> If a Jewish husband dies without issue, leaving a brother who was a convert [to another religion] there is some authority (Rabbi Yehudai Gaon) for saying that the widow is exempt from *halitzah*, if at the time of her marriage the brother was already converted. But this ruling is not to be relied upon. (*Shulchan Aruch Even ha-Ezer* 157, 4)

Upon this the *Tur* observes:

> We do not know why it should make any difference whether the brother was or was not a convert at the time of the marriage. (*Tur* ibid.)

In showing the preponderance of opinion that an apostate remains a Jew, thus rejecting the Gaonic view, Silberg notes (from *Or Zaruah* 1, 605) the suggestion that Rabbi Yehudai Gaon was really saying not that the brother-in-law was not Jewish, but that the rabbis simply annulled the marriage between the woman and her husband, thus negating the need for *halitzah*.

Finally, two further opinions which support Brother Daniel's claim that an apostate remains a Jew:

> A childless widow whose husband's brother is a convert from Judaism cannot be freed from the legal obligation to marry him except by *halitzah*. What is the reason? Because of the sanctity of attaching to the fact that he remains Jewish. (*Otzar Hageonim* by Dr. Levin, on *Y'vamot* 22a)
>
> A Jew who becomes an apostate maliciously is nonetheless called "your brother," since though he has sinned, he remains a Jew. (Responsa of Benjamin Zeev, para. 15, Jerusalem 1959, according to the Venice edition of 1539)

Next, Justice Silberg rejects the State Attorney's notion that a convert is only partly Jewish since he is not considered a Jew for matters of inheritance, the prohibition on taking interest, and being counted in a minyan. Judaism, he states, is a status that cannot be divided, the expression of Judaism's totality and completeness being expressed from of old with the words of the second Commandment: "You shall have no other gods before me." The State Attorney is also inaccurate in that a convert may partake in religious ceremonies which do not require a minyan. (Silberg notes here that we should take into account another version of that law, found in the Tosafot, wherein the law is limited to an apostate who returns through repentance.)

As for the question of whether or not a Jew who converted is exempt from the prohibition of taking interest, Silberg provides halakhic authority on both sides, and concludes that it is doubtful. First the arguments that interest <u>may</u> be taken:

> It is permissible to take interest on a loan made to an idolater who denies the vital tenants of Judaism and a Jew who has changed his religion is regarded as an

idolater. (*Tur Yoreh Deah* 159 and *Shulchan Aruch Yoreh Deah* 159, 2)

Nachmanides, of blessed memory, has written in one of his Responsa, that it is permissible to charge interest on a loan given to a Jew who became a convert. (Responsum by Rabbi Shlomo Ben Adret, ibid.)

Next, those who argue that interest may not be taken:

Rashi ruled that it is not permissible to take interest from a Jew who is a convert for he is called "your brother" and regarded as Jewish though an apostate and a sinner, as it is written, "Israel has sinned" -- although he has sinned, he remains Jewish. (Responsa of Rashi 175 (New York, 1943) pp. 196-7)

MaHaril followed Rashi, Rabbi Eliezer Bar Yoel Halevi, and Smag to the effect that it is forbidden to charge interest on loans made to converted Jews. (*Darche Moshe* on *Tur*)

On the question of inheritance, Silberg restates the State Attorney's argument which was based on a responsum of Hai Gaon, and then rejects it. He goes on to give interpretation to the biblical precept that a convert may not inherit from his father. Again, he says that there is a wide difference of opinion, and concludes that even if the views of those who allow interest to be taken but prohibit the convert from inheriting from his father are followed, these rulings are not enough to deduce that the convert is to be rendered non-Jewish since he would be regarded as non-Jewish for all purposes. Hence, Jewish status is indivisible.

Silberg returns to his original question as to whether or not the term "Jew" has the same meaning as used in the Rabbinical Courts Law and the Law of Return. He concludes no, since the term "Jew" was intended to have a religious meaning

in the Rabbinical Courts Law and a secular connotation in the Law of Return. The former, passed by the Knesset, had the purpose of making Jewish Law in the area of marriage and divorce the law of the land. Naturally, then, the term "Jew" as used in that law must be defined as it is in the halakhah. Were any other definition to be applied to the Rabbinical Courts Law, then it would no longer be a religious law. In the case of the Law of Return, however, such a contradiction does not exist since it is not a religious, but a secular, law. Since the term "Jew" was not translated or interpreted by the Knesset for the purposes of the Law of Return nor subsequently by any Court decision, Silberg says that the word must be understood according its "ordinary meaning," that being the meaning understood by "the Jews." Interestingly enough, this "ordinary" definition, which obviously does not include a person who has converted to Christianity, is in opposition to that of Jewish cultural (and legal) heritage. What Silberg is saying is that while Jews are in continuity with their history (and past definitions), a new history (and new definitions) has been created from the beginning. Once more, Silberg asks whether using the "ordinary" meaning, the term "Jew" would include one who has converted. The answer, he says, is sharp and clear: No!

In support of this argument, Silberg notes that Jews have an umbilical cord to the past, and that all Jews (except a handful) share the sentiment that "we do not cut ourselves

off from our historic past nor deny our ancestral heritage."[28] He questions whether a Jew who has converted could truly find national pride in a history which he now sees through "Christian" eyes and which he now judges by "Christian" standards. There is no doubt that Brother Daniel will love Israel, says Silberg, but that love will be from the outside, not the inside; it will forever be the love of a "distant brother."

Parenthetically, Silberg emphasizes that he has no quarrel with the Catholic Church or with Brother Daniel personally. He is sure that Brother Daniel will not harbor any ill feelings towards the State because of the Court's decision. What is at issue, says Silberg, is not personal decency, but whether or not Brother Daniel may assume the name "Jew." Again comes the emphatic: No!

Though Brother Daniel's attorney argued that to rule against him would make Israel a theocratic state, Silberg rejects this as completely unfounded since, had religious law been applied alone, Brother Daniel would have been considered a Jew. He underscores the fact that Israel is ruled by law and not by religion.

In final support of his argument, Silberg quotes from three Israeli scholars, all of whom agree that "Jew" and "Christian" are contradictory terms. First, from Yehezkel Kaufmann (1889-1963), biblical scholar, thinker and essayist:

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[28]Special Volume, p. 11

> Even the national idea, although it gave birth to the conception of Jewish secular nationalism, could not sever at one stroke the ancient bonds between Israel and its Torah, between the people and its sacred law. On the contrary, national sentiment itself has endeavoured to tie *these very bonds* [Silberg's emphasis] more tightly by nationalism. Furthermore, even at the very moment when the people was impressed with a secular mould . . . it nevertheless sought to set up Jewish nationalism upon "Jewishness" in the sense of "Torah," a way of life or an "idea" of a special kind. (*Gola Venechar*, Vol. II, p. 361)

This passage was taken from Kaufmann's monumental work, a sociological study tracing the fate of the Jewish people from ancient times to modernity. In an earlier section (p. 264) not quoted by Silberg, Kaufmann asserts that "the Jewish nation cannot achieve redemption from its exile by assimilation among other peoples. The end of being an alien and of the battle of the exile can only come through national redemption, by the conquest of the national heritage."[29] Both these selections serve Silberg's argument well in that a Jew who converts to Christianity, thereby severing his national and religious bonds to the Jewish people, cannot possibly retain a connection to their "national heritage."

Second, from historian Raphael Mahler (1899-1977), who places Jewish history in accord with "historical materialism,"

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[29]"Kaufmann, Yehezkel," in Encyclopedia Judaica, Vol. 16, (Jerusalem: Keter, 1971), Col. 1351.

and who divides modern Jewish history in accordance with social and economic evolution:[30]

> The more cases of people of their class who went over to Christianity, the more they were followed by the remainder to the baptismal font . . . perhaps from a new feeling of family or class solidarity with those *who had already departed from Judaism.* [Silberg's emphasis] (History of the Jewish People in Modern Times, p. 160)

Here Silberg is highlighting Mahler's notion that the reason many Jews decided to convert was because of those Jews who converted before them. Both groups, in Mahler's mind, departed from Judaism; and for Silberg, that is exactly what Brother Daniel did, and thus he is not entitled to rejoin the Jewish people as a Christian.

Third, from the "dean of Jewish sociologists," Jacob Lestschinsky (1876-1966), a leader "in the political controversies which raged in Jewish public life . . . (who) was several times imprisoned for his political and literary activities . . . (and who) saw the birth of the Zionist idea and its culmination in the establishment of the State of Israel:"[31]

> Religion is still the clearest external sign which distinguishes the Jewish population from the non-Jewish. Both the Jewish and the non-Jewish public well know that the Jewish religion means also Jewish nationalism. A man can be most irreligious and even heretical and still regard himself as being Jewish in the religious sense and

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[30]"Mahler, Raphael" in Encyclopedia Judaica, Vol. 11, (Jerusalem: Keter, 1971), cols. 727-8.

[31]Paul Glikson, "Jacob Lestschinsky: A Bibliographical Survey" in Jewish Journal of Sociology, Vol. 9, No. 1 (June 1967), p. 48.

also be considered such by his non-Jewish neighbors. (*The Jewish Dispersal*, p. 41)

This passage, along with the two previous ones, all give scholarly, historical, and sociological credibility to Silberg's ultimate position that Brother Daniel cannot be considered a Jew according to the Law of Return. These are meant to complement his earlier-presented halakhic arguments, thereby completing the well-rounded (and lengthiest of all) opinion of Justice Silberg.

In concluding, Silberg adds that although there is a general difference of opinion between common people and scholars, all agree that a convert cannot be considered a member of the Jewish people, in principle because, "converts eventually become wholly deracinated, simply because their children intermarry with other peoples."[32] And although, as Counsel argued, there can be no fear of the next generation being lost to intermarriage since Brother Daniel will remain celibate, Silberg rejects this as a "frivolous remark."[33]

So to what nationality does Brother Daniel belong, having relinquished his ties to his native Poland? Silberg says that he is without nationality, and that the space on his identity card under "nation" should be left blank and unanswered.

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[32]Special Volume, p. 11.

[33]ibid.

After all, there is precedent for leaving spaces on the identification card blank since not all questions must be answered. Thus Silberg rules that the order nisi must be discharged.

iii.

The Opinion of Justice Haim Hermann Cohn

Justice Cohn agrees with his colleague, Justice Silberg, on three points, but disagrees with a fourth. First, though he is a stronger advocate of the separation between religion and State, he concurs that a converted Jew remains a Jew according to Jewish Law. Second, he agrees that the Law of Return should not be construed religiously, but rather through the normal channels of interpretation as applied by the Courts to any legislation passed by the Knesset. Third, he acknowledges Silberg's statement that "we do not cut ourselves off from our historic past, nor do we deny our ancestral heritage." But he adds that since the Law of Return is such a fundamental law that it is interpreted as a tenet of the State, it "ought to be construed so as not to conflict with the background and conception of the establishment of the State of Israel, but to promote the fulfillment of its prophetic vision and its aims."[34] In other words, the Law of Return must be viewed and implemented as a reflection of Israel's basic and founding values and self-concept.

Cohn disagrees, however, with Silberg's point that a secular interpretation of the Law of Return must lead the Court to deprive Brother Daniel of his rights as a Jew. Although Cohn concedes the Catholic Church's history of

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[34]Special Volume, p. 14.

brutality over the centuries and even restates Silberg's notion that a Jewish Catholic will forever be a contradiction in terms, he does not uphold Silberg's theory of "historical continuity." Rather, he ascribes to a history of change, progress, and evolution. For Cohn, history is the foundation of the past upon which to build.

For Justice Silberg, "Israel" is that community which, though not universally religious, is nonetheless defined by its unbroken connection to the sources of its religious heritage. This view is not unlike that of Hayim Nahman Bialik and Yehoshua Hana Ravnitzky, whose Sefer Ha-Aggadah provided to the secular Jew (and Israeli) an understandable digest of those sources and that heritage. In his introduction to the English translation, David Stern notes that "important as the political restoration (of the Jewish State) was, it was only through an equivalent cultural rehabilitation that the Jewish people would truly be reconstituted and their future existence guaranteed."[35] Thus did Bialik and Ravnitzky's work symbolize that unbroken commection for the modern, Hebrew-speaking Jew, no matter how secular in his/her religious practice.

For Justice Cohn, though, the establishment of the State of Israel was a revolutionary event in the history of the Jewish People, and thus, "it renders imperative a revision of

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[35]H.N. Bialik and Y.H. Ravnitzky, ed., The Book of Legends: Sefer Ha-Aggadah (New York: Schocken, 1992), p. xix.

the values which we have imbibed in our long exile."[36] Whereas in the Diaspora the Jews were the minority and often persecuted, in their own land the Jews are now independent, the majority, and a State unto themselves. Thus the old "Galut" way of thinking and the old self-perceptions which have, in his mind, become standard and customary must be revised.

Moreover, he appeals to a phrase in the Declaration of the Establishment of the State of Israel which says, "the State will be open wide to every Jew." Here now is Brother Daniel knocking on the door and declaring himself a Jew; is the State of Israel to close the door? Cohn has no doubt that had Brother Daniel presented himself to the Minister of Interior in "street clothes," instead of the priestly gown and wooden cross, and declared his Judaism, there would have been no problem whatsoever. Cohn is troubled by the fact that it was only because he came as he did, without deceit, that Brother Daniel found the gates locked.

Justice Cohn compares Brother Daniel to those Jews who had to dress and act as Christians in order to be accepted centuries ago. Had they <u>not</u> donned the Christian religious garb, they would have found the gates to their society locked. So here is Brother Daniel, who comes as he is -- can the gates be closed before him as they were before those Jews who chose to reveal their true selves?

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[36]<u>Special Volume</u>, p. 15.

Irrespective of Silberg's notion of "historical continuity," Cohn says that, "times have changed and the wheel has come full circle."[37] The gates cannot be closed before Brother Daniel just because he presents himself as a Christian. The Jewish State should not react to history by dealing out measure for measure.

Additionally, Cohn appeals to the prophet Isaiah's vision (Is. 26:2): "Open the gates that the righteous gentile which keeps the truth may enter in," and he concurs with its midrashic interpretation: "Isaiah speaks of the righteous gentile, and not of priests, levites or the people of Israel. Almighty God does not disqualify anyone; all are acceptable to God; the gates are always open and whoever wishes may enter." (*Sifra, Acharei Mot* and *Shmot Rabbah*, Ch. 17) Though on the surface this may seem like a plausible and even convincing argument for allowing Brother Daniel to be registered as a Jew, and although it may tug on the heart strings of those to whom Jewish texts speak, it must be remembered that the gates of Israel were <u>not</u> closed to Rufeisen. On the contrary, he was allowed to immigrate and to settle within Israeli borders. Like other Christians at that time, he could go through the proper channels of immigration and naturalization in lieu of immediate citizenship under the Law of Return. It may be that Cohn is trying to fight fire with fire, as it

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[37]<u>Special Volume</u>, p. 15.

were, in that he, like Silberg, is trying to appeal to rabbinic texts and the authority of history to make his point. However, to extrapolate this verse of Isaiah to have it apply to the literal gates of the State of Israel is, in my opinion, an extension that does not reach.

Next, Cohn takes issue with the July 20, 1958 Government decision[38] for the purposes of the Law of Return, accepting the first part, but rejecting the second. With reference to the first part, he emphasizes that because there is no legal, objective test to determine if a person is a Jew, it must be assumed that the Legislature intended to be satisfied with the subjective test; that is, personal disclosure. With respect to the "no other religion" proviso, Cohn views this as exceeding the powers of government. It appears here as though Justice Cohn is abandoning any rationale for arguing personal Jewish status from Jewish history. He is, in essence, retreating into a narrow reading of the 1958 decision: simply put, since there is no objective, legal standard, the only standard for inclusion that may be used is a personal disclosure that is hopefully made sincerely.

Cohn also rejects the drawing of a distinction between the Law of Return and the 1949 Registration of Inhabitants Ordinance. The test for the Registration of Inhabitants Ordinance is subjective since the requirement to register lies

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[38]"Anyone declaring in good faith that he is a Jew, and who does not profess any other religion, shall be registered as a Jew."

with the inhabitant, not with the registration officer. Registration, therefore, is nothing more than evidence that an inhabitant has furnished certain information to the officer, be it name, address, religion, or nationality. It is not the duty of the officer to make any inquiries, nor to verify the information provided; the officer's duty is merely to record the information provided. Based on this, Cohn argues that the 1958 Government decision is contrary to the language and spirit of the 1949 Ordinance, "and for the purposes of the registration itself this limitation also has no binding force."[39]

Since Brother Daniel's declaration of Jewishness was made in good faith, and since it was accepted as such, Cohn concludes that he is entitled to an immigration certificate under the Law of Return and registration in the Register of Inhabitants as a Jewish national. Thus does Justice Cohn argue that the order nisi be made absolute.

In analysis, it is true that throughout Jewish history there has always been a definite distinction between the Jewish community and other groups, and that that distinction has always been recognizable by Jews and non-Jews, religionists and secularists alike. According to Zionist theory, the Jews, however defined, are an objective, national reality who, if nothing else, at least agree who is to be counted within

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[39]Special Volume, p. 18.

their ranks, and who without. Lacking this basic reality, Zionism and the State of Israel simply could not have been. However, using Cohn's reasoning, any person could claim that they were Jewish simply by stating this in good faith and thus perhaps be eligible for citizenship (and all the benefits granted thereto) in Israel under the Law of Return and the 1958 Government decision. This group could include any Christian, any Moslem, any Hindu, any Buddhist, any Australian Aborigine, or any Native American. How then could any distinction between Jews and non-Jews be made? How could Jews continue to claim to be an objective, national reality?

iv.

The Opinion of Justice Moshe Landau

Justice Landau concurs completely with the opinion and reasoning of his colleague, Justice Silberg; however, he does add his own personal remarks. First, he takes up the seemingly paradoxical notion that the Court should refuse Brother Daniel's petition when Jewish Law designates him a Jew. He says that this is quite understandable when one realizes that Jewish Law allows for a converted Jew to remain a Jew, not out of tolerance but out of disgust. The fact of conversion had to be disregarded by Jewish Law, says Landau, in order to protect the personal status of the Jew who converted. He adds: "As a person deeply conscious of his own self-respect, the petitioner should never have invoked the assistance of Jewish religious law which so contemplates a Jew who changes his faith."[40]

Adding to that point, Landau makes two comments on the Jacob Katz essay, "Though he has sinned, he remains a Jew," brought to the attention of the Court by the State Attorney. He says that the rabbinic author of the statement (found in *Sanhedrin* 44a) certainly never intended for it to apply to a converted Jew, especially since it refers to the people of Israel as a whole, not to a specific individual. Though the Talmud does speak of an idolatrous apostate, it is doubtful

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[40]Special Volume, p. 19.

whether that was meant to include one who has actually embraced another religion.

The concept of the *mumar* in the Talmud did not originally apply to one who had converted to another religion. Though there were two classifications -- a *mumar le-hakis* (one who violated a commandment in a spirit of rebellion and a denial of its divine authority), and a *mumar le-te'avon* (one who violated a commandment because of an inability to withstand the temptation) -- both still retained their Jewish status (though they lost all rights pertaining thereto).[41] Only with the advent of Christianity and later Islam, when converts to these new religions were viewed as totally and purposely forsaking the Jewish people and their religion, was the idea that an apostate (referring to a convert) could retain their Jewish status even possible. While there was much sympathy for those who were forced to convert, far less approval was given to those who were voluntarily baptized: "Parents would go into full mourning for an apostate child, sitting shivah on low chairs and being comforted by relatives and friends. Thereafter the child was treated as dead and his name never mentioned in the home again."[42] Thus to say that the principle, "Though he has sinned, he remains a Jew," was

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[41]"Mumar," in Dan Cohn-Sherbok, The Blackwell Dictionary of Judaica (Oxford: Blackwell Publishers, 1992), p. 378.

[42]"Apostasy," in Alan Unterman, Dictionary of Jewish Lore and Legend (London: Thames and Hudson, 1991), p. 24.

universally accepted as an halakhic doctrine meaning that a Jew can never lose his/her Jewish status, would not be totally correct. As seen earlier (and also noted below), it would be more accurate to say that this idea was mainly the contribution of Rashi.

Landau remarks that even though Rashi and others gave wide latitude in the interpretation of the dictum, this was apparently done in order to show leniency towards those who were forced to convert and not to shut them out of Judaism should they eventually repent and return. Though not mentioned by Landau, in his article, Katz also stresses that Rashi's expansion was done for broader theological purposes as well: that is, to contradict the Christian argument of the time that a baptism changed the personal status of a Jew.

Like Justice Silberg, Justice Landau decides the fate of Brother Daniel's petition not on the grounds of religious law, but solely by the secular Law of Return. He primarily employs an historical argument in that he seeks to determine the present-day law not on what the law was in history, but by the current legal system. The question is thus again for Landau: What did the Legislature intend as the meaning of the term "Jew" in that Law? Unlike Justice Silberg, who sought to interpret the term "Jew" from the "ordinary, person-on-the-street" meaning, Landau believes that the ideology of the founders of Zionism was in the minds of the Members of the Knesset when they enacted the Law. Since, as he argues, "the

State of Israel was established by Zionists on the principles of Zionism, and (since) the Law of Return itself gives expression to the fulfillment of one of the basic principles of Zionism,"[43] he builds his position upon the writings of Theodore Herzl and Ahad Haam.

From Herzl, Landau quotes from a letter in which a Jew who converted to Christianity is told that he cannot become a member of the Zionist organization: "Mr. De Jong being a Christian cannot join the [Zionist] Organization. We would be grateful to him if he assisted us as a non-member." (Herzl's Letters, Vol. III) And in response to one of Brother Daniel's attorneys who quoted from Herzl's The Jewish State, that the State would not be a theocracy, Landau turns the quotation around to show how it refutes the case of Brother Daniel, since it appears within the context of a discussion over which language will spoken in the State after its establishment:

> We will not speak Hebrew with each other, for who knows sufficient Hebrew to ask for a railway ticket? That language that will be easiest for use in daily public life will automatically be recognized as the first language. For what we share in common from the national point of view is unique and singular. In substance, we still regard ourselves as belonging to the same community *through our ancestral faith alone.*

Simply stated, one who has abandoned their ancestral faith cannot be considered as belonging to the same community as those who have not forsaken their past.

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[43]Special Volume, p. 20.

For Landau, the fusion of Herzl's vision with Ahad Haam's thoughts, which together created modern Zionism, is of great legal significance. The following selection, quoted by Landau, is a good summary of Haam's attempt to create a particularly "Jewish" culture as a substitute for a religious understanding of Judaism:

> Jewish nationalism without any trace of those elements which for thousands of years had been the very life breath of the nation and had given it its special place in the cultural evolution of mankind -- such a grotesque creature can only be imagined only by one who is very far removed from the spirit of our people. (At the Crossroads, Dvir Edition, 1959, p. 291)

Ten years after writing that, Haam again found it necessary to dispel the notion that "free national consciousness" can exist. No person, he says, can be separated from their past without a "negation of the negation" with regard to Christianity. His reaction was intended as a criticism towards an article from *Hapoel Hatzair* which stated among other things that "one can be a good Jew and at the same time experience some religious emotion at the Christian legend of the son of God who was sent to mankind in order to redeem with his blood the sins of the generation." Haam's rebuttal:

> Can the tree free itself from its roots buried deep in the soil which deprive it of freedom of movement?
> . . . Anyone who truly has no portion in the God of Israel and does not in his innermost self feel any spiritual affinity to that "Exalted Being" for whom during the centuries our ancestors gave their hearts and souls and from whom they drew their moral strength -- such person may be an excellent man but a national Jew he cannot be even were he to live in the land of Israel and speak the Holy Tongue. (Law from Zion, Dvir Edition, p. 406)

It is worthy to note here that there were writers who suggested that a Christian could still be a "good Jew," but Landau chose to give Ahad Haam's views more credence, a logical choice given his historical prominence in the Zionist "canon;" but it remains a choice nonetheless.

Next, Landau draws upon the Declaration of the Establishment of the State of Israel. He says that the Law of Return was enacted upon the spirit of the Declaration, specifically upon the idea that Jews have an "historic and traditional attachment" to the Land of Israel, which was shaped by their "spiritual, religious and political identity (since they) never ceased to pray and hope for their return to it and for the restoration in it of their political freedom." Not only are religion and nationalism intertwined in the sources of the past, but so are the Law of Return and such sources. In other words, he believes that even the most secular definition of "Jewishness" has always included a modicum of religious content, even if that content is limited to the beliefs of dead ancestors. Because the Jews inherited that religion, one who has converted cannot be considered a member of the Jewish community. Thus, says Landau, by converting, Brother Daniel severed his ties with the national past of his people and is not entitled to appeal to the Law of Return, which itself illustrates the national sense of the Jewish people. Thus does Landau himself conclude that "the petitioner has excluded himself from the common fate of the Jewish people and

has linked his destiny to other forces whose precepts he honors both in thought and in observance."[44]

Briefly, Landau directs his attention to the difference between a Jew and non-Jew as regards conversion from one religion to another with respect to the 1949 Registration of Inhabitants Ordinance. He says that a Jew who is non-religious is not obligated to register his religion as a Jew; neither is he able to be compelled to register as such. However, a person who converts of his own free will necessarily must attach significance to his religious beliefs. How much the more so does Brother Daniel, whose religion is central to his entire being, thus create a contradiction with the Law of Return.

In responding to Justice Cohn's notion that what matters is the declarant's subjective feelings and his declaration made in good faith itself, Landau argues that this ruling is beyond the scope of the petitioner's case. Such a "single test" is not acceptable by Landau, who adds that the Legislature never intended that a person claim to be Jewish solely for the Law of Return and then be able to declare to be Jewish or not at will. Instead, Jewish identity must be based on some acceptable criterion, and for Landau, that criterion is nationalism, which has always emphasized the national aspect of Judaism. While there may not be an objective test to

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[44]Special Volume, p. 23.

determine who a Jew is, there is an objective yardstick for determining who belongs to a particular nation -- a yardstick which is measured by the nation itself, not by any one individual person. As for the national aspect of Judaism, there remains a religious identification, no matter how small, which all Jews around the world have in common. Therefore, conversion to another religion is synonymous with the rejection, not only of Judaism itself, but also of the Jewish nation. Though the State is indebted to Brother Daniel for his dedication and love for Israel and for his brave acts in the past, says Landau, there remains a "manifest objective difficulty" which hinders the acceptance of his application as a Jew.

In conclusion, Landau again stresses that which Silberg stressed, that the separation of religion and State is not at issue in this case. Furthermore, despite the fact that Zionism historically emphasized the national character of Judaism while the enemy of the Jew emphasized Judaism's religious nature, it is nonetheless reality that identification with Judaism as a religion is what connects all Jews around the world. Conversion to another religion is basically the same as total assimilation. Since the Law of Return was intended to benefit Jews who wanted to immigrate to Israel from the Diaspora, says Landau, this illustrates even more the weakness in the petitioner's interpretation of the word "Jew"

in that Law. Thus does Justice Landau accord with Justice Silberg, and against Justice Cohn, that the order nisi be discharged.

V.

The Opinion of Justice M. Elyahu Mani

The opinion of Justice Mani is so short and precise that it may be quoted here in full:

> I too am of the opinion that the order nisi should be discharged for the reasons given in the judgments of my learned colleagues, Justice Silberg and Justice Landau. I should like to identify myself with everything they have said, and I do not think that there is anything which I can usefully add.[45]

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[45] Special Volume, p. 24.

vi.

The Opinion of Justice Zvi Berinson

The judgment of Justice Berinson begins by disassociating the case of Brother Daniel from that of the typical person who has converted out of Judaism. He places special emphasis on the fact that, though converted, Brother Daniel continued to identify with Jews nationalistically; and this fact was demonstrated in both word and action. He also restates Brother Daniel's claim that nothing in the fact that he has embraced the Christian faith should prohibit him from being a member of the Jewish people on a national level, especially according to the Law of Return. What Brother Daniel wants is simply a nationalistic interpretation of the Law and a definition of Jewish identity based primarily on nationalistic terms: that all Jews, as a single nation, shall return to their national homeland.

Of all the Justices who wrote opinions on this case, Berinson begins with a detailed summary of the life and personality of Brother Daniel. This is in spite of the fact that this is a legal case, and that an opinion rendered on such a case should focus on legal issues. But nevertheless, Berinson takes the time to recount Rufeisen's acts of bravery and dedication for his fellow Jews before his conversion. This and the fact that Brother Daniel specifically chose the Carmelite Order with the (Zionistic!) hopes of emigrating to Israel, serve well his own personal feelings (stated later)

that Brother Daniel should be considered a Jew. In the end, he does make his decision and write his opinion based on the Law of the Land, as he should, but still much of his opinion is concerned with his own personal feelings.

