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Child Custody: A Comparative Analysis

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CHILD CUSTODY: A COMPARATIVE ANALYSIS

*By Ronald Warburg**

Foreward

The purpose of this essay is to give an aperçu of the varying approaches for the disposition of child custody cases developed by American law during the past thirty years and the Rabbinical Courts of Israel (hereinafter referred to as the *Beth Din*),[1] a contemporary repository of the sources of Jewish law. The study that follows is not to be read as "a history of child custody" in the sense of tracing this legal topic as it might have developed over the course of time.

Though there will be occasion to allude to the relevant principles of American law[2] and principles of Jewish law,[3] it is the jurisprudential perspective rather than the substantive content which is the primary theme.

I. A parent's relationship to his child may be viewed as a status carrying with it certain responsibilities and duties owed to the child with reference to care, education, and support. When a family breaks up through death, divorce, separation, child neglect or abandonment, the individual who performs most of the parental functions, who lives and cares for the child is said to have custody of the child, even though someone else may exercise some other parental rights and obligations.[4]

In determining a custody dispute between natural parents and proceedings involving a natural parent and a third party, American courts have frequently based their decisions on two doctrines. The first of these doctrines, which may

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1 This study is based upon the published decisions of the Rabbinical Courts of Israel (*Piskei Din Rabbani*—hereafter cited as *PDR*) Volumes 1 through 9.

2 For a comprehensive examination, see Foster and Freed, "Child Custody" (1964) 39 N.Y.U.L.R. 423; Foster and Freed, eds., *Current Developments in Child Custody* (Law Journal Seminars—Press, N.Y., 1978). For a suggested bibliography of secondary sources, see Foster, *A Bill of Rights for Children* (Illinois, 1974).

3 See Schereschewsky, *Dinei Mishpachah* (Jerusalem, 1971, in Hebrew) 376–384; Shochetman, "The Essence of the Principles Governing the Custory of Children in Jewish Law" in Elon, ed., *Sh'naton Ha-Mishpat Ha-Ivri* vol. 5, pp. 285–320.

4 See Pound, "Individual Interests Involved in Domestic Relations" (1916) 14 Mich. L.R. 177.

be called the "parental right" theory[5] establishes that natural parents unless declared unfit have a right to custody of their children upon the severing of marital ties. "Primary",[6] "prior",[7] and "legal"[8] are the varying adjectives utilized by the courts to legitimate the right of the natural parents to custody of their children. The parental right doctrine is justified by the assumption that a natural parent will most adequately fulfil the child's needs.[9] Various criteria have been developed by the courts to establish parental unfitness.[10] A parent may for example be declared unfit if he or she has been convicted of a crime, has been guilty of moral misconduct, or has been guilty of child neglect, abuse or abandonment. In such situations, according to the doctrine of *"parens patriae"* the state possesses the power to remove a child from the custody of his natural parents.[11]

Other American jurisdictions recognize that the question is not one of the rights of parents or others to custody but rather of the right of the child itself (as an individual and legal personality) and of the state to place a child

5 For the historical antecedents of this doctrine in early common law, see Blackstone, *Commentaries on the Laws of England* vol. 1, p. 453; Pollock and Maitland, *History of English Law* (2nd ed., 1899) 318; Hocheimer, *Custody of Infants* (1899). This doctrine has been frequently invoked during the 1940's and 1950's in the California Federal Courts. See e.g., *In re Hampston's Estate* 55 Cal. App. 2d 543, 131 P. 2d 564 (1942); *Roche* v. *Roche* 25 Cal. 2d 141, 152 P. 2d 999 (1944); *Shea* v. *Shea* 100 Cal. App. 2d 60, 223 P. 2d 32, 34 (1950). During the 1960's, other jurisdictions continued to invoke this doctrine despite bitter dissenting opinions. See e.g., *Raymond* v. *Cotner* 175 Neb. 158, 120 N.W. 2d 892 (1963); *In re Mathers* 371 Mich. 516, 124 N.W. 2d 878 (1963); *In the matter of Jewish Child Care Assn.* v. *Sanders* 5 N.Y. 2d 222, 156 N.E. 2d 200 (1959).

6 *Stubblefield* v. *State* 171 Tenn. 580, 106 S.W. 2d 558 (1937); *Jones* v. *Darnall* 103 Ind. 569, 2 N.E. 229 (1885).

7 *Duffy* v. *Dixon* 209 Ark. 964, 193 S.W. 2d 314 (1946); *Everett* v. *Barry* 127 Colo. 34, 251 P. 2d 826 (1953).

8 *Yancey* v. *Watson* 217 Ga. 215, 121 S.E. 2d 772 (1961); *Pickett* v. *Farrow* 340 S.W. 2d 462 (Ky., 1960).

9 *Newby* v. *Newby* 55 Cal. App. 114, 116, 202 Pac. 891, 892 (1921); *Stout* v. *Stout* 166 Kan. 459, 464, 201 2d 637, 641 (1949); *Ross* v. *Pick* 199 Md. 341, 86 A. 2d 463 (1952); *Smith* v. *Jones* 275 Ala. 148, 153 So. 2d 226 (1963) and see Comment, (1945) 33 Cal. L.R. 306, 310.

10 For an analysis of these factors, see Simpson, "The Unfit Parent" (1962) 39 U. Detroit L.J. 347; Oster, "Custody Proceedings: A Study of Vague and Indefinite Standards" (1965) 5 J. Family L. 21.

11 This doctrine is an old Equity concept by which the state exercised its sovereign power of guardianship over persons under physical or mental disability, including children. See discussion in Note, "A Fit Parent May be Deprived of Custody of his Child if the Best Interest and Welfare of the Child Would be Served by Allowing Another Person to Raise Him" (1966) 4 Houston L.R. 131, and Foster, *A Bill of Rights for Children, supra* n. 2.

in an environment most conducive to its welfare.[12] While it is generally fitting and proper that parents should have custody of the child, this is only true because, and to the extent that, it will be conducive to the child's welfare. Consequently, custody may be taken away from either or both parents if the welfare of the child demands such action.

This does not mean, however, that a child may be taken away from the warmth and security of the place he knows as home merely because the child will be given better economic, social and educational conditions elsewhere. An extreme interpretation of this doctrine known as the "best interests of the child" doctrine could eventually lead to a redistribution of the entire minor population among the "fitter" members of the community, a policy the courts have declined to implement.[13]

Before the "best interests of the child" doctrine comes into play, some event or behaviour must have terminated the parental right to custody. The natural parents possess a prior right only to be forfeited by separation from their child over a long period of time, by abandonment, neglect or gross unfitness as parents.[14] Consequently, poverty of the parent is itself no sign of unfitness, and the fact that another party may be financially more qualified to assume custody of the child is irrelevant.[15]

Seemingly, the conflict between these two basic doctrines (parental right v. best interests of the child) is more an issue of semantics than substance, more apparent than real,[16] since even those courts which tend to apply the "best interests of the child" doctrine firmly support the thesis that one of the most significant determining factors as to what constitutes the best interests of the child is custody by his biological parents.[17] Since both doctrines seek

12 See e.g., *United States* v. *Green* 26 Fed. Cas. 30 (No. 15256); *Chapsky* v. *Wood* 26 Kansas 650 (1881); *Finlay* v. *Finlay* 240 N.Y. 429, 148 N.E. 624 (1925).

13 See e.g., *Lacher* v. *Venus* 177 Wis. 558, 571, 188 N.W. 613, 618 (1922); *Baumann* v. *Baumann* 169 Nebraska 805, 101 N.W. 2d 192, 195 (1960).

14 See e.g., Idaho Code, Sec. 16–1638 (Supp. 1975); Minnesota State Ann. 260, 191 (1971); Ohio Rev. Code Ann. Sec. 3107.06(b). See Foster, "Adoption and Child Custody: Best Interest of the Child?" (1972) 22 Buffalo L.R. 1.

15 See e.g., *Chapsky* v. *Wood, supra* n. 12; *Alston* v. *Thomas* 161 Md. 617, 158 Atl. 24 (1932); *In re Bistany* 239 N.Y. 19, 145 N.E. 70 App. Div. (1924); *In re White* 54 Cal. App. 2d 637, 129 P 2d 706 (1942). Although the relative financial conditions of the contesting parties is not usually determinative of the right to custody, the father's inability to provide the minimum needs for the child's well-being could be a significant factor in awarding custody to a third party. See e.g., *Lancey* v. *Shelley* 232 Iowa 178, 2 N.W. 2d 781 (1942); *Comm. ex rel. Lucchette* v. *Lucchette* 166 Pa. Super. 530, 72 A. 2d 617 (1950); Oster, *supra* n. 10 at 35–36.

