

# ***Flexibility and Facilitation:***

## ***The Case of Adoption in Jewish Law***

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### Introduction

**T**he issue of the permissibility within *halakha* of parents to be in physical seclusion (*yihud*) or to have affectionate physical contact (*hibbuq ve-nishuq*) with their adopted children has already been the subject of great debate amongst Orthodox Jewish scholars of the 20th Century. The problem simply stated is that *halakha* generally limits *yihud* and *hibbuq ve-nishuq* between the sexes to cases of marital intimacy or family affection between parents and children as a preventative measure to limit illicit sexual relations.<sup>1</sup>

While the *halakhic* discourse on the general matter of these prohibitions does have nuanced contours, including questions as to what age the prohibition begins to be applied, which biological relatives are included or excluded or whether its foundations are biblical Law, rabbinic decree or both,<sup>2</sup> clearly,

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1. See Babylonian Talmud Tractate *Qiddushin* 80b, Babylonian Talmud Tractate *Avodah Zarah* 36b, *Shulhan Arukh Even ha-Ezer* 22, Maimonides' *Sefer ha-Mitzvot* prohibition 353 and Nahmanides' comments, Maimonides *Mishneh Torah: Issurei Biah* 21:2,6–7 and 22, *Sha"kh Yoreh Deah* 195:20.
  2. The Talmud in *Qiddushin* 80b bases the prohibition on an implication in a verse in Deuteronomy 13:7 “when your brother, the son of your mother, misleads you...”, which is understood to allude to the close relationship between mother and son who may be found secluded together often. The implication is that other male-female relationships who do not share a similar relationship may not be secluded together. Whether the prohibition was considered to be biblical or rabbinic is a

an unqualified application of these prohibitions to cases of adopted or step-children<sup>3</sup> may raise serious concerns for the families involved.

It is difficult for any parent to imagine being unable to show physical affection to a child, being unable to allow one parent to leave on a business trip, or being forced to avoid spending time alone with the child to provide guidance and the security of parental warmth. It would be particularly difficult to accept this ruling in a case where one parent passes away knowing that there is a possibility that the child would have to be sent away in order to avoid a violation of *halakha*.

Many approaches, both stringent and lenient, have been offered in response to this dilemma by eminent Orthodox rabbis including R. Moshe Feinstein, R. Eliezer Waldenberg, and R. Shmuel HaLevi Wosner. The decisions of community leaders like these have served as the foundation to permit or prohibit varying degrees of parent-child interactions in adoptive families within the boundaries of Orthodox Jewish commitment.

Upon review, it is clear that the subject of *yihud* and *hibbuq ve-nishuq* between adoptive parents and children has a brief but complicated history closely tied to questions regarding the fundamental norms which guide the Orthodox community. Both sides have argued vociferously in the face of clearly established values that exist in tension within Jewish tradition regarding the deeply held tenets of sexual morality on the one hand and the overwhelming sensitivity and ethic surrounding the just treatment of the orphan on the other. In addition, the treatment of adoption is heavily influenced by considerations of Jewish continuity in a way that separates it from other concerns of social justice in the Orthodox community.

In general, the emphasis in traditional sources on Jewish continuity for our purpose is exhibited in the high regard rabbinic texts display for education and parenting, including adoption, and may often be manifested in the *halakhic* mechanisms geared to facilitate them. In that light, this paper will explore

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matter of dispute. See R. Eliezer Waldenberg's *Tzitz Eliezer* (6:40:1) for a synopsis of these views.

3. For the purposes of this paper I do not differentiate between children whose biological parents are deceased and ones whose biological parents are still alive. The rabbinic understanding of one who 'raises an orphan' apparently applies to situations where the biological parents may still be alive but the adoptive parents are acting *in loco parentis*. See *Shu"t Maharam Mintz* 80 s.v. *ve-ken hiluq* for an example to contrary.

some of the basic approaches that have been taken within the Orthodox community to permit “normal” parent-child relationships in the case of adoption. As will become evident, these approaches typically combine a variety of strategies to accomplish this goal, including interpreting the relative silence on this issue in traditional sources to be benign, applying behaviorist oriented psychological explanations of the natural familial exemptions from *yihud* to cases of adoption, emphasizing the esteem with which the Talmudic Sages viewed adoption, and treating the adoptive parent as the *de facto* parent for purposes of these exemptions in order to facilitate their role as guardian-caretaker.

In addition to summarizing these positions much of this paper will expand upon them where possible, in particular emphasizing the argument that *halakha* grants adoptive parents exemptions due to a halakhically recognized relationship as a *de facto* parent, which, while not identical to a biological parent, does indeed share many *de jure* similarities. In addition, we shall explore the possibility that familial exemptions to prohibitions like *yihud* do in fact have a firm foundation in the deeply held concern for the feasibility of family life and how this may serve as a basis for applying these exemptions in order to facilitate adoption as a valued *mitzvah* meant to give orphans a chance to be raised with as much normalcy as possible.

## Part I — Modern Responses to the Question of Adoption: Silence and Precedent

### Introduction

Strangely, the question of *yihud* and *hibbuq ve-nishuq* with adopted children does not seem to appear in any traditional work of Jewish Law until the 20th century. Considering the fact that adoption unquestionably occurred in Jewish communities throughout the centuries and, as we shall see, is described and clearly lauded in sources within rabbinic literature, it is curious that this rather obvious dilemma did not surface earlier. Not surprisingly, the need to explain this gap is essential to both sides of this debate, particularly the necessity of identifying possible precedent if only to give voice to the silence.

## The Stringent Approach

One proponent of a stringent approach to limiting *yihud* for adoptive families, R. Aharon Jacobowitz, refers to a letter from R. Menachem Mendel Schneerson, the Seventh Lubavitcher Rebbe, in explanation of why the question never arose. From that letter R. Jacobowitz concludes that the upsurge in questions about adoption can be attributed directly to a change in adoption customs and the rise of the practice of hiding the history of adoption from the child in question.<sup>4</sup>

In Jacobowitz's view, adoptive parents who wished to keep their parental status hidden were obviously concerned about having to treat a child differently in respect to practices of gender separation for fear that it would give away their biological lineage. He writes:

ונראה דהכונה בזה לומר, שאין לתמוה למה לא נתעוררה שאלה זו עד עכשיו מפני שבאופנים שהי' נהוג עד זמננו הרי לא היו משתדלים להעלים מהילדים את הוריהם האמתיים. ובודאי כשהגיע גיל איסור היחוד היו נזהרים בזה כבכל האיסורים.	It appears that his intention was to say 'don't wonder at why this question never arose until now, for the way that [adoption] had been conducted up until today's time did not include the attempt to hide from these children who their true parents were. Certainly [in earlier times], when the age of the prohibition of <i>yihud</i> came about, they were as careful about it as they would be about all prohibitions.' <sup>5</sup>
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For scholars like Schneerson and Jacobowitz, there can be no argument from silence to support a case for leniency. The clear existence of a prohibition in *halakha* testified to for centuries cannot be disregarded in a particular circumstance in which the sources happen to be silent, especially one like adoption whose practice has a long history. Moreover, proponents of this viewpoint deny any possible leniency founded in inference or conjecture regarding original intent, even when such conjecture has been codified and canonized within a legitimate *halakhic* source.

One target of such criticism is R. Eliezer Waldenberg who utilized the position of the 16<sup>th</sup> century sage R. Mordechai Jaffe — explaining the biological

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4. Ironically, this practice was common in the US despite opposition of social service authorities throughout the 20<sup>th</sup> Century. See *The Adoption History Project* <http://www.uoregon.edu/~adoption/topics/telling.htm>.

5. *Otzar Haposkim* 9:130

parents' exemption to *yihud* — as a foundation to allow a similar exemption for adoptive parents.<sup>6</sup> This objection is most clearly stated by R. Yitzchak Yaakov Weiss.

<p>ותמה אני לבנות יסוד להתיר במה שלא מצינו מדברי ר"א שישמיענו הדין במציאות כזה, שכבר הי' בעולם לגדל יתומים מיום הולדם בביתם, לחוות דעתם שאין איסור יחוד למגדלם עמהם, רק מאיזה טעם שמובא בפוסקים לפרש מה שהתירה התורה, לומר שגם במציאות שאסרה התורה יש להתיר היכא דשייך אותו טעם שכתבו הפוסקים במציאות שהתירה התורה, דבודאי לא נתכוון הלבוש לקבוע הלכה להקל עפ"י אותו טעם...</p>	<p>It is baffling that one would construct a foundation for leniency upon something not explicitly taught for this situation in the words of the <i>Rishonim</i> or <i>Aharonim</i> (as raising orphans from birth was already in practice). [They] explicate their opinion that there is no prohibition of <i>yihud</i> between them and those who raise them merely from the rationale given by <i>posqim</i> to explain what the Torah permitted, concluding that the rationale given by the <i>posqim</i> in one situation where the Torah granted permission applies in another related prohibited situation. Certainly the <i>Levush</i><sup>7</sup> did not intend to establish a halakhic leniency based on this rationale...<sup>8</sup></p>
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Weiss is expressing the exasperation shared by many of his colleagues that anyone would try to deduce an exception for a clear prohibition by applying an interpretation of original intent suggested by a later sage as to the reasoning behind permitted actions, when there is no clear precedent for making such an application in the original formulation.

The fundamental complaint is the familiar *אין דורשין טעמא דקרא לקולא*, namely that 'one cannot find leniencies by surmising unstated original intent to Torah prohibitions'. Only when the Torah itself gives the reasoning may one attempt to apply it to a relevant case. In sum, Weiss and others argue that there is neither legal precedent for allowing *yihud* with an adopted child of a different gender nor any recourse to an inference from the original intent of accepted exemptions to *yihud*, as all such explanations are *ex post facto* and cannot be used to limit a potentially biblical prohibition.