Justice Berinson also recapitulates part of the case brought to the Court, initially focusing on the response to Brother Daniel of Yisrael Bar-Yehuda, the then-Minister of the Interior. Even though Brother Daniel emigrated from Poland as a Jew in the eyes of the Polish authorities, Bar-Yehuda explains the denial of the application as being based on the Government's decision of July 20, 1958.[46] In that letter, Bar-Yehuda states that despite the Government decision, in his opinion, the declaration of Brother Daniel, made in good faith, should have been sufficient for his being registered as a Jew. That is because he is asserting a "separation of Church and State" position wherein Rufeisen would clearly be considered a Jew and where this case would not be one for the secular Courts to decide. However, as quoted by Berinson, Bar-Yehuda must admit that, "he is not free to act according to his own understanding and inclination alone. He must act within the limits of the existing Laws even if he struggles to secure their change or amendment."[47] Berinson states that

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[46]"Anyone declaring in good faith that he is a Jew, and who does not profess any other religion, shall be registered as a Jew."

[47]Special Volume, p. 27.

though he agrees with Bar-Yehuda on the merits of the case, he questions the legality of his approach. He admits that he, too, would like to simply be able to follow his own personal preference and grant citizenship to Brother Daniel, but he cannot since he must interpret the meaning of the term "Jew" as found in the Law of Return not with personal criteria, but with the understanding of those who wrote the Law, ". . . or more correctly, in the sense that it is used in common parlance today."[48]

Berinson says that the then-Minister of the Interior erred when he subordinated his own opinion to that of the Government decision, since under the Law of Return, it was he (the Interior Minister), not the Government, who had the authority to issue the certificate of immigration. By virtue of the fact that the term "Jew" in the Law of Return was left vague by the Knesset clearly meant that determination was to be made by the Minister. The subsequent Government decision, which was not firmly grounded in law, was merely the opinion of the heads of State, and should have had no bearing on the Minister's opinion since it is the responsibility of the Courts alone to determine the purpose of the Legislature in creating the Law of Return. On this point, Berinson concludes that the differences of opinion between the then-Minister and the Government is no longer important since he is no longer

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[48]Special Volume, p. 28.

the Minister of the Interior, and since the current office holder agrees with the Government decision of 1958.

Justice Berinson reiterates his opinion that the lawyers for both the Minister and Brother Daniel agree that the term "Jew" as found in the Law of Return must be interpreted from a secular-national, rather than religious, point of view. The disagreement is on the nature of that interpretation. Counsel for the petitioner argued that because the Law does not specifically give to the term "Jew" a religious meaning, Brother Daniel, on account of his Jewish descent and national pride, is entitled to an immigration certificate. The State's attorney, on the other hand, argued that a converted Jew excludes himself from the Jewish people in the general and secular sense. Both parties, says Berinson, brought to the Court writings of national and religious leaders, historians, and scholars. However, these are of little help in this case since they were written for a specific time and place and a reality which has changed. This new reality includes the Holocaust, the Nazi plan to obliterate all Jews regardless of their level of belief in their religion, and the establishment of the State of Israel. Berinson asks: Since Hitler would have killed Rufeisen because of his racial ties to the Jewish people, irrespective of his religious affiliation, should not the Jewish State which was created in order to gather together the dispersed Jews of the world, also recognize his Jewishness? Of course, on an emotional level, the answer would be

"yes;" but the decision must be made, not by the heart, but by the mind -- that is the Law of the Land and the will of the people.

Berinson again restates that if it were purely his decision to make, there would be no question that Brother Daniel should be considered a Jew, and thus a member of the Jewish people and nation. He first draws upon the dictionary definition of "nation" in stressing that having a common religion is not mentioned among the traits shared by people who make up a nation.

Second, he quotes from Zionist, economist, and sociologist, Dr. Arthur Ruppin (1876-1943):

> A man belongs to that nation, that is, that national group, to which he feels the greatest affinity through history, language, culture, and common customs. A nation means a community of people who share the same fate and culture. (The Jewish Struggle for Survival, p. 11)

> Close involvement of Jews in the language and culture of their Christian environment leads to intimate social contact, to intermarriage . . . conversion and eventual withdrawal from all things Jewish. (ibid., p. 240)

At first glance it would appear that Ruppin's words are in opposition to the point which Berinson is trying to make; but Berinson takes the passages and draws very delicate conclusions from each. First, he notes that the first passage does not contain the word "religion," and thus he interprets Ruppin's words to mean that religion is not an essential element to the people of a specific nation. One could argue, however, that in the case of Judaism, "culture" and "shared

customs" must include aspects of "religious" behavior. Although Berinson, the good secular Zionist, is here trying to define Jewish culture as being without "Judaism," he is at the same time defining "religion" in a theological sense which perhaps does not conform to the way in which "Judaism" is understood and lived by the Jewish people.

With respect to the second Ruppin passage, Berinson draws a distinction between "conversion" and "eventual withdrawal." He notes that although the former precedes the latter, they are not synonymous terms. Just as with the first passage, Berinson is here twisting Ruppin's words to make his point. Though he does make other good points in his opinion which challenge the reader to truly consider Brother Daniel's case on an emotional level, his choice to use Ruppin's words to prove his point may be considered poor. Though Dr. Ruppin died before this case came to the Court, even before the establishment of the State of Israel itself, there can be no doubt that he would not have acquiesced to Berinson's interpretations.

Nevertheless, Berinson also highlights the significance of the fact that though Brother Daniel did convert to Christianity, he did not break with his family nor seek to leave the Jewish flock:

> His membership of the Jewish people has been forged by suffering and courage such as cannot easily be matched in our generation that has seen so much suffering and courage. His claim is genuine in conviction and sentiment, in word and deed, and finally in his having

immigrated to the State of Israel and his desire to live there and work on its behalf.[49]

For Berinson, all of this should have been sufficient for the gates to be opened wide -- for Brother Daniel to be not only welcomed into the citizenry of Israel, but also for him to be granted an immigration certificate and for him to be registered in the Register of Inhabitants as a Jew by nationality.

Thus Berinson challenges his colleagues and readers to consider that had Brother Daniel believed in Buddhism, which does not require conversion, instead of Christianity, he would have been considered Jewish; and to accent this point, he draws upon the writings of Ahad Haam, who believed that a Jew who rejected the religious aspect of the nation could still be included in the Jewish fold.

Irrespective of all of this, says Berinson, the Jewish people throughout the centuries has decided otherwise: a converted Jew is not only outside of the Jewish faith, but also outside of the Jewish nation and community; a converted Jew is called a *m'shumad*, reflecting that the person has "destroyed" himself, and hence gone astray from the nation.

Thus, says Berinson, the Law of Return was enacted in this spirit, that the term "Jew" was to be understood in its popular, secular meaning. When the Knesset unanimously adopted the Law, the Speaker said that it "symbolized the aspirations which the Jewish people have had for two thousand

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[49]Special Volume, p. 30.

years."[50] In essence, this meant that the term "Jew" meant what the people of Israel has said that it meant throughout their history: a meaning that has never included a Christian in the definition of any Jewish community.

Moreover notes Berinson, even Moshe Shertok, a Jewish Agency representative who appeared before the United Nations Special Committee for Palestine in 1947, said to the nations of the world that a Jew who becomes a member of another faith can no longer claim to be a Jew: "The religious test is decisive."[51] That was public opinion then which was reflected in the Government decision of July 20, 1958. "My final conclusion therefore," says Berinson, "is that a Jew who has changed his religion cannot be considered a Jew in the sense intended by the Knesset in the Law of Return and as this word is used in common parlance today."[52] He renders this decision even though his own personal feelings, the nature of Jewish history, the best of Zionist thought, and even the halakhah ("A Jew even if he has sinned, remains a Jew") all can be said to argue in favor of the Jewish status of Brother Daniel. The true irony is that the will of the people (and the Knesset as their representative) contradicts all of these other (and

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[50] Special Volume, p. 33.

[51] ibid.

[52] ibid.

perhaps "better") indications of Jewish identity. Only when the deeply seeded feelings against Christianity for the centuries of wrongs committed against the Jews begins to wane, says Berinson, will perhaps a person such as Brother Daniel be able to be recognized as a Jew by the public at large. Until then, he cannot be considered a Jew under the Law of Return. Thus does Justice Berinson agree that the order nisi be discharged.

D.

Benjamin Shalit (*Shalit*):

When A Non-Halakhic Jew Is Considered A Jew

i.

Overview

Israeli Naval Lieutenant Commander Benjamin Shalit was born of two Jewish parents in Haifa, Israel in 1935. In accordance with the Registration of Inhabitants Ordinance of 1949, he completed a registration form on November 11, 1948. On that form, he indicated that he was of no religion and through the space marked "nationality," he drew a line. An identity card was issued to Shalit in 1951 on which "Jewish" appeared under "nationality" without objection. While studying in Edinburgh, Scotland, he met and married (in 1958) Anne Geddes, born of a Scottish father from an old Zionist family, and a French mother whose family was known to have no religious identification. Together, the Geddes family had no religious affiliation.

In February 1960, having completed his studies, Shalit returned to Haifa along with his wife, who was granted a visa for permanent residence by the Ministry of the Interior. On her registration card, required for entry into Israel, the words "Not Religious" appeared in the "religion" column, and nothing was entered under "nationality." In October 1960, Anne Geddes Shalit applied to amend her entry in the Registration books: to have "British" appear under "nationality," and to have her personal name changed to "Ann." This fact would later be disputed by Shalit who would contend that his wife's petition was only to have the spelling of her name officially

changed to bring it into accord with its pronunciation in English. In 1965, Shalit himself petitioned to have his identity certificate altered to read "Hebrew" for "nationality." But the official in charge issued him another certificate with no changes: "Jewish" remained as the entry for "nationality." Again, though, no objection or problem arose out of this.

Their son, Oren, was born on March 14, 1964. His birth was registered under the 1949 Registration of Inhabitants Ordinance; however through the space for "religion" a line was drawn, while in the space for "nationality" (that is, national affiliation), the word "Jewish" was entered. In 1960, though, this was changed by an official of the Ministry of the Interior, acting under the direct auspices of the Minister: for "religion," the words "Father -- Jewish, Mother -- non-Jewish" were inserted, while for "nationality," the word "Jewish" was replaced with "Not Registered."

The daughter Galia, born February 11, 1967, was registered under the August 1, 1965 Population Registry Law, which replaced the earlier Ordinance. The notification of her birth, signed by Shalit, showed both parents' nationality as "Israeli" while for "religion" a line was drawn. However, neither the daughter's religion nor nationality was stated by the parents. An official of the Ministry, however, inserted "Not Registered" for "religion" and "Father -- Jewish, Mother -- non-Jewish" for "nationality." On March 1, 1967, Benjamin

Shalit, sent the following letter to the Ministry of the Interior:

> We the undersigned, hereby apply to register our daughter Galia as being without religion. Likewise, we apply to have her registered as belonging to the Hebrew or Jewish nation and we hereby give you notice that any other registration is contrary to our wishes and constitutes an infringement of our freedom of conscience.[53]

Following the refusal of this request by the Ministry, and after numerous further correspondences, the Israeli Supreme Court issued an order nisi on February 25, 1968, calling upon the Minister of the Interior and the District Registration Officer of Haifa to show just cause as to why the children's nationality should not be registered as per the father's request, that is "of Jewish nationality and without religion."

In their reply to the order nisi, the Minister and the Officer said that they would be willing to change the registration of the daughter to make it correspond to that of the son (that is, religion: Father -- Jewish, Mother -- non-Jewish; nationality: Not Registered), but they again refused to register the children as being of Jewish nationality. Their reason was that "a Jew, in the meaning of this concept accepted by the Jewish people for untold generations includes, and includes only: (i) a person whose mother was Jewish and

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[53]Quoted by Justice Kister in Special Volume, p. 104.

who is not of any other religion; (ii) a person who has been lawfully converted and is not of any other religion."[54]

Acting as his own lawyer, Benjamin Shalit appealed the case to the Israeli Supreme Court, which ruled in his favor, five to four in January 1970. Justices Sussman, Berinson, Witkon, Manny and Cohn all ruled to make the order nisi absolute; while Justices Agranat, Landau, Silberg and Kister all dissented from the majority opinion. Those who ruled in Shalit's favor all basically argued that the question "Who Is A Jew?" and the Jewish status of Shalit's children did not arise for decision. Moreover, they found that the registration officer was legally bound to record the responses of the declarant unless he has reasonable grounds for believing that he is lying. And, they noted that the religious test which was used to declare the notification incorrect was itself incorrectly used, in that it should not have been the determinative test for purposes of registering nationality. Those who dissented from the majority opinion did so for a variety of reasons which will be detailed in the following pages.

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[54]Special Volume, p. 35.

ii.

The Opinion of Justice Haim Hermann Cohn

The only question that the Court is deciding, says Justice Cohn in his opinion, is whether or not the Minister of the Interior was qualified to direct the registration officer not to record the exact responses of Shalit, and instead record the children's nationality as "Not Registered." What the officer actually recorded is not of importance; only the fact that he went against the directives of the petitioner in following a direct order from a superior. This issue is in light of the fact that the Minister of the Interior does have the responsibility of executing the Ordinance and the Law, and that he is the one who appoints registration officials to their posts. Justice Cohn proceeds on the assumption that the Minister may give orders to his subordinates as long as those instructions are "not of legislative effect" or add to or detract from the powers and responsibilities given to them by law.

Cohn makes it very clear that the issue of the nationality of the Shalit children is not present before the Court, and thus he refuses to rule on that topic. He says that the Court is only required to make the registration officer comply with the Law of the Land, that is the 1949 Registration of Inhabitants Ordinance and the 1965 Population Registry Law. And right away, Justice Cohn states that these laws do not give the officer the power to decide the nationality of the

children (or any other person for that matter). His decision, therefore, to register the children as he did, is irrelevant. Moreover, since the officer is not empowered to decide anyone's nationality, it follows that the Minister, his superior, is likewise not competent to direct him how to decide or not decide. Thus, says Cohn, the orders of the Minister in this case are not applicable and have no legal bearing.

Cohn, who was in the minority when he ruled in favor of Brother Daniel here restates his words from that case:

> The registration officer is neither a secular judge nor a religious authority; he is merely a registrar and registers only that which the citizen required to register tells him. Registration in the Register of Inhabitants that some person is Jewish by "nationality" . . . merely proves that that person has requested the registration officer to register his nationality as Jewish. . . . In other words, registration is nothing more than evidence of a declaration made before the registrar. It is unnecessary to add that such a declaration and the registration effected thereto cannot bind any judicial or administrative authority before which the actual question what are the nationality and religion of the particular applicant may arise.[55]

He also draws a comparison between this case and *Funk-Schlesinger v. Minister of the Interior* (1963), wherein the Court ruled that the Minister may give directives to registration officers. In that case, such directives did not, in effect, give the power to decide a person's nationality to the officers; rather, they instructed officers that they did not have the power to decide judicial or religious questions and

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[55]Special Volume, p. 41.

that such power could not be given to them by the Minister. Their task was only to record what was told to them, and to notify the declarant that that was all that he was doing and that the registration was not judicial proof of anything except the fact that the declarant performed the duty of registering. The officer also had to make clear to the declarant that secular and religious courts and administrative authorities had the right not to accept the registered particulars as facts; and that,

> after warning has been given by the registration officer as aforesaid, he must register the particulars delivered to him:
> (a) if he sees no apparent reason for doubting the particulars delivered to him;
> (b) if, where doubt has been created in his mind in respect of some particular and he has required evidence thereof, the particulars have prima facie been proven to him;
> the registration officer must always bear in mind that he is no judge or decision-maker [*posek* in Hebrew: rabbinic decision-maker] but only a registrar, and he records simply what the citizen obliged to register tells him.[56]

Justice Cohn notes, though, that times and methods have changed: where once directives gave limits to the Ordinance and warned registration officers not to exceed their powers, new directives (issued as early as 1960) gave "procedural instructions" to the officers for recording information given to them. Cohn says that the situation is as if what the declarant provides is no longer of any importance (in fact,

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[56]*Henriette Anna Caterina Funk-Schlesinger v. Minister of the Interior*, H.C. 143/62, Piskei Din 17 (1963), p. 246 in Special Volume, pp. 41-2.

it is sometimes totally ignored); the officer is now free to register the information as he sees fit, even if what he registers is contrary to that of what the declarant notifies, as long as he follows the directives provided to him by the Ministry. The following, notes Cohn, is part of the "procedural instructions:" "In the case of children born to a Jewish father and non-Jewish mother, the items 'religion' and 'nationality' shall be entered according to the corresponding item of the mother."[57] Now even though these directives were not followed by the officer, the registration as made and even as it should have been made following the directives, were both not according to any declaration by the citizen. In fact, Shalit opposed the registration as made (and would have opposed it were it made in accordance with the directives) and what was registered was done so against his wishes.

Justice Cohn repeats again that the Court has ruled that a registration officer must register a person according to the responses given to him by that person. Though the officer may refuse to register a particular entry, he may not go against the wishes of a declarant unless directly given the power to do so by the Legislature. According to Sections 15 and 16 of the 1965 Population Registry Law, an authority (secular, religious, or administrative) must notify the registration officer if the name, religion, or personal status

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[57]Special Volume, p. 42.

of a resident has changed. However, it was not until the 1967 Population Registry (Amendment) Law that the officer was allowed to make any changes without direct notification by the resident. Thus says Cohn, lacking explicit permission from the Legislature, an officer may not register any particular, even if proven to him to be correct by a Court of law; rather, regardless of its correctness, he must leave the entry as is.

He also notes that the 1967 Law allows the Chief Registration Officer to oversee the correction of a clerical error or omission which may have been made in the Registry; but these are the only changes which may be made, irrespective of any informal "directives" or "procedural instructions." Since, says Cohn, the Legislature did not allow the officer to correct other than clerical errors, it did not care that an entry would remain incorrect; its main concern was only that an entry should never be made against the wishes of a resident. In fact, Section 19D of the Amendment provides that an erroneous entry may only be corrected by means of an application by the resident, who must provide a public document stating that the entry is incorrect. Once again, notes Cohn, the Legislature showed its indifference to an incorrect entry remaining as is in the Registry. Finally, Cohn notes that while Section 19E(a) allows an officer to register on his own an item which is incomplete, or in conflict with another entry or public document, as long as the resident is allowed to be heard and to present his own

evidence, Section 19E(b) states that nationality, religion, and personal status are not included in this provision. He summarizes in crisp form the extensive, detailed, and technical discussion presented heretofore:

> In other words, if the "nationality" of a particular resident (or his child) is not recorded in the register, the registration officer may not enter the same unless the person agrees to the proposed entry or the registration officer obtains a judgement of the District Court; and for this matter it is immaterial whether by virtue of instructions or directives he received from the Minister of the Interior, or out of his abundant knowledge of the law or his erudition in the Talmud and the Poskim, the registration officer knows (or thinks he knows) with certainty what is or is not the "nationality" of the person concerned.[58]

Thus the issue is thus the meaning of the Population Registry Law. Cohn's view is that the only relevant information is that which is supplied by the applicant, nothing else: not the directives of the Interior Minister, nor any secular, legal knowledge the registrar may possess, nor any religious, legal knowledge the registrar may possess.

It is worthy of note that Cohn lists these sources in decreasing order of relevance, since one might think that the registrar would be most likely to follow any directives given him first, then follow his own personal awareness of Israeli Law, and finally to apply a "foreign" legal system (in this case, the Talmud and Poskim). In doing this, Cohn invites the reader to share his own personal view that traditional Jewish Law is largely inconsequential and extraneous to the

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[58]Special Volume, p. 44.

legal system of the modern, secular, Jewish state, as is English common law, which like the halakhah constitutes a significant part of the background of the Israeli legal system, but which is certainly not the Law of the Land in the State. Naturally, there are others, as we will see, who argue that halakhah is not irrelevant, especially in terms of defining the word "Jew" with respect to Israeli Law and policy.

Additionally, it is interesting to note here that Justice Cohn is in line with his opinion in the Brother Daniel case when he argued that the secular Law should decide a Jew's status in the State of Israel, not the old "Galut" way of thinking or old self-perceptions which for him became of no use once the revolutionary event of the establishment of the State occurred.

Justice Cohn continues his analysis of the laws which apply to this case: since, he says, any given entry into the Registry could conflict with religious laws or other secular laws, the Legislature was most wise in declaring (in Section 3 of the 1967 Law) that the registration of nationality, religion, and personal and marital status should never be immediately apparent evidence of the accuracy of those entries. Moreover, the Law (in Section 40) provided that no Registry entry may effect laws with respect to the prohibition or permission in matters of marriage or divorce. Thus, says Cohn, did the Legislature make clear its desires with respect

to registration itself -- that a resident merely comply with his duty -- and principally with respect to the limits of the powers of registration officers and their superiors. In Cohn's view, those in the Legislature did not give the power to register a particular to the Minister directly or by his order to the officer, not because they were unaware of future problems that were likely to arise, but because they sought to solve these problems the best way they could -- that being to say that an entry in the Registry is not proof of any particular fact being true.

Once again, Cohn reiterates his position that an officer may only register a person's nationality according to that person's own personal disclosure; irrespective of the officer's own beliefs and regardless of any directives given to him by his superiors, he may only record that which is stated directly by the citizen or indirectly through a judgement of the District Court. But what happens, he asks, if a registration officer refuses to record the declaration of the resident? What if he does nothing at all, records nothing, and in essence folds his arms? Though he is prohibited from making an entry of his own volition, how do we know that the officer is bound to record something that he believes to be false? First of all, Cohn says that the proof is in the fact that, notwithstanding the registration form submitted to him by Shalit, the officer entered the words "Not Registered" on the son's certificate. Since the document is the resident's,

and not that of the officer, he is not allowed to make any changes to the entries as submitted to him on the form. Secondly, although the officer may try to induce the resident to correctly fill out the form, if he is unsuccessful, he may only try to get a judgement from the District Court; he cannot, on his own, change any entry given to him by the declarant. Third, says Cohn, "the 'power' to refuse an entry that involves an offence does not need to be expressly stated in the Law; it is self-evident and given to every authority carrying out administrative functions."[59] Thus a notification made in "good faith" and for the purpose of fulfilling the duty to register must be accepted by the officer, even though he does not have to accept a knowingly false entry according to Section 35(b) (2) of the 1967 Law.

Even if, says Cohn, someone presented an argument before the Court that showed that the Shalits knowingly gave false information regarding their children's nationality, or that their notification was not made in "good faith" and for the purpose of fulfilling their duty to register their children, that argument would have been rejected since the entry of "Jewish" for "nationality" is not likely to mislead anyone. That is because of Sections 3 and 40 of the Law which stated that registration is not proof of truth, because notification was given with the understanding that it was the truth since

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[59]Special Volume, p. 46.

the Shalits believed that their children really were Jewish with respect to their nationality, and because their sole purpose in registering their children was to fulfill their duty to do so under the Law.

Finally, Justice Cohn adds a postscript to his opinion, having read the opinions of his fellow justices, and not wanting his silence to be taken as consent. He says that those who side with the Minister of the Interior "do not go beyond the negative," and in effect leave the children without nationality; they do so without regard, only caring that Jewish "nationality" remain pure. Such a decision, though, does not meet the standards of the Law since "nationality" as mentioned in the Law must not only be applied to Jewish nationality: the word *l'om* in the Law as applicable to the Jewish State must be exactly the same as applied to every other nation. Cohn argues that the Knesset intended nothing special vis-a-vis the Jews, and to say (as does Jewish Law) that "nationality" and "religion" are one in the same, is to totally dismiss the interpretation of the term "nationality" as it is used in the Law, which is of a secular state and which does distinguish between the two.

> The matters upon which the Courts are ordered, and therefore allowed, to decide according to Jewish Law, or according to the laws of any other religion, are expressly laid down with particularity by the Legislature, and where the Legislature has not insisted upon the applica-

> tion of religious law, the Court may not apply it; for else not trace of the rule of law will remain.[60]

In his argument, Cohn attempts to designate the halakhic definition of "nationality" as an unwarranted intrusion of religious law into secular law. In doing so, he assumes that the Israeli Legislature intended to define in its legislation the term "nationality" differently from that of the traditional Jewish definition, and that the Legislature wanted to recognize as "Jewish" certain individuals whom centuries of Jewish Law and practice have regarded as Gentiles. Such assumptions, though, make the Zionist movement and the State of Israel seem as revolutionary events in Jewish history wherein there was a radical departure in defining Jewish identity. As we will see, his colleagues point out their own version of the meaning and significance of the Jewish national movement.

Yes, says Cohn, Jewish religious law does have its own place of honor, but in his mind, words used by the Legislature in the Law of Return, in the Registration of Inhabitants Ordinance, and the 1967 Law must be interpreted and implemented according to secular, not religious, law.

In finally rendering his opinion that the order nisi be made absolute, Justice Cohn once again notes that the issue of the children's nationality did not arise before the Court, and thus he did not comment upon it. Moreover, since the said

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[60]Special Volume, p. 47.

issue did not come up before the registration officer, it is only just that he be prevented from infringing upon the rights of the petitioners by assuming powers that were not given to him.

In light of the political importance of this case, though, it might be said that this sort of reasoning and interpretation is rather narrow. Cohn attempts limit and define this case and its issues as "who has the power to do what." His opinion implies that the case and the broader issue of Jewish identity is simply dependent upon the proper interpretation of a few old laws. Of course, the definition of the term "Jew" is not given in his opinion, and perhaps that was his intention: to render a decision in this case and to solve the legal problems which it presented, without addressing the broader and more controversial question: "Who is a Jew?"

iii.

The Opinion of Justice Moshe Silberg

Justice Silberg considers this case and its main issue to be of supreme importance and significance -- perhaps the most important case with which the High Court has ever dealt. In saying this, he employs language which parallels Scripture itself in order to convey its epic importance. This is in striking contrast to Justice Cohn's dry and technical use of language in his attempt to play down the importance of the case: whereas Cohn presents a mostly "legal" argument and shies away from the controversial and political issues, Justice Silberg declares that this case demands of the Jewish people and Jewish State a deep self-examination into their essence as a people and a nation as part of the rebuilding of the Jewish State. This issue lies far beyond simply reading and interpreting the applicable laws: the question goes to the heart of Jewish national existence. In contrast with Cohn, it is not a "legal" question, but a wholly "Jewish" question, certainly one unable to be discarded as simply a matter of regulation.

He admits that, if asked before the case ever got to the Supreme Court, he would have said that it was too big for them: "a shoe larger than the foot," he says, paraphrasing the Talmud. That is because the true defendants in the case are, in his view, not merely the Government or the State of Israel, but the entire Jewish people; and only a sample group from

world Jewry, if such existed, would be able to solve the issues in this case. But since such a group does not exist, and since the case has been brought before the Court, he says that it is their duty to attempt to discover the "Jewish attitude" with reference to the case at hand.

This is not surprising coming from Justice Silberg, for it was he who in his opinion in the Brother Daniel case argued for the concept of "historical continuity." There he said that although the halakhah considers Brother Daniel a Jew, the "ordinary meaning" of the term by the average Jew on the street would not include such a person who has become a Christian, and thus he ruled against Brother Daniel. In this case, Silberg will make the same argument (perhaps not as effectively), but arrive at a different conclusion: he will argue that the halakhic standard is the proper one for historical continuity. (In the quote below, he indicates that in this case Israeli Law cannot depart from Jewish Law in defining a "Jew.") He also attempts to distinguish between this case and *Brother Daniel*, for he knows that ruling against Shalit, having ruled against Rufeisen, presents to the readers of his opinions and the public at large the appearance of hypocrisy.