16 See Johnstone, "Child Custody" (1952) 1 Kansas L.R. 37, 42, 47; Clark, *Law of Domestic Relations* (St. Paul, West, 1968) 592.

17 See *Brown* v. *Dewitt* 320 Mich. 156, 30 N.W. 2d 818 (1948); *Ross* v. *Pick*

the same basic objective from two different perspectives, it seems to make little difference whether the termination of parental rights is rationalized in terms of "best interests of the child" or the "unfitness of the parent". Consequently, some courts[18] and legal commentators[19] equate the two doctrines suggesting that the conflict represents a difference in rules rather than a clash of rules.

Of course, the two doctrines are not necessarily at variance. Certainly no judge likes to think that his decision undermines the child's best interests; but the rationalization should be distinguished from the rule of the case. The fact that the courts themselves frequently go to great lengths to show that in a given case the affirmation of a parental right to the child is not against the child's best interests, in effect implies that these two doctrines may lead to different results.

To focus best upon the practical differences between these two doctrines, one must distinguish between custody proceedings involving natural parents and custody contests between a natural parent and a third party.

The last century saw the demise of the common law notion that a father had a right to custody of his child; and now statutes have been enacted in virtually all state legislatures that place the father and mother on an equal basis.[20] Nevertheless, a paradoxical situation developed. The legal rights of the father to custody of the child which were abrogated by the various legislatures were only replaced by a judicial recognition of the rights of the mother to custody. Despite the equalization statutes, if other things are equal and in the absence of compelling reasons of maternal unfitness, the courts have in the majority of cases awarded custody to the mother, particularly children of tender years.[21]

Whereas formerly a strict application of the parental right doctrine would result in an automatic preference for the father assuming he is fit, now pre-

199 Md. 341, 86 A. 2d 463 (1952); *In re Custody of Hampton J. Adams Co.* 84 Pa. Ct. C.P. (1963).

18 See *Guardianship of Smith* 42 Cal. 2d 91, 94, 265 P. 2d 888, 891 (1954); Application of *Vallimont* 182 Kansas 334, 321 P. 2d 190 (1958); *Giacopelli* v. *Florence Cr. Herden Home* 16 Ill. 2d 556, 158 N.E. 2d 613 (1959).

19 See *supra* n. 16. Also, see 42 *Am. Jur.* 2d, Infants, Secs. 53–54.

20 See Madden, *Person and Domestic Relations* (St. Paul, West, 1931) 369–372; Clark, *op. cit. supra* n. 16, at 584–585. See e.g., *Spratt* v. *Spratt* 151 Minn. 458, 464, 187 N.W. 227, 229 (1921); *Boone* v. *Boone* 80 U.S. App. D.C. 152, 150 F. 2d 153 (1945); *Hild* v. *Hild* 221 Md. 349, 157 A. 2d 442 (1960).

21 See Drinan, "The Rights of Children in Modern American Family Law" (1962) 2 J. Family L. 101, 102. For a recent discussion, see Roth, "The Tender Years Presumption in Child Custody Disputes" (1977) 15 J. Family L. 423. At 423–434, he collects cases from some 37 states adopting this presumption, often despite the existence of "equalization" acts passed by the various state legislatures.

ference is accorded to the mother assuming she is fit.[22] Though few would disagree that there is psychological data to legitimate the preference, commonly known as the "tender years presumption" to operate in favour of the mother,[23] the blind acceptance of this shibboleth ignores the empirical data demonstrating that "mothering" may be a function independent of the sex of the individual performing it.[24] Adopting the perspective of the best interests approach would require the courts to make a full scale inquiry into the relevant data concerning the child's actual welfare.

Undoubtedly, custody proceedings involving a natural parent and a third party offer the greatest opportunity for separation of parent-oriented factors from child-oriented factors in custody dispositions. The importance of the family structure and the traumatic effect on children separated from their parents, particularly their mother, is supported not only by common experience but by a vast literature in the area of child psychology and psychiatry.[25] Consequently, many courts purporting to apply the "best interests of the child" doctrine conclude that in a contest between a parent and a third party, the child's best interests inexorably require an award to the parent.[26]

While it is certainly true that in many cases the child's interests are best served by awarding custody to the biological parent, there are situations which rebut this presumption. There are numerous cases which indicate that it is no longer a rarity for third parties to prevail over natural parents.[27] When, for example, the parent has voluntarily broken up the family unit, usually through separation over a long period of time, any attempt to reunite the parent and child may be extremely detrimental to the child. The trauma of separating a child from the custody of a third party with whom a deep rela-

22 See cases cited by Foster and Freed, "Child Custody", *cit., supra* n. 2, at 423, 436 ff.

23 See, e.g., Spitz, *Hospitalism, an Inquiry into the Genesis of Psychiatric Conditions in Early Childhood: The Psychoanalytic Study of the Child* (N.Y., 1945) Vol. 1; Erikson, *Childhood and Society* (2nd ed., 1963); Bradbrook, "The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Interparental Child Custody Disputes" (1971) 11 J. Family L. 557.

24 See e.g., Yarrow, "Material Deprivation: Toward an Empirical and Conceptual Reevaluation" (1961) 58 Psychological Bull. 459, 475–479; Levine, *Who Will Raise the Children? New Options for Fathers (and Mothers)* (1977).

25 See Bowlby, *Child Care and the Growth of Love* (1973); Patton and Gardner, *Growth, Failure and Maternal Deprivation* (1963) 81–84; Watson, "The Children of Armageddon: Problem of Custody Following Divorce" (1969) 21 Syracuse L.R. 55.

26 See *supra* n. 17 and Foster and Freed, *supra* n. 22.

27 See e.g., *Bonilla* v. *Bonilla* 335 S.W. 2d 572 (Ky., 1960); *Thompson* v. *Thompson* 352 P 2d 179 (Wash. 1960); *Halstead* v. *Halstead* 144 N.W. 2d 861 (Iowa, 1966); *In re Application of Carlson* 181 Neb. 877, 152 N.W. 2d 98 (1969).

tionship exists may be psychologically equivalent in its detriment to the orphaning of that child.[28]

The dilemma which confronts the court in such cases is whether to treat the child as a detached individual, apart from his blood-ties or to emphasize the family unit from the perspective of the parent. When faced with this situation, the court in *Blow* v. *Lottman*,[29] adopting the parental right doctrine, stated that a mother's disqualification as custodian by reason of unfitness is a prerequisite to an award of custody to another person, even if the party is better qualified to rear the child.[30] Consequently, in the absence of abandonment, neglect, abuse or moral unfitness, the parent and child will be reunited despite the potential psychological impairment to the child's well-being.

On the other hand, courts, adopting the best interests of the child doctrine, do not require the establishment of parental unfitness, prior to awarding custody to a third party. As the court said in *Eaton* v. *Eaton*:[31]

> The best interests of the child is the standard and it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interests of the child that he be placed in the custody of someone other than the natural parent.

In other words, though a natural parent may be of good character and suited to rearing his child, the court has concluded in such situations that custodial disposition by the third party would most further the child's psychological well-being and personality growth.

II. In order to clarify the approach of the Rabbinical Courts of Israel to child custody proceedings, it is necessary to compare the attitude of American law and that of Jewish law towards the relationship of child custody to child support.

28 Foster, *supra* n. 2 at 16. For an earlier discussion, see Note, "Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties" (1963) 73 Yale L.J. 151.

29 75 SD 127, 59 N.W. 2d 825 (1913). See also *Re Estate and Guardianship of Turk* 194 Cal. App. 2d 736, 15 Cal. Rptr. 256 (1961); *Stafford* v. *Goode* 193 Kan. 120, 392 P 2d 140 (1964); *Pace* v. *Barrett* 205 So. 2d 647 (Miss., 1968).

30 See e.g., *In re Guardianship of Peterson* 119 Neb. 511, 516, 229 N.W. 885, 887 (1930); *Ridgeway* v. *Cels* 214 N.E. 2d 31 (Mass., 1966); *Kewish* v. *Brothers* Alabama 181 So. 2d 900 (1966); *People ex. rel. Scarpetta* v. *Spence-Chapin Adoption Serv.* 28 N.Y. 2d 185, 269 N.E. 2d 787, 321, N.Y.S. 2d 65 (1971). Where both parents were deemed unfit and custody was awarded to grandparents, see *Kees* v. *Fallen* 207 So. 2d 92 (Miss., 1968); *In re Craigo* 266 N.E. 92, 145 S.E. 2d 376 (1965) and *State ex. rel. Obrecht* v. *Obrecht* 256 S.W. 2d 955 (Tex. Civ. App., 1953).

