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## Law, Religion, and Immigration: Building Bridges with Express Lanes

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# LAW, RELIGION, AND IMMIGRATION: BUILDING BRIDGES WITH EXPRESS LANES

*Gideon Sapir\**  
*Mark Goldfeder\*\**

## ABSTRACT

*This Article asks whether it can ever be moral or legal to use certain criteria, including nationality and/or religion, in formulating preferential immigration policies. In order to answer the question, it presents an in-depth look at the controversial “right of return,” focusing in particular on the example of the Israeli Law of Return. It contains a detailed history of the law and its development; a defense of the right of return in general; the principle and contextual arguments in favor of an amendment to or abrogation of Israel’s law; and a theoretical and practical defense of the law, with some ideas for potential modification.*

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## INTRODUCTION

On February 18, 2016, Pope Francis gave an in-flight interview on his way from Juarez, Mexico to Rome, Italy.<sup>1</sup> The interview went viral<sup>2</sup> because when asked about Donald Trump's plan to build a wall between Mexico and the United States, the Pontiff responded that, "[a] person who thinks only about building walls, wherever they may be, and not building bridges, is not Christian."<sup>3</sup>

The comment ignited a firestorm of media attention as well as a back-and-forth between the Vatican and Trump's political camp that focused on context, the role of religion in immigration policies, and what the Pope actually meant.<sup>4</sup> While much has been written about the legal and religious implications of keeping a particular religious group or nationality *out* of a given country<sup>5</sup>—a question that was recently revisited when Trump called for a temporary ban on all Muslim immigrants<sup>6</sup>—relatively little has been written about the opposite idea: whether, to use the Pope's analogy, a person can build a bridge that has an express lane *in* for a particular nationality or religion.

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<sup>1</sup> *Full Text of Pope Francis' In-Flight Interview from Mexico to Rome*, CATHOLIC NEWS AGENCY (Feb. 18, 2016), <http://www.catholicnewsagency.com/news/full-text-of-pope-francis-in-flight-interview-from-mexico-to-rome-85821/>.

<sup>2</sup> See, e.g., Molly Hemingway, *5 Problems with Pope Francis' Comments*, FEDERALIST (Feb. 18, 2016), <http://thefederalist.com/2016/02/18/5-problems-with-pope-francis-comments-on-donald-trumps-faith/>; John Hayward, *Trump Vs. Pope Francis*, BREITBART (Feb. 19, 2016), <http://www.breitbart.com/big-government/2016/02/19/trump-vs-pope-francis-immigration-compassion-and-national-legitimacy/>; Hayley Hoefer, *Views You Can Use: The Pope Vs. the Donald*, U.S. NEWS (Feb. 18, 2016), <http://www.usnews.com/opinion/articles/2016-02-18/pope-francis-says-donald-trumps-views-on-immigration-arent-christian>.

<sup>3</sup> Hoefer, *supra* note 2.

<sup>4</sup> James Martin, *What the Pope Did, and Didn't, Mean When He Said Trump Was Not a Christian*, WASH. POST (Feb. 19, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/02/19/what-the-pope-did-and-didnt-mean-when-he-said-trump-was-not-a-christian/>.

<sup>5</sup> See, e.g., James R. Edwards, Jr., *A Biblical Perspective on Immigration Policy*, CTR. FOR IMMIGR. STUD. 10 (Sept. 2009), <http://cis.org/sites/cis.org/files/articles/2009/immigration-biblical-perspective.pdf>; Matthew Soerens, *Scripture and Immigration*, WELCOMING STRANGER, [http://welcomingthestranger.com/wp\\_welcoming/learn-and-discern/scripture-and-immigration](http://welcomingthestranger.com/wp_welcoming/learn-and-discern/scripture-and-immigration) (last visited Nov. 17, 2017); *What Does the Bible Say About Refugees and Immigrants?*, DISCIPLES HOME MISSIONS, 1–3 (2007), <http://christianchurchestogether.org/wp-content/uploads/2013/01/What-Does-Bible-Say-Disciples-of-Christ.pdf>; Sarah Larimer, *Why Franklin Graham Says Donald Trump is Right About Stopping Muslim Immigration*, WASH. POST (Dec. 10, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/why-franklin-graham-says-donald-trump-is-right-about-stopping-muslim-immigration/>; Jazz Shaw, *So Is a "Complete and Total Shutdown" of Muslim Immigration Legal?*, HOT AIR (Dec. 8, 2015), <http://hotair.com/archives/2015/12/08/so-is-a-complete-and-total-shutdown-of-muslim-immigration-legal-constitutional/>.

<sup>6</sup> Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/>.

This Article argues that while it may not be moral or legal to keep a group out of a country based on their nationality or religion, it can, at times, be both moral and legal to use the same criteria to build an express lane in a country. While this idea is one that has implications for countries all over the world, the example that we use to make this point is the somewhat controversial, oft-debated Law of Return in the State of Israel.