Now whereas Justice Cohn exclusively focused on the applicable laws to this case -- the 1949 Ordinance, the 1965 Law, and the 1967 (Amendment) Law -- Justice Silberg totally ignores these as being irrelevant to this case. Moreover, the

case is much too important to merely focus on the technicalities of interpretation -- Cohn's approach, which he calls "easy," since it would allow the court to avoid having to confront the ominous issues which Silberg sees as crucial and central to the case. In short, the problems of this case go far beyond those of the Shalit family:

> The problem in all its magnitude and gravity is the substance of the concept "Jew:" can a person belong to the Jewish people without being at the very same time an adherent of the Jewish religion. . . . Briefly, it is whether some test, other than the halakhic test, exists for determining the national identity of a Jew. . . . We must decide whether the first respondent [the Minister of the Interior] must register them as Jews by reason only that their parents -- both father and mother -- regard themselves as Jews and intend to bring up their children in the spirit of Israeli Jewry in the sense and with the content which they attribute to this abstract idea.[61]

Before addressing these questions, though, Silberg pauses to interject comments on what he knows will be for some people a sign of hypocrisy in his argument: in *Rufeisen*, he and many of his colleagues wrote their decisions based on the fact that the Law of Return was a secular law; so why should not the same reasoning be employed in this case with respect to the Population Registry Law, also a secular statute? He answers this question by distinguishing between the two cases: in *Brother Daniel*, even though he was a Jew according to the halakhic standard, he was considered a Gentile by the ordinary meaning of the term "Jew." And since it was the Knesset, the

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[61]Special Volume, p. 49.

legal representative of the people, who created the Law of Return, the Court was bound to interpret "Jew" in a popular, secular (i.e. non-halakhic) manner. However, in this case, the circumstances are different: the term "Jew" does not appear in the 1965 or 1967 Laws, but rather the term "nationality." Thus the question is whether or not in the space reserved for "nationality" a child born of a Jewish father and non-Jewish mother may be registered as a Jew. Since, as Silberg argued in *Rufeisen*, there is no widely accepted practical definition of the term "Jew" other than the halakhic one, it is that standard which must be applied to the requirement to register a person's nationality in the Registry Law, notwithstanding the fact that it, too, is a secular law.

Returning to his original questions, Silberg distinguishes between the two possible tests for determining Jewish status: the "inner affiliation" or "subjective" test as proposed by Shalit, and the halakhic or "objective" test as proposed by the Attorney General. He says that these distinct criteria must be weighed against one another "without any preconceptions" or "prejudice." However, Silberg does give more weight to the halakhic test in noting that it has been the long-accepted method for determining Jewish status. He says that even the historian, who may reject the traditional-religious interpretations of the Torah as given by the Rabbis of old in the Talmud, must concede the fact that determining a child's status according to the mother dates

back at least to the time of Ezra: "Now then, let us make a covenant with our God to expel all these women *and those who have been born to them* [my emphasis], in accordance with the bidding of the Lord and of all who are concerned over the commandment of our God, and let the Teaching be obeyed. (Ezra 10:3)[62]

Next, Silberg moves on to the issue of "nation" and "nationality." What is that shared bond, he asks, which ties people together into a single ethnic group? Although some may theorize that such a question cannot be answered, Silberg notes that in this case, both parties agree that the shared bond is people-hood or nationality, which are one in the same. This, he says, is correct in light of the fact that friend and enemy alike both characterize Jewry as a people or nation. (He notes Esther 3:8: "and their laws," said Haman, "are diverse from those of every people.") The two terms are also synonyms and used in parallels in the Bible: "Attend unto me, My people, and give ear unto Me, nation." (Is. 51:4); "He subdues people under us and nations under our feet." (Ps. 47:4); "Peoples shall curse him, nations shall execrate him." (Prov. 24:24)

Thus the remaining question is how and by which characteristics individual members are to be identified. Should the usual halakhic test be employed, or should, as Shalit argued,

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[62]New Jewish Publication Society translation.

connection to Israeli-Jewish culture and its values be used to determine a (non-halakhic!) Jew's national identification? Shalit argued that his son (then four years old) and daughter (then one year old) should be registered as belonging to the Jewish nation since, "although not members of the Mosaic religion (nor of any other religion), [they] are of Israeli-Jewish affiliation and brought up in this spirit."[63]

Responding to this, Silberg says that had he wanted to immediately dismiss the petition, he would have done so on the grounds that it was unclear how Oren and Galia themselves (now being only four and one respectively) would identify with the Jewish people, if at all, once older and able to think for themselves. He says that there is "no guarantee" that Oren and Galia will follow the maxim from Proverbs 1:8: "Hear, my son, the instruction of your father, and forsake not the teaching of your mother." They may in the future come to hate their "synthetic Jewishness" and prefer instead to be Gentile, Canaanite,[64] or devotees of the "modern cosmopolitanism" of the New Left (what Silberg fears the most because the chief sin,

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[63]Paragraph 5 of his petition, Special Volume, p. 51.

[64]A somewhat derogatory name given to a small group of Jewish writers and artists who became visible beginning in 1942. They pushed for a "Hebrew" nation instead of a "Jewish" one in which all native-born Israelis (including Christians and Moslems) and immigrants who wished to join them would be included. They rejected the Judeo-Christian-Muslim view of history and favored a return to consciousness of those different ethnic groups which inhabited the land prior to the three religions.

in Silberg's view, of the New Left is its rejection of ethnicity and national feeling by Jews in favor of a mushy "one-worldism.") Silberg states that it is absurd to think that, as the Shalits argued, the children are old enough to know and understand what their national identity is and where the center of their lives lays. The "subjective" test, then, fails in his view since success cannot be determined until the children have grown; and even then, a test based on personal criteria will fail. In fairness, Silberg's adversary on this issue, Justice Cohn, never proposes a "subjective" test to determine Jewish identity. He focuses only on the declaration of the parents as to the children's identity and the fact that the registration official must record only that which is reported to him. These are clearly objective matters. On the other side of the issue is Justice Silberg, who wants to force the Court to address the subjective nature of nationality, and more specifically, Jewish nationality.

Now even though Silberg believes that the above stated facts alone are enough to dismiss Shalit's case, he does not base his decision on these grounds -- and that is a good thing, since there is really "no guarantee" that any child, halakhically Jewish or not, will adhere to the proverbial maxim which he quoted. Any Jew (or non-Jew for that matter) can grow up to hate and rebel against all that their parents stand for and represent, irrespective of how they are defined,

characterized, or registered by others, including the State in which they have always lived.

So Silberg bases his decision on other, more convincing and less obviously arguable, rationales. He says that since (at that time) four-fifths of the world's Jewish population live outside of the Land of Israel, and since those who do live in Israel cannot be exclusively counted as those making up the Jewish nation -- a nation which Silberg says does not even exist -- any identifying characteristic that is to define the Jew must include also those who live abroad. He interprets the word *l'om* as used in Israeli Law and as intended by the Knesset to mean "membership in the Jewish people as understood by all the Jews." This is again in contrast to Justice Cohn who maintains that because the Knesset is a secular, legislative body, its laws must be construed in a secular-legal manner, not according to "Jewish" (read: religious) standards. In light of the fact that the Knesset never expressly stated that the definition of Jewish "nationality" had to correspond to the halakhic or any other measure, it is thus reasonable to assume, in Cohn's view, that the Knesset was satisfied with the term being defined according to the declaration of the applicant. Justice Silberg, on the other hand, cannot comprehend a non-Jewish definition of Jewish nationality, even with respect to secular, Israeli Law.

In refuting Cohn's opinion in the *Brother Daniel* case (and thus in the attempt to underlie his opinion in this case)

that the Zionist movement was so revolutionary that it required a revised conception of Jewish identity, Silberg notes that the establishment of the State itself and the winning of the Six Day War and all that followed from it gave all Jews everywhere a sense of pride and belonging, while he rejects the notion that because of all of that, Israeli-Jewish nationality should be ipso facto Jewish nationality. Such a secular nationality does not exist; and even if it did, being of secular, Israeli-Jewish nationality (of which there is no such thing) would not entitle a person to be registered as a Jew in the Population Registry since having just arrived unassimilated to secularism, a person declares him/herself to be of Jewish nationality.

Silberg notes that the Declaration of Independence of the State of Israel designates it as a country of immigration: "This is the highest and all-embracing principle of our Zionist religious faith and without it there is no meaning to our suffering in our land."[65] He says that future sources of immigration cannot be known; from where they will come and with what beliefs they will bring remains a mystery. Here again, he employs biblical language and quotes a passage which stresses the uniqueness of the Israelite people in arguing that Shalit is simply wrong: there is just no such thing as

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[65]Special Volume, p. 54.

Israeli-Jewish nationality separate and apart from the historic people of Israel.

Thus he says that Shalit made two mistakes: one, in ignoring the fact that the teaching of the Jewish religion occupies an honorable place in Israeli society and that religion influences the views of all the people; and second, in not understanding or grasping the reality that Israeli youth have "swung to the right," especially since the June 1967 Six Day War: "To say that our young people have freed themselves from all attachment to the inheritance of their progenitors is therefore jejune, superficial, defamatory, and damaging."[66] It is, on the contrary, the connection to the past and that heritage upon which rests Israel's claim to the land. Though physically exiled from it for 1900 years, the spiritual presence of the Jews did not lack for even a moment. Thus, says Silberg, to divorce Jewish nationality from its religious substructure is to commit treason by removing the Israeli-political claim to the land.

We see here that like Cohn, Silberg composes a narrative of modern Jewish history (albeit the antithesis of Cohn's narrative) in order to justify his decision in this case. He paints the post-1967 Jewish youth as being unmistakably (if not religiously) Jewish, and the war itself as a turning point in the history of the Jews. The war, in his account, has

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[66]Special Volume, p. 56.

caused young Israelis to become aware of their Jewishness (he quotes from a book containing personal accounts of Israeli soldiers during the war), connected anew to the heritage of their ancestors. Though their lifestyle is not totally rooted in Torah and Mitzvot, there is nevertheless significant religious content and values. Such a narrative points out the great error of Shalit's argument, that a substitute "Hebrew" identity can be fashioned free of religious influences, especially since the Law of Return itself proves that the meaning of the word "Jew" cannot be separated from its Jewish spirit: by saying "any Jew (*y'hudi*) is entitled to immigrate," the Knesset must be implying a Jewish national identity (*yahadut*) different from an Israeli national identity which could not have even existed when the Law was enacted.

Silberg is emphatic that if the "Shalit precedent" is allowed to stand as law, others (Christians, Moslems, and converts out of Judaism) will come forward claiming to be of Israeli-Jewish nationality and wanting to be registered as Jews in the Jewish State. He says that in the Diaspora, where conversion and intermarriage are rampant, the exclusion of apostates from the Jewish community acts as an impediment for those who might convert but do not, fearing exclusion from their community. Were Shalit's petition to be granted, Silberg says that this barrier will be lost and such apostates will be "purified," thus leading to the disintegration of the Jewish community structure in the Diaspora.

While on the surface this may seem to be a logical concern, it is really nothing more than a slippery slope argument since while in the Jewish State, one can live a secular life and remain a Jew (in the "nationalistic" sense), in the Diaspora, Jewishness is primarily defined along religious (not national) lines. Thus to be of Israeli-Jewish nationality (of which as we have seen there is really no such thing) outside of Israel means nothing. Moreover, even Shalit acknowledges the fact that he intends to raise his children as Jews (albeit secular, Israeli Jews), not as religious Christians or Moslems or as apostates.

Silberg notes that even the Reform movement in America (let alone the Orthodox and Conservative movements) requires that a non-Jew undergo a process of conversion before becoming a Jew, thus becoming a member of the Jewish religion before being counted among the Jewish people: The CCAR Rabbi's Manual (1949 edition) instructs every prospective convert to be asked: "Do you promise to cast in your lot with the people of Israel amid all circumstances and conditions?" and then issued a certificate announcing that so-and-so has joined the Jewish religion. He also notes what is taken to be Ruth the Moabite's statement of conversion (Ruth 1:16): "your people shall be my people, and your God my God," and says that, with respect to the State of Israel, this is the halakhic test. But we must ask whether the situation in Israel was the same as it was in North America, where Judaism was primarily

defined religiously (and nationally), or in biblical times, when the status of nationhood depended upon the relationship between the Israelites and their God. Obviously, the modern situation in Israel was different and unique from that of the United States and biblical times.

Silberg thus continues to argue that the halakhic test is the easiest and most simple one to use to determine Jewish nationality since it may be applied to every Jew from every corner of the earth. Interestingly enough, this was not his argument in *Brother Daniel* where in spite of the halakhic test which declared Rufeisen to be a Jew, he went along with the opinion of the people who declared him not to be. Be that as it may, Silberg defends the halakhic test from two challenges proposed by Shalit. In the first instance, the petitioner compares the halakhic test to the definition of Jewish status as employed by the Nazis. Silberg is clearly troubled and angered by this line of reasoning: "A Jew who accuses members of his own people of Nazism -- is there any greater masochistic pleasure than this?"[67] He then defeats Shalit's argument by saying that on the one hand, the analogy between the halakhic requirement of a Jewish mother and the single Jewish grandparent requirement of the Nazis is "absurd beyond all example," and on the other hand, whereas the Nazi definition was designed to distinguish an inferior race from the "ideal"

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[67]Special Volume, p. 60.

Aryan people, the halakhah does not consider race as the determining factor for inclusion in the Jewish nation. (Silberg notes a Responsum of Maimonides which ruled that a convert of African or Indian descent is still considered a member of the Jewish people).

The second of Shalit's two challenges which Silberg calls "more impressive and really captivating:"

> Can the son of a Jewish mother, who joins the El Fatah terrorists and strives with all his might and main to destroy Israel, be called a Jew by nationality, whereas a person, the child of a non-Jewish mother, who sheds his blood for this country and is prepared to sacrifice his life for it, is to be held a gentile, a non-Jew? Is this conceivable? Where is the plain, simple logic?[68]

One might think that, as in *Brother Daniel*, the person-on-the-street answer to this question would be no; but in not wanting to expand the person-on-the-street standard to which he had to resort in that case, Silberg here says that the "Jewish" El Fatah terrorist is (and would be according to the person-on-the street definition) still a Jew, though a "despicable, wicked Jew," and that the child of a non-Jewish mother is still a non-Jew. The status of Jewishness, he says, is not a reward or honorary degree for working on its behalf; rather, it is a religious-legal classification which has certain qualifications and conditions -- qualifications and conditions which the Shalit children do not meet.

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[68]ibid.

Justice Silberg notes that Oren, in fact, was circumcised, though not for religious purposes, but for reasons of convenience. He says that had the Shalits not been such "atheistic fanatics," they could have had their children converted without compromising their own principles and without causing all the problems which came along with the court case. According to halakhah (*Ketubot* 11a: Maimonides, *Hilchot Issur Bi'ah* 13:7; *Shulchan Aruch Yoreh De'ah* 268:7), a child may be converted on the authority of the *bet din*, which means that the religious precepts need not necessarily be accepted by the parents or the child. And what is more, a child who is converted on authority of the *bet din* may retract his conversion upon reaching adult age, thus voiding the conversion retroactively. This, says Silberg could have been a viable option for the Shalits and their children had they been less fearful and stubborn and been a little more flexible and knowledgeable.

To call the couple "fanatics," though, seems a bit unfair, although it is understandable in light of all the political turmoil which this case caused. Perhaps Justice Silberg thinks that there is some political drive behind the Shalits, and so his use of "fanatics" is meant to apply to those groups which he opposes more than it is meant to apply to Benjamin and Ann, who hardly see themselves as "fanatics." They merely want their children to be registered as Jews in the Jewish State by virtue of having a Jewish father, just as

any child born of a Jewish mother and non-Jewish father would be so registered. Moreover, it is doubtful whether the Shalits would be willing to avail themselves of the solution which Silberg proposes since they already consider their children to be Jews, thus making conversion to Judaism unnecessary.

In concluding, Silberg reflects upon his words from *Brother Daniel* in saying that to redefine Jewish national identity is to bring about the end of Zionism and Jewish heritage and history. To grant the Shalit petition would be in effect to create a new culture and to disregard the culture of the past 2400 years which defined Jewish national identity, not as secular, but as religious. Though his is not a purely "legal" argument, Silberg still believes that the words "Jew" and "Jewish identity" as employed in Israeli laws cannot be simply understood as secular terms; they must be read against the backdrop of history and experience which gave them, Zionism, and the Jewish State meaning and substance. Thus does Justice Silberg rule that the order nisi be discharged and the Shalit petition dismissed.

iv.

The Opinion of Justice Yoel Sussman

Following an overview of the facts in the case, Justice Sussman attempts to define the pertinent issues. It is immediately obvious that Sussman is disturbed by the pressure being placed on the Court to rule against Shalit. He specifically mentions the letters, some on official stationary of the State, received at his residence, and he clearly holds the "anti-Shalit" camp responsible for such unethical (if not illegal) actions. His entire opinion is shaded by this undue pressure in that he takes the straight "legalistic" approach to the issue, perhaps in the attempt to show his displeasure with the (presumably religious) radicals who would rather see the issue settled on an emotional level without regard for the legal process. He says that even though the newspaper headlines on the case say it is a "Who is a Jew?" issue, and despite the letters stating that he and the other justices were not competent to address such an issue, Sussman says that "Who is a Jew?" is <u>not</u> the issue in this case. The present case is not about who is a Jew, but whether the Minister of the Interior and the registration official must follow the directives as stated in the order nisi, and register the children as being of Jewish nationality and without religion. In this manner, his opinion is very much like that of his colleague, Justice Cohn.

The first question Sussman addresses is: What is the duty of the registration officer under the 1965 Ordinance and the 1967 Law? As regards his responsibilities concerning the registration of the son, Sussman (like Cohn) follows the law as laid down in the *Funk-Schlesinger* case, where the officer is bound to register particulars according to what he is notified. With respect to his responsibilities concerning the registration of the daughter, although the 1967 Law did not specifically address his duties, nothing has changed since the Ordinance, and the officer is still required to register an individual according to the notification given.

What if the information supplied is unsatisfactory or unrealistic? Again, says Sussman, *Funk-Schlesinger* upheld the Ordinance directive which allowed the officer to ask for proof, an allowance which did not change when the Law was enacted. However, neither the aforementioned case, nor the Ordinance or the Law give to the officer the legal power to verify facts given to him. Since a citizen is presumed to be telling the truth, the officer is thereby bound to register the particulars as given to him, especially since the registration is for registration purposes only and not for proof of truth. The only exception is where a particular as given is clearly incorrect -- the case where an adult seeks to be registered as being five years old. But even in such an instance, the officer may not register the age of the person according to his own opinion, he may only refuse to document

the answer provided him. Thus, says Sussman, the changes which the registration officer made to the notifications regarding the Shalit children were done so illegally. Later on, he takes up the issue whether the officer must record an actual response, but he makes it clear here that the officer may not alter any provided answer. He adds that what the officer did enter for religion, "Father -- Jewish, Mother -- non-Jewish," does not answer the question as to the religion of the person being registered since the religion of the person's parents is not of issue. In concluding his answer as to the duty of the registration officer, Sussman says that the officer must record that which is told to him unless there is a reasonable doubt as to the accuracy of the information as given.

The next question Sussman addresses is: Were there reasonable grounds for assuming that the notification was not correct? In refusing to register the children per the parent's notification, the officer stated that he was following directives issued to him by the Ministry of the Interior on January 1, 1960 (which invalidated directives given March 10, 1958). Those directives are as follows:

> Where children are born of a mixed marriage, the particulars of religion and national affiliation shall be registered according to the following directives:
> (a) in the case of children born to a Jewish mother and a non-Jewish father, the children shall be registered as "Jewish" under the items "religion" and "national affiliation;"
> (b) in the case of children born to a Jewish father and a non-Jewish mother, the items "religion" and "national

affiliation" shall be entered according to the corresponding item of the mother.
Where the parents object to the registration of the children under the items "religion" and "national affiliation" according to the corresponding item of the mother, the children shall be registered under the said items according to such other non-Jewish religion and national affiliation as the parents shall notify. Where the parents object as aforesaid and do not notify items of another non-Jewish "religion" and "national affiliation" of the children as aforesaid:
(1) "Father -- Jewish, Mother -- non-Jewish" shall be entered under the item "religion" in the questionnaire;
(2) the item "national affiliation" in the questionnaire and in the identity card shall not be completed.
Where it is proved that the children have been converted by a competent *bet din*, "Jewish" shall be entered under the items "religion" and "national affiliation."[69]

However, says Sussman, these directives are merely administrative, not legal, guidelines. Where they are in accordance with the law, the officer must follow them, but where they differ from the law, the officer may not use them as a basis for acting or refusing to act.

Before deciding whether there were reasonable grounds to assume that the children were not of Jewish nationality, Sussman discusses the issue of the purpose of registration itself. Briefly, Sussman notes that the 1965 Population Registry Law like its predecessor, the 1949 Registration of Inhabitants Ordinance, is just that: a registration law designed to collect and detail statistical information. Even the then Minister of the Interior who introduced the proposal for the Ordinance, stated that its purpose was merely to be an "accurate index." Later, in the *Funk-Schlesinger* case, the

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[69]Special Volume, p. 78.

Court said that no entry in the Registry could be construed as being fact. Only when the Ordinance was replaced by the Law did a particular entry, excluding religion and national affiliation, serve as proof for correctness. With respect to religion and national affiliation, Sussman notes that the law has remained the same since 1949. As an aside, we might question the necessity for an "accurate index" which serves as no "proof of correctness" with respect to religion and national affiliation. And of what use is this "accurate" index if it can be challenged on the "Who is a Jew?" question? Perhaps the answer lies in the fact that the Court made different rulings at different times based on different circumstances. The original intent of the index may have been to portray an "accurate" picture of the population. But after that was challenged in court, its accuracy had to be then doubted. Only with another court case was the "accuracy" of the index upheld, although with the caveat of excluding two very important and telling items.

Back to Sussman's opinion, he also draws upon a 1964 pamphlet, entitled "Religious Issues in Israel's Political Life," (published by the World Zionist Organization, distributed by the Jewish Agency) which notes that even though the registration of a child may be contrary to the definition of Jewish status according to halakhah, this fact is of no consequence since the registration itself is only proof that a person has fulfilled his/her obligation to register.

Next, Sussman distinguishes between "objective" particulars, such as name, address, and sex, and "subjective" particulars, such as religion and nationality. During debates by the Council of State before enacting the Ordinance, an objection to the registration of religion was raised. In response, the then Minister of the Interior said, "If anyone says that he belongs to no religion, that needs to be registered. A person can be registered as a Jew by nationality, a Hebrew according to his language, and as a person without religion."[70] With respect to nationality, the Minister responded:

> If he thinks that he is without nationality, he may register: without nationality. If he thinks that according to nationality he is not an Arab or a Frenchman, an Armenian, or a Jew, he may state: of no nationality, and no danger will result from this, neither to the people nor to religion nor to the State.[71]

Sussman here appeals to legislative history and uses these statements to prove that a person's religion and nationality, save in exceptional cases, cannot be independently verified; thus they are "subjective" in nature and wholly depend upon the personal feelings of an individual. Since no further objection was raised regarding the Minister's explanations, and since the Ordinance was adopted unanimously, no "objective" test can be used to determine a person's religion or

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[70]Special Volume, p. 70.

[71]Special Volume, pp. 70-1.

nationality. Here Sussman is attempting to establish "original intent" by interpreting the words of the statute by looking at its legislative history. But his discussion is limited in that all 120 Knesset members did not voice their own personal opinions before enacting the statute. Beyond that, we might ask whether, in fact, the interpretation of the Minister of the Interior was correct in the first place. Sussman is obviously placing much weight on this man's understanding of the "original intent" of the law makers.

Sussman notes that the officer acted on the principle, "A person is not to be considered as being of Jewish nationality if the Jewish religion does not regard him as a Jew." He interjects that because of the rule, Rufeisen, even though converted to another religion, should still have been registered as a Jew. However, since the declarant does not have to base his notification on the "objective" test (following the halakhic principle just noted), the officer in this case acted upon an incorrect assumption, and thus his refusal to register the children as per the request of the parents was not based on reasonable grounds. With respect to the *Rufeisen* case, Sussman notes that the Ministry and registration officer, in not issuing him a *oleh's* certificate under the Law of Return and in refusing to register him as being of Jewish nationality, were denying the very principle upon which they professed to act. Notwithstanding Sussman's paralleling of the two cases, one could argue the opposite direction and

learn from the *Brother Daniel* case that the actions of the officials of the Israeli Government are not dictated by halakhah. Or, one could conclude that *Brother Daniel* served as a precedent, denying an individual the absolute right to declare his own nationality. Although Rufeisen declared himself to be a Jew, based upon a standard other than personal disclosure, the Court refused to grant him that right. By extension to this case, the Shalits could also be denied the right to base the registration of the nationality of their children on personal disclosure, on the basis of a similarly "external" measure of Jewishness. As is usually the case, how one interprets a court ruling is selective and beneficial only to the point trying to be made; alternate interpretations are usually either ignored or discounted.

Next, Justice Sussman takes up the issue, "rule of interpretation." He says that a term cannot have the exact meaning in every act of legislation in which it is used. To reinforce the point that the meaning of a word changes with circumstances and over time, he quotes from American Justice Oliver Wendel Holmes: "A word is not a crystal, transparent and unchanging, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."[72] Still, Sussman says that it is nevertheless reasonable to take the meaning of the

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[72]*Henry R. Towne v. Mark Eisner* (1918) 62 L.Ed. 372; 245 U.S. 418 in Special Volume, p. 74.

term "Jew" to be the same in the Population Registry Law and the Law of Return. Not to would lead to the impossible situation where a convert who immigrated to Israel would not be considered a Jew under the Law of Return, but after settlement, the same person would be regarded a Jew by nationality and be registered as such. Since the term "Jew" has multiple meanings, depending on the context and the specific purpose of a given law, it is therefore impossible to even ask the question, Who is a Jew? Because of the poverty of language a word must be interpreted in light of the purpose of the particular law. On one hand, it would be quite controversial to suggest that the historic definition of the term "Jew" could encompass the modern world-view, but on the other hand it would be equally controversial to believe that the Knesset intended to separate the word "Jew" from its historic moorings . So again, says Sussman, the only question applicable to this case is whether the registration officer was required to register the Shalit children according to the Ordinance and the subsequent Law.

But before answering what "Jew" means in the 1967 Law, Sussman first looks at the meaning of "nationality" for the purpose of the Law. He concludes that, "a group of people attain the rank of a nation by virtue of a complex of subjective and objective factors taken all together."[73] He gives the

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[73]Special Volume, p. 74.

example of two people, born of Jewish parents, who immigrate to Israel. One wishes to be registered as belonging to the Jewish nation, the other to England -- a subjective difference. Sussman says that the Law would not allow a registration officer to respect the wishes of the first and to disregard the wishes of the other. Both are entitled under the Law to be registered according to their notification.

In the end, it is not important to this case for the Court to determine the exact definition of a nation. The registration officer simply must record a declarant's statement, and to use the religious test as grounds for refusal is not allowed since the Population Registry is not based on that criterion. Like Justice Berinson in his *Brother Daniel* opinion (at page 73), Sussman refers to Dr. Arthur Ruppin who not only not regarded religion as one of the similar factors people must have to make up a people or nation, but also contended the subjectivity of a person's feelings of belonging to a given people or nation. Thus based on political and social theory which speak of nationhood in the abstract, "national affiliation" for Sussman is a totally "subjective" concept. In this way, the Jewish nation is just like the French or German nation. Since in this case, Shalit gave his responses in good faith, the January 1, 1960 directives of the Ministry to the officer are incompatible with the 1967 Law and are thus to be ignored. But in analysis of his view, we must ask whether the Knesset believed the Jewish nation to be

such an abstract concept when it enacted statutes relating to Jewish nationality. Are we in fact, "like all the other nations?" (After all, we say otherwise in many of our prayers!) It is doubtful whether this question could be answered in the affirmative by any of the world's religious or otherwise Jewish groups.

Nonetheless, Sussman further notes that the directives were changed in 1960 because of a change in the Ministry, and he points out that had the children been born before 1960, they would have been registered (as undoubtedly others were) as Jews on account of the earlier Directive: "anyone declaring in good faith that he is a Jew, who does not profess any other religion, shall be registered as a Jew." So it was not the law itself which changed in 1960, but the composition of the Government; and because of that, since the meaning of the law is constant, the mere political change in Government is not reason alone to effect a change in Government Law.

Thus in declaring that the order nisi be made absolute, Justice Sussman concludes that,

> (a) the registration officer is bound to effect registration in accordance with the notification of the declarant unless he has reasonable grounds for assuming that the notification was incorrect.
> (b) the religious test upon which the registration officer based his assumption that the notification was incorrect is not the determinative test for the purposes of registration of nationality.

(c) the facts relied upon by the petitioner justify his application, particularly as he followed directives made by the Government itself and in accordance with which it acted until 1960.[74]

[74] Special Volume, p. 77.

V.