31 50 Ill. App. 3d 306; see also *Clark* v. *Greening* 197 Okla. 277, 170 P 2d 223 (1946); *People ex rel. Hermann* v. *Jenkins* 34 Ill. App. 255, 180 N.E. 2d 359 (1962); *People ex rel. Pace* v. *Wood* 50 Ill. App. 2d 63, 200 N.E. 2d 125 (1964).

When a family breaks up, through death, divorce, separation or child abandonment, the various elements of the custody relationship have to be dealt with separately by the courts. Thus, one parent may exercise certain rights and have certain obligations vis-à-vis the child despite the fact that custody of the child has been awarded to the other parent or a third party.

If a parent did not have custody of his child would this be tantamount to absolving the parent from his legal duty of child support? Is the legal duty of support given in reciprocation (i.e., in consideration) for the parental right to custody? Consequently, if in a divorce decree, custody is awarded to the mother, is the father who is obligated to support his child, exempt from his duty?

Invoking the principle of reciprocity, common law[32] and early twentieth century American law[33] exempted the father from child support[34] upon awarding custody to the mother. The prerequisite for invoking this principle of reciprocity is the recognition of a parental right to custody, i.e., "parental right doctrine". The "best interests doctrine" which given recognition to the *child's right* logically excludes the invoking of this principle of reciprocity.

Whereas common law and early American law invoked the doctrine that parental obligation of support is in reciprocation for the parental right to custody, the general principle of Jewish law is that child support is determined independently of any formula of reciprocity.[35] According to many authorities in Jewish law, a father is primarily liable for child support by virtue of his paternity[36] irrespective of whether the marriage has been terminated by

32 Bishop, *Marriage and Divorce* (6th ed., 1881) sec. 557; Schouler, *Marriage, Divorce and Separation and Domestic Relations* (6th ed., 1921) sec. 752.

33 See cases cited in Note, (1928) 42 Harv. L.R. 112. Certain jurisdictions have only exempted the father from child support if the mother was a faulty spouse. Notwithstanding these cases, courts have affirmed children's rights and have properly distinguished between alimony where fault is a relevant factor and child support where fault is irrelevant. See Clark, *op. cit., supra* n. 16, at 490. In recent years, the duty of child support has been determined independently of any formula of reciprocity and consequently American courts have ordered fathers to pay child support regardless of the fact that custody may have been awarded to the mother. See Clark, *loc. cit.*, n. 16, at 400, n. 26.

34 Though in the past, the father has been held liable for child support it should, however, be noted that recent cases and statute law have placed parents on parity with regard to support. See *Annual Survey of Law* (N.Y.U., 1976) vol. 51, p. 378. Freed and Foster, (1977) 3 Fam. L. Rep. 4052; Weitzman, "Recent Developments in Child Support Cases" (January, 1978) 179 N.Y.L.J. no. 1.

35 See Schereschewsky, *op. cit. supra* n. 3, at 363–367.

36 See R. Bezalel Ashkenazi (16th cent.), *Shittah Mekubbezet, Ketubboth* 65b; R. Asher b. Yechiel (1250–1327), *Rosh, Ketubboth*, chapter 4; R. Meir b. Baruch (1220–1281), *Maharam of Rothenburg*, Responsum No. 244 (Berlin); R. Solomon b. Yechiel Luria (1510–1574), *Maharshal, Yam Shel Shelomo, Ketubboth*, chapter 4; R. Ben Zion Uzzi'el (20th cent.), *Mishpetei Uzzi'el, Even*

divorce[37] or death, or whether the child was born out of wedlock.[38] Acknowledging that the father's obligation to support his child is by virtue of his paternity, the Israeli Rabbinical Courts (the *Beth Din)*, in numerous decisions,[39] have stated that the child is entitled to paternal support even if in a given situation custody has been awarded to the mother. Furthermore, even if a wife is found guilty of conduct which justifies divorce, the husband remains obligated to support his child.[40] Similarly, the fact that the mother has custody of his child will not entitle the father to refuse to pay for his son's education.[41] Thus, in the adjudication of matters dealing with the parental duty to support a minor child and child custody, the *Beth Din* is more concerned with the adjustment of a human problem than with spinning out a symmetrical pattern of duties and rights based on the principle of reciprocity.[42]

ha-Ezer, section 4; for additional sources see Schereschewsky, *op. cit.;* see *PDR* 5: 292, 304, 305; *PDR* 7: 136, 152. A different opinion, and apparently supported by some authorities, was expressed by the *Ran,* who is of the opinion that the father's obligation to maintain his child stems from his obligation to maintain his wife. See R. Nissim b. Reuben (14th cent.), *Ran on Alfas Ketubboth,* chapter 5; *Melechet Shelomo Ketubboth* 4:6; R. Moshe Feinstein (20th cent.), *Igroth Moshe, Even ha-Ezer,* Responsum No. 106; for additional sources see Schereschewsky, *op. cit., supra* n. 3 at 366, n. 19; *PDR* 7: 136, 143, 145. Nevertheless, certain authorities maintain that the *Ran* did not present his approach as a guide for arriving at practical decisions. See R. Judah Rozannes (17th cent.), *Mishneh le-Melekh, Mishneh Torah* (hereafter cited as *M.T.) Ishut* 12:14; R. Meir b. Gedaliah (16th cent.), *Maharam of Lublin,* Responsum No. 79; R. Aryeh Leib HaKohen (18th cent.), *Avnei Millu'im, Even ha-Ezer,* Responsum No. 61. For varying interpretations to reconcile the seemingly conflicting statements of Maimonides (1135–1204), (see *M.T. Ishut* 12:14, 19:12, 19:14, 21:17), regarding this issue, see R. Shimeon b. Zemach (15th cent.), *Tashbez* 2:138; *Avnei Millu'im, op. cit.; Mishpetei Uzzi'el* 83:2; *PDR* 7:136, 144, 145. For a third approach towards defining the paternal obligation of child support, see *PDR* 2:65, 90, 91, 92.

37 See R. Joseph Caro (1488–1575), *Shulhan Arukh, Even ha-Ezer* 82:7 and commentaries, *loc. cit., Shulkhan Arukh, Even ha-Ezer* 61:1, 4; R. Solomon b. Shimeon (15th cent.), *Rashbash,* Responsum No. 168; *PDR* 2:65, 91. Adopting the approach of the *Ran, supra* n. 36, the father's obligation to support his child ceases to exist upon the death or divorce of his wife. Compare *PDR* 5:333, 335 with *PDR* 7:136, 145, 146.

38 See *PDR* 1:145, 154; *PDR* 7:136, 144, 146, 152; For additional sources, see Freiman (1943/44) 14 Sinai 254. For a differing rationale for this rule, see *Igroth Moshe, op. cit., supra* n. 36.

39 *PDR* 1:55, 61, 62; 161, 163; *PDR* 7:10, 34.

40 See *PDR* 1:55, 61; 147, 159.

41 See *PDR* 2:298, 303; *PDR* 7:10, 21, 22.

42 There is however one situation where the principle of custody is the determining factor upon the parental obligation of child support. In numerous decisions, the *Beth Din* authoritatively cites Maimonides' view (see *M.T. Ishut* 21:18) that if

Since the doctrine of reciprocity, as has been discussed earlier, is based upon a parental right approach to custody, does the *Beth Din's* rejection of this doctrine imply a rejection of the parental right doctrine? Without reference to all the aspects governing the parent-child relationship, one example will suffice to illustrate that the principle of reciprocity acknowledging a parental right perspective, is operative in other areas.

According to Jewish law, the finds of a son belongs to the father in consideration for the support given to the child.[43] The father is entitled to the finds though the child is of age (i.e., beyond the age he is obligated to maintain him) provided that the child is his dependent. But if the child is not supported by him, the finds belong to the child, even though the child is not of age.[44] Invoking the Halakhic rule "for their hand [i.e., the minors'] is like his hand [the father's]",[45] certain authorities maintained that a son's earnings equally belong to the father.[46] In other words, the formula of reciprocity is applicable both with regard to a son's earnings as well as to his finds. Though the Rabbinical Courts have not expressed a position regarding the earnings of a son, the *Beth Din* has invoked the principle of reciprocity regarding a son's finds,[47] acknowledging a parental right perspective.

a boy above the age of six should desire to remain with his mother without his father's consent, the father is entitled to refuse to pay his maintenance. Nevertheless, the *Beth Din* had concluded that if the best interests of the son dictate that he remain with his mother, under such circumstances, the father will remain obligated to support his son. See *PDR* 1:55, 61, 62; 161, 163; *PDR* 7:10, 34. Second, conversely, the ability to maintain the child can affect the custody of the child. The inability to provide the minimum support for the child's well-being can be a determining factor in transferring the child to another person despite the fact that the rule of custody dictates that the child remain with the present custodian. See *Ozar ha-Geonim, Ketubboth* 102B, pp. 359–360 and ensuing discussion in PDR 7:10, 19.