To begin, we move back in time just thirteen months before the Pope and the current President had their through-the-media exchange, to a darker moment in world history that led people to ask all kinds of questions about immigration, law, and religion.

### A. *Overview*

To all the Jews of France, all the Jews of Europe, I would like to say that Israel is not just the place in whose direction you pray, the state of Israel is your home. . . . All Jews who want to immigrate to Israel will be welcomed here warmly and with open arms. We will help you in your absorption here in our state that is also your state.<sup>7</sup>

With those words, Israeli Prime Minister Benjamin Netanyahu called for the Jews of Europe to take advantage of Israel's Law of Return.<sup>8</sup> His instruction came at the heels of the January 2015 Charlie Hebdo terrorist attack which left more than a dozen people killed—including four Jews who were slaughtered not for anything they had allegedly done, but simply for what they were.<sup>9</sup> Netanyahu's words were echoed later in the day by Avigdor Lieberman, the Israeli Foreign Minister, and Defense Minister Moshe Ya'alon; they both agreed that the safest place for the Jews of Europe is Israel.<sup>10</sup> On February 15, 2015, just over a month later, a gunman in Copenhagen, the capital of Denmark, attacked a synagogue where a Bar Mitzvah was being celebrated.<sup>11</sup> Speaking from his Cabinet meeting in Jerusalem, Netanyahu once again repeated the following:

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<sup>7</sup> Justin Jalil et al., *Netanyahu to French Jews: 'Israel is Your Home'*, TIMES ISR. (Jan. 10, 2015), <http://www.timesofisrael.com/netanyahu-to-french-jews-israel-is-your-home/>.

<sup>8</sup> *See id.*

<sup>9</sup> *When Jews Are Killed, No One Asks Why*, TOWER (Jan. 1, 2016), <http://www.thetower.org/2780-charlie-hebdo-editor-when-jews-are-killed-no-one-asks-why/>.

<sup>10</sup> *Netanyahu to French Jews: 'Come Home to Israel from Terrible Europeans Anti-Semitism'*, RT (Jan. 12, 2015), <http://rt.com/news/221499-israel-pm-immigration-france/>.

<sup>11</sup> *Copenhagen Shootings: Denmark Buries Jewish Victim Dan Uzan*, TELEGRAPH (Feb. 18, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/denmark/11421109/Copenhagen-shootings-Denmark-buries-Jewish-victim-Dan-Uzan.html>.

Jews have been murdered again on European soil only because they were Jews and this wave of terrorist attacks—including murderous anti-Semitic attacks—is expected to continue . . . . Of course, Jews deserve protection in every country but we say to Jews, to our brothers and sisters: Israel is your home. . . . I would like to tell all European Jews and all Jews wherever they are: Israel is the home of every Jew.<sup>12</sup>

Over the last couple of years, the rise of anti-Semitic attacks in Europe, and the public call for European Jewry to take advantage of Israel's Law of Return, has coincided with the international focus on the legality and morality of letting people in, or keeping people out, based on religious and national criteria. The time has come for an in-depth look at the oft-criticized Law of Return itself, from both a legal and moral standpoint.

The Law of Return, which was passed by the Knesset in 1950, gives all Jewish people an unconditional right to immigrate to Israel and gain citizenship.<sup>13</sup> For many years, the law has been considered one of the foundational stones in the ongoing construction of Israeli law<sup>14</sup> and has enjoyed wide consensus amongst the citizens of the State.<sup>15</sup> In recent years, however, voices from inside and outside of Israel have begun questioning its legitimacy and wisdom.<sup>16</sup>

For simplicity's sake, critics of the Law of Return can be usefully sorted into two main categories. First, there are those who attack the law from a moral standpoint, claiming that the law unfairly discriminates against non-Jewish citizens of the State as well as immigrant applications from other nationalities.<sup>17</sup> Second, there are those whose claims are focused not on the legitimacy of the Law at the time it was passed, but rather on the continued legitimacy and usefulness of such a law today.<sup>18</sup> Critics point to two major changes that have

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<sup>12</sup> Cheryl K. Chumley, *Benjamin Netanyahu Tells Europe's Jews to Move to Israel, 'Your Home'*, WASH. TIMES (Feb. 16, 2015), <http://www.washingtontimes.com/news/2015/feb/16/benjamin-netanyahu-tells-europes-jews-to-move-to-i/>.

<sup>13</sup> *Law of Return 5710–1950*, ISR. MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx> (last visited Nov. 17, 2017).

<sup>14</sup> David Clayman, *The Law of Return Reconsidered*, JERUSALEM CTR. FOR PUB. AFF. (July 16, 1995), <http://www.jcpa.org/jl/hit01.htm>.

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Alex Stein, *Is the Law of Return Unjust?*, DAILY BEAST (May 10, 2013), <http://www.thedailybeast.com/articles/2013/05/10/law-of-return.html>.

<sup>17</sup> *The Discriminatory Laws Database*, ADALAH (May 30, 2012), <http://www.adalah.org/en/content/view/7771>.