The Opinion of Justice Moshe Landau

Justice Landau, who espoused the Zionist perspective in his *Brother Daniel* opinion, here begins with highlighting certain facts of this case: that while Shalit himself is a Jew, his wife is not, being born of two non-Jews and having not converted; that the notification of the son's birth was done in accordance with the 1949 Ordinance; and that the notification of the daughter's birth was done in accordance with the 1965 Population Registry Law which replaced the Ordinance. He notes that the registration officer acted in accordance with the directives given to him by his superior, the Minister of the Interior, in recording for the son, "Not Registered" for "national affiliation" and "Father -- Jewish, Mother -- non-Jewish" for "religion." For the daughter, the two categories were confused and "Not Registered" was entered for "religion," and "Father -- Jewish, Mother -- non-Jewish" was entered for "national affiliation." Even though the Minister and the District Officer agreed to change the daughter's registration to have it coincide with that of the son, this was unacceptable to Shalit, who wanted the children registered as he had reported. Thus, Landau takes up the two issues which comprised the heart of Shalit's appeal: the subjective approach -- that the registration must conform to the notification and that the officer is not competent to alter any entry; and the objective approach -- that the

children should rightly be registered as of Jewish nationality.

He begins with the latter, by noting that to register the children as being of Jewish nationality would have been obviously incongruous with halakhah, with which spirit the Ministry made its directives. Since halakhah does not distinguish between the Jewish religion and Jewish national affiliation, Landau says that the micro issue is whether in the Jewish State a person can be considered as belonging to the Jewish nation though not considered a Jew by the halakhah: "Hence this petition raises in all its sharpness the problem whether in the State of the Jews, that is, the State of Israel, it is possible for a person to be considered a Jew by national affiliation although the halakhah does not recognize him as a Jew."[75] It is noteworthy that in that sentence, he uses the word "Jewish" (*ha-y'hudit*) to modify both the word "State" and "halakhah" (which begs the question, what other kind of halakhah is there?). Is it Landau's intention, by means of this rhetorical language, to stress the indispensable singularity of Jewishness? That is, is there one definition of Jewish identity agreed to by all (secular and religious) in Israel, and is the definition of "Jewish" in the "Jewish" State the same as it is in "Jewish" halakhah. In addition, the macro question is, what is the proper place of halakhah

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[75]Special Volume, p. 79.

in the modern State of Israel? This has been a problem plaguing the Legislature since the establishment of the State, and now an issue for the Court.

Landau says that there are four distinct groups in the State: the two "extremes," Orthodox religious Jews and uncompromising free-thinkers, the "moderates" between these two positions, and non-religious people, "who do not observe religious precepts but recognize the singularity of the Jewish people, the intimate traditional connection between the Jewish people and its religion and the halakhah as a national possession."[76] This is a nice touch, for who would wish to be labeled an "extremist?" Rather, for hotly debated issues where there seems to be no public consensus, it serves one's debating and political purposes well to label oneself to be a "moderate." Moreover, since there is no uniform consensus on the issues which comprise this case, to be in a democratic system of government means that people have the right to their different viewpoints as long as those people put the survival of the society itself as its first goal. In a case such as this, says Landau, the law cannot help us. Since there is no consensus in this case, extreme views should not be tolerated, for they will destroy the democratic system. Consensus must be built, even though there is none on which to lay a founda-

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[76]Special Volume, p. 80.

tion, and a "moderate" position must be taken which will somehow satisfy the greatest number of people.

For the Orthodox Zionists, who take this question and halakhah in general to be a black or white, right or wrong issue, extremism is not even of concern. They do not see that there is a problem at all because for them, the halakhic test for Jewish status is the only test. There is no desire or need for them to compromise in order to build a consensus, since for them, the halakhic position is so clearly and objectively true. Landau tries to push this group, whose position is taken by Justice Kister in this case (see pages 144ff), into a corner and to make them seem on the fringe and unreasonable.

The second group advocates absolute separation between Religion and State. For them, since halakhah is merely past history, any definition of Jewish status must be divorced from religious content. This position was reflected by Justice Cohn in his *Brother Daniel* opinion (see pages 52ff).

Between these two extremes are the "moderates" who are concerned with the influence of the "religious right" who seek to impose their views upon the entire State. In this case, for example, the Chief Rabbinate attempted to sway the opinion of the Justices while the case was pending. In order to combat such religious zealotry, the moderates take an anti-religious position. Finally, there are the non-religionists, who despite their lack of observance want to preserve the

unity which has been characteristic of the Jewish people for over two thousand years. This, says Landau, was the position of Justice Silberg in this case, and was the argument used by the Attorney General in defending this case.

Next, Landau distinguishes between this case and the *Rufeisen* case: whereas in *Rufeisin* a majority of the population would have agreed not to consider Brother Daniel to be a Jew (the "ordinary" meaning of the term), in this case there is no conceptual conformity. Because of this situation, Landau says that a *modus vivendi* must be attained whereby on all sides an "essential compromise" is reached. He appeals to the words of David Ben Gurion (*Netzach Yisrael*, p. 157): "The ability to compromise is a vital condition for the existence of any community, organization, or State."[77] In that spirit, says Landau, the Court appealed to the Government to remove the singular point of controversy, namely, to remove "national affiliation" from the particulars of registration. However, when that recommendation was turned down, the controversy made its way into the Court system. What, asks Landau, can the Court do to solve such a debate that deeply divides the public? The answer: nothing!

Nevertheless, Landau follows proper procedure and seeks to base his opinion on Court precedent. He notes that the only legal definition of the term "Jew" is to be found in the

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[77]Special Volume, p. 81.

1953 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, which defined the term according to halakhah. However, there is no legal example for extending that definition to apply to "national affiliation" under the Population Registry Law. So Landau follows his own words from a previous case (*Zim v. Maziar*, 1963): "[a Court Justice] must faithfully interpret the accepted views of the enlightened public amongst which he lives,"[78] and he quotes two famous justices to the same effect from books by Professor W. Friedmann. In the first, he notes how an American Supreme Court Justice ruled on a case; and in the second, he quotes from Learned Hand, another American judge:

> Justice Holmes himself chooses a solution characteristic of a Judge in a non-totalitarian country, who is aware of his social responsibility, conscious of the political problem before him in the form of a legal dispute, but convinced of his duty of impartiality in the balancing of social forces and equally convinced of the duty of the judge to leave the shaping of the political principles of society essentially to the proper legislative authority. (Legal Theory, 4th ed., p. 403)[79]

> No doubt it is inevitable, however circumscribed his duty may be, that the personal proclivities of an interpreter will to some extent interject themselves into the meaning he imputes to a text, but in very much the greater part of a judge's duties he is charged with freeing himself as far as he can from all personal preferences, and that becomes difficult in proportion as these are strong. The degree to which he will secure compliance with his commands depends in large measure upon how far the community believes him to be the mouthpiece of a public will, conceived as the resultant

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[78]Special Volume, p. 82

[79]Special Volume, pp. 82-83.

> of many conflicting strains that have come, at least provisionally, to a consensus. (Law in a Changing Society, p. 45)[80]

For sure, both Holmes and Hand advocated the doctrine of judicial restraint in that they maintained that ambiguous legal principles are better left to the interpretation of the Legislature than the Courts. To be fair, though, we should point out, as does Justice Witkon, that the American Courts have indeed made important legal history (desegregation, for example), but Landau rejects this too, saying that because of the American constitutional system, they have had to step into areas which would have been better left for the Legislature.

In this case, Landau says that there has never been a consensus on this issue, and any "mouthpiece" which speaks will only produce more discord and division. He says the judges must act with restraint in this matter, for even if the Court did rule unanimously one way or another, such an ideological-political problem as this would not be resolved. Thus he is convinced that no Court-imposed legal solution exists and any hope of a judicial decision is a false hope: "Does anyone seriously think that nine judges learned in the law can dispose of such an ideological-political problem by a majority vote or even unanimously, after the well-known

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[80]ibid., p. 83

reference to the question by the Government to many Jewish scholars in 1958 came to nothing?"[81]

However, in the meanwhile, there has been a temporary solution, that being the debates, actions, and non-actions of the Knesset over the years with respect to the issues of this case. As Justice Sussman did, Landau recalls that with respect to the proposed Bill of the 1949 Ordinance, the then Minister of the Interior, Mr. Gruenbaum, explained that a person could register as having no religion and as being without nationality. But just because someone can be registered in the negative, asks Landau, does that imply that someone can register themselves or their children positively (that is, as being of Jewish nationality), irrespective of halakhah? For those who believe that subjective (non-halakhic) criteria -- a person's own revelation -- is acceptable for purposes of registration of national affiliation (like Justice Cohn), the answer is of course yes; but, says Landau, this would be an incorrect interpretation of Mr. Gruenbaum's statement.

After what must have seemed like endless debate, and following the resignation of two Government Ministers, the Knesset finally passed the following resolution on July 15, 1958:

> To appoint a committee of three comprising the Prime Minister, the Minister of the Interior and the Minister

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[81]ibid.

> of Justice to consider and draft directives for the registration of children of mixed marriages whose parents wish the children to be registered as Jewish. The Committee of Three shall obtain the opinions of Jewish scholars in this country and abroad on the matter and shall draft registration instructions which will accord with tradition common to all circles of Jewry, Orthodox and free-thinking, in all its trends, as well as with the special conditions of Israel as a sovereign Jewish State, where freedom of conscience is assured, and as the center for the in-gathering of the exiles.[82]

Subsequently, the Committee of Three decided that no registration officer may, on his own volition, register children of mixed marriages, and that all previous directives given on the matter are null and void. The noble attempt to come up with a common tradition, agreeable to all circles was not successful. The issue of the directives ended on January 1, 1960, when the Minister of the Interior, authorized by the Government, withdrew the March 10, 1958 directives. Such directives remained unchanged up to the time of the Shalit case.

The reason Landau goes to such length in discussing the issue of the directives and their discussion in the Legislature is because he is not content with the notion that silence implies consent. He is firm in upholding the position that the Minister had the power in 1958 (and has the same power at any time) to give directives to his registration officials. However, those directives may not conflict with any other applicable law. While Justices Cohn and Sussman believe that there <u>is</u> conflict, Landau takes the opposite position. He

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[82]<u>Special Volume</u>, pp. 85-6 from *Divrei HaKnesset*, Vol. 24, p. 2314.

says that his colleagues' views attempt to minimize the significance of the Population Registry, and they try to prove that the halakhic test, because it impedes upon a person's right to self-disclosure, is thus contradictory to the Ordinance and the Law.

Landau also reacts to the dry, technical attitude which his colleagues take on this issue:

> In truth, how can the value of registration be denied from the political and social point of view which is no less important than its value from the narrow technical point of view, after feelings in the Knesset have run so high on this very subject in the course of long and bitter debate?[83]

He also asks why so many people both in Israel and in the Diaspora seem to be so interested in the issues of the case, and why Shalit is so intent on winning if the sole issues are legal in nature. He notes that even though Justice Cohn supported the subjective approach in the *Brother Daniel* case, the majority opinion favored instead the objective approach (although using objective criteria in that case led to Rufeisen not being considered a Jew, while in this case objective criteria are assumed to be the halakhic approach).

Moreover, since there is a section of the population which subscribes to halakhah for determining Jewish identity, the fact that Shalit reported his children to be Jewish is a false notification. And it is not only the religious camp which holds that view, but there are also others (who are not

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[83]Special Volume, p. 89.

religiously observant) who use the halakhic test as a traditional-historic test (which he says may be understood as a non-religious "rule of biological relationship" in that "the identity of the mother is always certain"). Then there are those like Shalit who outright reject the halakhic test.

Far from solving who is right in this debate, Landau returns to his principle point: the issue of judicial neutrality and the lack of a right of one group to impose its views onto others. He says that his colleagues who want self-determination to decide who is to be counted as one of the Jewish people are making a circular argument since it is based upon an assumption that is not generally accepted. While in the *Rufeisen* case an appeal could be made to the attitude of the public at large, the same could not be accomplished in this case. This is a beautiful argument, since it permits Landau to rule against Shalit without having to answer the painful question of "Who is a Jew?" Since there is no legal consensus on the interpretation of the Population Registry Law, and since there is no national or public consensus as to whether the Shalit children are Jewish, there is no reason to enforce Shalit's interpretation over that of the registration official. Landau wants to show Shalit that Jewish identity as self-defined is nonetheless a particular (and obviously contested) definition. Since there are also many non-Orthodox Israelis who define Jewishness according to the halakhic standard, argues Landau carefully without placing himself in

one camp or the other, rejecting Shalit's position could not be interpreted as religious coercion as Shalit contended.

So Landau turns to the role of the registration officer and the Minister's 1960 directives. He notes that Oren was born while the Ordinance was in effect, and Galia after the enactment of the Law, but before the 1967 Amendment. Landau says that since Shalit's petition was brought in 1968, those who wish to focus on the importance of the matter of registration would stress that the only law which should apply to each child is that law which was in effect at the time of that child's birth, while those who wish to ignore the matter of registration would argue for the policy that a law should apply retrospectively regardless of changes. In any event, says Landau, since the 1960 directives were given before either child's birth, and since they were in effect up until the time of the case, they should apply to both children. The officer was thus justified in assuming that the information reported to him with respect to "national affiliation" was incorrect and also acted properly when refusing to record such information. Registration according to personal notification is only permitted in a case where there is the absence of a public document. Since the parents' registration was on file, it was thus a public document, and therefore, the officer was correct in noting the child's national affiliation based upon that of its parents. Landau says that the officer was correct in leaving the space blank ("Not Registered") with respect to

the son and in being willing to do likewise with respect to the daughter.

Thus the legal question is not whether the registration officer acted correctly or not, but rather whether or not the Minister of the Interior had the proper authority to issue the directives in the first place. Landau concludes that, "since this question can be argued either way, varying with the ideological outlook of the observer, we obviously do not have, in carrying out our judicial task, any sufficient basis for the annulment of the directives given by the Minister."[84] Again, judicial restraint! In order to show the validity of this argument, he notes that in other policy matters on which the public was so divided the Court has acted likewise: to leave the matter to the Legislature.

Justice Landau wants his readers to understand that his opinion is not based on any legal impossibilities:

> That abstention from adjudicating which is our duty in this petition does not stem from the lack of justiciability of the subject [after all, the Court did decide *Rufeisen*], but from our inability to draw a judicial answer to the problem from any of the legal sources from which we usually obtain our inspiration. As I have explained, the views common among the enlightened public are also a proper source of adjudication when no other source is available to us.[85]

But the problem in this case is that the "enlightened public" is so divided on this case specifically, and on the "Who is

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[84]Special Volume, p. 93.

[85]Special Volume, p. 94.

a Jew?" question in general, that even this source of legal information leads to judicial failure. Thus in deference to the law as it stands, Landau says that "Not Registered" should be entered for "national affiliation," and that the officer should refuse to enter anything based on the parents' notification. In this way, a particular registration is not forced upon the parents, and even though the nationality of the children is in effect at a "stalemate," this is not a problem since there are often other items which are not recorded as well.

With respect to the entry "Without Religion" under the item "religion," Landau restates his words from *Rufeisen*: "a Jew who regards himself as non-religious discharges his duty to register his religion under the Registration of Inhabitants Ordinance, 1949, by so declaring to the registration officer." He adds that a father may do likewise for his children, and that the registration "Father -- Jewish, Mother -- non-Jewish" is no indication whatsoever of the children's religion or lack of religion.

Justice Landau concludes his opinion with a few personal remarks: he says that the "extreme anti-religious outlook" of the Shalits, extremism being the enemy within, will impinge upon the eventual conversion of the wife and children, and that perhaps Shalit was concerned with the public importance of the case as much as the personal importance. If anyone can <u>personally</u> decide that the children of his non-Jewish wife are

Jewish, then something is also being said about the public (that is, legal) definition of Jewishness in a Jewish State. Landau emphasizes that it is compromise or majority rule which, in a democratic society, must determine public policy. While the public at large may not be Orthodox, it is nevertheless Jewish, and it takes its self-definition of Jewishness to be a very public matter. He challenges the Shalits (whom he basically labels as selfish malcontents with their "public be damned" attitude) to recognize that there are many good people on the other side of the issue who feel as strong about their position as do they. He says that, as regards the children, the issue of their own identity would have been better left to them when grown and able to decide for themselves. As it is, they will still have to decide whether or not to be converted, since the law of personal status in Israel follows the halakhah.

It is thus the opinion of Justice Landau to discharge the order nisi.

vi.

The Opinion of Justice Alfred Witkon

Justice Witkon begins by stating his belief that the Court may address and even decide such issues as "Who is a Jew?" Despite the unjustifiable efforts of the Israeli Rabbinate to influence the Court, he maintains that the Court has the right to rule on ideological issues without reservation as to its competence and as to whatever may result from such decisions. Unlike Justice Landau, Witkon does not maintain that the greater issues of this case fall outside of judicial authority. However, he is quick to point out that a judge's answer to ideological questions does not have to be accepted as the right one; it is rather the judicial decision itself which is binding, even if it is unacceptable to a certain segment of the population. He cites as an example the 1954 U.S. Supreme Court decision *Brown v. Board of Education* which became binding as a result of judicial rule, though it nevertheless remained unacceptable to a certain segment of the population. He notes that even though there was strong opposition to the issue of integration on ideological grounds, that did not mean that the Court had no authority to rule in that case.

Justice Witkon expresses regret that the Government did not heed the Court's suggestion (before the case was brought) to remove the particular item "national affiliation" from the registration form. He notes that like the Court, the Legisla-

ture cannot impose ideological norms, but only prescribe legal rules: Though it can say who can be registered as a Jew, it cannot determine who is a Jew. Also noting the failure of the "fifty wise men" experiment, which would not have settled the issue anyway, Witkon concurs with Sussman and Cohn in asking whether it is necessary in this case that the question of "Who is a Jew?" be answered. His answer: a happy "no," since the Law does not require an answer. The Legislature, in his opinion, never wanted an ideological battle between the Government and the public as to the registration of citizens and as to who was a total Jew verses those who only reported to be Jews. Such ideological and religious issues do not have a place in a legal-technical discussion. In fact, he labels this whole ideological battle as "zealousness," saying that it is irrational, and that it disturbs the peace in an already peaceful, functioning, modern society.

In his own words, "Dogmatism is alien to the spirit of Judaism."[86] -- a good example of a secular judge making a religious (and quite liberal!) pronouncement. So, he asks, what exactly should a registration officer record if not that which is reported to him? Calling the Population Registry Law "simple and technical," perhaps he is ignoring the very fact that it is indeed that very law which identifies the citizens of the Jewish State as Jewish or not. We might inquire as to

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[86]Special Volume, p. 98.

whether this is a mere technicality or whether it really goes to the heart of what it means to be Jewish in a Jewish State. Still, Witkon maintains that even though the giving of the directives by the Minister was within the bounds of his authority, he nonetheless gave powers to the officer which conflicted with the intention of the Legislature. In Witkon's view, the question of which test should be used to determine Jewish identity is not at issue here. So, without wanting or feeling the need to answer the "Who is a Jew?" question, Witkon seeks an alternative solution to the petition.

Even though Justice Landau apparently follows the same course, Witkon does not agree with his methodology. He says that Landau based his decision upon precedents with respect to economic policy. This is a subtle but important distinction since decisions relating to "policy" are different from decisions relating to "law." Witkon points out that courts do hand down decisions which affect policy, yet he wants to argue that this practice is inappropriate. With respect to Landau's methodology, Witkon says that economic policy is not analogous to a person's inclusion in or exclusion from the Jewish people since economic policy lends itself to change and modification over time and is of material existence, while a person's identification with a people is not only immaterial, but also can affect other spheres of that person's life.

He labels "discriminatory" Landau's suggestion that the "nationality" item in this case be left blank, and notes the

"seriousness and dangerousness" of trying to use the Population Registry Law to determine Jewish identity. He says that since the Law never had any intention of deciding such a question, the Minister exceeded his powers. But this argument implies that the intention of the Knesset was the opposite: that the Population Registry Law count as Jewish individuals those who may not be Jewish. Was the intention of the Law really to record such "inaccurate" information? Perhaps Witkon is correct in labeling the Law as a "simple and technical," but that is not to say that his interpretation of it is totally without problems. Of course, the advantage his reading has for him is that it allows him to make a legal-technical ruling in a case as publicly divisive as this.

Witkon's second reservation with Landau's reasoning is the fact that he (Landau) gives a ruling on the very ideological issue which he seeks to avoid. Moreover, with respect to the Jewish *weltanschauung* of the moderate or centrist segment of the population as defined by Landau, he (Landau) provides his readers with a difference of opinion.

Witkon rather concurs with Sussman's view that the registration officer was bound to record that which was reported to him in good faith, barring any obvious falsehood; the subjective desire of a declarant is to be accepted, all the more so with respect to "nationality" which according to the secular point of view is determined subjectively by each

individual. With respect to this opinion, Witkon addresses Landau's objection:

> If we wish to act with neutrality between the religious and free-thinking camps, we must not raise any presumption in favor of the former and place the burden of proof upon the latter. Neutrality demands of us to give equal status to both competing approaches.[87]

Such neutrality, he says, can only be accomplished if the "Who is a Jew?" question is ruled to be outside the bounds of the Population Registry Law. The question in this case is who allowed the officer to impose his own -- in this case religious -- views upon the public. The Court has already ruled that a recorded entry is not evidence of truth, so the registration official is not obliged to agree with any intangible evidence provided to him, and therefore, he cannot question any response given to him in good faith.

Any other differences between the religious and liberal camps Witkon refuses to address since there is adequate room in the country for these and other groups, and since differences between the groups will not, in his view, divide the people. Division will only come between those who seek to force their views upon society and those who hold individual liberties as the highest ideal and who fight conformism. And on this point, says Witkon, the Court and the State have not been "neutral." Rather, they have been tolerant of non-conformists and have upheld the Declaration of Independence

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[87]Special Volume, p. 101.

and Declaration of Human Rights in the spirit of a liberal heritage.

As he sees it, Israel is purely a liberal and pluralistic society, and it is therefore the duty of the Court and the Legislature to maintain and promote tolerance as opposed to conformism. This, of course, is the heart of the whole matter: Is Israel indeed purely a liberal and pluralistic country like all other Western nations, or is it a Jewish liberal state which must then operate within an agreed-upon Jewish context? If it is the latter, then the "subjective" definition of Jewish nationality (which Witkon is here advocating) may be insufficient to produce communal unity. However, Witkon clearly leans towards the "secular-liberal" definition as befitting of the Jewish State, thereby diminishing the importance of the "Who is a Jew?" question.

In the end, Justice Witkon would have preferred that the "nationality" item be taken off of the registry; but since it had not been by the time of this case, he says that the "Who is a Jew?" issue must remain without resolution. The Law must then be applied according to its original intent: the registration officer must register the children according to the parents' notification. Only this way will society and the country be sheltered from "unnecessary hatred."

vii.

The Opinion of Justice Yitzhak Kister

Justice Kister begins his, rather lengthy opinion with a complete detailing of the facts of the case. His only interjections are with respect to asking what "an old Zionist family" means, and how the registration of particulars different from what was desired would be an infringement upon their freedom of conscience. In interpreting "an old Zionist family" Kister understands the phrase to mean that Mrs. Shalit's grandfather, and his descendants by extension, were all friends of the Jewish people by virtue of the fact that he was invited to assist Chaim Weizmann in the planning of the Hebrew University. In his second interjection, Kister says that a registration can only be true or false, not an infringement upon any right. He appeals to the time when, particularly in Germany, Jewish assimilationists wanted Judaism to be singularly a religion, not also a nation. He questions whether someone's freedom of conscience would have been trespassed if they were recorded by the non-Jewish census taker as belonging to the Jewish nation. This is an attempt to deflate the Shalits' argument that their freedom of conscience was insulted by the Government official. With that simple question, Kister minimizes the sharpness and severity of the plaintiff's complaint.

Justice Kister first takes up the issue of registration in general. He notes that overall, States want that the

information on identity cards and in its registers to be accurate, and that no civil right is violated if an entry is not made even though a particular is reported. He says that although a person who gives false information in good faith is exempt from prosecution, it does not follow that that declared particular must be recorded. The officer may record something that was not reported to him, but the citizen may still complain if that entry is incorrect or misleading.

With respect to the recording of "nationality," Kister raises the following difficulties: there is no single meaning of the term: in different countries it means different things (in Israel, he says it means "ethnic group" but not "citizenship"); in Israel there are people of many nationalities; the requirement to register applies not only to citizens, but to all those in the country, except temporary residents and visitors; even though the identity certificates record national affiliation which is normally reliably reported, there are cases wherein a person desires a certificate with a false nationality recorded; and finally, there are no public documents which can verify one's national affiliation since countries generally do not issue natural (that is, ethnic group) affiliation papers. Because of all these problems with the issue of recording of nationality, it is Kister's wish that the particular be removed from the registry rolls, and that in its place "religion," a more objectively determinable item be installed.

His next question is: What is nationality? In most cases (notably, in Western countries), it refers to the State while national affiliation refers to citizenship in that State. The conceptual basis for this is the subjective approach to the term which Kister says is rooted in Rousseau's Social Contract. His theory is that a State is merely an agreement between its citizen who may at will dissolve that State to form another. The problem, though, is in explaining what gives the State, if it is merely an agreement of its citizens, the right to enforce laws against those citizens who may disagree with them. Kister notes that other theories have been promulgated which define citizenship as an individual choice: a person may choose to belong or choose to sever his/her ties, but in so long as s/he is a citizen, the law is applicable. In remarking that there are criticisms of these theories, Kister's main point is that there are a myriad of subjective theories of nationality, and that with respect to Israel, these theories are not appropriate since "nationality" in Israel refers to "ethnic group" and not to citizenship. Had the other been true, this case would never have been filed since Shalit and his children would be Israeli nationals (in the citizenship meaning) and his wife a British national.

Nevertheless, before moving on to objective theories, Kister explores one more subjective notion: that language, religion, territory, race, and royal dynasty are those characteristics which define a group's national makeup. But Kister

wants to know how people who share these elements interact with each other, exchange ideas, and share beliefs. He says that like with a family, mutual respect and admiration must be present for any group to be considered unified in any manner. Common ancestry and common cultural factors may provide foundation for the feeling of unity, but Kister says that these things require no proof since it is national pride and patriotism which are the basis for the feelings of unity. As an important aside, Kister notes that the chief proponent of this theory, himself an apostate Jew, did not apply it to the present-day Jewish people, though he does refer to the Jews of ancient days as a people. Moreover, he notes that the Jews as defined by this "subjective" definition of nationality, which designates a group as having a collective feeling of unity and identification and upon which Shalit bases his argument, might actually exclude him from the group. In any event, Kister finds no answer in this theory as to how a person who belongs to one nation can become a member of another nation.

He moves on, then, to objective theories which define nationality according to objective elements and features: "territory, state, language, common origin, customs, centuries-old cultural values, a physical and spiritual legacy transmitted biologically or educationally or by family tradition, a heritage of spiritual or physical traits, and

also race."[88] With respect to language, Kister discounts an argument forwarded by a 19th century German jurist who singled it out as the discriminatory mark of a people. The jurist said that a German is a person who speaks German and who ceases to be German when German ceases to be his language. But Kister negates this element as being important since Jews have remained a nation and people without a common language. This, by the way, is an assumption which all the judges make: While outside of Israel, the debate continues as to what the Jews are, within Israel, all legal and theological premises begin with the notion that *Am Yisrael* exists and can be identified.

Next, with respect to race, Kister admits its anthropological importance and recognition as being a feature to distinguish nationality, but he says that race theories are basically racist, especially since their development led to Nazism. As far as their scientific value, Kister is content to mention that Adolf Hitler himself did not ascribe to the race definition, but used it since he needed a scientifically based theory in order to lend credence to his "satanic" plans. Proof of this is the fact that Hitler did not disqualify the non-Aryan Hungarians from the Aryan race. Moreover, says Kister, no race has ever been totally pure since no nation has ever existed in isolation. Another reason to discount the

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[88]Special Volume, p. 111.

race (that is, Nazi) argument is the fact that a second generation immigrant is generally regarded by the nations of the world as belonging to the nation to which his/her parents assimilated, while the Nazi theory holds that no assimilation is possible and that a person belongs to his/her birth nation until the end of time.

With respect to mixed national marriages, a child is generally considered to be as Shalit reported: father one nationality, and mother of another. But the race/Nazi conception is that such a union produces a new race, a mixed breed, in which the negative qualities from each are brought together. Some considered the quantity of Jewish blood to be insignificant; others advocated sterilization; and still others allowed these people to remain German citizens, but of second class status.