43 The recognition of the operation of the principle of reciprocity in this rule was provided by Rabbi Yochanan, a Talmudic sage, and post-Talmudic authorities ascribed to his position. See *Talmud Bavli, Bava Metzia* 12 A–B; *Talmud Yerushalmi, Ketubboth* 6:1; *Tosafot,* (12th and 13th cent. novellae on the Babylonian Talmud) *Bava Metzia* 12B; *Shulhan Arukh, Hoshen Mishpat* 270:2. For another explanation, see Samuel's view in *Talmud Bavli, Bava Metzia, op. cit.*

44 Whereas the finds of a daughter belong to the father even if the daughter is not dependent on him. See sources cited in *supra* n. 43 and *Talmud Bavli, Ketubboth* 46B. For the various interpretations of this rule, see R. Solomon b. Isaac (1040–1105), *Rashi, Ketubboth* 47A; *Rashi, Bava Metzia* 12A; *Tosafot, Ketubboth* 47B; *Tosafot Bava Kama* 87B and others.

45 *Mishneh Ma'aser Sheni* 4:4, *Mishneh Eruvin* 7:6.

46 See *Tosafot, Eruvin* 79B; *Tosafot, Gittin* 64B; *Tosafot, Bava Metzia* 12B. For a contrasting view, see *Shittah Mekubbezet, Bava Metzia* 12B. For a discussion of both views, see *Shulkan Arukh, Orah Hayyim* 366:10 and commentaries, *loc. cit.; Shulhan Arukh, Hoshen Mishpat* 270:2 and commentaries, *loc. cit.*

47 See *PDR* 3:329, 331, 332.

Consequently, the *Beth Din* affirms the rule that the father's right to his son's finds was given in consideration of the parental duty of child support while at the same time rejecting the idea that the parental right of custody was given in consideration of the parental duty of child support. Why is the formula of reciprocity invoked in one situation and rejected in another?

Despite the fact that we have not conducted a really comprehensive examination into all the aspects governing the parent-child relationship, the following rationale for understanding the *Beth Din's* position and ultimately for defining the approach adopted in custody proceedings can be put forward.

Though a child's finds and earnings belonged to the father, torts committed by a parent against a minor were actionable.[48] To allow even parents legal rights over children beyond paternalistic motivations[49] would imply a sanction

48 See *Tosefta, Bava Kamma* 9:8–10 and ensuing discussion in *Talmud Bavli, Bava Kamma* 87A–B. Though a father, in Jewish law, possessed no right to sell his son (see R. Moshe Sofer (1762–1839) *Chatam Sofer, Hoshen Mishpat,* Responsum No. 111), a poverty-stricken father could deliver his daughter into bondage. Whereas a slave is the personal property of its master, the daughter as a bondswoman was a legal person capable of rights and obligations bound by law to render service to another. See Horowitz-Rabin, ed., *Mekhilta de-R. Yishmael* 247; *Sifra on VaYikra* 25:43; *Talmud Bavli, Kiddushin* 20A. Moreover, the father could only sell her to a person with whom or with whose son a marriage could be consummated. Though according to certain authorities, this union did not require the daughter's consent, the master or son did not own her; on the contrary, the standards of a monogamous relationship were applicable, and legally speaking, she was entitled to all the rights of every married woman. See Maimonides, *M.T. Avadim* 4:8; R. Joseph Caro (1488–1575), *Kesef Mishneh, loc. cit.; Tosafot, Kiddushin* 5A; Horowitz-Rabin, ed., *Mekhilta de-R. Yishmael,* 258; *Talmud Bavli, Kiddushin* 18A. This institution did not exist after 70 C.E. and possibly was suspended as early as the Second Commonwealth. For a legal and historical discussion, see Cohen, *Roman and Jewish Law* (1966) 159–278, 772–777; Elon, *Herut ha-Perat be-Darkhei Geviyat Hov ba-Mishpat ha-Ivri* (1964) 1–17; Urbach, "The Laws Regarding Slavery as a Source for the Social History of the Period of the Second Temple, the Mishnah and Talmud" (1960) 25 Zion 141.

49 A father's right to give his daughter (until she attains the age of $12\frac{1}{2}$ years) in marriage does not reflect the notion of *patria potestas.* A primary consideration, uppermost in the minds of authorities which dictated the legal sanction of child marriages was the protection of the young against child abuse, particularly the desire to protect the chastity of young girls. See sources discussed in: Freimann, *Seder Kiddushin ve-Nissuim* (1945) 12–14, 138–139, 214–215; Agus, *The Heroic Age of Franco-German Jewry* (1969) 281–284; Katz, "Marriage and Sexual Life among Jews at the Close of the Middle Ages" (1945) 10 Zion 21, 24. Consequently, many authorities maintain that in cases where the father is away in a distant place, the mother and brother of the daughter are empowered to give her away in marriage. Yet some scholars opposed such a position in principle or on the grounds that there is the possibility that the father may give her in

of possessive rights in another individual; a relationship though enforced by Roman law which is alien to Jewish law.[50]

Consequently, one can readily understand why the *Beth Din* looked askance at the possibility of invoking a formula of reciprocity regarding child custody and support. The adherence to this formula would logically entail a recognition of a parental right to custody. Such a right implies that a child is a human chattel, personal property in which the parent is entitled to assert a custodial right of possession, a right denied by Jewish law.

There is no question of parental rights in custody proceedings, the *Beth Din* explains. Lest one misconstrue the Talmudic rule that "the daughter remain with her mother regardless of her age" or that "the son be with his father after the age of six" as connoting a sanction of possessive rights, the *Beth Din* reaffirms the words of a renowned Talmudic scholar of the 16th century, R. Shemuel de Medina, that custody situations focus upon "the rights of the child" rather than the rights of the parent.[51]

In fact, the *Beth Din* constantly speaks of custody situations involving a parental duty rather than a parental right.[52] Whereas the parental right doctrine developed in American law focuses on the right of the parent to receive custody of the child, the *Beth Din* focuses on the *duty* of the parent to provide proper care of the child. Jewish law, similar to other religious legal systems, is primarily a system of duties owed, rather than rights possessed.[53] Consequently, the primary legal category in custody proceedings is the "*hiyuv*", i.e., the individual's duty rather than his prerogative. If the doctrine of the logical correlativity of rights and duties asserts that every duty entails the existence of a correlative right,[54] then in custody cases, corresponding to the

marriage to some other man in the place where he resides. See *Ozar ha-Geonim Kiddushin* 46A, p. 123; *Tosafot, Kiddushin* 45B–46A; R. Joseph Caro, *Beit Yosef*, on *Tur, Even ha-Ezer* 37.

50 See Elon, *supra* n. 48. For further discussion of parental duties and rights in Jewish law, see Kister, "Zechut Horim BeYeladim BeMishpat Ivri" in Barth Memorial Volume (Tel Aviv). For a general discussion of the legal and historical sources regarding the unlimited authority of the father in Roman law, see Westerman, *The Slave Systems of Greek and Roman Antiquity*, Memoirs of the American Philosophical Society, (Philadelphia, 1955) vol. 40; Rabello, "Patria Potestas in Roman and Jewish Law" (1974) 5 *Dinei Israel* 85.

51 *Maharashdam, Even ha-Ezer,* Responsum No. 123; *PDR* 1:65, 75; 145, 157; *PDR* 3:353, 358.

52 See *PDR* 1:145, 147 and cases cited *supra* n. 51.

53 See e.g., Elon, *Ha-Mishpat Ivri* (1973) 171–180; Silberg, *Kakh Darko shel Talmud* (1961) 66–96; Urbach, *Hazal: Pirkei Emunot ve-Deot* (1969) 254–347. Whether Jewish law recognizes a legal category of rights is an interesting question and is beyond the scope of this essay.

54 See Herzog, *The Main Institutions of Jewish Law* (1936) vol. 1, p. 46. Nevertheless, according to Jewish law, certain duties may not be correlated with a corresponding right. The duty of *tsedaka* (charity) for example, may require

parental duty of child care is the right of the child to be provided with proper care.