<sup>18</sup> Mark J. Altschul, *Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining Its Present Language*, 2002 U. ILL. L. REV. 1345, 1356 (2002).

taken place since the founding of the State that, in theory, might obligate Israel to revisit its immigration policies.

First, in contrast to the circumstances around the founding of the State, the Jewish people today are no longer openly and systematically persecuted.<sup>19</sup> Second, in the early years, the economic situation and security concerns in the State of Israel left the country quite weak;<sup>20</sup> however, today, both the economy and the security of the nation are strong.<sup>21</sup> Accordingly, the nature of those seeking to immigrate to Israel has changed. In the first decades, immigration was motivated by Zionistic aspirations and a desire to find sanctuary from hate and persecution, whereas today, a substantial number of immigrants do so mainly out of a desire to improve their quality of life.<sup>22</sup> Critics of the Law of Return claim that if these assumptions are true, they erode, or even entirely erase, the moral basis for the right of those eligible to return.<sup>23</sup> If correct, these assumptions also make the current arrangement undesirable from the perspective of the State of Israel's interests.<sup>24</sup>

This Article will consider these two types of challenges. Ultimately, we reject the fundamental arguments against the Law of Return while partially accepting the contextual arguments. The following is a brief outline of how the rest of the Article will proceed:

Part I will be dedicated to a historical review. We will describe the circumstances that led to the enactment of the original Law of Return and the way it has been used over the course of time, including the process that led to the one fundamental amendment it has already undergone.

Part II will be dedicated to the presentation and the rejection of the fundamental morals-based arguments. Our claim is that immigration arrangements that give preferences based on nationality and/or religion can be, and in this case are, consistent with the basic principles of liberalism. Every person has a fundamental right to culture, and from this individual right we can

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<sup>19</sup> *Id.* at 1365.

<sup>20</sup> *Id.* at 1368; *see also* REGIONAL AND ETHIC CONFLICTS: PERSPECTIVES FROM THE FRONT LINES 97–98 (Judy Carter, George Irani, & Vamik D. Volken, eds., 2009).

<sup>21</sup> Alex Brill, *Israel's Economic Growth Impressive*, SUN SENTINEL (Nov. 5, 2015), <http://www.sun-sentinel.com/opinion/commentary/fl-viewpoint-israel-20151105-story.html>.

<sup>22</sup> Hila Zaban, *Becoming a Local Within a Bubble: Enclaves of Transnational Jewish Immigrants from Western Countries in Jerusalem*, 16 J. INT'L MIGRATION & INTEGRATION 1003, 1005–06 (2014).

<sup>23</sup> *See* YORAM HAZONY, THE JEWISH STATE: THE STRUGGLE FOR ISRAEL'S SOUL 57–58 (2000).

<sup>24</sup> *Id.* (referring to the arguments of critics who claim that the law must be repealed as it provides a means for many “unwanted immigrants” to enter Israel).

derive a nation-state's right to self-determination. The logic underlying the right to self-determination in a nation-state leads to the right of members of a national group to migrate to their nation-state, as well as to the right or interest of the nation-state to favor group members in their immigration policies.

In addition to this general justification, we will argue that the Law of Return can be based on two unique justifications. One relies on the Jewish people's right to protection and safety from continued hatred and persecution, a right that all members of a persecuted people have, and which is especially relevant to the members of the Jewish nation.<sup>25</sup> A second justification is based on the fact that, contrary to other nations, membership in the Jewish nation is not contingent on race or blood and that every human being is, in fact, able to join the Jewish people through conversion.<sup>26</sup> Furthermore, for the purposes of the Law of Return, this conversion does not even have to have an overtly "religious" orientation.

In Part III, we address the contextual arguments. As a preliminary issue, we point out that accepting all of the proposed limitations on the Right of Return will eliminate one of Israel's founding principles. Israel has always believed that the Law of Return does not *grant* a right to the Jewish people of the world; it merely recognizes a right that every Jewish person already possesses, regardless of what the State says.<sup>27</sup> Obviously, any country is permitted to change its founding principles, yet such a decision should not be taken lightly.

Getting to the heart of the matter, this Article agrees that a significant percentage of the people making Aliyah<sup>28</sup> today are not connected in any significant way to Jewish culture and provides several explanations for this phenomenon. We do point out, however, that the overwhelming majority of non-affiliated immigrants to Israel eventually join the Jewish majority there, adopting the culture and assimilating into Jewish-Israeli society.<sup>29</sup> In light of this reality, we argue that Israel should keep the current arrangement largely intact,

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<sup>25</sup> Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 235 (1999).

<sup>26</sup> Altschul, *supra* note 18, at 1353.

<sup>27</sup> HAZONY, *supra* note 23, at 56 (citing David Ben-Gurion, Prime Minister, Speech (July 3, 1950)) (reprinted in Jerusalem Post, July 19, 1957).

<sup>28</sup> Aliyah has been defined as "the immigration of Jews back to their ancestral homeland." See *Defining Aliyah: The Meaning and History of Jewish Return to Zion*, INT'L CHRISTIAN EMBASSY JERUSALEM (Mar. 26, 2017), <https://int.icej.org/aid/defining-aliyah>.