Ending his discussion on mixed marriages and assimilation, Kister briefly recognizes the fact that there are people who favor cosmopolitanism to patriotism, and who feel as though the whole world is their nation. He also remarks that in the Western world no State requires national affiliation or citizenship in order to assume the rights of that State. That is why, he says, nationality is usually not indicated on identity or other personal cards even though there are individuals who value how their national affiliation is recorded. All of this leads Kister to focus on what he sees as the central question:

> Who is a Jew, what are the features or criteria by which to distinguish Jews from other peoples, what are the spiritual ties and bonds which attach a Jew to his people scattered the world over and to the land where his ancestors dwelt two thousand years ago, how does a person become affiliated to the Jewish people and how does a Jew cut himself off from his people and become a member of another nation?[89]

In attempting to conquer this question, Kister says that although Jews are not a pure race, there can be no doubt that they are nevertheless "singular" since they have remained a nation for two thousand years without disappearing as have other nations and cultures. And while some Jews trace their ancestry back to the same forefathers, there have also been converts who have joined the group. The Jewish people, then, is comprised of the descendants of Abraham, Isaac, and Jacob and all the proselytes of every generation with one single unifying element: Torah. Again, in Kister's mind, there can be no doubt that Torah (as opposed to "religion") is all inclusive of the Jewish human experience. As a prooftext, he cites Rabbi Sa'adia Gaon: "Our nation is a nation through its Torah alone." This, for Kister, is his point of argumentative departure -- he assumes that it is true. Even though it cannot be proven, what is important is that it is believed since it might as well be true. The proof of its falsehood falls upon those who do not believe it to be true. The point is, if Torah (in its broad sense) is that distinguishing feature which defines the historic "nation" of Israel, then

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[89]Special Volume, pp. 114-15.

the answer to "Who is a Jew?" for Kister (which by no uncertain terms would not include the Shalit children) is quite clear and summed up nicely in the statement of Sa'adia. He further stacks the deck against Shalit and shows the absurdity of his argument by stressing "Torah" in place of "religion," since Shalit and the other assimilationists use the term "religion" to define the Jews merely as a religious community. "Torah," says Kister, "comprehends not only matters of belief and opinion and the commandments affecting man and his Maker, but also social prescripts, law and legal procedure, customs and usages, including the relations between the Jew and his people, his land and his tongue."[90]

Now even though Shalit challenges the validity of using this definition, Kister upholds it, and seeks to define inclusion into the Jewish people according to the Torah. In modern times, he notes, the term "Jew" refers indivisibly to both a nation and religion. One joins the Jewish nation and religion by means of conversion, the prooftext for this being the Midrash on the story of Ruth and Naomi (see *Yevamot* 47b). Based on the verses from Ruth 1:16-18, the Rabbis delineated that which is to be told to a prospective proselyte. Since Ruth showed a steadfastness in her desire to join the Jewish people and religion, to live a Jewish life, and to be forever linked with the Jewish people, the Rabbis interpreted this to

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[90]Special Volume, p. 115.

mean that a proselyte is to be converted immediately upon acceptance of that which is told to him or her. Those factors, says Kister, are the "principal elements" of how one becomes a Jew and joins the Jewish people and religion.

At this point Kister gives us his own version of Jewish history, his own "telling of the story," as it were -- a common thread that runs between all the opinions. He says that the conversion process may even be the reason Jews and Judaism have survived for two thousand years without a land or shared language, despite the few cases of insincere conversions. Moreover, what is important is the fact that race has never been a disqualifying feature; and more than that, even enemies of the Jews or their descendants have become proselytes.

Kister now pauses to ponder the question of whether a person is able to "quit" Jewry. Despite the Talmudic principle "a Jew, though he has sinned, remains a Jew," (*Sanhedrin* 44a) it is generally accepted that an apostate from Judaism and any assimilated offspring are not considered as Jews. To support this notion, Kister relies upon a responsum by Rabbi David Ben Zimra from his *T'shuvot Radbaz* (2:251):

> The marriage of an apostate [to a Jewish woman] does not take effect according to the [written precept of] Torah. Nevertheless because of the severity of the status of a married woman [regarding adultery], it has been said [by oral tradition] that where an apostate marries, one must pay some regard to the marriage. Although under the law of the Torah he is a gentile for

all purposes, apprehension arises as to whether he had intercourse for the purpose of proper Jewish marriage.[91]

This and many other halakhic writings on the subject make it clear that a Jew who has left Judaism is not considered a Jew, except for a few matters, and that assimilated offspring are non-Jews for all purposes. What is missing from this argument is the other side of the issue, particularly the most important authority on the issue: Rashi. In his *T'shuvot Rashi* (paragraph 173), he rules that a *mumar* or *m'shumad* remains a Jew for all purposes. Even though this issue of whether one can cease to be a Jew was central to the *Brother Daniel* case, Kister very conveniently here overlooks the fact that there the court did not deny Rufeisen's petition on the grounds that a *mumar* ceases to be Jewish, but rather based its decision and interpretation of the Law of Return on "secular" grounds. There is no question that Kister's presentation of only one side of the halakhic argument serves his purposes, but his readers must take note that it is nevertheless a one-sided expression.

The issue of mixed marriage is next addressed by Kister, beginning with the biblical quote upon which the halakhic prohibition is based (Deut. 7:3-4): "For he will turn away your son from following me." Kister says that although the Torah gives no reason for this and many other commandments or prohibitions, the following Talmudic interpretations have

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[91]Special Volume, p. 118.

emerged (see *Kiddushin* 68b): all kinds of "turners away" are implied; the prohibition only applies to a non-converted Jew, since once converted, there is no fear of being "turned away;" only a child born of a Jewish mother and non-Jewish father is implied by the verse since the child of a Jewish father and non-Jewish mother is not considered to be a Jew.

Kister notes that in criticizing those Talmudic principles, Shalit raised the case of Kamel Nimri, the El Fatah terrorist leader born of a Jewish mother and non-Jewish father. He says that that case is evident of the "grave national danger" of such a union where an Arab father turned his Jewish son away from Judaism, and that it happened in the Jewish State itself proves that there is reason to fear the result of mixed marriages. Certainly Kister's intent is not to compare or equate Benjamin Shalit's marriage to a non-Jew to the mixed marriage which produced a "Jewish" Palestinian terrorist, but rather his point is that the horrendous effects of mixed marriage which produced such a "Jew" in the Jewish State serve to lessen public support for the Shalits and their line of argumentation.

In the case of a child whose mother is Jewish and father non-Jewish where the child is raised as a non-Jew, the halakhic issue is whether the child is an apostate upon maturity or at birth. Kister says that the prevailing halakhic opinion is that in this case the child is considered

to be non-Jewish from birth and in need of conversion to be considered Jewish.

Why does the child of a non-Jewish mother take the status of the mother? Kister notes that although no explicit reason is given by the Talmud, the reason may be found elsewhere. Nachmanides gives the natural reason in his commentary on *Kiddushin* 68b: such a child is "drawn to the mother and is attached to the ways in which she has reared him since infancy." Kister says that although other reasons are given in the halakhah, Kabbalah, and exegetical literature, this natural reason is sufficient, though he does add a quote from Rabbi Ben-Zion Uziel's *Mishpatei Uziel, Yoreh De'ah* (2nd ed.) 60, s.v. *Lakhein* (p. 205):

> This is a reasoned precept of the Torah: the child, and every living creature born of a mother, especially the kind which is suckled, follows after the mother and is influenced by her upon his very germination in the womb and from the milk which nourishes him. Particularly is it so with man who also possesses the power of speech which is expressive of the intellect. The child gets his impression from the mother's conversation, and the kindly caresses, by which she rebukes him and improves his character, as far as her education and upbringing in her father's house extends and her environment permits. Because the mother sways the child by her words, he follows her and honors her, more than he does his father (*Kiddushin* 30). If therefore we were to relate the child of a mixed marriage to the father, the child would from the very outset be a rebellious son to his parents and "halt between two opinions." He could be neither a religious nor a moral person. For this reason God has advised to leave the child to the mother in such a case, to avert the harmful effect of conflicting influences which irretrievably and inevitably destroy the soul of a child.[92]

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[92]Special Volume, p. 120.

This, says Kister, sums up the Torah's position. Moreover, with respect to what is just, Kister adds that Jews in Israel would deem wrong and unjust the case where a foreign court decided to give custody of a child to the non-Jewish parent to be raised as a non-Jew. There have also been cases where a non-Jewish mother has appealed to Jewish Law in arguing for custody since as he says, there exists a subconscious natural bond between a mother and her child.

By now, Kister has established that the "Jewish" (that is, Torahitic) position is that nationality is determined by one's mother, a point supported by "natural" and biological/behavioral arguments. Thus even if one disagrees with that position it is still a respectable one. So Shalit does not deserve rebuke for simply opposing that position; but rather he should be admonished for having equated the position of the Government to that of Nazi Germany. In light of the fact that, as he outlined, a person -- regardless of race -- joins the Jewish people by means of conversion, he says that Shalit should have known that such an equation was simply false and offensive. Although not grounds for automatically ruling against the plaintiff, this does give Kister a powerful emotional stance that Shalit, because of his own words, is a "bad man," and <u>ought</u> to lose.

What is most disturbing to Kister is that more than just attacking the position of the Government, Shalit seeks to assault and malign that of the halakhah and Jewish tradition

by claiming that it is racist and barbaric. In the attempt to further weaken the force of Shalit's legal argument, Kister is very easily able to characterize Shalit as the ultimate oxymoron: a Jewish anti-Semite, a person who rejects the "essence" of Jewish identity and yet still thinks of himself and his children as Jews. Though Kister does not go on to discuss what he calls Shalit's "serious conduct," he says that even had Shalit compared Nazi Germany to any other nation, let alone to the Torah, the Court should have taken action against him. All in all, Kister finds Shalit's language and arguments totally unacceptable for a court of law. For two further reasons Kister says Shalit should be taken to task: throughout history, hatred and persecution directed against the Jews has been started by means of false accusations against the Torah or individual Jews; and second, such accusations do not stand to show children love and respect for Judaism and the Jewish people.

Having finished his remarks regarding nationality, Kister addresses Shalit's notion that because of all the changes in recent times, the Jewish people should not be defined according to the Torah. What, then, is it that binds together all Jews throughout the world, asks Kister, or is there no longer such a thing as a single Jewish people?

Before answering these questions, though, Kister makes a few precursory comments: no definition of Jewish nationality by the Nazis or anyone else can be forced upon the State of

Israel or the Jewish people; in deciding whether Jews and Judaism have changed in modern times, it must be remembered that Jews and their religion have existed for thousands, not tens, of years; Shalit is, in error, asking the Court to look into the future and to make changes which he believes are for the people's benefit; and finally, even though the people Israel has not always been Torah-true, it has always been the Torah which has united the Jewish people.

All of this is in the attempt to dismiss the position taken by Justice Cohn and others that since Emancipation, a revolutionary change has occurred in the Jewish self-definition. Jewishness, for Kister, is a feature of the historic *Am Yisrael*, a unit which cannot be defined by secular terms alone; rather is it Torah which will always be the lasting and eternal element of Jewish identity. He does not reject modernity itself, but rather the notion that modernity brought with it an essential break in Jewish history, a notion which is assumed by Shalit in arguing that such a break requires new and different definitions of Jewishness. For Kister, the Jews continue to be the same people they have always been, and despite all their differences and disagreements, it has been their Torah (or the influence of Torah and religious tradition upon their sense of identity and identification) which has by itself defined and determined "Jewish nationality" throughout history up to the present day. Because of Torah, says Kister, the Jews have survived and have rejected assimilation,

and have returned to their land. All of this serves to destroy Shalit's case, which is based upon the idea that religion and nationality are separable.

Having made these comments, Kister seeks to sum up Jewish history from his standpoint as a "believing Jew." He begins with a lengthy quote from Rabbi Meir Simkhah HaCohen's *Meshekh Khokhmah*, of which I will only here reproduce a selection:

> Such is the way of Providence: The Jews have lived for ages in the Diaspora, existing in a wondrous manner which mankind would not believe and which is incomprehensible to the intelligent person who knows the history of the world and the storms that have these two thousand years swept over this people, few in numbers, weak in power and helpless. . . . And all this for two reasons, for maintaining the true religion and its purity and for preserving the nation. . . . Such has been the way of the Jew ever since he became a wanderer.[93]

Throughout history, Jews have had to endure "fluctuations of fortune," and there has always been a certain drive to assimilate into the culture in which they were living. There were also times when the Torah was forsaken, if not totally forgotten, by a certain segment of the Jewish people. Notwithstanding all of this, Kister maintains that there are three main principles which speak to the Jewish people's ability to survive: as a whole, the Jewish people is eternal; the oneness of the Jews, the love of Judaism, and the responsibility one Jew has for the other have all been stamped upon the collective soul of the Jewish people, and it is the individual Jew's responsibility to nurture these attributes;

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[93]Special Volume, pp. 126-7.

and third, though many individual Jews assimilated while the entire people was scattered and being persecuted, tradition was nevertheless alive and well.

With all this in mind, Kister addresses Shalit's notion that the Jewish people and the Jewish religion are separable, a notion that grew during the Emancipation and the Enlightenment. As the Jews moved out of the ghettos, they took advantage of the newfound opportunity to relate with the cultures in which they lived. Many believed that by assimilating, persecution could be averted -- some even converted out of Judaism in order to fit in. But even with all the integration, many others maintained a strong bond to the people and its history. A common ground was sought on which the Jew could remain true to his religion and his culture while at the same time showing that he was a loyal citizen of the State in which he lived. Since the Jews had no land, no territory, not even a shared language, it was difficult to regard them as a nation. Those who assimilated basically dropped the hope of one day returning to Zion restored; rather they desired to remain and flourish in their "host" country. Since this approach did not harmonize with the Torah, many difficulties were overcome by means of reforms. Though some religious precepts were retained, the belief that the Jews were a nation was discarded. Although at first, assimilation was accepted by the non-Jewish community, it was not long until it was realized that the acceptance was really a mask

for encouragement towards religious conversion. And no matter how much the Jews assimilated, hatred and persecution were never eliminated. Opposing the Reformers were the religiously observant Jews, later Orthodox, who rejected the changes and retained the notion of Jewish nationality.

These two approaches eventually found expression in the way Jews were registered in the population registers of the countries in which they resided. The Reformers proudly declared themselves to belong to their "host" nation, while belonging to the Mosaic religion; the observant declared that they were Jewish nationally as well as religiously. Although in every land, Jews were loyal subjects, they were never totally accepted by their neighbors: even when a Jew converted, he was still nevertheless regarded as a Jew.

On the subject of assimilation itself and the Orthodox reaction to the assimilation of the Reformers, Kister says that with all their differences, they nevertheless remained "one people, one national group." To show this, he looks at the fact that according to Jewish tradition, assimilationists have always remained Jews. From Rabbi Yitzkhak Izik Safrin of Kumrana writing in the 19th century:

> All the sinners in this State and particularly in the States of Germany, I attest solemnly are forced converts, children made captive by non-Jews, and they speak without understanding. All are ready at a moment's notice to shed their blood for the Sanctification of the

> Name (of God) in love and joy and with cheerful heart. (*Netiv Mitzvotekhah, Shevil Ha'Emmunah*, 6)[94]

Kister says that Safrin's assumption, that though assimilated, there nevertheless remains a spark of Jewishness has been proven correct many times, especially since the rise of the Zionist movement and the birth of the State of Israel. In this regard, Kister notes the self-expression of Professor Franz Oppenheimer, a German Jewish scholar who later became a Zionist:

> I have never concealed the fact, even in Zionist circles, that I am quite "assimilated." Had I looked into my soul, I would have found 99% of Goeth and Kant and only 1% of the old Covenant, and even that mainly through the medium of Spinoza and Luther's Bible. I have felt myself entirely German but I could understand why the consciousness of my being Jewish stock could not be reconciled with my consciousness of belonging to the German people and its culture, and therefore I was never assimilated. (*Erlebtes, Erstrebtes, Erreichtes* (Dusseldorf, 1964), p. 211)[95]

Kister says that Oppenheimer is typical of the intellectual Jew. Though German literature and culture were a major part of his life, he still retained Jewish national feelings. What, asks Kister, is the origin of these feelings? To answer the question, he refers back to his discussion on mixed marriages and the notion that a child is reared by its mother. Even with all the "outside" influences, the feelings and sense of Jewishness cannot be ignored; in fact, such feelings are

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[94]Special Volume, p. 132.

[95]Special Volume, p. 133.

amplified when those "outside" forces come face to face with the notion of Jewish nationality. Kister says that there is no doubt that Jews who consider themselves to be only Jewish nationally or religiously -- even if they represent themselves not to be Jews -- nonetheless remain Jewish both religiously and nationally. The common thread is the acknowledgment of a common origin and of a nation different from all others because of the Torah. Even with all the assimilation, those who did not convert yet remained Jewish. Thus, for Kister, the Jewish people has always been one nation. And even with all the assimilation in the Diaspora, there remains a spark of Jewishness whereby the bond is never completely severed. In Israel and around the world there are Jews who cling wholeheartedly to the Torah and its precepts, there are those who desire to sever their ties to their people and their heritage, and there are those who are not religiously observant but who want to maintain their national link to the past.

Following this discussion, Kister moves on to address Shalit's petition that his children be registered as Jews since the 1958 directives allowed for non-Jews (or children born of non-Jewish mothers) to be registered as such upon notification. Even though those directives were later withdrawn, Shalit still holds that they, or more specifically their underlying principle, should be acted upon concerning his children. Though the directives instruct that registration be made according to the "expressed desire" of the

parents, Kister wants to know What this means. Is it that the children automatically and immediately become Jewish? He notes that the author of the directives himself believed that the "expressed desire" is that of the child, and that the notification of the parents takes place only following the child's "expressed desire" to his/her parents. And following the notification of the parents, says Kister, the child is considered a Jew since the Government would not want its records to be false. This, in his opinion, is the attempt of the Government to create a new group of Jews, a group that is not Jewish according to the Torah. Moreover, there exists the fear of assimilation in Israel -- not the assimilation of Jews into other cultures, but the assimilation of non-Jews into the Jewish culture. At that time, a real fear existed that a Jewish woman might marry an Arab man and produce children (who were Jewish according to halakhah) who would later become enemies of the Jewish people and Jewish State. Kister argues that while with respect to mixed marriages between Jewish women and men from other countries, it is difficult to make any definitive statement, it is always difficult in instances of mixed marriage to determine which partner will be the assimilator and which the assimilated.

In response to the 1958 directives, a large majority of Jewish scholars expressed their displeasure and disagreement, and the directives were subsequently withdrawn with new directives being inserted in their place. Kister says that

it is on this fact, and on the fact the new directives were issued in accordance with halakhah that Shalit's complaint is based. In response, Kister says that it is not the Court's role to determine with respect to the Jewish people, who is to be deemed "within" and who "without," and which criteria are to be used to make such a determination. Since a majority of the leaders of the Jewish people has not decided to change or abandon the existing framework for determining such matters, the halakhic definition must stand, thus justifying the new directives as given.

The question, then, is whether the new directives contradict any other existing Israeli or international law. Kister says that there is clearly no contradiction with any international law. Moreover, Kister is emphatic that immigration into the State of Israel should be reserved for Jews and Israeli citizens, though non-Jews may still be admitted by the Government. Since anyone who does come is given the same rights, Jew or non-Jew, the new directives cannot be said to be prejudicial or preferential.

"Even," says Kister, "if there were any grounds for abandoning the directives and the rules common till now among the Jewish people under the halakhah, and even if I were to say that a non-Jew can be regarded as a Jew on some other basis, there would still be no justification for granting the

(Shalit) petition.[96] That is because no new criteria has emerged which can describe as a whole the Jewish people, and because no new framework has been created to unite the entire Jewish people. Thus a specific declaration, even though made in good faith, means nothing and proves nothing: Kister knows of no case where a person changed his nationality by virtue of making a declaration for registration purposes. The desire to join a particular nation is only of import when "nation" is understood to mean "State," and affiliation to that State means citizenship. He draws an analogy between citizenship and Jewish religious affiliation: a person does not become a Jew by virtue of a notification. Conversion is affected according to a proper procedure, where thereafter, the person is accepted by the whole people as a part thereof. With respect to the Jewish nation, which Kister views as an ethnic group, there is no body that can officially accept a person into its rank; thus to change nationality, "utter assimilation" is required. And because of this, he argues that there is no difference between the subjective and objective approaches.

With respect to the child of a mixed marriage, there is no way to properly determine its nationality, other than to say that its father is of this nationality and its mother of that nationality. A baby by itself cannot have any national

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[96]Special Volume, p. 141.

feelings or the desire to belong to a certain group of people. Since according to law, a parent's notification is given in their own name, not in the name of the child, there is no possibility of the child's desires being expressed. The only solution is that the registry official, having documents in hand which testify as to the parents' nationality, register the child according that of the parents -- be they the same or different. When the child's mother is Jewish, Kister holds that the national affiliation of the child may be registered as Jewish because the child is considered Jewish by the halakhah. Thus there is no way in the case of the Shalit children to construe that they are already Jews or have feelings of Jewish national identification. For Kister, the legal issue is very simple: there is just no basis to interfere with what the registry official did. For legal precedent, he defers to the opinion of Justice Landau.

With respect to Shalit's petition that the children be registered as "Hebrews," Kister says that no such separate nation exists. That they can be registered as "Israeli," referring to "nationality" in the sense of "ethnic group" and citizenship is of no issue. Since the children cannot be registered as Jews, Kister says that to register them as "Hebrews" or "Israelis" by nationality is out of the question, though he maintains their right to be registered as Israeli citizens. And the fact that the Shalits have no problem with their children's nationality not being recorded is also

important, especially since Benjamin Shalit himself did not identify with any particular nation when he was young.

In concluding his opinion, Kister briefly notes that integration into Israeli culture and a Jewish education do not make a person Jewish. What is required is "national consciousness, national respect, national pride, and devotion to the whole people." Since not registering the children as Jews will not infringe on any of their rights as citizens of the State, and since it is impossible to know what their national feelings will be when they grow up, Kister says that it is better that they not be registered as Jews. In the future, it will be their deeds that will include or exclude them from the Jewish people, not how they are registered. If they desire to completely join the Jewish people, conversion will be available to them, though Kister is not requesting this.

Since the truth was registered by the official, Kister says that the Court should take no action. Thus does he rule that the order nisi be dismissed and the petition discharged.

viii.

The Opinion of Justice M. Elyahu Mani

As was the case in *Rufeisen*, Justice Mani's opinion is so brief and to the point that it may be quoted here in full:

> I am of the opinion that the problem whether the petitioner's children actually belong to the Jewish nation does not have to be decided at all in the present proceedings and therefore I do not presume to express any view in connection thereto. All that I decide is that:
>
> (a) The Registration of Inhabitants Ordinance, 1949, and the Population Registry Law, 1965, authorize neither the registration officer nor even the Minister of the Interior to prescribe criteria for deciding the question when a particular person belongs to a particular nation;
>
> (b) In the circumstances of the present case and for the reason which my learned colleagues Sussman and Cohn have stated in detail, the registration officer had no choice but to register the nationality of the petitioner's children in accordance with the notification delivered to him.
>
> For these reasons, I also am of he opinion that the order nisi should be made absolute.[97]

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[97] Special Volume, p. 148.

ix.

The Opinion of Chief Justice Shimon Agranat

In beginning his opinion, Justice Agranat focuses on those of his colleagues. He agrees most with the conclusion and main points of Justice Landau, however he adds that the solution to whether the registration officer must register the children's nationality as Jewish even though their mother is not Jewish cannot be found in the legal sphere; but rather lies in the ideological realm. Agranat's view is that since there is so much disagreement among the public, it would be better if the space were left blank altogether. We might ask, if there is no legal solution to this case in that the Law of the Land does not resolve this issue, why not just allow the Shalits to register whatever they want on the identity cards of their children (a la Cohn)? If the law is indeed silent on this issue, then why deny people rights which the law does not even address?

Agranat's point is that the "Who is a Jew?" question is one of public import rather than of freedom of the individual under the political constitution of a democratic regime. We might also ask why Agranat does not simply stop here. If, as he says, this issue is not "legal" in nature, but rather lies beyond the professional competence of the Court, why continue? He must proceed precisely because there are indeed legal issues in this case, particularly the legality of the Mini-

ster's directives which dispense with the need to decide the ideological issues of the case.

With respect to the legal solutions posed by Justices Cohn and Sussman, who argued that declaration was sufficient for registration, Agranat says that these do not conform to the present case, especially since in the *Rufeisen* case, the judges who refused to grant his petition did so despite Rufeisen's personal feelings. In that case, the Jewish people agreed upon an objective criterion which conflicted with Rufeisen's declaration, thus negating it. In this case, Agranat points out, there is also the long accepted "objective" criterion that a person born to a non-Jewish mother (having not converted) follows the status of the mother with respect to membership in the Jewish nation. If that point is accepted, then it is logical to deduce that Shalit's declaration is also to be negated.

Of course, the real issue is the proper interpretation of the *Brother Daniel* case: what authoritative legal ruling can be deduced from the case? For Cohn and Sussman, *Rufeisen* demonstrated that the Law of Return and all other such legislative rulings for that matter are the decrees of a secular state. Thus Rabbinic Law must not play any role in their interpretation and application. On the other hand, for Agranat, the significant holding of that case is that even though the State of Israel is a secular state, objective

factors (not one's personal declaration) must nevertheless be employed in determining "Jewish identity."

Agranat next outlines the four details upon which Shalit's petition is based: (1) Since the Government applied a religious rule, the Court may not uphold this, but rather must seek a general secular test to determine national affiliation. Such a secular definition must be sought through secular literature which maintains the notion that religion and nationality are separate concepts, and thus the halakhic test, which was bypassed in *Brother Daniel*, is also here irrelevant. (2) A person's race cannot be the determining factor for nationality. (3) A "common enemy" may be one mark of being identified with the Jewish people, as Herzl said, "We are a group, an historical group of individuals who act together and have a common enemy." (4) Based on the secular criteria just mentioned and based on all the facts, the Court must allow the children to be registered as being of Jewish nationality.

In response to these arguments, Agranat remarks that, "the concept 'nationality' or 'nation' -- in the 'natural' as distinct from the political ('nation-state') sense -- is a dynamic-historical concept which does not admit of precise definition."[98] In support of this remark, Agranat notes that many different, non-reconcilable definitions can be found in

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[98]Special Volume, p. 151.

many books; some definitions present a broad concept of nationhood, and others present a narrow conception. He quotes the following three broad definitions in order to show the complexity and consolidating nature of the concepts "nationality" and "nation:"

> The nation is a group united by community of blood (or descent or race), language, country, spirit or character, customs, law, religion, historical past, consciousness of unity and a desire directed towards unity in the future. (Yehezkel Kaufmann, *Golah VeNechar*, vol. 1-2, p. 108)

> The nation may be said to be a body of persons, inhabiting a definite territory and thus united by the primary fact of contiguity, who physiologically, and in respect of the blood in their veins, are generally drawn from a number of different races or breeds brought by time and their own wanderings into the territory, but who psychologically, and in respect of the content of their minds, have been led by a life of contiguity to develop two forms of mental sympathy. The first is a common capital of thoughts and feelings acquired and transmitted in the course of a common past history. . . . The second is a common will to live together for the future, freely and independently increasing the common capital of thoughts and feelings, and thus exercising a right at the very least of social, but possibly also of political self-determination. (Ernest Barker, Principles of Social and Political Theory (1951), p. 53)

> (A nation is) a community of individuals who -- in the absence of personal acquaintance -- have little difficulty in finding a common basis for communication. . . . Such a community cannot arise unless its members share certain important aspects of culture -- a common language, a common history, a common tradition, a common way of life, a common religion, or a common sense of destiny -- although the specific aspects of culture held in common may vary from nation to nation. . . . (Herbert Kelman, "Patterns of Personal Involvement in the National System" in International Politics and Foreign Policy, ed. Rosenau, 1969, pp. 276)[99]

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[99]Special Volume, pp. 151-2.

In trying to come to some conclusion on the definition of "nation," Agranat stresses the following two elements: First, that a nation is generally "the supreme and noblest stage of ethnic existence." (Kaufmann, p. 110); and second, that a nation is composed of "racial-lingual (or racial-cultural) singularity."

It is important to note that Agranat is not exclaiming his support for purely racial criteria, but rather just the fact that descent may be counted as a unifying factor. Despite the manner in which the Nazis used race to proclaim their superiority, Agranat still maintains that race as a national characteristic is truly significant in that it is a unifying element, much as being related to members of a family produces kinship and brotherhood. He again draws from Kaufmann (p. 118):

> The brotherhood created by continuous intermarriage over generations has noting to do with singularity of anthropological type nor with singularity of a first "ancestor" or "purity" of unmixed blood. It is a genetic brotherhood and constitutes the objective basis of the national consciousness which holds the national community together as a community resting upon fellowship of blood and bound together by ties of brotherhood.[100]

His purpose in drawing upon such secular authors as Kaufmann and Barker is to attack Shalit's definition of nationality head-on: he is using Shalit's own kind of proof against him. Agranat is trying to show that Shalit, according to his own

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[100]Special Volume, pp. 155-6.