Though we have seen that Jewish law rejects the parental right doctrine of American law, one could seemingly argue that it accepts the best interests of the child doctrine, developed by American law, which affirms the child's right to proper care. And yet, though in both American law (a right-based system) and in Jewish law (duty-based system) corresponding to the parental duty of child care, there exists a child's right to be provided with proper care, it is important to distinguish which is derivative from which.[55]

There is a difference between the idea that a father has the duty to provide a proper home because the child has a right to receive a proper home and the idea that the child has a right to be provided with a proper home because the father is duty-bound to provide a proper home. In the first case where one is dealing with a right-based theory, one justifies the duty by pointing to the right; if one requires justification, it is the right that one must justify.[56] In the second place, where one is dealing with a duty-based theory, one must justify the duty, and one cannot do so by pointing to the right.[57] Consequently, the best interests of the child doctrine, a by-product of a right-based system, the focus is on the *child's right* whereas in Jewish law, the focus is on the *parental duty* of care. In American law, parental duty is a derivative of the child's right and in Jewish law, the child's right is a derivative of the parental duty to provide proper care.

Furthermore, there is a difference in emphasis and import between the breach or neglect of duty and the invasion or interference with a right. For to focus upon duties and their breaches is to concentrate necessarily upon the person who has the duty; it is to invoke criteria by which to make moral assessments of his conduct. Rights, on the other hand, call attention to the injury inflicted; to the fact that the possessor of the right was adversely af-

one to give to one or a large number of recipients (based on a system of priorities laid down by Jewish law) not one of whom can claim the contribution as his right. See *PDR* 1:145, 154, 155.

55 See Dworkin, *Taking Rights Seriously* (Cambridge, 1977) 171.

56 Cautioning jurists to retain the proper perspective in right-based systems, the late Justice Holmes writes: "The duty to keep a contract at common law means a prediction that you must pay damages, if you do not keep it . . . But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. . ." (Holmes, "The Path of the Law" (1897) 10 Harv. L.R. 457). For further discussion of Holmes' view see White, *Social Thought in America* (Beacon Press, 1957) 65–75 and Hart, "Holmes' Positivism: An Addendum" (1951) 64 Harv. L.R. 929.

57 A similar idea was expressed by Prof. Elon and the late Prof. Silberg who wrote that since *"peria'th bal hov mitzva"* (i.e., to pay one's personal debt is a religious duty), the creditor receives his money almost "incidentally" or as a "secondary result" of the performance of the debtor's duty. See Silberg, *op. cit., supra* n. 53, at pp. 72–73; Elon, *supra* n. 48, at p. 20, n. 44.

fected by the action.[58] Here, adopting the perspective of the child's best interests doctrine suggested by the American courts, the man at the centre is the child who benefits from the father's compliance. In Jewish law, the man at the centre is the father who is complying with the will of God. As stated by the *Beth Din:* "Here we have only duties from one side, the father is obligated to support his child and obligated to supervise and care for him".[59]

Though both parents may assume the duty for the care and welfare of the

58 The treatment of codes of conduct as instrumental is most plainly exemplified in America's right-based system which traces its ideological origins to the classical liberal utilitarian morality of John Stuart Mill and the possessive individualism of Thomas Hobbes and receives its classical legal expression in Austinian jurisprudence. See Alexis de Tocqueville, *Democracy in America* (N.Y., 1945) vol. 1, p. 254; Mill, *On Liberty* (N.Y., 1956) 99–100; Mill, *Utilitarianism* (N.Y., 1910) 55; Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, England, 1962); Austin, *Lectures on Jurisprudence* (1879). Since the essence of a right-based system is the maintenance of a balance of social interests, it is held together by a pervasive bond of reciprocity. In other words, in a right-based system there exists a concept of duty, but totally different from the concept of duty in a duty-based system. Insofar as one generally benefits from the fact that others refrain from undermining the system on the expectation that your fellow-citizen will also refrain, there exists a duty to obey the law, i.e., reciprocal duty. See Austin, *The Province of Jurisprudence Determined* (N.Y., 1954) 186; Kelsen, *General Theory of Law and State* (Russell and Russell, N.Y., 1961) 3. For a critique of this traditional positivist account of the nature of law and for a presentation of law in a right-based system in terms of its intrinsic value, see for example, the writings of Lon Fuller: *The Law in Quest of Itself* (1940); *The Morality of Law* (rev. ed., 1969). Also Fried, *An Anatomy of Values* (Cambridge, Mass., 1970). This distinction has its implications for the contemporary philosophical issue regarding "the enforcement of morals" in modern liberal society. Among the key sources on this topic are: Hart, *Law, Liberty and Morality* (Stanford, Calif., 1963); Devlin, *The Enforcement of Morals* (London, Oxford U. P., 1965).

59 *PDR* 1:145, 158. Though according to Jewish law, a son below the age of six and a daughter regardless of her age, are to remain with their mother; nevertheless, since the parental duty of care is imposed upon the father, a mother may decline to accept custody of her child. See Schereschewsky, *op. cit., supra* n. 3, at 380, n. 17; *PDR* 1:145, 158. Though Jewish law plainly exemplifies a legal system characterized by a "morality of aspiration" (see Fuller, *The Morality of Law* (New Haven, 1969) 19 ff.); nevertheless, it lays down prescriptive rules for social living. Jewish law is an example of a legal system which begins at the bottom with prescriptive rules and extends upwards towards the loftiest strivings of human excellence. See e.g., Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha" in Fox., ed., *Modern Jewish Ethics: Theory and Practice* (Ohio State U. P., 1975). Nevertheless, in contrast to a right-based positivist system, Jewish law views these prescriptive rules in terms of their intrinsic value rather than their instrumental value.

child,[60] nevertheless, to best serve the interests of the child, the beneficiary of the parental duty, the *Beth Din* has adjudicated custody proceedings based upon "legal rules" established by earlier authorities in Jewish law.[61] Legal rules are not descriptive in the sense that they correspond to existential phenomena which exist apart from the system. Nor are they fictional for they are capable of referring to actual events. They are the creation of a normative system. To take an example, when I say there is a contract, I am only saying that there is a rule which specifies under which conditions a contract arises. Legal rules are prescriptions such that if they are applicable to the facts of a controversy before a *Beth Din*, they are binding upon it.

In the case of a son below the age of six, the rule of thumb adopted by the majority of authorities in Jewish law is that the welfare of the child of tender years is normally best served by placing him with his mother with the understanding that the father is entitled to visit his son to fulfil his educational responsibilities vis-à-vis the child.[62] In pursuance of this rule, two corollaries have been developed. First, since the natural place of a young son is with his mother, her marital status (married or divorcée) becomes an irrelevant factor.[63] Second, a mother may not deny the father access to his five year old son by moving to another country.[64] Such an action by the mother would prevent the child from receiving his educational training from his father.

Above the age of six, the son must live with his father, since at this age the child requires intensive educational guidance. Regardless of her age, the daughter remains with the mother in order to be instructed in the ways of modesty and moral propriety.[65]

Whereas in other areas of man's activities Jewish law implements and enforces duties by a system of penal and civil law and plaintiffs asserted "rights"[66] against individuals failing to comply with their religious duties,

60 The father on the grounds of his legal standing as a natural guardian and the mother by virtue of appointment by the *Beth Din* or by virtue of living with her child. See *Rosh*, Responsa 82:2, 87:4, 96:2; R. Solomon b. Abraham Adret (1235–1310) *Rashba*, Responsa, vol. 2, no. 49; *Shulhan Arukh, Hoshen Mishpat* 285:8, 290:1.

61 See Schereschewsky *op. cit.* at 377, n. 4.

62 See Maimonides, *M.T., Ishut* 21:17; R. Yom Tov Vidal (14th cent.), *Maggid Mishneh, ad. loc.; Shulhan Arukh, Even ha-Ezer* 82:7; R. Joshua Volk b. Alexander Katz (16th cent.), *Derishah, Tur, Even ha-Ezer* 82:2.

63 See Schereschewsky, *op. cit.* at p. 377, n. 5.

64 See *Maharashdam, Even ha-Ezer* 123; R. Moshe b. Joseph, *Mabit* 1:165; *PDR* 2:298, 301, 302. For a dissenting view, see R. Chaim b. Israel Benevistes (17th cent.), *Knesset ha-Gedolah, Tur, Even ha-Ezer* 82:33.

65 See Schereschewsky, *op. cit.*, at 377–378. This rule applies even if the mother is caring for other children or is earning a living and consequently, she will be unable to remain at home during the daytime. See R. Samuel b. Moshe (16th cent.), *Mishpetei Shmu'el*, Responsum No. 80; *PDR* 1:113, 118.