<sup>29</sup> Alexander Yakobson, *Joining the Jewish People: Non-Jewish Immigrants from the Former USSR, Israeli Identity and Jewish Peoplehood*, 43 ISR. L. REV. 218, 226–27 (2010).

since a high absorption rate serves the Israeli interest. However, we do note that some immigrants who are given rights under the Law of Return are active members of other faiths, and these immigrants tend not to become absorbed into the Jewish majority.<sup>30</sup> Therefore, we ultimately conclude that it is advisable to amend the Law of Return to address this particular phenomenon.

The argument regarding the disappearance of anti-Semitism (or at least its weakening) is regrettably rejected. We point out that while the reasoning behind anti-Semitism does periodically change, anti-Semitism as a phenomenon unfortunately continues to thrive even in countries where Jewish existence was nearly extinguished after the Holocaust, as well as in countries like the United States, where Jewish people enjoy a general sense of safety and prosperity.<sup>31</sup> It is further argued that the high rate and prevalence of anti-Semitism requires Israel to respect every Jewish person's right to immigrate to Israel, based on the right to be free from persecution, without a need to prove actual persecution in every instance.

## I. HISTORY OF THE LAW

### A. *The Law of Return (1950)*

At the end of the British Mandate in Palestine, as the last of the British troops departed, the members of the National Council of the Jewish Community gathered and declared the establishment of the modern State of Israel.<sup>32</sup> The Israeli Declaration of Independence stated that “the State of Israel will be open to all Jews.”<sup>33</sup> This announcement was greatly needed in light of the severe restrictions placed by the British authorities on Jewish immigration.<sup>34</sup> These restrictions had not been lifted even in moments of severe crisis and need, like

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<sup>30</sup> See Asher Greenberg, *Israel, Designed to Absorb Jewish Refugees, Now Struggles with African Migrant Wave*, TABLET (Mar. 26, 2017), <http://www.tabletmag.com/jewish-news-and-politics/158935/migrants-in-south-tel-aviv>. See generally *Minority Communities in Israel: Background & Overview*, JEWISH VIRTUAL LIBR. (Feb. 16, 2016), <http://www.jewishvirtuallibrary.org/minority-communities-in-israel-2>.

<sup>31</sup> See *The 2013 Top Ten Anti-Israel Groups in the U.S.*, ADL (2013), <http://www.adl.org/assets/pdf/israel-international/israel—middle-east/Top-Ten-2013-Report.pdf>; see also Susan Jones, *FBI: Jews Twice as Likely as Muslims to be Targeted by Hate Crimes*, CNSNEWS (Nov. 14, 2017), <https://www.cnsnews.com/news/article/susan-jones/fbi-jews-twice-likely-muslims-be-targeted-religious-hate-crimes-us>.

<sup>32</sup> WILLIAM L. CLEVELAND, *A HISTORY OF THE MODERN MIDDLE EAST* 252 (6th ed., 2016).

<sup>33</sup> The Declaration of the Establishment of the State of Israel, Official Gazette, No. 1 of the 5th Iyar, 5708, May 14, 1948, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> [hereinafter *The Declaration*].

<sup>34</sup> *Immigration to Israel: British Restrictions on Jewish Immigration to Palestine*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/History/mandate.html> (last visited Nov. 17, 2017).

during World War II, when European Jews were systematically exterminated by the Nazis, or after the War when hundreds of thousands of Jewish refugees were trying to enter the country in search of a safe haven.<sup>35</sup> Thus, in its very first meeting, on the day after the State was established—even before the Representatives signed the Independence Scroll<sup>36</sup>—the Provisional Council officially abolished the limits set by the mandate on Jewish immigration.<sup>37</sup> In doing so, they provided a ray of hope and assurance to post-Holocaust Jews around the globe, essentially saying that they all had a home to come back to.<sup>38</sup>

While the gates of Israel were immediately and effectively opened to Jewish immigration upon the establishment of the State, the Law of Return, which legally enshrines the right of every Jew to immigrate to Israel, was not passed by the Knesset until July 5, 1950, over two years later.<sup>39</sup> The main reason for the time lag was the legislature's original intention to encapsulate this right in a constitution, which was supposed to be adopted shortly after the State was established.<sup>40</sup> The initiative to form a constitution, however, faced many stumbling blocks along the way. Among these difficulties were the failure to bridge some deep moral disagreements; the reluctance of the ruling party, Mapai, led by David Ben-Gurion, to adopt a constitution that would limit the government's power;<sup>41</sup> and possibly the transformation of the Constitutive Assembly (elected for the sole purpose of establishing a constitution) into the first Knesset, which weakened the interest of that body to establish a constitution.<sup>42</sup> The public debate over the constitution and its contents, which lasted nearly two years, made it clear to everyone that the establishment of a

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<sup>35</sup> The policy, which was published in the 1939 "White Paper," established severe limits on the continued immigration of Jews to the country. See *Palestine: Statement of Policy*, Cmd. 6019 (May 23, 1939), <http://unispal.un.org/UNISPAL.NSF/0/EB5B88C94ABA2AE585256D0B00555536>.