"social-scientific" criteria, is incorrect in his definition of nationality.

At this point, Agranat feels it necessary to clarify his position that race can be a unifying element: at a nation's inception, the racial element must be tied to cultural factors, and upon reaching national maturity, an ethnic group is preserved and guarded by racial singularity. Following this brief clarification, Agranat focuses on "religion" as a common attribute of a nation. He notes that although its importance has been recently diminished, it remains important to certain nations: Catholicism to Ireland, and Islam to Pakistan, for example. With respect to the Jewish nation, he says that Jews never saw themselves only as a religious sect, but rather as "a national community whose chief characteristic is its attachment to the monotheistic religion of the Pentateuch and the Prophets."[101] There is no doubt in his mind, then, that for two millennia the Jewish people has encompassed a religious-national character epitomized by the phrase, "the Torah and the children of Israel are one."

With that historical analysis in place, Agranat turns to explain how halakhah reflects the understanding of the Jewish people as a religious-national-racial entity. In doing so, he uses the phrase *halakhat ha-mishpat ha-ivri* ("the rules of Jewish Law"), which reflects a much more "secular" and

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[101]Special Volume, p. 157.

"national" understanding (rather than "religious") of halakhah. His underlying motive is to use "secular" language in order to lessen the force of Shalit's "secular" argument while at the same time emphasizing again that religion and nationality are inseparable. He highlights the three halakhic propositions which apply to this case: (1) a person born of two Jewish parents is considered as belonging to the Jewish people; (2) though mixed marriages are prohibited, the status of a child of such a union follows that of the mother; and (3) a non-Jew can join the Jewish people through the act of conversion. It is specifically the second aspect which is directly relevant to this case, and the point for Agranat is that this principle has been historically bound up with the general prohibition against mixed marriage. To show that it is not just the Orthodox community which takes this position, Agranat draws upon Professor Louis Finkelstein of the Jewish Theological Seminary:

> Our sages recognized that the determinative education of a child is that given to it while still in the cradle before it has learned to speak. Such education it receives largely and principally from its mother, and she must either be of our people's race or have herself accepted Judaism. (December 12, 1958 response to the questionnaire of Prime Minister Ben-Gurion)
>
> In the case of a mixed marriage, the status of the children is determined by the faith of the mother, as the greatest influence in their lives. ("The Jewish Religion" in Finkelstein ed. The Jews: Their History, Culture, and Religion, vol. II, p. 1741.)[102]

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[102]Special Volume, p. 161.

But does or should this reality continue to exist in light of the reality of the modern, secular, Jewish State? In other words, asks Agranat, what kind of State is Israel? This and the following rhetorical questions which he poses are the reasons why this case is entirely ideological in nature:

> The problem accordingly for us is whether, having regard to the important function which this prohibition (along with other factors) has fulfilled in ensuring the separate existence of the Jewish people in the past, it follows that the above-mentioned test has grown such roots in the course of history of the Jewish people as to have become an abiding value that binds us today and from which it is therefore impossible to depart in the least, even for the circumscribed statistical purpose of registering the "nationality" particular in the Population Registry? Or may we say that Jewish society in Israel is basically a dynamic secular society in which the institution of religion does not fulfill any comprehensive or decisive function? Is it that in the present age there is no place for distinguishing between a person born of a Jewish mother and a non-Jewish father and one born of a Jewish father and a non-Jewish mother, because the latter is not entirely without Jewish descent and therefore, if he was born in this country or has come to settle here, will presumably attach himself in the course of time to the people that dwells here in Zion even without undergoing the ceremony of conversion? And by reason of all this, is it not right, at least in regard to the technical requirements of national registration, that no attention should be paid to the historical grounds mentioned before, because equally valid is the view that each generation has its own needs and each generation its own truths?[103]

Agranat addresses these questions with five points.

First, he notes that the early Zionists worked from the foundation that the historical connection of the Jewish people is a function of its national solidarity. From this followed that the present was inextricably linked with the past and

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[103]Special Volume, pp. 164-5.

that therefore the people had to return (or be brought back) to the way of their ancestors.

Second, the Zionist movement was comprised of people from one end of the religious spectrum to the other. Though they sought to somehow combine Judaism with modernism, they left the details of how that was to be done to the post-establishment of the Jewish State.

Third, despite the fact that the question of how the Judaism of the past should be played out in the modern Jewish State was not stipulated by the Zionists, Agranat says that there were nevertheless three basic discernable approaches: the Orthodox Zionists who advocated a modern State indistinguishable from halakhah and halakhic authority who would then determine the "Who is a Jew?" question solely on the basis of halakhah; and those who advocated a total individual approach to religion despite the unifying factors of a common origin and fate who would not rely on halakhah to answer the "Who is a Jew?" question, but who would look to a person's social-political integration into the society of the Jewish State.

The third group (and this is Agranat's fourth point) lies in the middle. They (a la Justice Landau) are the ones who point to the Jewish cultural heritage as being the unifying factor of the Jewish people. The Jewish religion is thereby a Jewish cultural treasure which must be studied and learned. They too would uphold the halakhic standard for determining Jewish identity in principle, but they would not be unified

in saying that it should be strictly applied in the eventual Jewish State (or in a case such as this).

Agranat's fifth point is that the approach of these three schools -- the fact that they desired to have moorings in the historical past while differing in their approach to religion -- still remains within the population of the Jewish State. True, Israel is a liberal-secular nation which according to its Declaration if Independence guarantees "freedom of religion, conscience, language, education, and culture," but there also remain differences as to the appropriate nature and relevance of religion in such a State. On this question, there is much division and an ever more clearer distinction being created between the different groups, despite the fact that there are those non-religious Jews who are returning in their religious observance to some traditions. Yet Agranat is able to give his own personal political history of the State since its inception: With respect to religion questions, the Government actually avoids making decisions; it rather seeks to compromise among the different factions. While he sees this as a positive and constructive reality, others view it as a matter of Israel's faulty political constitution which gives small (by number) political parties exaggerated power in the Legislature.

At this point, Agranat summarizes his conclusions up to this point:

> (1) The answer to the question before us -- whether a person can be registered as Jewish under "nationality"

> in the Population Registry, when born to a Jewish father and a non-Jewish mother, depends upon the choice between the historical approach . . . and the "modern" approach. (2) The choice between the two approaches itself depends on the attitude towards religion, and with regard to this question profound differences of approach exist in the Jewish community of Israel. (3) It follows that we find ourselves here in the ideological province in which no national consciousness has become consolidated and this criterion cannot therefore assist in solving the problem of registration.[104]

In order to convince his readers of these conclusions, he sets out to detail the positives of the historical approach as against the positives of the modern approach.

Under "Considerations in favor of the historical approach," Agranat forwards two general points: first, that the term "Jew" as used in other legislation [the 1953 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, for instance] has always been understood and interpreted as being in accord with the historical halakhic definition; and second, that Jewish communities outside of the Land of Israel (specifically in the United States) nevertheless maintain an historic link to the principles of the Jewish religion. As for the first point, Agranat notes that since historically, intermarriage was prohibited, that ensured the survival of the Jewish people despite dispersement. Moreover, because the halakhic standard for determining Jewishness applied in the past and is still applied within certain laws of the State, it should, he argues, also be applied in this case. He briefly notes that

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[104]Special Volume, p. 169.

the ruling in *Brother Daniel* (which proved to be antithetical to the halakhah) does not weaken the above argument since the decision was justified with the argument that Brother Daniel, having converted to another religion, severed his ties with his past, that being Judaism. As for the second point, Agranat notes that although not all American Jews feel an attachment to their historic-religious past, there nevertheless is among them (since the Holocaust and the establishment of the State of Israel) a conscious recognition that they are historically linked to a wider national-religious community. In support of this position, Agranat quotes from Max Lerner (below) and others who basically report the unity of the American Jewish community:

> In the quarter century after the rise of Hitler to power, during which the profile of Jewish life abroad included the experience of martyrdom, the needs of the refugees, and the crises of the new Jewish State, the emphasis within the American Jewish group shifted away from assimilationism toward . . . assertion of their uniqueness and separateness as a historical community. (America as a Civilization (1957), p. 510)[105]

He also notes that although there was an increase in the incidents of mixed marriage following the late 1950s, the rabbinical bodies of the United States from all movements still condemned the practice of intermarriage and were also zealous in their upholding of the halakhic standard of Jewish identity (although as we will see later, the Reform Movement early on accepted patrilineal descent in practice though not

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[105]Special Volume, p. 172.

publicly). In light of this historic attachment which Jews around the world share, Agranat says that to deviate from the halakhic definition of the term "Jew" would be to further divide the world's Jewry and to confuse future generations.

In presenting "Opposing considerations," that is, in light of the fact that modern Jews are "equals" with those of the past and that they are thereby not bound to those laws laid down by their predecessors, and considering that perhaps it is necessary to broaden the halakhic standard, Agranat makes four points. First is that the Population Registry Law is a wholly secular law with a wholly secular purpose. In other words, a person should be registered according to his/her own personal declaration -- the subjective argument -- and given the following objective facts: "that he does not entirely lack Jewish descent; that he maintains the center of his life in Israel; and that therefore it is to be presumed that he has integrated himself into the life of the Jewish community or will do so."[106] This is justified since the current situation presents mitigating circumstances against halakhah, and since even though registry per se is not evident of truth, refusal to register such a person is likely to produce undue discrimination and an inferiority complex.

The second consideration is that based on the Declaration of Independence, the term "Jew" as applied in the Law of

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[106]Special Volume, p. 175.

Return must be interpreted in a "dynamic-liberal-secular" light. It follows that the same must apply to those who have already immigrated and who are productive citizens of the country.

Third, since registration of a particular is not evidence of its truth, a person registered as Jewish because his father is Jewish will still not be considered Jewish for purposes of marriage. Therefore, broadening the halakhic definition for purposes of registration will not weaken the law prohibiting mixed marriages.

Fourth and finally, one cannot say that broadening the halakhic definition will widen the ideological differences between Jews within and outside of Israel since the Israeli prohibition against mixed marriage only applies outside of Israel to those who take it upon themselves.

Agranat accepts the fact that these two considerations -- the historical approach and the modern approach -- are in conflict within the society, and that since there has not been public outcry demanding one position or the other, these approaches cannot help in solving the issue of registration which is before the Court. The point is that even if the Population Registry Law was interpreted in a narrow sense (that is, as a purely statistical measuring device), a decision would still have to be made as to whether or not to broaden the halakhic definition of the term "Jew" for such purposes; and that decision is ideological in nature. Thus

even if the halakhic definition of the term "Jew" were to be broadened for purposes of registration to include the Shalit children and others like them, the given fact that registration of a particular item is not proof of its validity is not enough to solve the ideological problem that the registration will nevertheless possess vital political-social merit as well as technical value. Additionally, in the future, the registration of a particular may be given the legal status of evidence of truth thereby pushing the halakhic definition of a Jew further into a corner. Once legal recognition is given to a particular definition of the term "Jew" that is at odds with the halakhic one, there no longer remains one, singular, unifying standard for determining Jewish identity, and a division is created between the present and the past.

With respect to the directive of the Interior Minister to leave blank the space "nationality," Agranat says that although an inference could be made that the children were not entitled to have "Jewish" in that space, the absence of an entry is not proof that they are not members of the Jewish people. Here, he concurs with Justice Landau, that the status of the children would be "left in the balance." He also recognizes that this solution leaves the term "nationality" un-interpreted, does not solve the overall problem of how to register the children of mixed marriage, and may lead to discrimination and feelings of inferiority. On the other hand, the Minister's directive dispenses the need to decide

the ideological issues of this case. This he sees as an advantageous position since the acceptable answer may be found in the future. But what he would really rather see is the item "nationality" removed from the Population Registry.

Agranat's final question is whether given the differences of opinion in the general population, it is the judicial purpose of the Court to, in effect, legislate a solution. His answer is no, on three grounds. First, he reasons that there is legal precedent, "that the High Court has a discretion when application is made to it by the citizen for relief against the act or decision of a public authority, and the Court will not interfere in the matter if justice does not require it."[107] Second, since there is no public consensus on this ideological issue, the Court is not bound to take a position. Third, since it is the role of the State to follow the will of its citizens, he argues that an ideological issue such as this requires public discussion and clarification in order to produce justice in the society before the State can step in to mould, shape, and interpret the issues into law. It is therefore not the role of the Court Judge to take a position on such a dividing ideological issue as "Who is a Jew?" even if it is a legal position since his opinion cannot accurately reflect the views of the public at large.

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[107] Special Volume, pp. 180-1.

To reinforce these positions, Agranat relies upon "two great pillars of American jurisprudence," Supreme Court Justices Felix Frankfurter and Benjamin Cardozo (who just happen to be Jewish), who both address the issue of the function of a judge in allowing legislatures to decide ideological issues rather than providing a judicial answer based on their own view of the public's will. According to Frankfurter,

> It is not the duty of judges to express their personal attitudes on such issues, deep as their individual convictions may be. The opposite is the truth: it is their duty not to act on merely personal views. ("John Marshall and the Judicial Function" in Government Under Law, ed. A. E. Sutherland (1956), p. 6)

However, according to Cardozo, there are instances where the "common will" cannot be determined:

> . . . when there are no legislative pronouncements to give direction to a judge's reading of the book of life and manners . . . he must put himself as best as he can within the heart and mind of others, and frame his estimate of values by the truth as thus revealed. Objective tests may fail him, or he may be so confused as to bewilder. He must then look within himself. ("Paradoxes of Legal Science" in Selected Writings, p. 284)[108]

For all these reasons, and for all those presented by his colleague, Justice Landau, Justice Agranat rules for the dismissal of the order nisi.

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[108]Special Volume, pp. 182-3.

X.

The Opinion of Justice Zvi Berinson

At first thought, Justice Berinson was content with simply expressing his concurrence with the opinion (as regards justifications and conclusions) of Justice Sussman, but after receiving letters from friends which quoted from his own *Brother Daniel* opinion, he decides to briefly elaborate further. He reinforces his opinion and justification of his *Brother Daniel* opinion; and secondly, he says that to apply his *Brother Daniel* opinion to this case (with respect to how to register the Shalit children's nationality) would lead him to the same conclusion as Justice Sussman.

Berinson recalls the facts of *Rufeisen* and of this case, noting that they are basically opposite sides of the same coin. In other words, he views the authoritative legal ruling of *Rufeisen* to be the declaration that halakhah does not determine Jewish status under the Law of Return. In fact, it does not determine Jewish status under any enactment of the Knesset. So in this case (given current realities), he does not think that the halakhic standard should (or does) apply.

This, of course, is in contrast to Agranat and others who see the issue as one of "objective" verses "subjective" identity. For them, in *Rufeisen*, the criterion was the "man-on-the-street" definition of the term "Jew," while in this case, the criterion is the generally accepted notion that to belong to the Jewish nation, one must partake of the minimum

national, ethnic, or even religious requirements as understood by "the Jews" themselves.

In light of his understanding that the halakhic principle was instituted because of the fear that Gentile mothers would lead their children to abominations, the situation in the State of Israel is different, and therefore requires different considerations. Thus he notes the then current situation: that the marriage of Jewish women to non-Jewish men is a much more prevalent practice than the reverse, and that in nearly all cases, the woman is cut off from her people when she goes and joins her husband's family and people. Yet according to halakhah, the children of such unions remain Jewish, while, for instance, if the father is a Moslem, the children are considered Moslem by his religion. Berinson asks how, in this case, should the nationality of the children be registered if not per the declaration of the parents? Those who would uphold a *Rufeisen*-like standard might point out that the woman is cut off from her people but not from her tradition. This in itself represents an "objective," public evaluation of her national status: her nationality can thus be "objectively" defined as "Arab."

On the other hand, says Berinson, are the Shalit children, born to a Jewish father and non-Jewish mother. Even though they are being raised in a Jewish environment and educated in Jewish schools, according to Jewish Law, they are considered as Gentiles, and even if they one day marry a Jew

and bear children, they too will be considered as Gentiles. Now if the grandson marries a Jew and has children with her, the children will be Jewish, but have a Gentile father. Berinson asks: "Are the iniquities of the fathers to be visited upon the daughters, unto the third and fourth generation and their children after them, even though they do not emulate their fathers in this regard?"[109]

He thinks absurd the notion (and halakhic reality) that the head of the East Jerusalem terrorist organization, who though born of a Jewish mother and works for the destruction of the Jewish State, is halakhically considered Jewish while the Shalit children, born of a war veteran (who happens to be their father and not their mother!), are considered non-Jews. The problem with this "sneaky," though effective, rhetorical language is that, on the one hand, there are many Jews who are enemies of Judaism and the State of Israel, while on the other hand, there are many "Righteous Gentiles" and other non-Jews who wholeheartedly support the Jewish State. Should they, then, be considered Jewish by virtue of the fact of their kindness to Judaism or the Jewish State? We must remember that a person's identity and a person's actions are two separate things and should not be confused.

Halakhah aside, Berinson reiterates that the Population Registry is not based or rooted in Jewish Law, but rather that

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[109]Special Volume, p. 187.

it is merely a list of those persons residing in the State from many religious and national backgrounds. Moreover, he says that it is the "man-in-the-street" definition which must be applied to the term "nationality," and that the terms "nationality" and "religion" are separable since they are two separate questions on the citizenship application. Since no single definition of the terms can assist in deciding this case, Berinson says that "'nation' must be given an ordinary meaning compatible with the spirit of the times and reflecting the view accepted by the enlightened section of the population."[110] (How we define this standard and these people is anyone's guess!) Taking into account the fact that the Shalit children are being raised as all other Israeli children, should they be left "nationless" in their own nation? Should those couples wherein the wife is not Jewish be discouraged from immigrating to Israel? These, of course, are rhetorical questions for Berinson with obvious answers.

To support his position, he quotes two lay people who participated in a "Who is a Jew? What is a Jew?" conference. First, the words of Ya'akov Cohen and then Joseph Bentwich:

> Our problem now is that for the first time in the history of the Jews, a majority of the people, both in this country and abroad, do not attach importance to the definition of Judaism according to the halakhic viewpoint. This is not a quantitative change . . . but a qualitative change.

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[110]Special Volume, p. 188.

> Such a person [i.e. a person who voluntarily undertakes to be a Jew] who wishes to identify himself with the Jewish people, a people not very popular in present times, and to join his fate with it in the sense of "thy people is my people and thy God my God," must have the way barred to him simply because his mother is not Jewish? "Jew" is not a matter of biology or race. Then why should he not convert? The trouble, however, is that our rabbinate is very rigorous about accepting converts; it regards itself bound by the halakhah and without authority to induce changes.[111]

Berinson is quick to point out that the latter sentiment is from a person who recognizes that religious values <u>are</u> an essential ingredient of "Jewishness," for Bentwich also said:

> Every people tries to preserve its values, its own tradition and customs -- and prides itself with them. Identification with the Jewish people, with its history, with Jewish culture, the Bible and tradition -- we cannot free ourselves from these things and say we are no longer committed to them.[112]

Since in other matters, the Legislation of the State has included people of many nations and religions, it should therefore in this case also separate "nationality" from "religion" in its interpretation and application of the Population Registry Law. Since any given registration officer cannot possible know any given person's actual national origin or affiliation, especially since many nations and peoples have been divided and unified throughout history, there is no question for Berinson that the officer has no right or authority to record a person's nationality on his own accord.

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[111]<u>Special Volume</u>, p. 189.

[112]ibid.

The only option is for the registration officer to record that which is reported to him if offered in good faith.

For all the reasons cited, Justice Berinson is of the opinion that the order nisi be made absolute.

E.

The Amendment to the Law of Return (1970): A "Definitive" Answer

Following the decision of the Court in the *Shalit* case, it was obvious that nothing was solved and that there remained no resolution to the question of "Who is a Jew?" Even though the Court did not decide the issue or establish a legal or otherwise definition of a "Jew" (except for the implementation of a specific administrative law), there was still much opposition. The ruling in favor of Shalit caused an uproar in the Orthodox community, as once again Mafdal threatened to withdraw from the coalition government. There was a barrage of letters and public sentiment calling upon Prime Minister Golda Meir to reverse the Court's decision. The Chief Rabbinate of Israel called upon Minister of the Interior, Moshe Haim Shapiro, not to obey the decision, but rather to follow only the halakhic position (which he agreed to do!). Many in the non-Orthodox community were also unhappy with the Court's ruling, saying that it would lead to more intermarriage in Israel and in the Diaspora. As the War of Attrition with Egypt raged on, the stability of the coalition Government became a priority; a compromise between Golda Meir, the Labor Party, and the Orthodox had to be worked out. Mrs. Meir agreed to concede an halakhic definition for Jewish Status provided that it did not inhibit immigration or cause a greater separation between the religious community in Israel and the non-Orthodox community abroad.

On March 10, 1970, following an historic debate in the Israeli Legislature, an amendment was added to the Law of Return, for the first time giving a definitive definition to the term "Jew:" "For the purpose of this law, 'Jew' means a person born to a Jewish mother, or who has become converted to Judaism, and who is not a member of another religion." The last phrase was intended specifically to assure that another Brother Daniel case could not be argued.

During the debate, the Orthodox insisted that the words "in accordance with halakhah" be inserted after the words "converted to Judaism" in order to declare invalid conversions performed under Reform and Conservative rabbis in the Diaspora. Mrs. Meir and the Legislature, however, did not yield on this point, arguing that in Israel the Government had the right to make rulings with respect to conversions, but outside of Israel it did not. Moreover, they understood and realized that the majority of conversions performed outside of Israel were done under non-Orthodox rabbis. Thus a person converted outside of Israel under the auspices of a Reform or Conservative rabbi would still qualify for Jewish status under the Law of Return.

As a further acquiescence to the Orthodox, an amendment was enacted with respect to the 1965 Population Registry Law, bringing it in line with the new definition as established by the amended Law of Return. Now, in order for a person to be registered as a Jew, in terms of "religion" and/or "national-

ity," the registry official had to be sure that the person fell under the amended Law of Return definition:

> Section 4(a) of the new law extended rights under the Law of Return, i.e., the right of Aliyah, the acquisition of Israel citizenship on arrival, as well as rights extended under other laws. Among these were economic benefits accorded to Olim, as well as to "the children and grandchildren of a Jew, to his spouse, as well as the spouse of his child or grandchild, excluding a person who was a Jew and who of his own free will has embraced another religion." Thus non-Jewish spouses of Jews, as well as their offspring, regardless of whether they were Jews in terms of the Halakhic definition, would be admitted to Israel and entitled to all the benefits accorded to such persons.[113]

Did this amendment to the Law of Return and the fact that it seemed as though the Orthodox had prevailed in making the halakhic definition of Jewishness the legal one for the State of Israel settle once and for all the question "Who is a Jew?" Not by any stretch of the imagination! Since the Orthodox community lost the conversion battle, they pushed on, changing the question to "Who is a Jewish Convert?" After nearly every national election since 1970, the issue of Jewish status has become relevant, because there has not been a majority Government elected by the Israeli populace. So coalition Governments, which must include the smaller, Orthodox parties, have had to be formed. In order to build the coalition, the major party blocs have been willing to accept the demands of the religious parties, demands far beyond what their electoral strength would normally demand. The Orthodox community has

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[113]Abramov, p. 304 (note).

continually pushed for another amendment to the Law of Return. but so far, the Legislature has continued to reject all appeals to amend the Law. In maintaining the non-Orthodox viewpoint, Rabbi Richard G. Hirsch, executive director of the World Union of Progressive Judaism wrote in Keeping Posted:

> No political body has the right or the capacity to impose a political solution in the area of religious practices. The Knesset has no jurisdiction over Diaspora Jewry and cannot affect the practices of religious movements abroad. The religious differences between Orthodox, Reform, and Conservative Judaism should be reconciled by religious leaders in dialogues based on mutual respect and recognition of a shared Jewish destiny.
>
> If Israel is not a society where all Jews feel at home, then Israel will not remain the spiritual home for all Jews. What is at stake in the "Who is a Jew?" issue is no less than the very character of the Jewish State and its relationship to the Diaspora. Through this struggle Reform Jews are helping to maintain Israel as an open and pluralistic society, one with which all Jews can proudly identify.[114]

There is no doubt that the question of "Who is a Jew?" is not, nor will it perhaps ever be, settled. Now that the Jewish community is world Jewry, everything that one group does affects all other groups. Though each individual group or community can and perhaps must establish for itself its own definition of Jewishness, there remains the desire to maintain a link with tradition and to at least maintain the appearance of Jewish unity, be that just a pipe dream or a vision which all Jews wish to emulate.

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[114]Bennett, pp. 16-17.

It is indeed unfortunate that political considerations had to be infused into the debate of this most sensitive and polarizing of issues. Yet, we all know and recognize that politics play an integral (if not disgusting!) role in how legislatures and countries operate and which laws are enacted in a given society. With respect to this issue, the debate goes far beyond politics and emotions, and even laws. The fact still remains that every community and society must decide who is to be included and who excluded, and how that inclusion and exclusion is to be determined. Since Judaism is built upon a structure linking every generation with past generations and a past history, how one person experiences that link with the past is determined by how that person understands, experiences, and even writes the past. That is why we saw many of the Israeli Supreme Court justices and the Reform Movement give their respective versions of Jewish history.

In the next section, we will look for areas of convergence and divergence among the two court cases and the Patrilineal Descent Decision of the CCAR. It will be important to notice how each community defines itself and why, and to compare the different versions of Jewish history forwarded by different persons and groups.

CHAPTER THREE

The CCAR Resolution on Patrilineal Descent and Its History

Even though the actual Patrilineal Descent Decision was not adopted by the CCAR until 1983, it was in principle the prevailing practice virtually since the Reform Movement's beginning. As early as 1892, at the third convention of the Central Conference, a resolution was adopted which, in essence, defined a Jew according to his or her beliefs and practices, rather than by his or her descent or any formal conversion ceremony. The traditional-halakhic requirements of *milah* (circumcision) and *t'vilah* (ritual immersion) were basically dropped. It is important to note that, at least with respect to a prospective convert, only education and intent mattered. The person no longer needed any type of religious or ritual change in status. We will see this come up again in 1961. The words of the 1892 resolution were as follows :

> Therefore be it resolved that the Central Conference of American Rabbis, assembled this day in this city of New York, considers it lawful and proper for any officiating rabbi, assisted by no less than two associates, to accept into the sacred covenant of Israel and declare fully affiliated to the congregation *l'chol davar shebik'dusha* any honorable and intelligent person, who desires such affiliation, *without any initiatory rite, ceremony or observance whatever; provided, such person be sufficiently acquainted with the faith, doctrine, and canon of Israel.* (my emphasis)[115]

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[115]Yearbook of the CCAR, Vol. 3 (5653/1892-93), (Cincinnati: Bloch Publishing, 1893), p. 94.

In 1947, the Conference formally adopted the Committee on Mixed Marriage and Intermarriage's proposal which, in essence, said that a child born of a non-Jewish mother may be considered Jewish without ritual conversion given various conditions. However, now what mattered was the intent of the parents. Given a parental declaration of intent, a child was thus "converted:"

> With regard to infants, the declaration of the parents to raise them as Jews shall be deemed sufficient for conversion. This could apply, for example, to adopted children.[116] This decision is in line with the traditional procedure in which, according to the Talmud, the parents bring young children (the Talmud speaks of children earlier than the age of three) to be converted, and the Talmud comments that although an infant cannot give its consent, it is permissible to benefit somebody without his consent (or presence). On the same page the Talmud also speaks of a father bringing his children for conversion, and says that the children will be satisfied with the action of their father. If the parents will therefore make a declaration to the rabbi that it is their intention to raise the child as a Jew, the child may, for the sake of impressive formality, be recorded in the Cradle-Roll of the religious school and thus be considered converted.
>
> Children of religious school age should likewise not be required to undergo a special ceremony of conversion but should receive instruction as regular students in the school. The ceremony of Confirmation at the end of the school course shall be considered in lieu of a conversion ceremony.
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> Children older than confirmation age should not be converted without their own consent. The Talmudic law likewise gives the child who is converted in infancy by the court the right to reject the conversion when it

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[116]An adopted child is considered a complete member of the family and as if s/he were a natural child of the parents. Thus an adopted child whose parents declare their intention to raise their child Jewish is sufficient for establishing that child's Jewish status. The adopted child is thus "converted" by means of the adoption process. (See Rabbi's Manual (CCAR, 1988) and American Reform Responsa (CCAR, 1983), #63)

> becomes of religious age. Therefore the child above religious school age, if he or she consents sincerely to conversion, should receive regular instruction for that purpose and be converted in the regular conversion ceremony.[117]

Important here are the words "sufficient for conversion." As we will see, they do not appear in later publications of the Central Conference. Thus like the 1892 resolution, a person joined Judaism through some act -- in this instance, the declaration of one's parents.