6. See below for further discussion on this approach

7. i.e., Jaffe

8. *Minchat Yitzchak* 9:140

## The Lenient Approach

In contrast to the above, R. Azaria Berzon relates a personal conversation he had with R. Nachum Eliezer Rabinovich.<sup>9</sup> Rabinovich, citing an important dictum from rabbinic literature (which we shall later return to), is quoted as saying:

התופעה של אימוץ איננה  
חדשה, אלא היא היתה קיימת  
במשך כל הדורות. וכבר אמרו  
חז"ל (סנהדרין יט, ב): "כל  
המגדל יתום בתוך ביתו מעלה  
עליו הכתוב כאתלו ילדו." איך  
יתכן שלא כתבו חז"ל שצריך  
להזהר מאיסור ייחוד במצב זה  
שמגדל יתום בתוך ביתו – אם  
אכן איסור זה נוהג? מדוע  
איסור זה נשמט מכל ספרות  
הפוסקים במשך הדורות, ולא  
נתעורר עד דורנו אנו?

The phenomenon of adoption is not something new, but rather has existed throughout the generations. Our Sages of blessed memory have already written (b. *Sanhedrin* 19b) 'Whoever raises an orphan inside his home the Torah speaks of him as if he bore the child himself'. How can it make sense to say that our sages of blessed memory did not [also] write that we had to be careful about the prohibition of *yihud* in the situation of the one who raises an orphan inside his home — if indeed this prohibition was practiced? Why is this serious prohibition omitted from all the writings of the *posqim* throughout the generations, only appearing today?

Here we find that Rabinovich presented the inverse to Jacobowitz's and Weiss's argument, concluding that, in consideration of the fact that the Talmudic Sages knew about and even encouraged adoption, one must assume they would have warned people about *yihud*.

Moreover, Rabinovich is not merely making an argument from silence, which would certainly be weak in the face of the openly stated prohibition. Instead, by citing the Babylonian *midrash* that states that the one who adopts an orphan is referred to by the Torah as having given birth to that child, Rabinovich is inferring that there is in fact a legitimate basis for the assumption that an adoptive parent is treated like a regular parent. Therefore, the silence points to a lack of a prohibition as opposed to a lack of a leniency.

Other sages have also sought to find precedent within rabbinic literature for normal parent-child interactions in the situation of adoption. R. Eliezar Waldenberg puts forward one such example from the rabbinic canon.<sup>10</sup> The

9. Azaria Berzon, "Sheelot Yihud B'Yamenu", *Techumin* 10, 317, fn 19

10. *Tzitz Eliezer* vol. 6 40:21

example he uses is the case of Rabbi Eliezer Hagadol, who is said to have raised his niece for thirteen years with him in the same bed until she showed signs of sexual maturity at which point he sent her to get married.<sup>11</sup>

For Waldenberg this case is an example of how the normal prohibitions restricting physical closeness, which also apply between an uncle and niece, were suspended in the case of adoption. He explains that R. Eliezer's behavior of sleeping in the same bed with his niece indicated that he treated her like he would have his own daughter.

Additionally, R. Moshe Feinstein, in approaching this question,<sup>12</sup> utilized a dispute from the Babylonian Talmud (*Sotah* 43b) and highlighted the opinion of Rabbi Eliezer ben Yaakov that it is prohibited for step-children raised together to marry each other, lest it look as if a brother and sister were getting married. Although this opinion is rejected, Feinstein argued that for Rabbi Eliezer ben Yaakov's ruling to have any reasonable basis in social reality, parents necessarily had to be treating all of their children similarly, whether biologically related or not. If they had stringently observed prohibitions of *yihud* and *hibbuq ve-nishuq*, this would have been an obvious indication that there was a different relationship with those children who were not biological relatives and there would therefore be no basis for the concern about the appearance of incest.

## Summary

The silence of generations of *halakhic* decisors regarding this question has stood at the heart of this 20<sup>th</sup> century debate. As I have shown, the disagreement over interpreting this silence is central for determining the *halakha*.

Those who are stringent claim that the basic prohibitions are clear from the Talmud and the lack of open argumentation to the contrary from later sources merely supports that no lenient interpretation is plausible. Those who are lenient present a more complicated view of the earlier rabbinic material, pointing to different types of precedent within the rabbinic sources for treating the adoptive parent the same as a biological parent with regard to these prohibitions.

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11. *Abot de-Rabbi Natan* 15; on the permissibility of bed sharing between parents and children, see Maimonides' *Mishneh Torah: Issurei Biah* 21:7.

12. *Iggrot Moshe — Even Haezer* 4:64

## Part 2 — Psychological Taboos as a Basis for Exemptions

One of the primary lines of reasoning for permitting *yihud* and *hibbuq ve-nishuq* between the adoptive parent and child has been the claim that any active sexual interest will simply never develop in such a relationship due to habituation of a non-sexual parental interaction.

Eliezer Waldenberg, the best known proponent of this approach, bases his reasoning upon a selection of texts that illustrate how habituation protects as it were against sexual transgression. While Waldenberg understood that a biologically based aversion to incest was a commonly accepted interpretation,<sup>13</sup> as noted above, he proffered an alternative behavioristic explanation based primarily on the writings of the early modern Eastern European sage R. Mordechai Jaffe (c. 1530-1612).

... לפי שהבן מתייחד עם אמו' כלומר שהבן מצוי עם אמו תמיד, דאזתא לאשמועינן שהבן מותר להתייחד עם אמו מפני שאין דרכה לבא עמו לידי הרגל עבירה, והוא הדין האב עם בתו.	'for the son is secluded with his mother', <sup>14</sup> that is to say that the son is always found with his mother, which comes to teach us that the son is allowed to be in <i>yihud</i> with his mother since it would be unusual for her to be with him in a way that habituates transgression, and this moreover would be true for a father and daughter. <sup>15</sup>
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Part of Jaffe's intention is to explain how the midrashic foundation for *yihud*, which assumes that a son is in the company of his mother, would also apply to a daughter with her father. Waldenberg applies this same reasoning to the case of adoption:

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13. A more detailed account of the psychology of sexuality and aversion in *halakhic* literature and its limitations in explaining exemptions to prohibitive barriers between the sexes is presented further on in this paper.

14. b. *Qiddushin* 80b; Jaffe is commenting on how the verse in Deuteronomy 13:7 brought to bear by the Talmud provides for the exemption of *yihud* between mother and son.

15. *Levush* EH 22:1

<p>דמכיון שהושרש בלבבותם מאז קטנותם שהיא לו כאם והוא לה כבן וכן באיש הוא לה לאב והיא לו כבת, וביחסי טיפוח כאלה גדלו אצלם אזי מכח הרגשה זאת תו אין דרכה של האשה לבא עמו לידי הרגל עבירה, וכן אותו הדבר גבי איש דתו אין דרכו לבא עמה לידי הרגל עבירה</p>	<p>Since it is has taken root in their hearts from when the child was small that she is a mother to him and he is a son to her (or for a man that he is a father for her and she a daughter to him), and within this nurturing relationship they were reared by them, hence, due to the power of this emotion, it is no longer in woman's nature to seek to be with him in a way that habituates transgression, and the same applies to a man, that it would no longer be in his nature to seek to be with her in a way that habituates transgression.</p>
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This formed the basis of Waldenberg's allowance for *yihud* as well as *hibbuq ve-nishuq* when the child has been adopted early enough to facilitate this type of relationship. He concludes that all exemptions attach to the adoptive relationship when a son is adopted before the age of nine or a daughter before the age of three, these being the ages when the *yihud* prohibition begins.

R. Chaim David Halevi uses similar reasoning to be lenient.<sup>16</sup> He states that since the parents raised and reared the children from when they were young “the evil inclination has absolutely no power over them”. He derives this conclusion mainly from the Provencal Medieval scholar R. Menachem HaMeiri (1240-c. 1310) who states that the reason for the *yihud* exception for parents has to do with the same lack of sexual inclination.<sup>17</sup>

In what is a paradigmatic nature vs. nurture debate, we find that some of the legal scholars who oppose being lenient in this area disagree with the assumption that there would be the same type of lack of a sexual inclination in the case of an adopted child. In response to Waldenberg, R. Shmuel HaLevi Wosner states that there is an emphatic difference between a child's relationship to his or her biological parent, in which there is a manifestly clearer lack of sexual inclination than with someone else's child.<sup>18</sup> R. Yitzhaq Weiss also discounts any equivalence, citing R. Shlomo Yitzhaqi's (Rashi; 1040–1105) explanation that the foundation for the exemption is the men of the Great

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16. *Aseh Lekha Rav* 3, 10:39

17. *Beit ha-Behira, Qiddushin* 351

18. *Shevet ha-Levi* 10:196

Assembly having removed the inclination between family members, making this in his opinion a biological based exemption and nothing else.<sup>19</sup>

To this point we have reviewed the debate between 20<sup>th</sup> century Orthodox *posqim* on the issue of seclusion and physical affection between adopted children and their adoptive parents concluding that the disagreement rides more or less upon how to read the silence of the sources and whether there can be a credible argument that there is no inclination between parents and adopted children. In this paper we will continue to explore additional possibilities for leniency.

### Part 3 — Adoption as a Mitzvah: Flexibility and Precedent

To better understand the nature of flexibility in matters of Jewish law, the stakes are always an important factor to consider. Extreme suffering, financial loss, violations of human dignity, and communal need may be used as a foundation for relying upon otherwise rejected lenient opinions or violating certain particularly rabbinic prohibitions outright.<sup>20</sup> In some cases, a biblically-commanded action may supersede a prohibited action.<sup>21</sup>

*Posqim*, in weighing their decisions, are responsible to the values embedded within the Law and traditions of the Rabbinic Sages and are charged with seeking the means to apply the law with a modicum of faithful flexibility to uphold those selfsame halakhic values. Classic cases of flexibility in light

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19. *Rashi Qiddushin 81b*

ודר עם אמו או עם בתו – דלא תקיף יצריה עלייהו דאהנו ביה אנשי כנסת הגדולה דלא מגרי בקרובתא...	He may live with his mother and daughter — for his inclination does not press him upon them for the Men of the Great Assembly effectively eliminated the lust for immediate relatives...
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The issues with this interpretation will be dealt with further on in the paper. Suffice it to say that it does not explain exemptions from before the period of the Men of the Great Assembly. Nonetheless, R. Waldenberg himself recognized that this Rashi could be read against his interpretation.