<sup>36</sup> The Independence Scroll was the document that established the State of Israel. *Establishment of Israel: The Declaration of the Establishment of the State of Israel*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/the-declaration-of-the-establishment-of-the-state-of-israel>.

<sup>37</sup> *The Declaration*, *supra* note 33.

<sup>38</sup> *Id.*

<sup>39</sup> *Law of Return 5710–1950*, *supra* note 13.

<sup>40</sup> See Mark Goldfeder, *The State of Israel's Constitution: A Comparison of Civilized Nations*, 25 PACE INT'L L. REV. 65 (2013).

<sup>41</sup> See Ruth Gavison, *A Constitution for Israel: Lessons from the American Experiment*, 12 AZURE 133, 146 (2002). See generally Ruth Gavison, *The Controversy Over Israel's Bill of Rights*, 15 ISR. Y.B. ON HUMAN RIGHTS. 113 (1985).

<sup>42</sup> See generally Gideon Sapir, *Constitutional Revolutions: Israel as a Case Study*, 5 INT'L J. L. CONTEXT 359 (2010).

constitution was not yet possible.<sup>43</sup> As a result, the Knesset turned to enshrining the right of Jews to immigrate to Israel in a “regular” legislative act.<sup>44</sup>

The Law of Return was passed by the Knesset on July 5, 1950.<sup>45</sup> The Knesset member who introduced the bill stressed the importance of the date when the law was passed since it was the anniversary of the death of Theodor Herzl, who was considered the visionary of the Jewish State. Section 3 of the Law established the right of every Jew to immigrate to Israel. This right had minimal restrictions and was denied only to those who “act against the Jewish People, or may endanger public health or national security.”<sup>46</sup> Four years later, another section of the Law was added that denies the right to immigrate to someone with “a criminal past, likely to endanger the public.”<sup>47</sup> Over the years, the use of these exceptions to limit the immigration of Jews to Israel has been minimal.<sup>48</sup>

### B. *The 1970 Amendment*

Since its implementation, very few significant changes have been made to the Law of Return. One notable exception occurred in 1970 following the political crisis that arose from a controversial ruling by the Supreme Court of Israel. We will briefly describe the Amendment and the circumstances surrounding its adoption.

In the period before the founding of the State and in the early years of its existence, no attempts were made to officially define the term “Jew”; anyone who claimed to be Jewish was simply treated as such.<sup>49</sup> In the beginning, the

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<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Law of Return 5710–1950*, *supra* note 13. The Knesset member who introduced the bill stressed the importance of the date when the law was passed since it was the anniversary of the death of Theodor Herzl, who was considered the visionary of the Jewish State. *See Law of Return is Enacted*, CTR. FOR ISR. EDUC., <https://israeled.org/law-of-return-enacted/>. This was the Hebrew date of his passing, 20 of Tamuz. Theodor (Binyamin Ze’ec) Herzl, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/biography/Herzl.html> (last visited Nov. 17, 2017).

<sup>46</sup> *Law of Return 5710–1950*, *supra* note 13.

<sup>47</sup> 1st Amendment, 5714-1954, SH No. 163 p. 174 (Isr.).

<sup>48</sup> *See, e.g.*, HCJ 9056/11 Marmelstien v. Minister of Interior, (Nevo Legal Database, 18.6.2013) (Isr.) (original in Hebrew). In this case, the Court upheld the Minister of Interior’s decision to deny the Right of Return to the Ukrainian husband of a Jewish Woman, who was convicted of attempted murder fifteen years before his request. *Id.*

<sup>49</sup> RUTH GAVISON, THE LAW OF RETURN AT SIXTY YEARS: HISTORY, IDEOLOGY, JUSTIFICATION 45–46 (2009) (original in Hebrew). *See* ALEXANDER YAKOBSON & AMNON RUBINSTEIN, ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS 140 (2009).

Law of Return also left this definition open, leaving room for a broad spectrum of possible religious, social, and cultural interpretations.

The choice to leave the definition open was no accident—it was an attempt to avoid the deeply religious and political question of who should be included.<sup>50</sup> The question, however, could not be avoided forever; evading the question only shifted the heavy burden from the legislative branch (who failed to define it) to the executive branch (who struggled to implement an ill-defined law) and, finally, to the Court, who had to review those executive decisions.<sup>51</sup> The Court addressed the controversy in several high profile cases,<sup>52</sup> including the Shalit case,<sup>53</sup> which led to its amendment.<sup>54</sup> The Shalit case was notable not only for the hard substantive question it dealt with but also for the political and legislative responses it evoked.<sup>55</sup>

Benjamin Shalit was a Jewish officer in the Israeli Navy who married a non-Jewish woman, Anne, while he was studying abroad.<sup>56</sup> When Anne moved to Israel in 1960, she received a resident certificate, and in the registration documents she was listed as having no religious affiliation.<sup>57</sup> The couple had two children. When Shalit went to fill out their registration, he listed them as having no affiliation under religion, but as Jewish under the rubric for national affiliation, despite traditional Judaism being matriarchal. When the registration clerk refused to let this through, Shalit petitioned the Supreme Court of Israel. He claimed that a person should be able to belong to the Jewish nation without being a member of the Jewish religion.