In the 1961 Rabbi's Manual, the issue was again addressed, stating even more clearly the Reform Movement's position that a child born of a non-Jewish mother may be considered Jewish given years of study and the intention to live as a Jew.[118] The status of a child whose father is non-Jewish is also discussed, here for the first time. Most important, however, is the fact that a major change had taken place since 1947. Now a person is recognized and accepted as Jewish without any type of actual or quasi "conversion," be that circumcision and ritual immersion or declaration and religious education:

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[117]CCAR Yearbook, Vol. 57 (1947), pp. 170-1.

[118]More correctly, the two paragraphs quoted are simply given as a statement with no sources or references. The statement is not based on any resolution of the Central Conference or any responsum of the Responsa Committee. However, the Rabbi's Manual is an official publication of the Central Conference, and therefore, the statement may be taken as the official position of the Central Conference.

> Jewish law recognizes a person as Jewish if his mother was Jewish, even though the father was not a Jew. One born of such mixed parentage may be admitted to membership in the synagogue and enter into a marital relationship with a Jew, provided he has not been reared in or formally admitted into some other faith. The child of a Jewish father and non-Jewish mother, according to traditional law, is a Gentile; such a person would have to be formally converted in order to marry a Jew or become a synagogue member.
>
> Reform Judaism, however, accepts such a child as Jewish without a formal conversion, if he attends a Jewish school and follows a course of studies leading to Confirmation. Such procedure is regarded as sufficient evidence that the parents and the child himself intend that he shall live as a Jew.[119]

So now, no actual or quasi-type of "conversion" was necessary for establishing Jewish identity. One did not now join the ranks of Judaism through a change in status (however effectuated); rather a person was simply given Jewish status given certain specific requirements.

By the 1980s, the situation facing the American Jewish community had changed. The country's Jewry included tens of thousands of Jews who were intermarried and an equal number of children of such unions who were also being influenced by the extended non-Jewish family. Thus the long-held assumption that the child of a Jewish mother (and non-Jewish father) was likely to be more Jewish than the child of a non-Jewish mother (and Jewish father) was no longer valid.

Although the issue of patrilineality had been discussed by the CCAR's long-standing Committee on Conversion, at the

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[119]Rabbi's Manual (New York: Central Conference of American Rabbis, 1961), p. 112.

1979 Biennial in Toronto, the president of the Union of American Hebrew Congregations, Alexander Schindler, called upon the Union to take action. In a 1986 interview with Keeping Posted magazine, Schindler gave his three reasons why patrilineal descent had to be proposed for defining who is a Jew:

> To begin with, I felt it was in keeping with our fundamental Reform principle of making no distinction between the rights of men and women in religious life. . . . The second reason concerns the high rate of intermarriage, often involving Jewish men marrying non-Jewish women. The third reason concerns the tens of thousands of children who have Jewish fathers and non-Jewish mothers. The traditional Jewish definition of Jewishness made them feel less than Jewish [indeed, since according to that definition, they are not Jewish at all!], perhaps even inferior.[120]

The issue was referred to the CCAR for clarification and advice. At their next convention, one year following the Toronto Biennial, the CCAR established a Select Committee of twenty members. Over the next three years, that Committee met numerous times and reworked, again and again, their Report to the 1983 Convention. In his presentation of the report to the Conference, Peter S. Knobel stated explicitly that:

> The purpose of the document is to deal with a situation peculiar to our community, namely to establish the Jewish status of the children of mixed marriage in the particular setting of the Reform Jewish community in North America. While we recognize that what we do here will have an impact on other communities, there are many historical examples of rabbinic pronouncements designed to address the specific situation of individual Jewish communities. It should be further emphasized that we are offering guidance to our colleagues on how we believe the

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[120]Bennett, pp. 9-10.

problem should be resolved, specifically for those who come to us for help, but as is the case with all CCAR resolutions, individual rabbis will have to make determinations in individual cases.[121]

Knobel also noted that the Committee wanted to make it clear that the halakhic notion, that biological descent held for the child of a Jewish mother but not for the child of a Jewish father, was no longer sufficient. Furthermore, as stated above, because of the fact that the non-Jewish family was an ever-increasing presence in the life of children of mixed marriages, the Committee wanted to outline those acts which would be required of parents in order to show their commitment to the Jewishness of their children. Following various amendments and much discussion, on March 15, 1983, the CCAR adopted the following resolution:

> The Central Conference of American Rabbis declares that the child of one Jewish parent is under the presumption of Jewish descent. This presumption of the Jewish status of the offspring of any mixed marriage is to be established through appropriate and timely public and formal acts of identification with the Jewish faith and people. The performance of these mitzvot serves to commit those who participate in them, both parent and child, to Jewish life.
>
> Depending on circumstances (according to the age or setting, parents should consult a rabbi to determine the specific mitzvot which are necessary), mitzvot leading toward a positive and exclusive Jewish identity will include entry into the covenant, acquisition of a Hebrew name, Torah, study, Bar/Bat Mitzvah, and Kabbalat Torah (Confirmation). For those beyond childhood claiming Jewish identity, other public acts or declarations may

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[121]CCAR Yearbook, Vol. 93 (1983), p. 144.

be added or subtracted after consultation with their rabbi.[122]

Along with the above stated reasons as to why the Decision was necessary, we can look for more justification within the text of the full report of the Committee and to other opinions which were voiced months after the Report's adoption.

The full text of the Report notes that intermarriage is among the most compelling issues facing the American Jewish population.[123] It is pointed out that intermarriage became an issue following the Enlightenment and Emancipation. A quotation from Robert Seltzer (a Reform rabbi), Jewish People, Jewish Thought (p. 544) is provided: "Social change so drastic and far reaching could not but affect but on several levels the psychology of being Jewish. . . . The result of Emancipation was to make Jewish identity a private commitment rather than a legal status, leaving it a complex mix of destiny and choice." But who is to say that this version of Jewish history is correct? As we saw in *Brother Daniel* and *Shalit*, we are the ones who interpret history and give it the meaning it has and the meaning we want it to have. So, "Jewish" is not necessarily a "private commitment rather than a legal status" until we say it is. Anyone who appeals to history must remember this.

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[122]ibid., p, 160.

[123]ibid., pp, 157-60.

In 1806, the Napoleonic Assembly of Notables challenged the Jewish community for the first time to choose between tradition and modernity. The CCAR Committee on Patrilineal Descent Report notes that, "this tension is now a major challenge, and it is within this specific context that the Reform Movement *chooses* to respond." (my emphasis) [The word "chooses" is the key word here since it is always our choice what history compels us or any group of people to do.] The Report goes on to note the halakhic position that the offspring of a Jewish mother (and non-Jewish father) is considered a Jew while the offspring of a Jewish father (and non-Jewish mother) is not. In order to take appropriate action given the modern situation, the Committee examined the halakhic position, previous Reform positions, and current factors: "In doing so, we seek to be sensitive to the human dimensions of this issue."

Additional justification is given by means of briefly analyzing the history of patrilineality. Both the Bible and the Rabbinic tradition assume paternal descent in determining inclusion into the Jewish people. Cited is Numbers 1:2, "by their families, by their father's houses," and its interpretation (from *Bava Batra* 109b and *Y'vamot* 54b): "The line (lit. family) of the father is recognized, the line of the mother is not." The Rabbinic tradition of paternal descent is further discussed in *Mishnah Kiddushin* 3.12, where the paternal line is maintained, given a Jewishly legal marriage.

Given a Jewishly invalid marriage (that is, where the mother cannot legally marry any Jew), the offspring's status was determined by the mother. Since a Jewish woman could not legally marry a non-Jewish man and a Jewish man could not legally marry a non-Jewish woman, the halakhic principle of matrilineal descent was developed. In other words, because a woman had no choice but to return to her own people with her children (a point for which the Report offers no prooftext), the Rabbis linked religious status to the mother. The Report continues by reprinting the 1947 proposal of the Committee on Mixed Marriage and Intermarriage and the passage from the 1961 Rabbi's Manual, and concludes by stating the Resolution outright.

Just months after the Resolution was adopted, still more justification and clarification became necessary. In the September 1983 (vol. 8, #8, pp. 32-36) issue of Moment magazine, Rabbis Sheldon Zimmerman and Jakob J. Petuchowski debated the Decision. Rabbi Zimmerman, then the spiritual leader of New York City's Central Synagogue and the co-chairman of the Task Force on Reform Jewish Outreach for the UAHC and the CCAR, said that the issue of "Who is a Jew?" has been a problem for 4,000 years and that it is each new generation's obligation to take account of its own situation in determining a definition of Jewishness. There is no question that a person born of two Jewish parents is Jewish and that a person born of two non-Jewish parents is not

Jewish. That holds true for Jewish law, especially since there is no standard of belief or practice and since a person remains a Jew no matter what. The person whose mother only is Jewish is also considered by Jewish law as if s/he has two Jewish parents, while the person whose father only is Jewish must convert in order to attain the same status. Rabbi Zimmerman says that "this is, in many respects, an anomalous situation, and it was in an effort to repair the anomaly that, at its convention in March 1983, the Central Conference of American Rabbis adopted the Resolution."

Thus, there were two goals intended by the Resolution: First, that the distinction between having a Jewish mother and Jewish father be eliminated; and second, to establish a "new category" of Jewishness that would lie somewhere in-between the automatic status of a person with two Jewish parents and the unambiguous status of a person with two non-Jewish parents. With the Decision, said Zimmerman, "more will now be expected of the child of one Jewish parent than has traditionally been required of the child of a Jewish mother; yet less than formal conversion will now be required than has traditionally been required of the child of a Jewish father."

Next, Zimmerman addresses the need for the Decision and why it was so controversial. It was born out of the CCAR's perception of the problem of intermarriage and the fact that Jewish men will continue to marry non-Jewish women (the more frequent type of mixed marriage) no matter what. Since many

of these fathers desire to raise Jewish children, and since many of the children of such unions have already become religiously affiliated, the intention was to include rather than exclude these children: "We say, with the halakhah, that birth creates a claim to Jewishness. But we go on to say -- and here we part from the halakhah -- that birth is not sufficient to establish identity." It is not mere birth, then, but rather "visible commitment" that is required, regardless of which parent happens to be Jewish.

Zimmerman notes that matrilineality was not always the principle for determining Jewishness, and that in ancient Israel it was in fact the paternal line which determined inclusion into the Jewish nation. Along with the reasons given in the Report for the change, Zimmerman notes (like the Report, with no proof for these debatable assertions): "the rape of Jewish women by foreign soldiers, (and) the inability to resolve 'who is the father' with certainty in a polygamous society." These historic reason linked children with their mother, yet -- and this is core of his argument -- the historical reality has changed, necessitating a more equal approach.

In response to those critics who claim that the Reform Movement is dividing the Jewish people, since at least the answer to "Who is a Jew?" was always agreed upon, Zimmerman asserts that there exists no unity to divide. Neither Reform conversions nor marriages nor even rabbinical ordination

itself are accepted by the Orthodox Rabbinate or community. He notes that in Israel, the Rabbinate investigated the Jewishness of American Jews who wished to marry, and required a certificate by an Orthodox rabbi proclaiming Jewishness. "This is Jewish unity?" asks Zimmerman. There is no unity when one side proclaims its way to be the only valid way and discounts the other side no matter how they do things: "A Judaism that rejects the demands of history and the necessity for halakhic responsiveness, that mocks and dismisses alternative views -- such a Judaism can hardly be thought to preserve Jewish unity or be its arbiter. Jewish unity is a vision, not a reality." In response to those who argue that the Decision will encourage more intermarriage, Zimmerman (who himself does not officiate at mixed marriage ceremonies) says that it is ridiculous to believe that Jews will feel that the Resolution in essence gives them permission to marry outside of their faith. Since the essence of the Decision creates a higher standard of Jewishness and Judaism, Zimmerman believes that it will actually encourage conversion. In place of birth, Talmud Torah is to be the ultimate test.

Beyond that, Zimmerman calls for honesty: if there is concern with respect to the Orthodox position, Reform rabbis should be forthcoming in telling the child that traditional conversion is always a possibility. The child should be told that the Reform Movement wants to include them and not make their Jewishness dependent upon the accident of birth.

Finally, even though the make-up of American Jewish life can be summed up with the word "minimalist," Zimmerman says that "we are holding up a standard, a vision of what can be. We recognize a claim to Jewish descent that has not been recognized for many centuries, and we declare that we are ready and willing to embrace those who fall within the scope of that claim."

The contrasting point of view on the issue of patrilineal descent was provided by Dr. Jakob J. Petuchowski (1925-1991), the Sol and Arlene Bronstein Research Professor of Judeo-Christian Studies at HUC-JIR in Cincinnati: "The March 1983 decision of the CCAR is more than a coming-to-terms with the sociological realities of 20th century America. It becomes a conscious step taken by the Reform rabbinate to establish Reform Judaism as a *sect* on the periphery of Judaism." Since the year 70 C.E., when the Jewish Temple was destroyed and the Jewish people went into exile from their land, there has not been a universally recognized authority; the cohesion of the community was centered around halakhah. Those who did not acknowledge the halakhah's authority removed themselves from mainstream Judaism, and moved to its periphery. Certainly there were discrepancies in religious practice and belief among Jews around the world, but these differences remained within the bounds of the same family, in that no matter what one Jew thought of another Jew's theology or religious customs (or lack thereof) there was no denying their Jewish status:

"The bottom line of the great freedom of thought and the considerable leeway granted in matters of practice by traditional Judaism was the universal acceptance of the laws of personal status, the ability to recognize one another as Jews."

Petuchowski maintains that Reform Judaism, long before the 1983 Decision, stretched the bonds of cohesion with the world's religious community by not requiring a *get* for divorce, by doing away with circumcision and immersion for conversion, and by "increasingly countenancing" mixed marriages. Petuchowski views the Patrilineal Descent Decision as "the final step in this process." He sees the Reform Movement as acting unilaterally in changing the definition of "Who is a Jew?" so that no longer can the most liberal Reform Jew be linked to the most ultra-traditional Jew. As for the future result, he says that non-Reform rabbis will have to investigate the Jewishness of prospective marriage partners, and that children of Reform marriages will be limited in their choice of prospective partners to only fellow Reform Jews: "In other words, by making marriage with other religious Jews (of a non-Reform variety) practically impossible in the long run, Reform Judaism has now taken a decisive step on the road to becoming a sect." Moreover, even though it was not the intention of the founders of Reform Judaism, he argues that it turned out that Reform congregations tend to attract the minimalist element of the Jewish population in any given

community. However, since Reform Judaism does not contain and is not likely to produce the usual elements which guarantee the general continuance and survival of a religious sect -- enthusiastic sectarians and self-sacrificing missionaries -- its continuity and endurance cannot be guaranteed.

In Petuchowski's view, the movement has taken this drastic step in order to simply increase its numbers, and in doing so has changed *Liberal Judaism* into *Jewish Liberalism*: "Everything goes; Reform Judaism is all things to all people. . . . Today, atheists, agnostics, and non-theistic humanists are members in good standing of the Central Conference of American Rabbis." Aside from this, Petuchowski says that it will be interesting to see how the Decision plays itself out in the State of Israel and around the world. Specifically, he wonders whether Israel will reject and denounce the Decision or give in because of monetary considerations, and whether Reform rabbis in Britain (some CCAR members) will accept or reject the decision of their American colleagues.

One month after that article, in October 1983, Rabbi Walter Jacob, chairman of the Responsa Committee of the CCAR responded to the following question: "What are the origins of matrilineal descent in the Jewish tradition; what *halakhic* justification is there for the recent Central Conference of American Rabbi's resolution on matrilineal and patrilineal descent which also adds various requirements for the es-

tablishment of Jewish status?"[124] Without going into every detail as provided by the answer, the main points will be highlighted here. For two thousand years, the Jewish status of a child was determined by the mother. This was instituted for a variety of reasons (among which was not rape): the offspring of illicit intercourse or illegal unions, the doubt as to the father's identity, the absence of a father. In any event, before matrilineality was universally accepted as being authoritative, there was much debate and disagreement. Rabbi Jacob notes that "the discussions demonstrate that this decision represented rabbinic reaction to specific problems," a point that implies that the Reform Movement and its rabbis are also reacting to specific problems in creating their Decision. In other words, he is arguing from an "is" to an "ought," in that since change happened then, that justifies change now.

It is clear that during biblical and post-biblical times, the status of the child followed after the father. This did not ultimately change until conditions demanded it: for example, entry into the priesthood continued to follow the paternal line (if the marriage was proper). For improper marriages and children of un-solemnized marriages, the child followed after the "tainted" parent. Even with respect to a

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[124]The full text of the question and answer may be found in Walter Jacob, ed., Contemporary American Reform Responsa (New York: CCAR, 1987), pp. 61-68.

mixed marriage, the rule of matrilineality is suspect and debated among scholars. Jacob points to modern thinkers who cite the Roman Paulus (a child's mother is always known while its father was uncertain) as the basis for the rabbinic position. He also refers to Shayde J. D. Cohen's suggestion that the matrilineal position may have sprung from the general biblical and rabbinic dislike for mixtures (such as with respect to animals and materials). Also noted is the debated practice of the Karaites, who may have considered Jewish the child of a non-Jewish mother and Jewish father. Jacob, though, is unclear on this issue since the sources available are themselves unclear.

However, missing from these discussions is the stream of halakhic thought which denies Jewish status to the child of a Jewish mother and non-Jewish father. That is to say, Jewish status along the matrilineal line is not necessarily automatic, it merely provides an "option" for obtaining Jewish status. J. David Bleich points out that ". . . in cases in which the father is a non-Jew the child is accorded the status of a Jew only if he 'conducts himself as a Jew;' otherwise, he is deemed to be a non-Jew."[125] So if such a person is raised as a Jew and lives as a Jew, halakhic conversion is not necessary. However, if such a person has been raised as a non-Jew, it is as though he has rejected his "option" to

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[125]J. David Bleich, Contemporary Halakhic Problems, Volume III (New York: Yeshivah University Press, 1989), p. 98.

receive Jewish status based on birth, and he thus must undergo conversion to be deemed a Jew. Bleich, however, is firm in establishing that "the overwhelming majority of halakhic authorities . . . clearly and definitely rule that the child of a Jewish mother and a non-Jewish father is, in all instances, deemed to be a Jew."[126]

Returning now to Rabbi Jacob: In further building the justification for the CCAR's resolution, he points out that "these discussions show us that our tradition responded to particular needs. It changed the laws of descent to meet the problems of a specific age and if those problems persisted, then the changes remained in effect." Again using history as its own justification for change, the argument was made that the situation of the late nineteenth and twentieth centuries could not have been foreseen by the writers of the ancient texts. Prior to the modern era, marriages between Jews and non-Jews were extremely rare, and the relationship -- culturally and otherwise, between Jews and non-Jews expanded given the freedom and equality of the societies in which Jews now lived. Rabbi Jacob notes that the wording of the Decision reflects the Committee's sensitivity towards the reality of numerous mixed marriages, the structure changes in the family, and the development of new sex roles.

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[126]ibid., p. 99. For a more detailed discussion of this issue, see Bleich, Contemporary Halakhic Problems, Vol. II, pp. 103-107.

On the question of descent, Jacob elaborates further with five points. First, Jewish status in the biblical period and in later specific cases was determined by the father. Second, this practice was changed by the rabbinic authorities only once social or religious conditions demanded it, though we are not told specifically what these were -- but the implication again being that the Reform Movement is doing likewise. Third, since equality between men and women is an ethic long since upheld and universally applied by the Reform Movement, its application is thus warranted in this case. Fourth, since virtually all Jews have recognized the legality of a civil marriage between a Jew and Gentile, there is a moral imperative to recognize (the real change here) and educate as Jews the children of such marriages when desired by either parent. Fifth, Rabbi Jacob notes the rulings of the Israeli Supreme Court in the *Brother Daniel* and *Shalit* cases, even though they are secular in nature and non-binding upon the American Reform rabbinate. He also calls attention to the subsequent actions of the Israeli Government, which both narrowed and broadened the definition of Jewishness for purposes of immigration (see Chapter 2E). Important is the fact that, like the Israeli Supreme Court, the Reform Movement used flexibility in answering new and difficult questions of Jewish identity. Thus, says Jacob, "for the reasons cited in the introduction to the Resolution, those stated above and others, we have

equated matrilineal and patrilineal descent in the determination of Jewish identity of a child of a mixed marriage."

On the question of the requirements for establishing Jewish status, Jacob notes both traditional and modern factors. In requiring "appropriate and timely public and formal acts of identification with the Jewish faith and people," instead of relying on birth alone, he says that the Reform Movement has become more exacting than traditional Judaism. Previously, the number of people with doubtful Jewish status was small. The question was brought to light with the Conversos (also known by the derogatory term Marranos): "When such individuals identified themselves and lived as part of the Jewish community, they joined a semi-autonomous corporate community largely cut off from the surrounding world. Its entire way of life was Jewish." This reality changed, though, with the Emancipation. It has became more difficult for those of doubtful status to join the Jewish community. In Jacob's words, "they and virtually all Jews live in two worlds." The situation in America and the West (also of concern at that time was the status of the two million or so Jews in the Soviet Union) is that a large number of individuals are of doubtful status. To overcome this problem of identity, the Reform Movement choose to require "appropriate and timely public and formal acts," the exact nature of which is dependant upon circumstances. By making the requirements even more strict than mere birth, the hope

was that those individuals falling under the provision of the Decision would become even more dedicated to Judaism and fully integrated into the Jewish community.

In concluding, Jacob states the following additional reasons for the Decision:

> 1. We do not view birth as a determining factor in the religious identification of children of mixed marriage. [Worthy of interjection here is the fact that birth <u>is</u> a determining factor when <u>both</u> parents are Jewish! See below.]
>
> 2. We distinguish between descent and identification.
>
> 3. The mobility of American Jews has diminished the influence of the extended family upon such a child. This means that a significant informal bond with Judaism which played a role in the past does not exist for our generation.
>
> 4. Education has always been a strong factor in Jewish identity. In the recent past we could assume a minimal Jewish education for most children. In our time, almost half of the American Jewish community remains unaffiliated, and their children receive no Jewish education.

There is no question that these are pragmatic arguments for stronger programs of Jewish education and outreach. But as a critique, we might ask what makes them justifications for

changing the 2000 year-old definition of Jewishness? In fairness, it must be remembered that, at the very least, the Reform Movement and its leaders responded (positively or negatively) to a situation which they viewed as unprecedented in Jewish history. Because of their conception of history, and the development of the issue of Jewish status, they felt that they were in line with history in proposing a new standard for Jewish identity.

A number of questions and issues remain, many of which I intend to address in Chapter Five. For one, the Reform Movement does not deal with how one loses his/her Jewish identity. In other words, after the "appropriate and timely public and formal acts of identification," what is next? Does a person who is Jewish according to the Decision fail to remain Jewish upon relinquishing their Jewish identity? Or once considered a Jew, does that person fall under the halakhic rule that "a Jew, though he sins, remains a Jew?" These are problems and questions with which the Reform Movement has not yet had to deal.

Another issue that is of concern here is the notion of requiring more than the tradition from children of mixed marriage, while requiring nothing from children of two Jewish parents. Though Reform Responsa speak at length about apostasy, in that one can be a bad Jew though "Jewish" by birth, I think that the case of Brother Daniel is a clear one for the Reform Movement and Reform Jews on an emotional level

as it was for most of the population of Israel. Yet there are thousands of Jews in the United States and around the world, born of two Jewish parents, who are totally unaffiliated and have no Jewishness in their lives whatsoever. Do we say, with regard to these people, that they remain Jewish because of their birth, a criterion which we rejected in order to justify the Resolution? As we will see, there are no easy answers to these difficult questions, and in defense of the Reform Movement, as Rabbi Jacob said, the Resolution and Decision were merely a reaction to present realities.

That is not to say that many other issues and questions have not been addressed by the CCAR and its Responsa Committee. (See, for example, Contemporary American Reform Responsa (CCAR, 1987), nos. 39, 42, and 59) A quite interesting and telling case presented itself at the time of the writing of this thesis.[127] A rabbi in California asked if a woman whose maternal grandmother had been a Jew, but whose mother had converted to Christianity and who herself had been baptized as a Lutheran and brought up in that church, required conversion in order to be considered a Jew. There was also the question as to her Jewish status following the matrilineal principle.

Dr. Mark Washofsky, writing for the Responsa Committee, confirmed the rabbi's decision to require conversion from this

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[127]"Conversion of a 'Matrilineal' Jew," CCAR Responsa Committee, 5754.13 (unpublished).

woman. Based on the 1983 Decision, given the fact that the woman had been raised as a Christian, she required "other public acts or declarations" in order to claim her Jewish identity. Referring to the above mentioned responsa, Dr. Washofsky also noted that "this Committee has taken the view that the adult child of one Jewish parent requires conversion when that child has never previously identified as a Jew. Also worthy of note is the fact that though the woman is a Jew because, biologically speaking, her mother was Jewish, Dr. Washofsky maintains that some event according to halakhic practice, some formal rite would be required of the woman in order for her to return to the folds of Judaism. Still, there have been and remains much dispute and disagreement among rabbinic and halakhic authorities as to the Jewish status of apostates.

CHAPTER FOUR

Comparison and Analysis

What is most intriguing about the *Brother Daniel* and *Shalit* cases and the CCAR Patrilineal Descent Decision is that the issues involved may be understood, contemplated, and stated on many different levels. It is possible to take the strict halakhic approach, or it is possible to take an extremely open approach, saying that a Jew is anyone who claims to be, or anyone who is considered to be by another specific group. In the *Brother Daniel* and *Shalit* cases and the CCAR Resolution, there were many variables at work, and many different positions taken for many different reasons.

This section seeks to examine some of the similarities and differences between all three of these most historic rulings. In doing so, we will explore the different and varied problems faced by the two communities: the State of Israel and the American Reform Rabbinate. We will look at the many positions taken and determine if they were strict or lenient and why, and we will look to which particular audience each body -- the Israeli Supreme Court and the Central Conference of American Rabbis -- was talking.

The most obvious similarity between *Brother Daniel*, *Shalit*, and the CCAR Resolution on Patrilineal Descent is that a non-halakhic definition of the term "Jew" was ultimately decided upon in all three cases. Certainly this was not the

specific intent of the Israeli Supreme Court, although with respect to the Central Conference, it is not clear. Nevertheless, it was the outcome of their decisions. In *Brother Daniel*, the Court was dealing with an halakhic Jew who had converted to Christianity and who had become a priest; yet the Court ruled that he could not be considered a Jew for purposes of claiming citizenship under the Law of Return, even though the Law of Return had not specified any definition of the term "Jew." In *Shalit*, the Court was dealing with two children born of a non-Jewish mother, thereby making them non-Jews according to halakhah; yet the Court ruled that they must be registered as Jews with respect to nationality. Finally, in considering Jewish the child of a Jewish father and non-Jewish mother (without conversion), the Patrilineal Descent Decision of the CCAR made a clear break with halakhah in considering the child of full Jewish status (given certain requirements). In the Committee's own words, ". . . this resolution . . . departs from long-standing halakhah decisions."[128] So we see that in all three cases, although there were those in all the discussions who dissented, a non-halakhic result came about because of the position of the majority opinions.

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[128]"Questions and Answers on Jewish Descent: Clarifying the Jewish Identity of the Child of Mixed Marriage" (Loose Pamphlet) New York: Committee on the Status of Children of Mixed Marriages (Patrilineal Descent), 1984, question #9.

What does this mean? Why should this surprise us? After all, neither the Israeli Supreme Court nor the CCAR is an halakhic body per say. Yet here is where we can perhaps draw a distinction. Whereas the Israeli Supreme Court is not and does not consider itself to be a rabbinic body, the CCAR does. Thus the Court's decisions do not have to be couched in rabbinic terms or justified "rabbinically" (even though many of the opinions were), while those of the CCAR do (or at least claim to be). That is not to say, however, that the Court's decisions do not have to be justified "Jewishly." In the two cases examined here, there is no question that in the majority of opinions cited there is an abundance of Jewish content, Jewish reasoning, and appeals to Jewish interests and sources.