20. For a description of how these and other factors play in to rulings in Jewish Law, see: Aaron Lichtenstein “The Human and Social Factor in Halakha,” *Tradition* 36 (2002) 89–114.

21. See b. *Yebamot* 4a

of human need include allowing one to *re-kosher* (*kasher*) expensive family heirloom chinaware after one year, or ask a gentile to turn the lights back on at the synagogue on the Sabbath. While generally koshering ceramics or asking a gentile to violate the Sabbath are outside the bounds of *halakha*, these situations of serious loss or communal need create room for allowances.

For the case at hand it can therefore be stated that the greater the importance that Rabbinic sages have placed on the institution of adoption, the greater the likelihood that they would have wanted to apply legitimate halakhic flexibility and leniency to facilitate the practice.

R. Moshe Feinstein opens his response by notifying the reader that, “one who raises a girl or boy orphan we find is [performing] a great *mitzvah*.”<sup>22</sup> In doing so he wished to clarify the stakes involved in the debate. The more difficult one makes it to adopt within the bounds of *halakha*, the more difficult that same *poseq* is making it to observe a great *mitzvah* and the more likely it is to lead to the complete abandonment of the *mitzvah*.

That we are dealing with a *mitzvah* is perhaps self-evident as it involves taking an innocent and essentially helpless person who has little chance of having a future and providing him or her with a home and a nurturing family, food, clothing, education, and religious training. Moreover, the Bible itself is replete with severe statements about protecting the orphan and not oppressing him, and includes the orphan as a recipient of the social safety network laws such as *ma’aser* and *peah*. As we shall see, adoption is indeed considered to be one of the greatest fulfillments of the commandment of *tzedakah* found within the Jewish tradition.<sup>23</sup>

Within rabbinic literature we find many statements lauding the act of adoption. Perhaps the clearest is in b. *Ketubot* 50a, describing R. Shmuel bar Nahmani’s interpretation of the verse in Psalms (106:3) “Happy is he who observes law and acts with righteousness at all times” as referring to one who raises an orphan in his home.<sup>24</sup> In the beginning of Chapter 6 of *Esther Rabbah*

22. “במי שמגדל יתום או יתומה שאשכחן שהוא מצוה גדולה”, *Iggrot Moshe, Even Ha-Ezer* 4:64

23. There is even the possibility that adoption can be viewed as a quintessential fulfillment of the *mitzvah* of *tzedakah* as providing the needy along the lines of ‘*asher yechsar lo*’, for that which he is lacking’, (see b. *Ketubot* 67b; *Shulhan Arukh* YD 250:1) which can include status goods and a spouse and would likely apply to providing parental affection, care, a stable household and a relatively normal childhood.

24. This *midrash* is trying to explain how one performs an act of giving “at all times”.

this same *midrash* is presented in a much more dramatic context. The text describes the Sages' gathering using the word *nimnu*, which suggests that the decisive interpretation was important enough to require an authoritative vote by the *Sanhedrin*.

Although the *Esther Rabbah* source notes some other suggested interpretations, the adoption interpretation is clearly the relevant conclusion, as the *midrash* connects it to Mordechai's adoption of Esther, described in Esther 2:7. Moreover, immediately afterward, the *midrash* states:

<p>ד"א: 'אשרי שומרי משפט'          – זה מרדכי, 'עושה צדקה בכל          עת' – שגדל יתומה בתוך ביתו,          אמר דוד לפני הקדוש ברוך          הוא: 'רבש"ע זכרני ה' ברצון          עמך בשעה שתעשה תשועה          לישראל ע"י מרדכי ואסתר          בשעה שבקש המן להשמיד את          ישראל... מה כתיב שם איש          יהודי וגו'.</p>	<p>Additionally, 'Happy are those who observe law' — this is Mordechai, 'acts with righteousness at all times' — for he raised an orphaned girl in his house.<sup>25</sup> David said to the Holy Blessed One 'Master of the Universe, let your will be that I be mentioned, oh God, at the time when you will make salvation for Israel by the hands of Mordechai and Esther at the moment when Haman will seek to destroy Israel...' What was written? "There was a Jewish man, etc."<sup>26</sup></p>
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In the rabbinic mind, there is a necessary association of David with messianic redemption. The *Esther Rabbah* text that identifies this adoption interpretation as being officially sanctioned by the *Sanhedrin* proceeds to associate David<sup>27</sup> and the messianic redemption with the redemption of the Esther narrative by way of an allusion in Psalms to Mordechai, who is identified primarily as the caretaker of an 'orphaned girl'. This line of typical midrashic-style free association highlights the esteem the authors of this text had for the practice of adoption by connecting it to the redemptions in both the Book of Esther and Rabbinic eschatology.

This interpretation of Psalms is not limited to the realm of homiletical

25. There is of course the famous midrash that Mordechai in fact married Esther (b. *Megilah* 13a). This has been used by posqim to show that there is indeed a problem of *yihud* with an adopted child, for why else would there have been the need for this interpretation if there weren't something questionable about the arrangement of Mordechai living with Esther (*Divrei Yetziv* EH 46).

26. *Yehudi* refers to David who was the King and quintessential representative of the descendants of Judah.

27. Psalms are traditionally attributed to King David

*aggadic* sayings but is in fact codified by many of the major *halakhic* authorities of the medieval period including R. Yitzḥaq Al-Fasi (1013–1103), R. Asher Ben Yeḥiel (1259–1307), and R. Aharon ben R. Yaakov Ha-Kohen of Narbonne (14<sup>th</sup> Century).<sup>28</sup> It is also referenced by R. Yaakov Ben Moshe Moellin (1365–1427) in response to whether one may transgress the prohibition of charging interest on a loan in order to raise money for helping orphans, an act which he lauds, stating “there is no greater *mitzvah* than raising an orphan, and its righteousness stands forever.”<sup>29</sup>

Perhaps the most potent source regarding the importance of adoption in the rabbinic mind can be found in the sixth chapter of *Midrash Mishlei*. In the midst of an account of the dire sins for which it is said there is no possible atonement in a human lifetime, the following discussion between Rabbi Alexandrai and his student is recorded:

<p>א"ל: "רבי אין לו תקנה?" א"ל:          "בני פעם אחת הייתי יושב לפני          בן עזאי חברי והיינו מעיינין          בפרשה זו, כיון שבאנו לפסוק          זה, א"ל: "ילך ויגדל יתום בתוך          ביתו וילמדו תורה ויעסק בכל          המצות, ומתכפרין לו עונותיו          לעולם הבא, על מנת שלא          יחזור בעבירה ויעשה תשובה:"</p>	<p>He said: "My Master, is there a remedy [for this sin]?" [R. Alexandrai] replied: "My son, once I was sitting before my friend Ben Azzai and we were studying this portion [of the Torah]. When we reached this verse he said to me: '[the one who commits this transgression should] go and raise an orphan in his house, teach him Torah and to take part in all the <i>mitzvot</i>, and this will atone for all his sins for the world to come on the condition that he repents and turns from his transgressions'."</p>
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This *aggada* states categorically that there is no sin for which the *mitzvah* of properly raising an adopted child cannot atone. Indeed, from all of these sources, it is clear that for the rabbis adoption can be considered one of the greatest expressions of the *mitzvah* of *tzedaqah* possible. Recognizing the great esteem in which the rabbis held adoption, proponents of a lenient approach seek flexibility to avoid any *halakhic* obstacles to adoption.<sup>30</sup>

28. See *Pisqei HaRif Ketubot* 50a; *Pisqei HaRosh Ketubot* 50a; *Orḥot Chaim: Tzedaqah* 5

29. אין לך מצוה גדולה מהמגדל יתום כדלעיל וצדקתו עומדת לעד. — *Responsa Maharil* 37

30. For example, Rabbi Michael Brody argues that rabbinic prohibitions that may interfere with raising adopted children generally were not applied in order to encourage the institution. See "The Establishment of Maternity and Paternity in Jewish and American Law" <http://www.jlaw.com/Articles/maternity4.html>

## Part 4 — Adopting and Parenting: The Guardian-Caretaker as Parent

### Talmudic Source

In R. Rabinovich's previously cited response to this issue, he suggested that some form of legal identification between the adoptive and biological parent is already found in the Talmud and may serve as the foundation for a lenient ruling. By challenging its opponents to find precedent in the face of this Talmudic identification, he determined that any normative interaction between a parent and child may be assumed to apply in the case of adoption unless explicitly stated otherwise. The rabbinic source Rabinovich uses as the foundation for this identification is the phrase from the b. *Sanhedrin* 19b that 'whosoever raises an orphan in his home, the Torah speaks of him as if he had given birth to the child himself.'<sup>31</sup> The text of the Talmudic *midrash* reads as follows

...הכתיב 'את חמשת בני מיכל בת שאול! אמר לך רבי יהושע: וכי מיכל ילדה? והלא מירב ילדה! מירב ילדה ומיכל גידלה, לפיכך נקראו על שמה. ללמדך שכל המגדל יתום בתוך ביתו — מעלה עליו הכתוב כאילו ילדו.	...does it not say 'the five sons of Michal bat Shaul' (2 Sam 21:8)? Rabbi Yehoshua would say to you: 'And did Michal give birth to them? Was it not Meirav who bore them?! [Rather] Meirav bore them and Michal raised them, and therefore they were called by her name. This is to teach you that whosoever raises an orphan in his home, the Torah speaks of him as if he bore [the child]'...
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31. Interestingly enough, this same concept is appears Tractate *Megillah* 13b in context of Mordechai and Esther.