66 Whereas in a right-based system, the individual is asserting his right, in Jewish law

in the adjudication of conflicting parental claims, the *Beth Din* as "the father of the orphans" intervenes on behalf of the child. Whether one assumes that the *Beth Din's* intervention is legitimated by the general authority entrusted to them to engage in legislative activity (i.e., enacting *takkanoth)*[67] or whether one assumes it is based upon the binding force of custom (i.e., *minhag)*[68] the implication is that the *dayyan* (judge) does not merely apply the existing law (i.e., legal rules) of child custody to cases in doubt but when confronted with situations lacking any precise precedents, the *dayyan* acts in a legislative capacity. Does this mean that a *dayyan* is free to reach decisions uncontrolled by authoritative standards?

Presumably such a conclusion is forthcoming. For example, if it is proven that the father of a seven year old son is not carrying out the duties of fatherhood properly, the *Beth Din* has the authority to entrust the child to the mother.[69] Furthermore, in other decisions, the *Beth Din* would have permitted a daughter to reside with her mother in the United States, despite the fact of the inaccessibility of the non-custodian parent (i.e., father lives in Israel).[70] The father's inaccessibility may preclude the parent from exercising his rights vis-à-vis the child. Seemingly, the *Beth Din* is acting arbitrarily.

But a review of the decisions handed down by the Israeli Rabbinical Courts during the past three decades leads to a different conclusion. Probing the latent meaning of the decisions based upon the hypothetico—deductive method[71] one realizes that "every term, expression, generalization or exception

the plaintiff is actually asserting the right of God by coercing the other individual to fulfil his religious duty.

67 See *PDR* 4:93, 95. For earlier discussions, see R. Solomon b. Abraham Adret (1235–1310), *Teshuvot ha-Rashba ha-Meyuhasot le ha-Rambam* 38; *Mishpetei Shmu'el, op. cit.*

68 See *Maharashdam, Even ha-Ezer* 308.

69 Based upon R. Judah b. Asher (14th cent.) *Zikhron Yehudah,* Responsum No. 35 and R. Yom Tov b. Abraham (14th cent.), *Ritba* cited by *Beit Yosef, Tur, Hoshen Mishpat* 290, the rabbinical courts have found authoritative basis for removing a child from his father's home. See *PDR* 2:162, 170, 171; *PDR* 4:97, 108. Though both responsa establish the validity of a *Beth Din's* intervention on behalf of a child whose father is found to be incapable of administering the property of minors, an explicit statement of the court's role in custody cases can be found in the *Rosh,* Responsum 82:2. According to a minority opinion (see *Maharashdam, Hoshen Mishpat* 308), a Talmudic dictum (see *Talmud Bavli, Bava Kamma* 87b) and a legal responsum (*Rosh* 87:1) invalidate a *Beth Din's* intervention on behalf of minors in their father's presence. For another interpretation of these sources and a critique of the *Maharashdam's* view, see *Mishpetei Shmu'el, op. cit.,* and R. Mordechai b. Judah Halevi (17th cent.), *Darkhei No'am,* Responsum No. 26. For a resolution of the seemingly contradictory decisions of the *Rosh* (82:2 and 87:1), see *Maharashdam, ad loc.*

70 See *PDR* 4:93, 95; *PDR* 7:3, 8.

71 This method, characteristic of Talmudic logic, rests on two assumptions: (1) every

is significant, not so much for what it states as for what it implies. . .".[72] The crucial question for purposes of an examination of the notion of the exercise of judicial discretion by the *Beth Din* is what happens when (1) we determine that no discoverable rule is applicable, i.e., is binding upon the *dayyan* in a particular case, and (2) a *dayyan* wishes to overrule a rule which he has determined to be applicable and thus binding upon him. How is a *dayyan's* decision circumscribed?

There is no doubt that the legal rules established by the earlier authorities of Jewish law find considerable authoritative support in line of the *Beth Din's* decisions.[73] For example, psychiatric findings will be considered by the *Beth Din* in order to arrive at a just and reasonable determination of the physical, mental, and moral well-being of the child whose custody is at issue. However, whereas a *Beth Din* will accept the testimony of a psychologist who testifies that "in light of the particular circumstances, the seven year old boy should remain with his mother"; it will reject a testimony that states "the natural needs of a seven year old son are to be with his mother".[74] Whereas, the former testimony is subjective and argues that the legal rule (i.e., a son above the age of six is to be with his father) is rebuttable in the particular case, the latter testimony is objective and establishes a *new* legal rule.

The fact that a legal rule may be rebuttable given the particular circumstances of the case indicates that the *dayyan's* decision does not merely involve a mechanical and formal application of a preexisting legal rule. Thus, adjudication of custody cases in Jewish law involves more than the judicial application of legal rules. In fact, the *Beth Din* points out that the rules are legal presumptions.[75] Moreover, the judicial application of rules is controlled by a "legal principle". Whereas a "rule" attaches a definite legal consequence to a detailed state of facts, a "principle" prescribes highly unspecific actions.[76] It is in accordance with this usage of the terms, that we can speak of a prin-

authoritative text is written with care and precision; and (2) the thought of the authoritative writer is internally consistent.

72 See Wolfson, *Crescas' Critique of Aristotle* (Cambridge, Mass., 1929), 24–25.

73 See e.g., *PDR* 1:55; 1:145; *PDR* 2:298; *PDR* 7:3; 7:10.

74 See *PDR* 3:353, 360.

75 See e.g., *PDR* 1:55, 61; 1:145, 157.

76 The terms, rules and principles in jurisprudential thought tend to be used in different ways and consequently the distinction between them has to be drawn at different places. I shall make use of the terms in such a way that principles are more general and pervasive than rules. The distinction between rules and principles is, on analysis, one of degree, since there is no hard and fast line between acts which are specific and those which are unspecific. Consequently, there will be borderline cases where it will be difficult to classify an act either as a rule or a principle. The usage of these terms has respectable precedents in American jurisprudential thought. See Pound, *An Introduction to the Philosophy of Law* (New Haven, 1922) 116; Dickinson, *Administrative Justice and the Supremacy of Law* (Cambridge, 1927) 128ff.; Dworkin, *op. cit., supra* n. 55, at 14–80.

ciple underlying a certain rule, determining its scope, and justifying exceptions to it.

It is indeed[77] a "legal principle" which is most energetically at work, carrying most weight, in the adjudication of custody cases by the *Beth Din*. On numerous occasions the *Beth Din* states that the operative legal principle in custody cases is the consideration of the material and spiritual interests of the child.[78] For the *Beth Din*, the principle as well as the rules are entities that antecede the particular case in which they are being applied. Though a legal rule and principle hold a definite logical relationship to one another—the principle stands behind every rule and the rule operates directly on fact-situations; historically speaking, they have a source external to the deciding *dayyan*.[79]

The extent to which the principle of "the interests of the child" is utilized for different purposes can be seen by a brief review of the decisions of the *Beth Din*.[80] Perhaps the most extensive and conservative function of a legal principle is to *interpret* legal rules. Consequently, in one case the *Beth Din* contends that the interests of the child is the underlying rationale which lies at the base of the rules of custody cases.[81] As an efficient legal principle, it imparts coherence of purpose to a branch of Jewish law (i.e., child custody) by capably explaining rules in accordance with one principle and thus demonstrating that we are not dealing with a mere collection of rules.

77 To prevent an otherwise likely misunderstanding, let me note from the outset that the model of decision-making process which is offered here is to be understood as an attempt to reflect the custody decisions of the Israeli Rabbinical Courts. Whether this model is applicable to custody cases adjudicated by other post-Talmudic authorities or reflects the normative structure of other branches of Jewish law where the *dayyan* acts in a legislative capacity is beyond the scope of this essay.

78 *PDR* 1:55, 61; 65, 75; 173, 178; *PDR* 2:3, 8; *PDR* 3:353, 358; *PDR* 4:66, 74; 4:332, 334.

79 Though the principle is operative in the responsa of the Gaonic period (see *Ozar HaGeonim, Ketubboth* 102b, pp. 359–360), its precise formulation is given a few hundred years later. See *Teshuvoth HaRashba HaMeyuhasot le HaRamban* 38. Also, the Talmudic statements that "a child of the age of six may go out by the *eruv* of his mother" (see *Talmud Bavli, Eruvin* 82a) and the legislative enactment that children should enter school at the age of six or seven (see *Talmud Bavli, Bava Batra* 21a) were interpreted by post-Talmudic authorities as providing legal rules for custody of boys. Similarly, the Talmudic statement that "a daughter must be always with her mother" (see *Talmud Bavli, Ketubboth* 102b) was interpreted by post-Talmudic authorities as suggesting a legal rule for custody of girls. See Shochetman, *op. cit. supra* n. 3 at 289–311.