It is interesting that in *Brother Daniel*, the lawyers for both sides appealed to the halakhah, although they came to two very different conclusions. Writing the majority opinion, Justice Silberg cited numerous rabbinic sources and actually agreed with Brother Daniel's attorney, who took the halakhic definition to mean exactly what it says: that a Jew who has converted to another religion nevertheless remains a Jew, though a sinful Jew. However, Silberg also ruled that the term "Jew" as used in the Law of Return and as implied by the Legislature was not identical with the halakhic position. Had the Law of Return stated implicitly or explicitly that a "Jew" was a person born of a Jewish mother or one converted to Judaism according to halakhic standards, he would have

ruled in Brother Daniel's favor. But since the term as used in the Law of Return had to be interpreted on secular grounds, Silberg then appealed to "historical Judaism" and the umbilical cord that every Jew has which attaches him/her to his/her past. Of supreme importance was the "man on the street" definition, which without question did not consider a converted Jew -- a priest nonetheless -- still to remain a Jew, the halakhic definition notwithstanding. Silberg thus distinguished the halakhic definition from the nationalistic one, which made it clear that a convert out of Judaism could not be counted as a member of the Jewish people.

In concurring, Justice Landau also showed favor for the national definition over the halakhic one. Justice Berinson also concurred, but for different reasons. He was drawn to the emotional argument that despite his conversion to Catholicism, Brother Daniel would have been killed by the Nazis along with all the other Jews. Yet he nevertheless made his final decision on the grounds that Jewish tradition considered the convert to be a *m'shumad*, one who has been destroyed and lost to the Jewish nation.

Thus it may be concluded that the majority opinion in this case was justified on religious grounds in certain respects, even though their final opinion was <u>against</u> the long standing "official" Jewish definition of a Jew. Perhaps this seems paradoxical, since one would think that if the Justices wished to uphold the halakhic standard for determining Jewish

status, they would have ruled in Brother Daniel's favor. As we saw, however, it was not specifically the halakhic standard which they wished to uphold, but more specifically, the nationalistic requirements and tendencies of that standard. This can be understood more fully when one considers for whom (that is, which community) the Court was writing. This will be discussed below.

It must also be remembered that the Israeli Supreme Court is a secular body, and as a court of law, its responsibility is to make decisions based on the Law of the Land, not on emotion or on public opinion. That was the position taken by Justice Cohn in his dissenting opinion. Like Justice Landau, Cohn said that the applicable laws were secular, not religious, and thus the language contained therein must also be construed along secular lines. But instead of replacing the halakhic definition with a nationalistic one, Cohn ruled that since Brother Daniel's declaration was made in good faith, it was incumbent upon the Government to accept that declaration as grounds for citizenship under the Law of Return. Cohn's opinion was mostly justified along legal and secular lines, although in the end, his ruling actually upheld the halakhic standard of Jewishness. That is to say, even though he concurred with his colleagues' notion that the halakhic definition of Jewishness should remain in tact, he did not use the halakhah as a justification of his opinion, albeit, interestingly enough, the halakhah supported his ultimate

decision to consider Brother Daniel to be a Jew for nationalistic purposes. Of course, we must clarify that the halakhah is not absolutistic, in that, for instance, it does not count the *mumar* as part of a quorum. Yes, Brother Daniel is halakhically Jewish, but the halakhah itself might not recognize his "nationalistic rights." This was a suggestion given by Menachem Elon.[129]

So in *Brother Daniel*, we had a ruling which would appear to have upheld the halakhic definition of Jewishness in its language, but which then ruled against it, since the halakhah would have considered him to be a Jew without argument since his mother (parents, no less!) was Jewish. To one who stands outside of the world of halakhah this might seem totally hypocritical: how can one align oneself with the halakhah and then rule against it? Yet to those who live within the system, it might seem totally logical (take for instance, the above reasoning). In order not to seem to be talking out of both sides of his mouth, Justice Silberg drew a distinction and said, in essence, that yes, Brother Daniel is a Jew, but not with respect to the Law of Return or for purposes of citizenship in the State of Israel. Whether or not this was a fair distinction to make depends upon who is reading and analyzing the opinion.

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[129]See Elon, *Chakikat Datit* (Tel Aviv: Ha-Kibbutz Ha-Dati, 1968), p. 53.

Already it should be clear that along with the "Who is a Jew?" question, it is additionally vital to ask: for what purpose and according to whose decision and justification is one to be or not be considered Jewish? It is not good enough to simply ask "Who is a Jew?" without considering all the other variables. This point becomes important in analyzing the *Shalit* case wherein the children were not Jews according to halakhah, but were allowed to be registered as Jews (as far as nationality is concerned) in the State of Israel.

As we saw, *Shalit* did not occur in isolation. The Court was quite mindful of all the implications that would result from its decision to rule in Shalit's favor -- the potential break-up of the coalition Government and the fact that 1969 was an election year -- and the political pulse of the country considering that the War of Attrition was then in progress. The Government's position was based on the notion that "religion" and "nationality" could not be separated, and that a person's subjective feelings vis-a-vis his or her own religious or national affiliation were irrelevant; the objective test (that is, the halakhic standard) was what determined a person's status as a Jew. This is, of course, in contrast to *Brother Daniel*, where the Government did not espouse a purely halakhic argument (knowing that it did not outright support their position).

In this case, the Government argued specifically for the halakhic position, since it obviously did not consider

Shalit's children to be Jewish. On the surface, this might seem contradictory to their position *Brother Daniel*; but it must be remembered that the Government's lawyers actually used the halakhic argument in that case as well, although they interpreted the halakhic standard along nationalistic lines. In this case, that was not necessary, since without any interpretation whatsoever, Shalit's children were not Jewish according to the halakhic standard. Shalit, on the other hand, argued that "religion" and "nationality" were separable -- that one could be a nationalistic Jew without following the Jewish religion. We might ask: wasn't this the basis on which the majority opinion in *Brother Daniel* rejected Rufeisen's argument for Jewish status? Did they not argue there that Brother Daniel could not be considered a Jew nationalistically even though according to Jewish Law he was? In this case, the variable was religion: could it be separated from nationality? Could a Jew be a Jew without following or believing in the Jewish religion while strongly identifying with the Jewish people and the Jewish State?

At first, the Court asked the Government to simply remove the category "nationality" from the identification card, but when this proposal was refused, a decision had to be made. There were three basic lines of reasoning. Justices Silberg and Kister wrote that the Shalit petition to register their children as nationalistic Jews should be dismissed. Silberg argued that in order to be considered a Jew and a member of

the Jewish fold, one must profess the Jewish faith (i.e. religion). In upholding the halakhic definition of Jewishness, Silberg noted that the idea of a secular Jewish-Israeli nationality was contrary to the Jewish historical experience; the Jewish religion and Jewish nationality were intrinsically intertwined. Justice Kister wrote that registration must be made on evidence: that is, if the parents are of different nationalities, the identity card should reflect that. He, too, upheld the halakhic definition of Jewishness by saying that, in essence, Judaism was an ethnic group with which one must be affiliated in order to be considered a Jew.

In the second group of opinions, Justices Agranat and Landau ruled that the question before the Court was purely ideological in nature, and thus it was not up to the Court to decide; it was simply a matter for the Legislature. They argued for self-restraint, saying that the Court should not act on personal emotions or public opinion.

Justice Agranat discounted Shalit's argument for a secular definition of Jewish nationality. Instead, he highlighted the national-racial and religious features of Jewish nationality. He also noted the historical attachment of the Jews to their monotheistic religion as being a defining national characteristic. Still, Agranat ruled that to decide the issues in this case was beyond the bounds of the Court's power, considering the enormous public division of opinion.

Thus he argued that the Court should not rule on the case at all, even though he dissented from the majority opinion.

Similarly, Justice Landau took the case and all the surrounding issues to be strictly of ideological character. He said that no legal solution could or should be reached. Landau argued for moderation and self-discipline, since self-discipline argued against the idea of unlimited choice, which Cohn and others advanced in Shalit's favor. Thus he dissented from the majority opinion in ruling against Shalit and by upholding the validity of the Interior Minister's directives.

The third and final group of opinions comprised the majority opinion, which in essence said that the Minister's directives of 1960 were not legally valid since they were not based on any law or administrative enactment; they were, thus, unenforceable. Those who concurred with the majority opinion all ruled that the Jewish status of the children was not of issue, and that it did not arise for decision; the question in this case was simply a legal-technical one: Was the registration official legally justified in refusing to register the Shalit children as Jews?

Justice Cohn, whose opinion in *Brother Daniel* upheld the halakhic standard even though that was not his specific intention, here ruled that there are indeed many definitions of Jewishness. As he did in *Brother Daniel*, here he argued for a subjective definition, although he did so through legal and technical reasoning. He noted that the *Brother Daniel*

decision upheld the secular definition of the term "Jew," and that that definition also applied to the Population Registry Law under which the Shalit children were being registered. No entry, he said, could be evidence of correctness, but merely evidence of that which was reported. Only if the data was not given in good faith, could the registration official then refuse to record that particular entry. Since there was no evidence of that occurring in this case, the registration official was legally bound to record that which was reported to him.

In concurring, Justice Sussman also ruled for the subjective test, since the absurd situation could be created where a convert to Christianity could be refused citizenship under the Law of Return (because of the *Brother Daniel* precedent), but then granted citizenship and be registered as a Jew once settled in Israel since he remained a Jew according to the halakhic standard. In order to avoid this and other conflicts, and since no single definition could be applied to the term "Jew," Sussman determined this case simply on legal-technical terms in ruling that the registration official was duty-bound to record that which was reported to him.

Also concurring was Justice Witkon, who noted that with respect to ideological questions, it would be erroneous for a judge to presume that a given ruling would settle the issue; rather it is only a judge's judicial decisions that must be accepted. Since in this case the issue was not ideological,

but only legal and technical in nature, the question as to which test was to be applied to determine a person's Jewishness did not arise for discussion or consideration. The Court, therefore, was not obligated to rule on that issue. Still, Witkon showed favor for the subjective test over the halakhic standard, since national identity could not in any way be forced upon a person.

Justice Berinson, who ruled against Brother Daniel, here ruled in favor of Benjamin Shalit. It may be recalled that in the first case, he was drawn to Brother Daniel's side on an emotional level, but ruled against him, citing the principle that a convert was considered by tradition to be a *m'shumad*. In this case, he noted that the halakhic standard simply did not reckon with the modern situation. The old fear that the child of a mixed marriage would follow the non-Jewish faith of the mother did not apply given the reality of the Jewish State (a "Reform" approach?). Moreover, he noted that the Population Registry was just that, a record of those residing in the State, not a tally or prescription of Jewish (or any other) religion or nationality.

So in this case, we had one group of Justices arguing on technical-legal grounds, one group arguing on ideological grounds, and a third group arguing on halakhic-evidence grounds. It is no surprise, then, that this case created much more division among the population than did *Brother Daniel*. Here, there was no general consensus; no "man-on-the-street"

argument could be used since the men (and women) on the street themselves could not decide or agree.

It is interesting, though, that the only way the Shalit children could be registered as Jews was, in essence, through a technicality -- the purely legal fact that the Law obligated the official to record that which he was told. In fact, their registration as Jews did not really make them Jews, for eventually, if and when they decided to marry, the Government-sanctioned, rabbinically-controlled marriage and divorce laws would require them to convert *to Judaism.* All that the case decided was that they must be registered as Jews under the Law as it stood at that time by virtue of the fact that they had one Jewish parent and would live a Jewish life.

That brings us to the CCAR's Patrilineal Descent Decision, which again said that the Reform Movement was publicly stating its acceptance of a person born of a single Jewish parent given the fulfillment of certain requirements. There is no question that the Committee would point out that the Resolution was proposed and accepted at an unprecedented and peculiar time in Jewish history, when the intermarriage rate was approaching fifty percent in the United States. But more than that, as was stated by Peter Knobel in his presentation of the Report, the Committee was intent on breaking the blood-line requirement for Jewish status since it was not only unfair and historically arbitrary, but it was also sexist.

In their pamphlet, "Questions and Answers on Jewish Descent," the Committee answered in the affirmative the following question: "Is it the intent of the Resolution to make the establishment of Jewish identity in the case of a mixed marriage dependent on more than descent from a Jewish parent?" The answer: "Yes, identity is seen as being derived from a Jewish parent, but finally determined in the life of the individual through public acts and the pattern of living."[130] Here is where an obvious difference between the situation faced by the Israeli Supreme Court and the CCAR becomes apparent. The State of Israel is a (the!) Jewish State. That means that the "default" religion there is Judaism, in that one does not need to do anything to be or live Jewishly. By being a Jew and living in the Jewish State, one has a Jewish Identity. It is the Christian, Moslem, and follower of other faiths who must "practice" their religion in order to live it in Israel.

That same line of reasoning follows here in the United States, where, Separation of Church and State notwithstanding, Christians are the overwhelming majority and Christianity the "default" religion. Elements of Christianity are interwoven into the very fabric of American life: the National Christmas Tree, the fact that Christmas is a national holiday, the use of the Gregorian Calendar which (falsely!) counts time from

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[130]"Questions and Answers . . . " question #3.

the birth of Jesus, the use of "Christ our Lord" at a public invocation, the practice of singing Christmas songs in public schools, to name but a few examples. To be a Jew in America, that is a practicing and identifying Jew, a person has to "do" and "be" and "live" Judaism. It is not enough to have been born to Jewish parents (or parent) and to be told later in life that your parent(s) happened to be of Jewish heritage. Jewish life in America today seems to be dependent on having a Jewish education, living in a Jewish home, reading Jewish magazines, attending a Jewish place of worship, upholding Jewish values, et cetera, et cetera.

Seen in this light, the differences between the two Jewish communities is obvious. The Israeli Court is a secular-legal body of the Government of a Jewish-religious State. The CCAR is a religious (and rabbinical) body living and working within the structure and confines of a secular (non-religious, or at least non-Jewish) country. So when these bodies make declarations, decisions, or resolutions, there can be no escaping their own identity or the boundaries which are established by virtue of where they are located and which Jewish community they serve.

Obviously, the Israeli Supreme Court serves the Government and the people of the State of Israel. But there can be no mistaking that whether just an ideal or a true reality, there seems to exist the notion of *k'lal Yisrael*, the idea that the world's Jews are intrinsically linked one to the

other by historic, religious, cultural, and even racial bonds. (The very idea of Zionism is itself predicated on this belief.) The very fact that Israel adopted a Law of Return speaks to the feeling of "oneness" Jews around the world feel for each other. For centuries, the halakhic definition of Jewishness served the Jewish people well. Each community knew definitively who was "in" and who was "out." If people moved from one community to the other, the same "membership" rules applied. Only with the establishment of the State of Israel, being a secular State, did these gut-wrenching issues of Jewish identity arise in the Jewish world. With the State of Israel, the possibility of Jewish secular law contradicting Jewish religious law came into being. That is the issue of the *Brother Daniel* and *Shalit* cases in their most simple and basic form.

Brother Daniel and *Shalit* were, of course, Israeli Court cases, not American, British, French, Australian, or South African. The jurisdiction of Israeli Law is contained with the borders of the State of Israel. So why should American Jews or the CCAR care what happens in Israel or in their courts? There can be no question that we are linked in some fashion, some way, some manner. Perhaps I and a Jew living in Me'ah Sh'arim have actually less in common than I and the Pope (*kivyachol*!), but there is some bond nonetheless. There is also no question that what happens in Israel affects Jews around the world. In 1967 and 1973, as Israel was being

invaded on all sides by her enemies, Jews in the United States and around the world opened their wallets and purses and donated millions; some even went to the battlefield itself. Just recently, as Israel signed peace treaties with her once enemies, no Jew could help but be touched and moved in some way by the prospect of real and enduring peace.

There is no question that what happens in Israel affects Jews around the world. Had Brother Daniel and Shalit lost their court battles, certainly that too would have had an effect on world Jewry. Does the other side of the coin hold true as well? Does what happen here in the United States affect world Jewry as well? Does the CCAR speak to global Jewry as does the Israeli Supreme Court?

The answer is no. The CCAR is the Central Conference of American Rabbis, not the Central Conference of World Rabbis or even the Central Conference of Rabbis (certainly we know that such a body could never be established!) The CCAR speaks to and for the Reform Jews of the United States and those rabbis and congregations in other countries who wish to join the CCAR and the UAHC. It is clear, at least on this issue, that the CCAR was not speaking to the Jews of the world or even all the Jews of the United States. The CCAR's intention was to speak to a specific problem faced by a specific community, namely, the Reform Jewish community of North America. The Committee on Patrilineal Descent stated quite clearly their intent on proposing the Resolution:

> Why does the Resolution limit itself to the Reform Jewish community of America? The CCAR addressed the social reality which its members face and did not wish to interfere in existing community patters in Israel, Great Britain, South Africa, and Australia, where conditions are different. Liberal Jews in each community will adopt the practice which is appropriate for their situation.[131]

In his presentation of the Resolution, Peter Knobel clearly stated: "The purpose of the document is to deal with a situation peculiar to our community, namely, to establish the Jewish status of children of mixed marriage in the particular setting of the Reform Jewish community of North America."[132] So the CCAR was not trying to establish a precedent of Jewish status for the world's Jewry. They were not saying that their Resolution should be adopted by any other community of Jews, and they were not implying that their Resolution or its effects should even be accepted by other Jewish communities.

This, of course, presents a major problem. For the first time in history a person could be considered Jewish by one group of Jews, and non-Jewish by another. Before the Resolution, no matter what differences there were between the Reform and Orthodox, American and Israeli, Australian and South African, Ashkenazic and Sephardic Jewish communities, at the very least, everyone agreed who a Jew was. With the Resolution, the singular definition, this bond, this symbol of *k'lal*

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[131]ibid., question #10.

[132]CCAR Yearbook, Vol. 93 (1983), p. 144

Yisrael was shattered: that was the argument against the Resolution espoused by Dr. Petuchowski and many others, including many within the CCAR itself. During the discussions on the Resolution, Rabbi Moses Cyrus Weiler, Honorary Life Chairman of MARAM, the Israel Council of Progressive Rabbis, gave a statement on his group's behalf expressing their opposition based partly on the argument of keeping *k'lal Yisrael* together.[133]

Perhaps, however, *k'lal Yisrael* is a just smoke-screen, a tool used affectively for fund-raising, and an ideal which we all proudly proclaim but which is in reality a total falsehood. After all, the Orthodox rabbinate in Israel does not recognize the rabbinic status of HUC-JIR graduates. Though they may consider Reform Jews to be Jews (if and only if their mothers are Jewish), many are considered to be sinners, apostates, heretics, and *mamzerim*. Does the Orthodox rabbinate consider what affect it will have on *k'lal Yisrael* before it makes a pronouncement or recommendation, or before it interprets the supposed "Torah-true" halakhic position on a given matter? Though Orthodox Poskim would say that they do consider *k'lal Yisrael* in their decisions, to one who lives outside of their world, it would appear that they certainly do not. It would appear that the halakhic community is a closed community.

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[133]The full text of his statement may be found in CCAR Yearbook, Vol. 93 (1983), pp. 146-8.

For liberal Jews, it may be that the ideal of a unified Judaism is important, but it must be weighed in every case against other, perhaps equally important, ideals. The Reform community is not a closed community, although there are limits and boundaries. Its problems are not the problems of other communities, even other Jewish communities. It does not have the same limitations or boundaries as do other Jewish communities. It has a different and distinct population to which it speaks and for which it speaks.

There is no question that the Patrilineal Descent Decision caused the rift between the movements to widen, and provided the Orthodox community with fresh ammunition to fire back at the American Reform Rabbinate. We saw that the *Brother Daniel* and *Shalit* cases nearly caused the Government of Israel to collapse. The issues surrounding the "Who is a Jew?" question are highly emotionally charged since they cut to the very core of one's personal and communal, religious, historic, national, and cultural identity. One who believes in the reality or aspires for the reality of *k'lal Yisrael* cannot help but vigorously defend the two thousand year-old standard for Jewish identity. Others, who believe that actual *k'lal Yisrael* cannot be a true reality given the tumultuous changes that have occurred in the Jewish world in the past few hundred years, cannot help but maintain that there are indeed many definitions of Jewish identity, and that the singular,

"objective," halakhic standard just simply cannot hold true in this age of modernism, enlightenment, progressivism, liberalism, and Reform.

CHAPTER FIVE

Conclusions and Personal Reflections

I wished to add this chapter to the thesis in order to have the opportunity and privilege of reflecting upon my own personal views on the issues presented here. As I mentioned in the introduction, this work was not intended to be a comprehensive study of Jewish identity throughout the ages, nor a comprehensive study of the "Who is a Jew?" question. Aside from the fact that I had to do this project "in partial fulfillment of the requirements for Ordination," I looked at it as a learning opportunity.

When I was in ninth grade, my Havurat Noar[134] teacher presented the class with the *Brother Daniel* and *Shalit* cases. I was mesmerized and confused, upset and angry, torn and tattered. Each member of the class was made to role-play one side of the issue. I had a very difficult time with that, since I understood both sides, and since I agreed and disagreed with both sides all at the same time. Perhaps that "traumatic" event in my life really remained with me, and was carried into my adulthood, until now, when I have had the opportunity to look at these cases in detail and to analyze

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[134]Havurat Noar is a special program for ninth graders in the Los Angeles area run by the Los Angeles Bureau of Jewish Education, wherein students from across the Los Angeles area study the same material in their classrooms and then come together for weekend *kinusim* to examine and experience the lessons learned.

them myself, as an adult, as a Jewish professional, and as a future rabbi.

I do not think it would be fair to the reader of this paper were I not to clarify my own personal opinions of the cases and of the issues involved with the "Who is a Jew?" question. I will be up-front enough to admit that I, like all others who address this issue, come at it from a particular angle and with certain prejudices to the question. Naturally, were I an Orthodox, halakhic Jew, I would uphold the halakhic viewpoint without challenge. Since I am not, my task is even greater, for I must struggle with all the issues and wrestle with my own prejudices and opinions. Though an observant Jew may question a given halakhic law or custom as to its origin or formulation, he may not question its authority or reasoning. A halakhah such as the one defining Jewish identity has been so well ingrained into Jewish life and the identity of Jewish communities around the world (except, of course, those which did not have the Talmud and later Codes), that it is difficult for it to be challenged or confronted.

But I, admittedly, approach this issue from a modern, Reform perspective. I was not raised in an Orthodox or halakhically observant home; rather, I was raised in a Reform Jewish American home and had my views of Judaism and the world shaped by Reform Jewish institutions. That is not to say that a Reform Jew could not take an halakhic position as his or her

own. In this particular case, I choose not to do so by virtue of the fact that my being a Reform Jew allows me the choice.

Without hesitation, I agree with the outcomes of the two Israeli Supreme Court cases, though the ruling in *Brother Daniel* is much clearer and more definitive to me than *Shalit*. Let me also state the obvious, that I accept the Patrilineal Descent Decision and its requirements for determining Jewish identity, although in my rabbinate, I intend to use the Resolution as, in the words of Rabbi Solomon Freehof (Reform Responsa (1960), p. 22), "guidance not governance."

In my opinion, Rufeisen was rightly refused citizenship under the Law of Return. To me, there are many types of Jews, with all sorts of varied beliefs and practices. Though it may be difficult to say what or who a Jew is, I have no problem saying what or who a Jew is not. Quite simply, a Jew is not a Christian, and a Christian is not a Jew! These are mutually exclusive categories, terms, and religions. There is no question that there are observant and non-observant Jews, believing and non-believing Jews, cultural Jews, secular Jews, Jews of every race and nation, Jews who identify and Jews who do not identify, very visible and invisible Jews, and even self-hating Jews. There are, however, no Christian Jews. Moreover, in our modern day and age there is no one uniform code of belief or practice among the world's Jews (as if there has ever been), in that a person can be religious or not, believing or not, atheistic or agnostic, ultra Orthodox or

Humanistic. The entrance into Judaism still remains through its religion -- a person must convert to the Jewish religion in order to become a Jew. The Talmudic dictum, "A Jew, though he sins, remains a Jew," notwithstanding, if entrance into Judaism is through conversion, then exit from Judaism is likewise. (The "re-entry" rituals prove this.) A person who has converted to and lives as a Christian cannot and should not be considered to be a Jew by any Jewish community. Brother Daniel was still free to enter the State of Israel and to eventually become a citizen; he certainly could align himself to the Jewish nation and to the Jewish people as have other Christians and those of many faiths. One fact still remains, and that is that, having converted, he is not a Jew.

As I mentioned, the *Shalit* case was not so cut and dry for me; the lines were blurred, and the issues less clear. In the end, I do agree with the Court's ultimate decision. Like a few of the Justices, I would have preferred that the items "religion" and "nationality" be removed from the Identity Card, but since they were not, I believe that what Shalit did was right and meritorious. Although I do not agree completely with his argumentation, I believe that by virtue of choosing to raise children within the Jewish State, and given one Jewish parent, the children were rightly allowed to be registered as Jews with respect to nationality.

This is also in line with my acceptance of the CCAR Resolution. Though I maintain the questions which I raised

in that chapter, in principle and in justification, I believe that the Resolution makes sense and that it is necessary. As an American Jew, and as a future American rabbi, I am and will be faced with certain realities. As a Reform Jew, I must react in some way to those realities. The Patrilineal Descent Decision was nothing more than, in the words of a book title by Dr. Michael Meyer, a "Response to Modernity." Perhaps if and when the realities of American Jewish life change again, a new response will be required.

Until then, we must realize that there are no guarantees, and that the eventual Jewish identity of the Shalit children or any other child is basically a roll of the dice. There are many people who receive the best Jewish education, who are raised in a very observant or identifying home, and who are entrenched in Judaism from birth, and still fall away from their heritage. There are also others who have no Jewish affiliation, whether born Jewish or not, but who come to have a very strong and positive Jewish identity later in life. Some convert to the Jewish religion, some become more observant Jews, some even go on to be Jewish leaders and rabbis.

If I were pressed into defining what or who a Jew is, I would have to say that a person is Jewish by identification. This is not meant to be an exhaustive definition or one that is mutually exclusive from others. A non-Jew who identifies with Judaism and the Jewish people (I have such a person in my student pulpit) is still a non-Jew, and a Jew (born of two

Jewish parents) who has no Jewish identity whatsoever, is still a Jew. What kind of definition is that? Perhaps it can be called the slippery-slope definition, but really, I believe that it is the best I can do at this time.

I do not claim to disregard the traditional vehicles for entrance into Judaism -- birth and conversion -- for I surely do not. I still believe that a person is born into Judaism, and is a "Jew-by-birth" by having one or two Jewish parents. Brother Daniel, for instance, is a "Jew-by-birth." There are also Jews who come to Judaism later in life, as a child or adult. These people are "Jews-by-choice." As I implied in the last chapter, I believe that here in America, being certainly a non-Jewish and perhaps to some extent even a Christian nation, all Jews in America are "Jews-by-choice" in that to be a Jew in America (or anywhere outside of the State of Israel), one has to choose to identify and to live as a Jew.

I recognize that this view is a radical departure from halakhah and the long-standing standard for determining Jewish identity, but times are different, and things have changed. I am emotionally drawn to the argument that Brother Daniel, though he converted, would have been killed by the Nazis, as undoubtedly many converts out of Judaism were. (Incidently, the Shalit children would have been killed as well!) However, I reject a self-identity and definition of Judaism that is shaped by those who seek to destroy my people and my religion.

It is not up to others to define or decide who or what a Jew is or should be. On one level, it is a totally subjective and personal choice. In that light, a Jew is anyone who claims to be. On another level, Judaism has always been a communal religion and way of life. No Jew can live in isolation and separation from a Jewish community. Thus it is also up to a given Jewish community to decide who "belongs" and who does not.

The notion of *k'lal Yisrael*, whether a reality or just a hope, has emotional pull. We must, nevertheless, ask ourselves whether it is today really a reality or just a hope, perhaps a hope beyond reach. Are Reform Judaism and Orthodox Judaism two separate religions? What are the similarities and differences between America's Jewish community and Israel's, or between those of any other two nations? What really does define or encapsulate, describe or attempt to describe all the world's Jews or even Judaism in general? Today, Judaism is, without a doubt, not monolithic. Perhaps it never was. Yet there is some bond, some tie, some "thing" which does unite the Jews of the world in some way. Perhaps it is Torah, perhaps it is Israel, perhaps it is anti-Semitism, perhaps it is history, perhaps it is God.

I take delight in the fact that this thesis has raised more questions than it has answered. Above all, I believe that the subject is incredibly complicated and that it plays on one's emotions. The question "Who is a Jew?" is one that

will never definitively be answered. Indeed, the question produces a stalemate. To this, I say "*lo yad'i'nan -- teiku*!" We do not know the answer; let it stand! Perhaps, indeed, when Elijah the Tishbite returns, we will know if all of our speculation and reasoning, all of our arguing and sermonizing, all of our discussion and discourse was part of the Divine Plan, or only the way of mere mortals.

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