... רבי חנינא אומר: מהכא +רות ד' ותקראנה לו השכנות שם לאמר יולד בן לנעמי. וכי נעמי ילדה? והלא רות ילדה, אלא: רות ילדה ונעמי גידלה, לפיכך נקרא על שמה. רבי יוחנן אמר: מהכא +דברי הימים א' ד' ואשתו היהודית ילדה את ירד אביגדור וגו', ואלה בני בתיה בת פרעה אשר לקח (לו) מרד. מרד זה כלב, ולמה נקרא שמו מרד – שמרד בעצת מרגלים. וכי בתיה ילדה? והלא יוכבד ילדה, אלא: יוכבד ילדה ובתיה גידלה, לפיכך נקרא על שמה. רבי אלעזר אמר מהכא +תהלים ע"ז+ גאלת בזרוע עמך בני יעקב ויוסף סלה. וכי יוסף ילד? והלא יעקב ילד. אלא, יעקב ילד ויוסף כילכל, לפיכך נקראו על שמו. אמר רבי שמואל בר נחמני אמר רבי יונתן: כל המלמד בן חבירו תורה – מעלה עליו הכתוב כאילו ילדו, שנאמר +במדבר ג'+ ואלה תולדת אהרן ומשה, וכתוב ואלה שמות בני אהרן, לומר לך: אהרן ילד ומשה לימד, לפיכך נקראו על שמו.

Rabbi Ḥanina says: “[One can learn this] from here (Ruth 4:17): ‘And the neighbors gave him a name saying “a son was born to Naomi”.’ And did Naomi give birth to him? Was it not Ruth who bore him?! Rather Ruth gave birth to him and Naomi raised him, therefore he was called by her name.” Rabbi Yoḥanan said: “[One can learn this] from here (1 Chr 4:18): ‘And his Jewish wife [identified as Batyah, Pharaoh’s daughter] bore Yered [identified as Moses]...’ And did Batyah give birth to him? Was it not Yoḥeved who bore him? Rather Yoḥeved bore him and Batyah raised him, therefore he was called by her name.” Rabbi Eliezer said: “[One can learn this] from here (Psalms 77:16): ‘You redeemed your people, the children of Yaakov and Yosef, with your arm.’ And did Yosef bear them? Did not Yaakov bear them? Rather, Yaakov bore them and Yosef financially sustained them, therefore they are called by his name.” Rabbi Shmuel bar Naḥmani said in the name of Rabbi Yonatan: “Whoever teaches his friend’s son Torah, the Torah speaks of him as if he bore him, as it says (Num 3:1): ‘These are the descendants of Aharon and Moshe...’ and it then says (Num 3:3): ‘These are the names of the children of Aharon...’ This tells you that Aharon bore them and Moshe taught them, therefore they were called by his name.”<sup>32</sup>

This section of the Talmud, first and foremost, is meant as praise to the one who adopts a child. One must nonetheless ask whether it can serve or ever has served as a basis for halakhic decisions regarding the relationship of an adopted child to his or her guardian-caretaker. Certainly, there are several concerns with utilizing this passage as a source for leniencies in *halakhic* matters.

It seems premature to make a legal argument about adoption from this source because it also includes two cases which are not about adoption, namely

32. R. Shmuel Eidels (Maharsha ad loc.) points out that in all of these examples the parents have not yet died. This indicates that the definition of orphan is not one where the parents have died, but where they are not able to fulfill their role.

financial support and teaching Torah. One would be hard pressed to make the case that one's teacher or patron should be so strongly identified with a parent as to allow for *yihud*.<sup>33</sup> The question of whether such identification can or has ever been made utilizing this Talmudic dictum is an important one.

## Roman vs. Jewish Law

Both R. Saul Berman<sup>34</sup> and R. Michael Broyde<sup>35</sup> have argued that Jewish Law does not support the contention that the adoptive parent is to be legally identified as the same as the biological parent. Whereas in Roman law the filial relationship was ultimately subject to judicial fiat, where adoption officially severs the legal relationship between the child and his biological parents, Jewish law does not recognize that such a relationship can be severed and that the laws which constitute Judaism's understanding of parental responsibility and negligence and the definition of incest are always in effect.

Broyde writes:

Although the institution of adoption, through its widespread use in Roman law, was well known in talmudic times, the codifiers of Jewish law denied that Jewish law recognized an institution of "adoption." Rather, they created the institution which they called "A person Who Raises Another's Child." Unlike either Roman law or current adoption law, this institution does not change the legal parents of the person whose custody has changed. One who raises another's child is an agent of the natural parent; and like any agency rule in Jewish law, if the agent fails to accomplish the task delegated, the obligation reverts to the principal. Thus, the biblical obligations, duties and prohibitions of parenthood still apply between the natural parents and the child whose custody they no longer have.

Additionally, Broyde notes the importance of biblical and rabbinic based

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33. Additionally, there is another lack of parallelism: in the first three scenarios of adoption the children are only referred to by their adoptive parent in the source text. In the last two cases, namely financial support and education, both the biological and adoptive parents are mentioned together. Also of interest is that the first three cases, the 'parent' is female and the last two, the 'parents' are male.

34. In a Class at YCT Rabbinical School on adoption given in the Spring of 2004

35. <http://www.jlaw.com/Articles/maternity4.html>

decrees in determining the difference between biological and adoptive parents. He comments that, despite being an unusual occurrence, Jewish Law does not prohibit marriage between an adopted child and a non-biological sibling, nor does the adoption exempt biological family from incest law. These basic biblical definitions remain tied to one's biological family.

Nevertheless, Broyde continues to cite a variety of precedents for expanding some of the rabbinically-based benefits and exemptions of parenting to those who have custody of the child. He particularly notes financial issues, which are reasonably related to guardianship rather than to biology:

On the other hand, certain non-biblical aspects of parenthood created by the rabbis have been connected to custody rather than parenthood. For example, in talmudic times it was decreed that the possessions, earnings, and findings of a minor child belong to his father. Although the wording of the Talmud refers only to father, it is clear from later discussions that this law applies to anyone who supports the child, i.e. adopting parents. The reason for the rabbinic decree is that it was equitable that one who supports a child should get the earnings of that child. Thus, a financially independent minor does not transfer his income to his parents. Similarly, the earnings of an adopted child go to his adopted parents since the rationale for the decree applies equally well to adopted and biological children.

Moreover, Broyde also addresses the question of *yihud* stating that most authorities, like R. Waldenberg, allow it because "without this lenient rule, the institution of raising another's child would disappear," a clear appeal to practical need as an underlying factor. Fundamentally, Broyde's argument can be identified as theoretically similar to Rabinovich's in identifying the adoptive parent with the biological parent, although in a much more circumscribed manner. He recognizes that the role of custodian comes with transferable rights, but he locates the definitional flexibility in the realm of rabbinic decree.<sup>36</sup>

## Adopted Children as Biological Children

That Jewish Law eschews a firm identification of the adoptive parent with the

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36. R. Broyde does not address the dispute as to whether *yihud* is fundamentally biblical or rabbinic in origin.

biological parent Notwithstanding, a survey of *halakhic* literature does indeed present us with a few cases where the Talmudic dictum of identification is used to treat an adopted child like a biological child in matters of law. One classic case is based on the Responsa of R. Meir ben Baruch of Rothenburg (c. 1215–1293) as codified by R. Moshe Isserles (1520–1572)<sup>37</sup> regarding how parties in a contract refer to each other when one is an adopted parent.

<p>מי שמגדל יתום בתוך ביתו וכתב עליו בשטר בני או היתום כתב על המגדלו אבי או אמי לא מקרי מזוייף וכשר הואיל וגדלוהו ראוי לכתוב כך</p>	<p>An individual who raises an orphan in his house and refers to him as ‘my son’ in a contract, or if the orphan refers to the one who raised him as ‘my father’, the contract is not counterfeit and is considered valid; since he raised him it is appropriate to write it in this fashion<sup>38</sup></p>
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A similar claim can be found in another source from R. Moses Isserles. In

37. *HM* 42:15

38. See *Biur ha-Grah* ad loc. and the original source from R. Meir of Rothenberg *Teshuvot Maimoni L'hilkhot Teshuva* 48, clearly basing this ruling on the Talmudic dictum of ‘as if he bore them’. Oddly, the commentary of R. Yehoshua Falk in *Sefer Meirat Einaim* ad loc. applies this same ruling to a man’s mother-in-law saying it would be valid to refer to her as ‘my mother’ in a contract which would mitigate the usefulness of this ruling to establishing a recognized parental role in the case of adoption. Nevertheless, the source text of R. Meir of Rothenberg clearly did not treat both cases in the same manner. For the case of the orphan he states:

<p>... וכתוב בו ותנו לבנו. נראה דלישנא מעליא הוא שרתי המגדל יתום ויתומה כאילו ילדו ואית לן כמה קריין ואין להאריך.</p>	<p>And it was written [in the contract] ‘we shall give to <i>our</i> son’, which appears to be the preferable language to use for one who raises an orphaned boy or girl in their home, it is as if he bore them, and there are many textual sources for this and I don’t have to elaborate.</p>
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But in regard to the mother-in-law he writes:

<p>וכתוב בו אמי פלונית בת פלוני לא מרענא שטר בהכי דכיון דשמה פלונית בת פלוני נכתב בו מה בכך דמסיק שמה אמי</p>	<p>If it was written upon it ‘my mother Jane Doe the daughter of John Doe’ the contract is not ruined. Since he wrote her name ‘Jane Doe the daughter of John Doe’ what difference does it make that he concluded by saying ‘my mother’</p>
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The first major difference which is unclear in Falk’s comments is that the original source requires the contract with a mother-in-law to still indicate both her first name and her father’s name, a much more specific identification than the case of adoption where a simple ‘our son’ would suffice. R. Meir of Rothenberg spends the remainder of the responsum drawing upon several sources to prove that writing this would be permissible, which indicates he felt he needed to elaborate and that it was less clear to him that it is okay to refer to your mother-in-law as ‘my mother’

response to a question regarding whether or not a grandchild may recite the mourner's *Qaddish*<sup>39</sup> for his grandfather when the grandfather raised the child himself, Isserles chose to defend the practice by defending the position, against the assertion of R. Yosef Colon (c. 1420–1480) to the contrary, that a grandson is in fact obligated in the *mitzvah* of honoring his grandfather even more than his own father. Yet, in his conclusion he dismisses any need to make such an argument, commenting:

<p>כ"ש דכמר אשר הנ"ל גדל היתום תוך ביתו ואמרו ... כל המגדל יתום בתוך ביתו כאילו ילדו</p>	<p>All the more so in the case of this gentleman who raised this orphan in his house... as it says 'whosoever raises [an orphan in his home] the Torah treats him as if he gave birth to him.'<sup>40</sup></p>
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Yet again, it is clear that the relationship is so obvious that Isserles is even more certain that an adopted child is obligated in showing honor to the one who raised him than he is that a grandson must show honor to his grandfather.<sup>41</sup>

The crux of the issue may best be represented by R. Shlomo Kluger's (1783–1869) famous question whether adoption suffices to fulfill the obligation to 'be fruitful and multiply' i.e., to procreate.<sup>42</sup> Kluger asks whether the dictum of 'whosoever raises' should be taken literally, thus allowing the positive commandment of procreation to be fulfilled through adoption. He suggests that the answer would be based on how one ruled in the dispute over whether the word *ke'ilu* ('as if') creates an exact equation or not. If the equation is exact than one can certainly fulfill one's obligation.

## Summary and Suggestion

Considering the above, there is clear precedent within *halakha* to treat the 'whosoever raises' text as legally substantive in the case of adoption.

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whereas it was "obvious" that an adopted boy should call the one who took him in 'my father' or 'my mother'.

39. Traditionally recited by Jews after the passing of a parent

40. *Responsa Rama*"h 118

41. Although on this point it should be noted that R. Moses Sofer, disputes this point in *Hatam Sofer* OH 164 and argues that an orphan is not really obligated to honor the one who raised him.

42. See *Hokhmat Shlomo* EH 1

In light of this, I would like to suggest a possible reading of the primary section in *Sanhedrin* that may shed light on the special relationship of the adopted parent to the adopted child. While this is far from a decisive read of the text, it does indicate that there is good reason to assume this is not merely a homiletical source.

The five cases mentioned in *Sanhedrin* include three cases of adoption, one case of financial support and one case of teaching Torah, and all conclude that the responsible parties are able to claim some level of parental identification for the recipients of their care, likely because they are all fulfilling a parental role to a greater or lesser degree. As noted, there is a key difference in the last two cases beyond the type of role the honorary parents play. In both of the latter cases the biological parent is mentioned prior to the honorary parent, as in ‘the children of Yaakov and Yosef,’ or ‘the descendants of Aharon and Moshe.’ While proper parenting in a Jewish context by necessity covers financial support — including attending to basic needs such as food, clothing, shelter and educational support particularly in terms of religious education — these forms of support are seen as tertiary to the definition of parent and therefore cannot claim a more fundamental identification. The primary caretaker who raises the child in ‘his own house’, treating the child as if he were his own child, is honored with the more fundamental identification by our text. This has many *de jure* consequences.

Assuring the health and stability of future generations is a central value in the Jewish tradition and, in consequence, one would expect that Jewish law would seek to enable practices that ensure it, just as it protects the household by allowing a married couple to remain in seclusion even during the period of menstruation. This goal is suggested in Broyde’s case that the fiscal rights and exemptions associated with fatherhood would accrue to a guardian to facilitate the financial support of the child. Furthermore, as will be detailed below, the ruling that an educator inherits parental exemptions for physically disciplining children points to this same phenomenon. As reflected by the *midrash* in *Sanhedrin*, these secondary parental figures are indeed like parents in these specific circumscribed manners.

Following in Rabinovich’s footsteps, one could make the case that in a situation of full blown adoption ‘*b’toch beito*’ (in his home), the identification is more complete to highlight its substantial importance as well as to indicate that the *de facto* similarities have the *de jure* consequences that help facilitate

integrating the child into the household.<sup>43</sup> As will be demonstrated below, both the parental relationships of educator and of guardian-caretaker are enough to exempt rabbis and adoptive parents from the severe transgression of causing an orphan to suffer in the course of disciplining him or her.

It can be argued that the need to integrate the child into the household and treat him or her as any other child should exempt the adoptive parents from prohibitions such as *yihud* and *hibbuq ve-nishuq*.<sup>44</sup> As noted by Rabinovich, this standard of identification was rarely questioned. Indeed, the few times it had been challenged in previous generations, outside of matters of incest, the answer was generally considered obvious that if one were adopted, one was treated like family.<sup>45</sup>

## Part 5 — Facilitating Adoption and Parental Surrogacy

### The Orḥot Tzaddiqim and the Qitzur Shulḥan Arukh

In the classic 15<sup>th</sup> century Jewish ethical treatise of unknown authorship *Orḥot Tzaddiqim*, the statement about the obligation of a father towards a child is expanded to include even the one who ‘raises the orphan in his home.’

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43. Perhaps the reason the cases were all female caretakers is because of the concept of *ishto k'beito*, his wife is like his home, that a woman was traditionally seen as the primary care taker within the house and was generally home with the children.

44. Obviously, one would assume that if there is any actual sexual interest on the part of the adoptive parent in the child that being in seclusion would be prohibited and that the relationship should be severed for the child's safety.

45. Despite the examples in the pages above and further provided below, there are two notable exceptions. R. Yaakov Emden (18th Century) was in doubt over whether a vow in which someone says “my children” would apply to the adopted children as well (*Sheelat Ya'abetz* 1:165); R. Moshe Sofer (18th-19th Century) claimed it was clear that an adopted child was not obligated in *אב כבוד אב* towards the adopting parent (see *Ḥatam Sofer* OH 164).

ויש כמה מיני רחמנות והם  
רחוקים זה מזה רחמי האב על  
הבן זוהי רחמנות הבאה מטבע  
כל החיים כדרך הכלבים  
והבהמות.. אבל הטוב והמעולה  
שבמידת הרחמנות שירחם על  
בנו להביאו לעבודת הבורא  
יתברך ... וירחם על נשמתו יותר  
ממה שמרחם על גופו וצריך  
להכותו בשבט מוסר להדריכו  
בדרך ישרה אפילו באכזריות כי  
זו האכזריות היא רחמנות  
מעולה ואם ימנע שבט מוסר  
מבנו כי יכמרו רחמי עליו  
להכותו ומניחו לילך בשרירות  
לבו הרע הנה זו הרחמנות  
טורדת ומאבדת את הבן מחיי  
העולם הבא ואף המגדל יתום  
שנאמר עליו (שמות כב כא) כל  
אלמנה ויתום לא תענון מצוה  
להלקותו בכדי ליישרו לדרך  
ישרה אף על פי כן צריך לנהל  
את היתום ברחמים יותר משאר  
כל אדם אך לא יניחחו לילך  
בשרירות לבו

There are many forms of compassion, and they are vastly different from one to the next. The compassion of a father to a son — this is a natural form of compassion in the natures' of all living things, like dogs and cattle... but the very best of the attribute of compassion, is that one be compassionate on his son to bring him to the service of the Creator, may He be blessed..., and he should be more compassionate towards his soul than his body and he should hit him with the staff of reproof to guide him on the straight path, even cruelly, because this cruelty is in fact the best form of compassion. If he withholds the staff of moral reproof from his son, when he hides his [true] compassion, [not] hitting him, and leaves him to go according to his own wicked heart, this type of [false] compassion banishes and destroys the son's [life] in the world to come. Even the one who raises an orphan in his home, about whom it is written (Exodus 22:21) "You shall not cause the widow or the orphan to suffer," it is a *mitzvah* to lash him in order to straighten his heart. Nonetheless, it is necessary to treat the orphan with greater compassion than other people, but you cannot let him go according to desires of their heart.<sup>46</sup>

There is an important and relevant implication to this rather extreme appeal for the value of physical discipline. While the author certainly uses the example of the orphan as a rhetorical point, it is clear that he is assuming that the one who raises an orphan, like a biological parent, has the right to hit his child in order to instruct him in proper moral conduct. This right to physically discipline one's child is an exemption for the sake of the *mitzvah* of education, despite the fact that hitting another person is clearly prohibited.<sup>47</sup> Not only this, but the position taken by the *Orhot Tzaddiqim* is even more radical than it appears, since the guardian-caretaker is exempt even from the prohibition of not causing the orphan to suffer; one of the most severe transgressions in biblical Law and associated in the rabbinic tradition with death by divine

46. *Orhot Tzaddiqim: Sha'ar ha-Rahamim*

47. See *Shulhan Arukh*, H<sub>M</sub> 421

punishment!<sup>48</sup> From this one learns that properly parenting an orphan can be a potent factor in determining legal exemption.

Although some may argue that ethical treatises are not commonly used as sources for legal precedent, this specific ruling in regard to the orphan is codified by R. Shlomo Ganzfried (1804–1886) in the *Qitzur Shulḥan Arukh*.<sup>49</sup>

אבל מותר להכות בניו הקטנים או יתום שהוא מגדל בתוך ביתו כדי להדריכם בדרך ישרה שזהו טובתם.	It is permissible to hit younger [biological] children or an orphan that one is raising in his home in order to guide them on a straight path, since this is for their benefit.
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According to Ganzfried, the relationship of adoption extends parental privilege to an arguably more severe prohibition than that of *yihud*.