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<sup>50</sup> See generally Gideon Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration*, 39 VAND. J. TRANSNAT'L L. 1233 (2006). Some scholars claim that the lack of definition was not based on a desire to avoid controversy, but on the mistaken assumption that there was no controversy, and that everyone agreed. See Moshe Silberg, *Personal Status in Israel 349* (1965) [Hebrew]. See also Comments of the Minister of Justice, Shapira, in the Knesset deliberation prior to the Amendment of the Law of Return in 1970. 5 Major Knesset Debates 1948–81, 1697 (Netanel Lorch, ed. 1993).

<sup>51</sup> See GAVISON, *supra* note 49, at 61–69 (describing the dispute and the Court's role in resolving it). See generally Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration*, *supra* note 50.

<sup>52</sup> See *Law of Return 5710–1950*, *supra* note 13.

<sup>53</sup> H CJ 58/68 Shalit v. Minister of the Interior 23(2) PD (II) 477 (1970), translated at Selected Judgments of The Supreme Court of Israel, Special Volume, 35 (1971) [hereinafter *Shalit*].

<sup>54</sup> Rebecca Weiner, *Judaism: Who Is A Jew?*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/jsource/Judaism/whojew1.html> (last visited Nov. 17, 2017).

<sup>55</sup> *Religion: Who Is a Jew?* TIME (Feb. 2, 1970); Weiner, *supra* note 54.

<sup>56</sup> See Lawrence S. Nesis, *Who is a Jew*, 4 MANITOBA L. J. 53 (1970).

<sup>57</sup> *Id.*

Reflecting the tremendous importance of the case, an unprecedented panel of nine justices sat to hear it.<sup>58</sup> Before it issued an opinion, the Court asked the Government to delete the national affiliation category entirely, which would have mooted the question once again. The Government, however, refused, and by a narrow majority of five against four, the Court granted the petition, instructing that the children be registered as belonging to the Jewish nation.<sup>59</sup> The decision surprised many in the traditional religious community, and amidst the public and political upheaval, the National Religious Party threatened to leave the coalition, which would have caused the Government to crumble.<sup>60</sup> In an effort to alleviate tension, the Law of Return was amended to include the definition of a Jew; the new section defined a Jew as a person born to a Jewish mother or who had converted and did not belong to another religion.<sup>61</sup>

This marked the first time that a definition for the term “Jew” was codified in law, and the definition provoked much criticism.<sup>62</sup> The Amendment significantly narrowed the eligibility to immigrate and left outside of its parameters many people who felt strongly connected to the Jewish people.<sup>63</sup> In an attempt to accommodate such individuals, the Knesset introduced another amendment to the Law of Return, which greatly *expanded* the Right of Return by granting this right to any family member of an entitled person (i.e., a “Jew” by the above-mentioned definition), up to a third generation regardless of the family member’s religious affiliation.<sup>64</sup> Section 4A of the 1970 Amendment vests the right to immigrate to Israel in the following individuals: “a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child and a grandchild

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<sup>58</sup> Currently, fifteen justices serve on the Supreme Court of Israel. *Id.* at 56. Unlike the U.S. Supreme Court, where the entire bench presides over all cases, the Supreme Court of Israel usually sits as a bench of three. *The Judiciary: The Court System*, ISR. MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx> (last visited Nov. 17, 2017). However, there is a possibility of expanding the panel. *Id.*

<sup>59</sup> For a discussion of the judgment and the related circumstances, see *id.*; PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 196–200 (1997); Altschul, *supra* note 18, at 1345–65; Noah Baer, *Who is a Jew? A Determination of Ethnic Status for Purposes of the Israeli Population Registry*, 10 COLUM. J. TRANSNAT’L L. 133 (1971).

<sup>60</sup> Nesis, *supra* note 56, at 80; see also *N.R.P. Walkout Threat*, JERUSALEM POST, Jan. 25, 1970, at 1 (discussing the N.R.P.’s threats to quit the coalition in the event of the registration not being amended by way of legislation).

<sup>61</sup> *Id.* Following the Amendment of the Law of Return, the Court rejected an additional petition filed by Shalit in which he requested to have his third child, who was born after the decision in the first petition, registered as a Jew. See H CJ 18/72 Shalit v. Minister of the Interior, 23(1) PD (1) 334 (1972) (Isr.).

<sup>62</sup> Shachar, *supra* note 25, at 245.

<sup>63</sup> See GAVISON, *supra* note 49, at 67.