80 For the subsequent discussion, I am indebted to the following individuals for insights: Singer, "Moral, Rules and Principles" in Malden, ed., *Essays in Moral Philosophy* (1958); Raz, "Legal Principles and the Limits of Law" (1972) 81 Yale L.J. 823; Dworkin, *op. cit.*, at 14–80.

81 See *PDR* 1:55, 61.

Secondly, through the medium of the principle, the *scope* of the rules may be widened.[82] To borrow a concept from analytic philosophy, all empirical discourse is "open-textured"[83] and therefore no rule can be formulated in such a way that no cases can arise in which its application is open to doubt. It is our inability to anticipate events, no less than our inability to give a full description of empirical occurrences, which makes for the constant defining and refining of legal rules. Consequently, "non-standard cases" will arise requiring the exercise of judicial discretion.

For example, if in a given situation, the psychological instability of a father prevents him from fulfilling his educational duties towards his son, the *Beth Din* has stated that it is incumbent upon a third party or an educational institution to receive custody of the child to provide for the child's needs.[84] Whereas the meaning of a word in common usage is settled by reference to its overall role in language, the meaning of the same word (i.e., father) when it occurs in a rule (i.e., a son is with his father after the age of six) may well be settled by reference to legal principle. Though the first function of a legal principle (i.e., grounds for interpreting a rule) merges with the second function (i.e., grounds for amending a rule), nevertheless, the two functions have been distinguished by the *Beth Din*. For example, though two *Batei Din* (courts) accepted the notion that the interests of the child is the operative principle underlying the rules of custody, nevertheless, one *Beth Din* rejected the possibility of an educational institution assuming the father's responsibilities.[85] Consequently, in a situation where the father was unable to provide educational training for the child, the son remained with his mother. Here the *Beth Din* acknowledged the operation of the principle as a vehicle to rule interpretation but declined to invoke the principle as a means to meet new factual situations.

That it is difficult, often practically impossible, to state exhaustively a legal rule that is to include the statement of the rule with all of its exceptions is most clearly demonstrated in cases where there is a conflict of rules. For example, what happens if a thirteen year old son prefers to remain with his

82 Since rules are "infractuous" they are not agencies of legal development, the legal principle is a means to meet new situations and thus widen the application of the rules.

83 Open-texture is Waismann's term: "It is not possible to define a concept with absolute precision, i.e., in such a way that every nook and cranny is blocked against entry of doubt". See Waismann, "Verifiability" in Flew, ed., *Logic and Language* (N.Y., 1965) 122–151. In this context, note Hart's discussion in *The Concept of Law* (Oxford) 121ff.; Gottlieb, *The Logic of Choice* (N.Y., 1958) 33–47; Hacker & Raz, eds., *Law, Morality and Society* (Oxford, 1977) 26–57, 99–118.

84 *PDR* 1:65,75; *PDR* 2:298,303; *PDR* 4:66,74.

85 This was the position reflected in numerous decisions handed down by the regional *Batei Din* in Israel. See PDR 4:66,74.

mother? On one hand, there is a rule that every son above the age of six is placed with his father; and on the other hand, there is a rule that a child's wishes are a relevant factor in his own placement.[86] In this case, the child's preference to remain with his mother conflicts with the judicial application of a rule which would clearly place the child with his father. Given the principle of the interests of the child, the conflict of rules has been resolved by stating that the child's choice will be a determining factor if he is old enough to form an intelligent judgment about his custody, i.e., majority age.[87] Consequently, if a thirteen year old son wants to remain with his mother, the *Beth Din* will agree.

Seemingly, the *Beth Din* has rejected the validity of one rule (i.e., the father retaining custody of a son above the age of six) in favour of the rule of considering the child's wishes. Actually, however, the *Beth Din*, adopting the classical rules of Talmudic logic, defines each rule as a "conditional statement" so as to remove the conflict between them. By incorporating into the statement of a given rule the conditions generally understood to govern its application, and by repeating the process for the rule that could be taken as conflicting with it, the rules are understood by the *Beth Din* in a manner closely approximating their original intent. In other words, the rule that a son above the age of six be placed with his father means that a father retains custody of the child assuming it is in accordance with the wishes of a child of majority age. On the other hand, the rule that one must consider the child's wishes is conditional upon the child's ability to form an intelligent judgment about his own custody. In this manner, both rules conform to the principle of the interests of the child.

Since the principle of the interests of the child is more general, pervasive and fundamental than the legal rules, in cases where the *Beth Din* ascertains that the application of the existing rule would sacrifice the overriding principle, the *Beth Din* arrived at a decision without recourse to the legal rule. Numerous decisions of the *Beth Din* have relied on the principle as the sole grounds for action in particular cases. For example, although the rule of custody dictates that a boy above the age of six ordinarily remains with his father, consideration of the best interests of the child (i.e., principle) will be the determining factor. Therefore, a son will remain with his mother who is providing a religious education rather than be placed with a father exhibiting schizophrenic tendencies.[88] Another *Beth Din* awarded custody of a thirteen year old son to an adulterous mother since the father's actions manifested an unwillingness to raise and educate the child.[89] Since there is neither the notion

86 See Schereschewsky, *op. cit.*, at 383.

87 *PDR* 1:55,61; *PDR* 2:298,300,301; *PDR* 4:332,333.

88 *PDR* 1:65,76.

89 *PDR* 1:55,63. In determining the interests of the child, the *Beth Din* is careful not to treat moral impropriety such as adultery as a conclusive presumption of unfitness to care for the child. The fact that a divorced mother "stepped out"

that a particular parent has a proprietary interest in the child nor a covenant running with the child to the mother, in another case the *Beth Din* recognized that a father may develop a psychological-affectionate relationship equivalent to that of the mother and consequently, the father retained custody of the young child.[90] Whereas in the case illustrating the operation of the first and second functions of a legal principle, the rules are interpreted and/or amended, in these cases the rules are not applied. The legal principle serves as the ratio of the *Beth Din's* decisions.

Though the legal principle of the interests of the child provides the basis for interpreting rules, grounds for particular exceptions to the rules, and the means to reconcile conflicts between the rules of custody, nevertheless, on certain occasions, the *Beth Din* observes that this principle may be overriden by a principle from another branch of Jewish law. For example, what happens if a father desires that his seven year old daughter settle with him in Israel? On one hand, there is the rule that "a man may compel all his household to settle in the land of Israel"[91] which reflects the principle of *"yishuv Eretz Yisrael"* i.e., the divine commandment incumbent upon each individual Jew to settle in Israel. On the other hand, to serve the best interests of the child and train the daughter in the ways of modesty, the rule dictates that the child remain with her mother. In this case, by placing the daughter in her father's custody, we advance the principle of *"yishuv Eretz Yisrael"* and by placing the daughter with the mother we seemingly serve the child's best interests. Since the land of Israel is viewed as the best possible place for educating a daughter, the *Beth Din* would allow a father to take his daughter to Israel, despite the absence of maternal upbringing.[92] Nevertheless, another *Beth Din* decided that the child's best interests may override the principle of *"yishuv Eretz Yisrael"*.[93]

The foregoing suggests that the degree of support in either direction is a function of the weight of the several principles involved. The fact that a particular principle prevails is determined by judicial decision-making. Note, however, that the "defeat" of a principle in a particular decision does not entail its invalidity. At worst, a "defeated" principle retains its status within the system and may emerge as a "victor" in future decisions.

with another man will not warrant loss of custody unless her activities will jeopardize the child's interests. See *PDR* 1:146; *PDR* 4:332. Only recently have American jurisdictions looked more carefully at parental conduct from the perspective of the child. See e.g., Hills, "The Effect of Adultery on Custody Awards" (1959) 16 Wash. & Lee L.R. 287.

90 See *PDR* 1:173,176. The dissenting opinion in this case accepted the principle of the majority decision but argued that a psychological relationship, with the father had never developed. See *PDR* 1:173,177,178.

91 *Talmud Bavli, Ketubboth* 110b.

92 *PDR* 7:3,8.

93 *PDR* 1:103.