### An Alternative Interpretation — Refuted

To problematize this for a moment, one could argue that Ganzfried is simply travelling down the well-trodden path in halakha and relying on those authorities who believe that it is permissible to physically attack someone in order to keep him from committing a transgression.<sup>50</sup> There are even authorities who maintain that an individual may use force to ensure his fellow Jew performs a positive commandment.<sup>51</sup> It is conceivable that striking an orphan to discipline him may neither imply nor require a recognized relationship *in loco parentis* within *halakha* on Ganzfried's part. One could argue that he may

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48. *Sha'arei Teshuva* 3:24

49. 184:2

50. This includes R. Asher Ben Yehiel *Piskei HaRosh Bava Kamma* 3:13; R. Shlomo Luria *Yam Shel Shlomo Bava Kamma* 3:9; R. Mordechai Jaffe *Levush ḤM* 421:13. However it is worth noting that even the most extreme understandings of the commandment to 'rebuke your fellow' exclude rebuking to the point where the transgressor will be angry enough to physically attack you thereby transgressing yet again. Hitting someone would seem a likely catalyst for a violent response.

51. See R. Aryeh Leib Heller, *Meshovev Netivot Hoshen Mishpat* 421:3 who argues that only the *Beit Din* had the right to force someone to perform a positive commandment. Also see R. Meir Simcha of Dvinsk *Or Sameah Mamrim* 4:3 who argues that the matter is dependent upon whether one is required to have intention upon performing a commandment.

believe it to be permissible for anyone to hit the orphan, if the intention is to guide him properly.

Nevertheless, further analysis of the sources in b. *Makkot* 8a, which serves as a primary source for the exemptions of parents in disciplining children, will reveal this interpretation to be an impossibility. The Mishnah deals with the punishment of exile to a city of refuge for a person who may have unintentionally murdered another Jew. It records examples of those exempt from this judgment of exile.

יצא האב המכה את בנו והרב הרודה את תלמידו ושליח ב"ב	This excludes a father hitting his child, a rabbi disciplining his student, and the agent of the court [administering lashes.]
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Rashi (ad loc.) explains that the exemption for the father is for a case of hitting the child to “turn him towards the true path.” Since the father accidentally killed his son in the process of performing the *mitzvah* of education,<sup>52</sup> he is not liable at all and need not run to a city of refuge.

The Talmud explains that this ruling is true even in a case where the child has sufficiently learned *mitzvot* already, but the father still needs to teach him a trade or even a moral lesson based upon a verse in Proverbs (29:17): “Reprove your son and he will give you peace”. The limitation on this ruling is only when teaching the child something superfluous like a trade he does not need. Nevertheless, there are no limitations intrinsic to this ruling in regard to moral reprimand. In fact, the only explicitly stated limit is extrinsic, namely that hitting a grown child may be ‘placing a stumbling block before the blind,’<sup>53</sup> as the grown child may lash out angrily in response and hit back thus leading him to a very grave transgression. This ruling is repeated by Maimonides in regard to both the parent and the rabbi, namely that they are exempt from the need to be exiled in the face of accidental death.

It is necessary to surmise that there is an implicit assumption that the verse of “reprove your son” can be expanded to include others who have categorical similarities to a parent.<sup>54</sup> That the sages believed that a rabbi would fit this

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52. As opposed to a case where the death resulted from an optional (*reshut*) activity like cutting branches in the woods. See the Mishna there in its entirety.

53. Leviticus 19:14; this is understood metaphorically in rabbinic thought to include any circumstance of leading another person to transgression.

54. This is arguably similar to the source for *yihud* and its exemptions. The verse in

description is not surprising, since they also expanded the category of ‘Honor your father and mother’ to require an even greater obligation to the rabbi since, as they claim, ‘your father brought you to this world, whereas your rabbi brings you to the World to Come.’<sup>55</sup> Additionally, there is the above-referenced statement from b. *Sanhedrin* that he who teaches his friend’s child Torah is treated as if he gave birth to him.

The sages believe that both a parent and a rabbi provide for the basic needs of the child. Therefore, both are deemed to share a similar role called ‘parent’ by Proverbs, including all concomitant exemptions needed to facilitate this role where appropriate.

Although Maimonides (1135–1204) does not explicitly expand this role to the one who raises the orphan within his home, he does expressly address the issue of a rabbi teaching an orphan. In the *Mishneh Torah* (*De’ot* 6:10), after explaining the severity of the prohibition against causing suffering to the orphan, Maimonides writes:

<p>במה דברים אמורים בזמן שעינה אותן לצורך עצמו, אבל עינה אותם הרב כדי ללמדן תורה או אומנות או להוליכן בדרך ישרה הרי זה מותר.</p>	<p>In what case are we dealing with? When he causes them suffering for his own needs. But when a rabbi causes them suffering in order to teach them Torah or a trade<sup>56</sup> or to guide them on a straight path it is permissible.</p>
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Maimonides only posits the idea that a rabbi or teacher may be exempt from issues related to physically disciplining an orphan likely because this is a relationship that has precedent in the Talmudic text. He does not suggest that anyone, no matter how well intentioned, may physically discipline an orphan and be considered exempt from the biblical injunction against harming an orphan if they are not in a qualified and recognized relationship.

It appears that in both the text in *Makkot* and Maimonides the relationship of a parent or an educator has commitments beyond merely deterring one’s fellow from transgression or even encouraging the fulfillment of *mitzvot*.

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Deuteronomy only speaks of a boy and his mother, but we assume that the same applies to a father and daughter.

55. See b. *Kritot* 28a

56. Maimonides seems to be collapsing the general term *rav* as teacher to include one who teaches a trade and not only one’s religious teacher, both of which are surrogate providers for fatherly obligations.

Such commitments, including concerns for moral development, are indeed a function of their relationship to the child and form the basis of the exemption for the use of force.

Even those opinions that would countenance someone using physical force to encourage the observance of a commandment by any other non-related individual do not make similar conclusions with regard to basic educational needs of the individual, including general Torah learning, ethical norms, and life skills. It would be difficult to imagine any authority allowing just anyone to physically discipline another child, orphaned or otherwise, for moral failings or for not doing their homework unless within the context of a specifically recognized relationship. Both Ganzfried and the author the *Orhot Tzaddiqim* assume that this broader relationship exists in the case of an adopted child and guardian indicating that there is a *de facto* parental role in this regard.

### Adoptive Parents as Parents as a Halakhic Desideratum

One could argue that the use of the above halakha to demonstrate that adopting parents have the status of parents in halakha goes too far. It is possible to claim that the case of disciplining an orphan is exceptional as it resides in the realm of education, an explicit value within *halakha*. Alternatively, one must ask whether becoming a full parental surrogate is a value espoused in *halakha* or not, and whether there is any evidence of this in traditional sources.

The answer would seem to be yes. There appears to be an indication within traditional sources that adoptive parents were assumed to have treated their adopted children as their own and fully integrated them into their family life.

One example may be found in the response of one of the towering figures of Medieval Iberian Jewry, R. Shlomo Ibn Aderet (1235–1310) to a question regarding one of the adoption cases from the list in *Sanhedrin*, namely the case of King David's wife Michal raising her sister's sons. The comment refers to a rather harsh episode involving David handing over five of King Saul's grandsons to the Gibeonites to be executed.<sup>57</sup>

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57. *Sheelot U'Teshuvot Ha-Rashbah* 1:10

## Keren I

נראה בעיני לפי הפשט כי על כן  
כנה אותם כאן בשם בני מיכל  
שגדלתה כדי להודיע שבחו של  
דוד. שאף על פי שנתגדלו  
בביתו ובחיק אשתו מיכל אשר  
אהב והם לה כבניה. אף על פי  
כן לא חמל עליהם במקום  
מצוה ולקדוש השם. כדי שיראו  
העולם שאפילו לנקום נקמת  
גרים גרוזים מסר לתלייה  
אנשים שהם למיכל אשתו  
כבנים ואשר גדלה אותם כבניה  
עם בני המלך.

In my mind, according to the simple meaning, the reason they were referred to by her name as ‘the sons of Michal’ whom she raised, was in order to make known the praises of David. For, even though they were raised in his household, and in the bosom of his wife Michal whom he loved and they were like children to her, nevertheless, he did not spare them where there was a *mitzvah* to sanctify the name of God. In order to show the world that even to take the vengeance due forced converts he gave them over to be hung notwithstanding the fact that they were like sons to Michal his wife whom she raised like her own sons along with the King’s [biological] sons.

This source assumes that Michal treated them like she would have treated her own children, further highlighting it as a deeply loving relationship. In fact, Ibn Aderet indicates that all the King’s children were raised similarly together.

What is more, offering the same parental care to an adopted child was encouraged in some circles. Returning to Ganzfried, we find that he lists religiously positive practices that can aid in atonement, including:

לגדל יתום בתוך ביתו ויתנהג  
עמו כמו עם בנו. To raise an orphan in his home and treat him like  
his own son.<sup>58</sup>

From the above, one sees that there is value accorded in halakhic literature to treating adopted children the same as one’s biological children. These examples further bolster Rabinovich’s case that, yet again, no qualifier to adhere to prohibitions of *yihud* and *hibbuq ve-nishuq* accompanies these statements. Moreover, they assume a value of integrating adopted children into the family seamlessly, making the argument for the necessity of facilitation and feasibility within *halakha* much stronger.

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58. 151:7. Although, a fair criticism may be raised that the “*ve-yitnaheg*” here could be telling us to raise our children to have fear of heaven, which R. Ganzfried urges in the preceding phrase. In other words, he may be saying raise your children to fear God, and do the same with your adopted children as opposed to the more general reading I am suggesting.