<sup>64</sup> *Knesset Amends Law of Return to Define “Who is a Jew,”* CTR. FOR ISRAEL EDUCATION (Mar. 10, 2017), <https://israeled.org/knesset-amends-law-of-return/>.

of a Jew.”<sup>65</sup> This Amendment rejected the Shalit case approach, in which the Court had treated the determination of Jewishness according to religion as distinct from the determination of membership in the Jewish nation; but, at the same time, it extended eligibility to numerous non-Jews who could now make the Aliyah.<sup>66</sup>

While the 1970 Amendment provided a definition of “Jew” in the context of the Law of Return, the Knesset failed to determine the nature of the conversion process that was necessary in order to satisfy the requirements of the Law. Hence, from this point onwards, the question was no longer “who is a Jew?” but, rather, “who is a Jewish convert?” For a long period of time, the Orthodox mode of conversion enjoyed a monopolistic status in the context of the Law of Return.<sup>67</sup> However, in 2005, the Supreme Court of Israel ruled that the State should confer equal recognition to all conversions conducted abroad by a recognized stream of Judaism (Orthodox, Conservative, or Reform).<sup>68</sup> As we shall explain later, this shift can be thought of as a crucially important fact in discussing allegedly discriminatory immigration policies.

## II. THE PRINCIPLED ARGUMENT

### A. *The Argument*

In recent years, many voices have arisen that challenge the legitimacy of the Law of Return. The argument is that the Law, on its face, discriminates against non-Jewish citizens of Israel<sup>69</sup> as well as people of other nationalities that wish to immigrate.<sup>70</sup> Before we begin, we should note that the Law of Return is not the only option for those that are interested in immigrating to Israel. Aside from this special provision, there is the general immigration law, which allows for

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<sup>65</sup> Law of Return (Amendment No. 2), 5710–1950, SH No. 586 p. 34 (Isr.).

<sup>66</sup> *Id.* at 67.

<sup>67</sup> See Altschul, *supra* note 18, at 1353.

<sup>68</sup> HCJ 2597/99 Toshbeim v. Minister of the Interior, 59(6) PD 721 (2005) (Isr.); see Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration*, *supra* note 50, at 1247–50.

<sup>69</sup> See, e.g., CHAIM GANS, *THE LIMITS OF NATIONALISM* 141 (2003) (“There is no doubt that the principal injustice that the Law of Return causes . . . stem[s] from the fact that it grants such advantages to one nation within a state which includes members of more than one nation entitled to self-determination.”).

<sup>70</sup> See, e.g., Shachar, *supra* note 25, at 236–37 (“[U]nlike most other countries, while Israel regulates the flow of immigrants to its territory, it also permits an unrestricted entitlement to membership for a particular group of persons . . . . The problem with this otherwise embracing immigration policy is that it does not embrace all potential immigrants.”).

immigration under certain fairly standard conditions, with especially generous access if the individual seeking immigration has familial ties to an Israeli citizen.<sup>71</sup> Critics, however, believe that the law unjustifiably places non-Jewish Israeli citizens and persons of other nationalities in an inferior position by bestowing an automatic immigration right to Jewish people.<sup>72</sup>

The State of Israel is not the only country with immigration procedures that give priority to a particular nation; indeed, many countries have legislation premised on a “Right of Return.”<sup>73</sup> Thus, this criticism is not leveled against the Israeli Law of Return alone, but, rather, targets any similar immigration legislation.<sup>74</sup> The pertinent question is, therefore, whether any nation’s use of national affiliation to distinguish between immigration applicants violates the duty to act with equality.<sup>75</sup> This question will be answered herein.

## B. Discussion

### 1. Insufficient Answers

The Declaration defines Israel as a “Jewish state.”<sup>76</sup> The Supreme Court of Israel has repeatedly ruled that the Jewishness of the State is a “constitutional basic fact” underlying the activity of state authorities.<sup>77</sup> Israeli law internalized

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<sup>71</sup> The Citizenship Nationality Law provides three ways by which to acquire Israeli citizenship: residence, birth, and naturalization. Citizenship Nationality Law, 5712-1952, 6 LSI 50 (1951–52) (Isr.).

<sup>72</sup> See Raef Zreik, *Notes on the Value of Theory: Readings in the Law of Return—A Polemic*, 2 L. & ETHICS HUM. RTS. 34313 (2008).

<sup>73</sup> See, e.g., Ústavní zákon č. No. 23/1991 Sb., *Listina Základních Práv a Svobod* [Charter of Fundamental Rights and Freedoms] art. 14, para. 4 (“Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave her homeland.”) (This Charter was enacted by the Czechoslovak Federative Republic and preserved in the constitutional systems of the Czech Republic and Slovak Republic.); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. XIV, para. 1 (“Hungarian citizens shall not be expelled from the territory of Hungary and may return from abroad at any time. Foreigners staying in the territory of Hungary may only be expelled under a lawful decision. Collective expulsion shall be prohibited.”).