The position that the *Beth Din*, by virtue of its legislative authority is free to exercise judicial discretion in child custody cases is vigorously challenged by the above mentioned cases. To say that a *dayyan* is free to reach decisions uncontrolled by authoritative standards is to fail to attend to the interplay of legal rules and principles operating in custody cases. Though the jurisprudential account of the decisionmaking process described above implies that issues are resolved by standards, nevertheless, the decisions reflected by the *Beth Din* do not reflect an exercise in legal formalism and mechanical jurisprudence. Certainly, the analysis suggests that there is more than one solution of a problem and different *Batei Din* are likely to arrive at different conclusions. Extant rules and principles will call for interpretation. There will be cases where one *Beth Din* will widen the scope of a rule whereas another will argue for a strict construction of the rule.[94] Second, vagueness which is the intrinsic characteristic of a legal principle allows for varying interpretations.[95] The conclusion is inescapable[96] that there are competing grounds for a decision and consequently, the *Beth Din*, in cases involving conflicting rules and principles may arrive at different solutions. Between the equally unacceptable extremes of mechanical jurisprudence and rule skepticism lies a model of a judicial decision reflected in the decisions of the Israeli Rabbinical Courts which captures the virtues while avoiding the difficulties of both extremes.

III. In light of the analytical framework of rules and principles described above, one can better understand the varied approaches suggested by American courts and the direction of American legal literature on child custody during the last twenty years.

One approach, acknowledging the parental right doctrine, has been to invoke the rule that the natural rights of the parent were paramount (i.e., parental preference rule) and superior to the principle of the best interests of the child. In the Michigan case, *in re Mathers*,[97] the natural mother was awarded custody where she had ten years earlier, shortly after birth, abandoned the child and a child welfare agency had placed the child in a foster home. Acknowledging the best interests of the child doctrine, the approach of other courts has been to affirm the principle of the best interests of the child and reject the parental preference rule. In *Cariere* v. *Prunty*,[98] the

94 See above discussion of *PDR* 4:66,74.

95 See above discussion of *PDR* 1:173.

96 Compare *PDR* 1:103 with *PDR* 7:3. See also *PDR* 4:66,74.

97 371 Mich. 516, 124, N.W. 2d 878 (1963). See also, *Raymond* v. *Cotner* 175 Neb. 158, 120 N.W. 2d 892 (1963); *State ex rel. Paul* v. *Deniston* 235 La. 579, 591, 105 So. 2d 228, 232 (1958).

98 257 Iowa 525, 133 N.W. 2d 692 (1965). See also *Giacopelli* v. *Florence Crittendon Home* 16 Ill. 556, 158 N.E. 2d 613 (1959); *Lincoln* v. *Lincoln* 24 N.Y. 2d 270, 299, N.Y.S. 2d 842, 247, N.E. 2d 659 (1969).

court awarding custody of a girl to her natural grandparents held that the principle of the interests of the child overrules the rights of the parent.

Other courts, however insist that it is erroneous to view a custody decision as a judicial resolution in favour of either the parental preference rule or the principle of the interests of the child. In the often-cited nineteenth century decision of *U.S.* v. *Green*,[99] Justice Story opening the door for viewing a custody decision as the interplay of rules and principles affirms the parental right to custody while emphasizing that

> . . . this is not on account of any absolute right of the father but for the benefit of the infant . . . When, therefore the court is asked to lend its aid to put the infant into the custody of the father and to withdraw him from other persons, it will look into all of the circumstances and ascertain whether it will be the real permanent interests of the infant. . .

Essentially, this decision, reminiscent of the approach of the Israeli Rabbinical Courts, views the principle of the interests of the child as the underlying rationale which lies at the basis of the rules of custody.

Nevertheless, upon a review of the decisions handed down in American jurisdictions, one finds that judges while giving explicit or implicit recognition to the ratio of *U.S.* v. *Green* case have actually either operated with the principle of the best interests of the child or while purporting to apply the principle have in actuality operated with the rules of child custody. In *Alingh* v. *Alingh*,[100] the Iowa court ruled that the best interests of the two children would be served by awarding custody to the paternal grandparents rather than the father. Similarly the best interests of the child were held superior to the mother's claim in *Halstead* v. *Halstead*[101] where the child had lived with his paternal grandparents for ten years.

However the application of the principle without recourse to the rules of child custody is fraught with difficulties. In a highly controversial decision, the *cause célèbre* of the 1960's, an Iowa court awarded custody to maternal grandparents because they could provide a more stable and beneficial home for the child. The court did not show either that the father was an unfit parent or that he had abandoned the child or that he could not provide a suitable home for the child. Apparently, in a genuine effort to promote the interests of the child, the court dispensed with the weighing of the facts,

99 26 F. Cas 30, 31 (DR I 1824), No. 15, 256.

100 144 N.W. 2d 134, Iowa (1966).

101 144 N.W. 2d 861, Iowa (1966). See also *Noble* v. *Noble* 292 Ky. 433, 166 S.W. 2d 991 (1942); Cases which invoke the principle in contests between natural parents: *Watts* v. *Watts* 77 Misc. 2d 178, 350 N.Y.S. 285 (1973); *Erwin* v. *Erwin* 505 S.W. 2d 370 (Tex. Civ. App. 1974); *Winter* v. *Winter* 223 N.W. 2d 165 (Iowa, 1974); *In re Marriage of Urband* 137 Cal. Rptr. 433, 68 Cal. 3d 796 (1977). For other cases invoking the principle, see Foster and Freed, "Life with Father: 1978" (1978) 11 Family L.Q. 321.

failing to take into account the natural father's capabilities and transferred the child to a 'better' home.[102]

On the other hand, in contests between natural parents, courts have tended to downgrade the principle of the best interests of the child which according to the avowed language of the courts is applicable by awarding custody to fathers only in cases of maternal unfitness.[103] The "tender years presumption" has operated in favour of the mother in different forms.[104] The doctrine operates as a presumption which the father must attempt to rebut by contrary evidence. In some instances, it serves as a tie-breaker when "all things are equal", i.e., the maternal preference rule should be an admissible factor in those limited instances where it would be impossible to decide upon the evidence. Many courts use the tie-breaker concept as a blanket judicial finding of fact, to avoid investigating the relative merits of the parents as parents. Though it is no longer a rarity for third parties to prevail over natural parents in custody proceedings, all too often it is based upon the presumption that the principle of the child's interests inexorably dictates that custody be awarded to biological parents as against *de facto* custodians, i.e., parental preference rule.[105]

Realizing that fact-finding and adjudication in custody proceedings is a painful process, in part, because there is not only involved a decision regarding past conduct but also a prediction for the future, the question is what is to be preferred: precision and clarity and/or flexibility. Whereas in the application of legal rules, the premium is on precision, on the application of principles the premium is on flexibility. These two goals are not always compatible and it is sometimes necessary to choose between them, to forego one for the sake of the other. Consequently, as we have seen, certain jurisdictions invoke the principle of the interests of the child, whereas others apply the legal rules of child custody. In order to advance the doctrine of the best interests of the child, the widely accepted approach in most jurisdictions, legal commentators have called for a replacement of legal rules, which in the past were injudiciously applied as absolute by the spelling out of detailed legal principles.[106]

102 See *Painter* v. *Bannister* 258 Iowa 1390, 140 N.W. 2d 152 (1966), cert. denied 385 U.S. 949 (1966). For a critique of this decision see Foster, "Adoption and Child Custody: Best Interests of the Child?" (1972) 22 Buffalo L.R.1.

103 See *Arends* v. *Arends* 30 Utah 2d 328, 517 P. 2d 1019 (1974); *Funkhouser* v. *Funkhouser* 216 S.E. 2d 570 (W. Va., 1975). See Kurtz, "The State Equal Rights Amendments and their Impact on Domestic Relations Law" (1977) 11 Fam. L.Q. 101, 135–143.

104 See Kurtz, *ibid.*

105 See *Kouris* v. *Lunn* 257 Iowa 1267 (1965); *Herrera* v. *Herrera* Tex. 409 S.W. 2d 395 (1966). See Foster and Freed, "Child Custody" (1964) 39 N.Y. U.L.R. 423; Foster, "Family Law" in *Annual Survey of American Law* (1960) 415, 421.

106 See Foster and Freed, *ibid.;* also, "Alternatives to 'Parental Right' in Child

Conclusion

Any attempt to correlate a secular system with a religious legal system risks serious anachronism, may give rise to individious comparisons and the importing of alien categories of thought from one system to another.

After having analyzed the varying legal and philosophical perspectives underlying the treatment of child custody cases by the two systems, we hope to have avoided Santayana's reproach that comparison "is the expedient of those who cannot reach the heart of the things compared".[107]

Custody Disputes Involving Third Parties" (1963) 73 Yale L.J. 151.

107 *Character and Opinion in the United States* (N.Y.) 166.

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