## Part 6 — Categorical Exemptions to *Yiḥud*: Model 1 — Lack of Desire

Although adoption does indeed involve an expanded role for the adoptive parent based on the *de facto* parental role of guardian-caretaker, can we assume that this role expansion would impact laws like *yiḥud* or *ḥibbuq ve-nishuq* that are meant to limit illicit sexual relationships? If the fundamental foundation for the parental role expansion to educators, including exemptions for physical punishment, is the practical need to facilitate the *mitzvah* of education by parental surrogates, can we make a similar claim for *yiḥud* with adopting parents? Is there foundation to say that considerations of fulfilling an important and necessary *mitzvah* may override prohibitions even for those who understand them to be of biblical origin because, as mentioned by R. Broyde in regards to adoption, “without this lenient rule, the institution would disappear”?

As noted, the primary justification for exemptions to *halakhot* that are meant to impede even the possibility of an illicit sexual relationship is that certain relationships are not subject to sexual desire. Certainly there is a great foundation for this line of reasoning within both common sense and rabbinic sources. Moreover, appeals to mitigating factors to one’s sexual drive are even applied to non-incestuous cases. One classic explanation for why a husband and wife, when she is forbidden sexually to him due to menstruation, are allowed to be in seclusion together is that they know that after a short wait they will be permitted to resume conjugal relations.<sup>59</sup> Another example is that clearly non-sexual contact across gender lines in a professional context such as a doctor with a patient is not prohibited, since the professional is ‘busy with his work.’

Yet, upon further analysis, we see that this may not be the only explanation for how these *halakhot* were conceptualized, and the idea of a lack of sexual desire likely worked in tandem with other factors to determine how these exceptions were made.

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59. See b. *Yoma* 18b; *Tosafot Sotah* 7a s.v. “*niddah*”

## Problematizing Lack-of-Desire as an Explanation

That sexual inclination or a lack thereof cannot be the only foundation for these exemptions is highlighted by an intriguing problem with Rashi's explanation that the exemptions to *yihud* can be traced to the story of the Men of the Great Assembly defeating the evil inclination and therefore defeating the desire for incest. If incestuous sexual desires existed beforehand, how, according to Rashi, was *yihud* between parents and children ever possible in the prior history of Israel from the days of Moshe onward? One would have to assume that there was an exemption despite the possibility of sexual interest. Moreover, some limitations on *hibbuq ve-nishuq* may exist even where there is no sexual inclination. For example, Maimonides asserted that it is also prohibited to show physical affection with a grown sister or an aunt despite his openly stated view that there is no sexual inclination within such relationships.<sup>60</sup>

R. Moshe Feinstein provides one explanation as to why the rabbinic sages instituted this added stringency.<sup>61</sup> He argues that it would habituate people to affectionate interactions between the sexes in general even outside the morally safe non-sexual family environment. However, if this concern of engendering a bad habit is so noteworthy, why wasn't it seen fit to apply it to parents as well? Furthermore, Maimonides does not even include the relationship of a brother and sister in his list of familial *yihud* exemptions despite his assertion that no sexual interest exists in this circumstance.<sup>62</sup>

On the other hand, according to those who apply such exemptions for affection and seclusion to the situation of a brother and sister, there are still *some* limitations of *yihud* between them, like not living alone together for an extended period of time.<sup>63</sup> One is left wondering: if it is sexual inclination or the lack thereof that is the basis for this ruling, why is the exemption of parents and children stronger than these other exemptions? If there is no sexual interest between a brother and sister such that they could be in *yihud* and be affectionate, upon what basis would one limit them from living together

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60. See *Mishneh Torah, Issurei Biah* 21:6

61. *Iggrot Moshe YD* 2:137

62. See *Mishnah Torah, Issurei Biah* 22:1–2.

63. See the statement in *Qiddushin* 81b regarding the opinion of R. Yehuda in the name of R. Assi "He can be secluded with his sister and live with his mother and daughter".

alone for an extended period of time? Finally, if sexual interest is the primary foundation for the prohibition and its exemptions how can any leniencies have existed prior to the intervention of the Men of the Great Assembly?

### Defending the Lack-of-Desire Model

One answer to these questions may be that the sexual inclination between parents and children is simply weaker and is even more taboo than between other sets of relatives. The argument likely has a sound psychological basis. It also fits with the explanation of the *Tosafot* to a Talmudic story of Ulla kissing his sister affectionately. This episode is contrasted to the ruling attributed to Ulla himself that one should never be affectionate with one of the forbidden relationships including one's sister.<sup>64</sup>

והוא היה יודע בעצמו שלא יבא לידו הרהור שצדיק גמור היה. He knew that he would not come to lust [after his sister] because he was completely righteous.

Implied in this explanation is that the average person, who is flawed, would be subject to lust even when the show of affection is between a brother and sister and that the rabbis understood that sexual interest may exist even if it is only limited to the realm of fantasy. Moreover, it implies that a lack of sexual desire does indeed account for *halakhic* exemptions of this nature, which is why Ulla himself was exempt.

### R. Moshe Feinstein's Approach

This approach is further supported by a Talmudic narrative referenced by R. Feinstein<sup>65</sup> to help prove that *yihud* between a mother and son who both converted is permissible.<sup>66</sup> The story describes a rather disturbing incident involving Amon, one of the villainous Kings of Judah, sleeping with his own

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64. See b. *Shabbat* 13a. This is the source for the claim that one should not show physical affection to his sister.

65. *Iggrot Moshe* EH 4:64

66. Conversion legally severs filial relationships according to *halakha*, although it is still rabbinically prohibited to marry or otherwise have a sexual relationship with these biological relatives.

mother.<sup>67</sup> The Talmud describes that when Amon had intercourse with his mother, the following conversation took place between them:

אמרה לו: "אמו כלום יש לך	His mother said to him, 'Can you possibly receive
הנאה ממקום שיצאת ממנו?"	pleasure from that place which you came from?!' He
אמר לה: "כלום אני עושה אלא	responded, 'I am only doing this to anger my
להכעיס את בוראי."	creator'. <sup>68</sup>

Amon's mother, with a rhetorical flourish, demands an explanation from her son as to why he would commit this violation since it obviously can't be due to sexual desire, a fact Amon confirms.

Rashi, in commenting on this text, provides a fascinating alternative explanation for the origin of the incest aversion. In clarifying the mother's reasoning he suggests that vaginal birth 'fully satisfies forever any desire' to return to it for sexual pleasure. R. Feinstein uses Rashi's explanation of the Amon narrative to resolve the issue of the Men of the Great Assembly story claiming that, as Amon lived prior to the Men of the Great Assembly, there was still naturally no desire between parents and children. It was only the prayers of these men that allowed siblings to fall under the same category as parents, and therefore it is not based on a truly innate lack of desire which provides an etiology for the difference in practice between parents and siblings.

Nevertheless, this answer is not fully satisfying. The story of Amon only provides an explanation for the lack of desire between a mother and son, but not a father and daughter.<sup>69</sup> Secondly, Rashi's comments regarding the Men of the Great Assembly were attached to the phrase "He may live with his mother and daughter." However, he should have commented, at least according to Feinstein, on the phrase "He may be secluded with his sister." Similarly, Rashi wrote "his inclination does not assert itself on *them* (*a'layhu*)", which should have been in the singular if it were meant with regard to a sister. It would seem that we must conclude that Rashi is not interested in harmonizing the

67. b. *Sanhedrin* 103b

68. The story has a double meaning. Amon penetrates his mother, from whom he came into being, as an act of defiance against God from whom all humanity came into being. The violation of his mother is a symbolic violation of God.

69. R. Feinstein addresses this concern by using the story of Lot's daughters as an example to the contrary. They required getting him drunk in order to seduce him.

incest taboo theory of Amon's mother with the narrative of the Men of the Great Assembly.

### R. Yehoshua Falk's Approach

On this same issue, R. Yaakov Yehoshua Falk (1680–1756) records,<sup>70</sup> like Feinstein, that Rashi must have meant to include brothers and sisters in his description of the act of the Men of the Great Assembly since otherwise it would make no sense to permit a sister at all.

ואף על גב דפרש"י כן אאמו ואבתו על כרחך דאחותו נמי קאי דאל"כ אין טעם כלל להתיר ייחוד באחותו טפי מבאחרות ובלא"ה ודאי אהני אנשי כנסת הגדולה נמי לקורבת אחותו אלא דאפ"ה אין לסמוך על זה לדור עמה בקביעות משא"כ באמו ובתו דאפילו מקמי אנשי כנה"ג אין להחמיר בהם אף לעיקר ייחוד דהא מהאי קרא דרמזו לייחוד גופא ילפינן דאדם מתייחד עם אמו, וכבר כתבתי דלפ"י ה"ה באב עם בתו	Even though Rashi comments on 'his mother and daughter' [his comments] must necessarily have referred to 'his sister' as well for without this there is no reason at all to permit <i>yihud</i> with 'his sister' more than with anyone else. Certainly the Men of the Great Assembly helped with the sibling relationship of a sister, only that even with this one should not rely upon it for living with her permanently as opposed to with one's mother or daughter, which is not the case for a mother and daughter, since even before the Men of the Great Assembly there was no stringency in their case even in terms of the essential [prohibition] of <i>yihud</i> , for it was the very biblical verse itself which hinted at the <i>yihud</i> prohibition to begin with from whence we learned that a son may be secluded with his mother. And as I already wrote that according to this the same rule applies for a father and daughter...
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Unlike Feinstein, Falk clearly believed that there was a sexual inclination towards parents beforehand as well. Nevertheless, he refers to the original allowance based on the verse in Deuteronomy regarding a son and mother as foundation for allowing parental *yihud*, despite predating the legendary theurgic removal of incestual sexual interest.

According to Falk, it was only after the act of the Men of the Great Assembly that temporary *yihud* with one's sister was permitted. Falk understood that the exemption of living together long term is a parent-child prerogative divorced from sexual aversion as shown by both the biblical antiquity

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70. *Sefer Pnei Yehoshuah*, *Qiddushin* 81b

of the allowance for parents and the limitation on the allowance for a sister even after interest was removed. Only short term *yihud* seems to have been permitted as a result of the lack of a sexual inclination.

### Summary — Re-problematizing the Model

Despite the usefulness of the above approaches, it must be conceded that explanations which differentiate between parents and siblings due to sexual inclination are at variance with Maimonides' explicit assertion quoted verbatim by R. Yosef Karo in the *Shulḥan Arukh* that the prohibition of hugging and kissing an aunt or a sister applies even though there is no sexual desire or sexual pleasure involved.

Additionally, this explanation does not address why there should be an exemption for *yihud* in the case of a married couple during menstruation. In such cases we assume that there is sexual desire between them even though they know they will have a totally licit opportunity for it in the future. In fact, traditional Jewish law prohibits them from eating and drinking off the same plate or passing items like a set of keys to one another in order to limit this desire during the period of *niddah* (menstruation).

## Part 7 — Categorical Exemptions to *Yihud*: Model 2 — Feasibility

An alternative explanation for the distinction between parents and other prohibited relationships for the purposes of this *halakha* may be culled from the explanation of the Medieval German scholar R. Eliezer of Metz (d. 1175) as to why a married couple is exempt from *yihud*.<sup>71</sup>

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71. See *Sefer Yeraim* 26 (first printing p. 192). Waldenberg cites this source as tertiary support for his case. While his central thesis is clearly the behavioristic development of an incest taboo, his secondary argument seems to be practical necessity.

ואף על פי שהחמירו בנדה יותר  
משאר עריות לענין אכילה  
ושתיה, לענין יחוד הקלו בה  
שאסור משאר עריות מותר  
בנדה כדאמרין בסנהדרין [ל"ז  
א] א"ל ההוא מינא לר' אבהו  
אמריתו שרי להתיחד עם הנדה  
וכי' וטעמא שאי אפשר לו שלא  
להתיחד עם אשתו נדה ואין  
גוזרין גזירה על הצבור אלא  
א"כ רוב הצבור יכולין לעמוד  
בה. ואף על גב דיחוד אסור  
מדאורייתא ... בן מתייחד עם  
אמו ואין מתייחד עם כל עריות  
שאינן להם היתר דומיא דאמו  
אבל נדה יש לה היתר ובמה  
מצנין אין ללמוד דאינו דומה  
מי שיש לו פת בסלו לשאין לו.

Even though they were even stricter about *niddah* than the rest of the forbidden relationships in terms of eating and drinking, in the matter of *yihud* they ruled leniently, which while prohibited in other forbidden relationships is permitted by *niddah* as was written in *Sanhedrin* (37a) 'A sectarian said to Rabbi Abahu: They say it is permissible to be in seclusion with [one's wife] during menstruation, etc' and the reason is that it is impossible for him not to be alone with his menstruating wife, and decrees are not made on the congregation if they are unable to keep them. And even though *yihud* is a Torah prohibition... [we see] a son may be secluded with his mother, but cannot be secluded with any of the other forbidden relationships that similarly do not have an allowance like with one's mother. Yet, the case of *niddah* has an allowance. We cannot use a "if we find it here we should find it there" comparison, because there is a major difference between one who has 'bread in his basket' and one who does not.<sup>72</sup>

A similar explanation is offered by R. Asher ben Yehiel (Rosh).<sup>73</sup>

ומשעת ראייתה עד שתטבול  
יש לה להתרחק קצת מבעלה  
בדברים שאפשר, כי התורה  
אסרה ייחוד של כל העריות וגם  
נדה היא בכרת כשאר עריות  
אלא שהדבר קשה לזיהור  
מייחוד אשתו נדה ומצאורמז  
מן המקרא להתיר ייחוד נדה...  
(סנהדרין ד' לז:)

From the moment she sees [menstrual blood] until she immerses herself, she should distance herself a little from her husband in matters that are possible. For [although] the Torah prohibited *yihud* of all the forbidden relationships — and [relations with] a *niddah* is punished by being 'cut off'<sup>74</sup> like the rest of the forbidden relationships — however, being careful not to be alone with one's menstruating wife is too difficult a matter. Therefore, they found a hint to this in the scriptures, to allow *yihud* with his menstruating wife... (*Sanhedrin* 37b)...

The explanation proffered by R. Eliezer of Metz and R. Asher Ben Yehiel for

72. i.e., that she will become sexually available to her husband soon enough.

73. See *Rosh, Niddah; Pisqei Hilkhotei Niddah ha-Qatzar*

74. *Karet* — being cut off from the community of Israel. Although the exact nature of

exempting a married couple during *niddah* is that the Torah and the rabbinic sages would never have prohibited *yihud* in such a case as it would have been completely unfeasible for their marriage.<sup>75</sup>

These sources provide us with another type of precedent, namely that the practicality of maintaining a household is one of the ways in which our Sages defined the limits of the prohibition of *yihud*.<sup>76</sup> Applying this reasoning to the laws of *yihud* in general, it neatly explains the questions surrounding the differences between parents and siblings regarding how *yihud* would have been permitted before the era of the Men of the Great Assembly even according to Rashi's explanation. To enforce *yihud* on parents and children would have been equally as unfeasible as between husband and wife, which is not true of an adult brother and sister living alone together.

In his responsa, R. Waldenberg was the first to suggest that a feasibility exemption may also apply to *yihud* between adopted children and their parents, although he uses it as a secondary support for his main argument. One objection raised against his use of the argument has been that is based upon a false analogy.<sup>77</sup> The allowance for a husband and wife is something that impacts the majority of the community, whereas adoption affects only the minority, so one cannot claim that the congregation is unable to keep it.<sup>78</sup>

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this punishment is debated, it is generally assumed to be of a spiritual nature and the worst punishment one can receive.

75. Of course, R. Eliezer of Metz also uses the argument that the awareness of eventual intimacy allows them to resist transgression, a patently psychological argument. Of course, it must be noted that I am not arguing that the psychology of sexual attraction plays no role in the determination of *halakha*, but rather that it is not the only or necessarily most important factor.

76. R. Eliezer of Metz seemingly rules that *yihud* in the case of a *niddah* is a rabbinic decree because it is dissimilar to the case of incest due to the temporary nature of the sexual prohibition. R. Asher ben Yeḥiel apparently maintains that it is a biblical prohibition, and characteristically we find that this is the ruling offered by his son R. Yaaqov ben Asher in the *Arba' Turim* EH 22.

77. *Shevet Halevi* 10:196

78. One can argue that, despite the fact the adoption is a minority practice, it does impact the majority in terms of the need to know that if tragedy strikes, one's children can be cared for properly. Furthermore, if one adds stepchildren into the equation, the numbers rise. It is also arguable that keeping the community from being able to properly follow the important mitzvah of adoption, because

R. Wosner argues that this fact was likely reflected in the formation of the exemption for marriage, stating that it was not that there was any original intent in the institution of *yihud* to exempt married couples because they could not realistically observe it, but rather, it included married couples who effectively could not observe it and vocally criticized the policy until the rabbis changed it. Consequently, R. Wosner concluded that there was no 'feasibility' clause for practical need in the original formulation of the decree, but only a later amendment for a specific and commonly voiced extenuating circumstance.

Despite the legitimacy of this objection, the position of R. Asher ben Yehiel would tend to push in the other direction. As referenced above, R. Asher ben Yehiel maintains that *yihud* between a man and a menstruating woman is a biblical prohibition, but it was permitted for a husband and wife nonetheless. Therefore, any exemption according to him must be part and parcel of the original *halakha*.

Additionally, the previously noted texts of R. Shlomo Ibn Aderet and R. Ganzfried, as well as the rabbinic examples cited by R. Waldenberg and R. Feinstein, present cases and rulings that can serve as precedent for stating that adopted children were indeed treated as if they were biological children. One may, therefore, conclude that an exemption for adoption exists. Whether due to a shared psychological aversion to sexuality, the need for feasibility, or a likely combination of both reasons, an adoption exemption to the laws of *yihud* appears to be a valid allowance that has precedent in *halakha*.

## Conclusion

As we have seen, leading Orthodox Jewish scholars of the 20<sup>th</sup> century have debated the permissibility of allowing adoptive parents to show affection or even be secluded in the same room as their adopted children. In this debate, the values as expressed in *halakha* of continuity of the Jewish family and justice for the orphan find themselves in tension with the accepted need for cautionary measures as a prophylactic for sexually immoral behavior.

In addition to outlining the contours of this debate, this paper has set out

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of difficulties and concerns of the possible death of a spouse, impacts the entire community.

to show that, in addition to purely precedential or psychological defenses of *yihud* and *hibbuq ve-nishuq*, the argument for feasibility provides a necessary explanation for many of the elements of how these *halakhot* have been applied in previous cases and can serve as basis for extending them to adoption.<sup>79</sup>

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79. I would like to suggest a few potential consequences within Jewish Law that may stem from embracing a concept of exemptions due to facilitation and feasibility as opposed to one based in a *halakhic* psychology of sexual desire. Principally, there may be a difference in the age adoption must commence for these exemptions to take effect and the age when they potentially have to cease. R. Waldenberg suggests that in order for his contention to work, the children must either be younger than nine years old in the case of a boy, or younger than three year old in the case of a girl which are the standard ages set in *halakha* for when *yihud* prohibitions go into effect. According to R. Waldenberg, any later age would contraindicate the development of a totally non-sexualized relationship. If the basis for allowing *yihud* is to facilitate normative parenting practices in a household, it could theoretically apply to older children and forego the need to establish a specific age. So long as one could comfortably offer the same nurturing guidance to the adopted child such that it would be recognizably similar to parenting, there should be no issue. Conversely, one could argue that R. Waldenberg's reasoning would allow the affectionate relationship to continue into adulthood. Exemptions based on facilitation and feasibility, on the other hand, should terminate as soon their necessity expires.