<sup>74</sup> See, e.g., Jeff Spinner-Halev, *Unoriginal Sin: Zionism and Democratic Exclusion in Comparative Perspective*, 18 ISR. STUD. F. 26, 33 (2002); Alexander Jakobson, *Jewish Peoplehood and the Jewish State—How Unique?*, 13 ISR. STUD. 1, 1–27 3, 5 (2008); see also Ruth Gavison & Nahson Perez, *Days of Rest in Multicultural Societies: Public, Private, Separate?*, in *LAW & RELIGION IN THEORETICAL & HISTORICAL CONTEXT* 186, 206–07 (Peter Cane et al. eds., 2008).

<sup>75</sup> See generally Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law*, NORWEGIAN CTR. FOR HUM. RTS. (2004).

<sup>76</sup> The Declaration, *supra* note 33. The Declaration also affirms that the State and its laws would “be based on freedom, justice and peace as envisaged by the prophets of Israel.” *Id.*

<sup>77</sup> EA 1/65 Yardor v. Chairman of the Central Election Committee for the Sixth Knesset, 19(3) Isr. SC 365, 385 (1965).

this basic element in its constitutional documents,<sup>78</sup> as well as in political and social areas. For example, Israeli election legislation disqualifies a candidate list that negates the Jewish character of the State.<sup>79</sup> The State of Israel enshrines in legislation the status of the institutions of the Jewish people.<sup>80</sup> It uses the Jewish culture in the State's symbols and official ceremonies and establishes the Sabbath and Jewish holidays as the official days of rest.<sup>81</sup> It gives the spirit of Jewish law a certain status in the ruling of the courts.<sup>82</sup> Israeli law also preserves in legislation the remembrance of the Holocaust,<sup>83</sup> compensates Holocaust victims,<sup>84</sup> and judges Nazis for their crimes.<sup>85</sup> It applies the Penal Law of the State of Israel towards offenses against Jews as Jews, even if committed outside its territory and towards non-citizens.<sup>86</sup> In fact, the Declaration itself references the concept of Return as a major founding principle of the State.<sup>87</sup>

The identification of Israel as a nation-state, and the anchoring of its national character in its established immigration practices, are not unique to Israel. As Rubenstein and Yakobson point out, many countries—especially in Europe—are categorized as nation-states.<sup>88</sup> One of the most significant and common identifiers of nation-states is the preference of certain nationals in the

<sup>78</sup> Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 150 (1992); Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 p. 90 (1994).

<sup>79</sup> Basic Law: The Knesset, as amended at 5745-1985, SH No. 1155 p. 196 (1958) (Isr.) (A list of candidates will not participate in elections to the Knesset if its aims or actions, expressly or by implication, deny the existence of the State of Israel as the state of the Jewish people.).

<sup>80</sup> See, e.g., World Zionist Organizations and Jewish Agency for Israel Status Law, 5713-1952, 7 LSI 3 (1952); Jewish National Fund/Keren Kayemet LeYisrael Law, 5714-1953, 8 LSI 35 (1958).

<sup>81</sup> *The State of Israel as a Jewish State*, KNESSET, <http://knesset.gov.il/constitution/ConstMJewishState.htm> (last visited Nov. 17, 2017).

<sup>82</sup> Law of Legal Foundations of Law, 5740-1980, § 1, 34 LSI 181 (1980).

<sup>83</sup> Martyrs' and Heroes' Commemoration (Yad Vashem) Law, 5713-1953, SH No. 132 p. 144 (1953); Martyrs' and Heroes' Remembrance Day Law, 5719-1959, SH No. 280 p. 112 (1959); Denial of Holocaust (Prohibition) Law, 5746-1986, SH No. 1187 p. 196 (1986); State Education Law (Amendment No. 5), 5760-2000, SH 122 (2000) sec 2(4).

<sup>84</sup> Invalids (Nazi Persecution) Law, 5717-1957, SH No. 43 p. 111 (1957) (Isr.); Claims by Victims of the Nazis or Their Satellites (Regulation of Handling) Law, 5717-1957 (Isr.); Victims of Holocaust Property Law (Restoration to Successors and Dedication to Support and Perpetuation), 5765-2005 (Isr.).

<sup>85</sup> Nazis and Nazi Collaborators (Punishment Law), 5750-1950, SH No. 57 p. 281 (1950); CC 40/61 Attorney General v. Eichmann 45 PM 45 3 (1961) (Isr.); CrimA 336/61 Eichmann v. Attorney General 16 SC 2033 (1962) (Isr.); CrimA 347/88 Demjanjuk v. State of Israel 47(4) SC 221 (1988) (Isr.).

<sup>86</sup> Penal Law (Amendment No. 39), 5737-1977, SH No. 1481 p. 348 (1977).

<sup>87</sup> DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL MAY 14, 1948 ("The State of Israel would be open for Jewish immigration and for the Ingathering of the Exiles."). This is seen as a reference to the Biblical promise of the Ingathering of the Exiles in Deuteronomy 30:1-5.

<sup>88</sup> See generally YAKOBSON & RUBINSTEIN, *supra* note 49.

immigration policy.<sup>89</sup> Of course, it is true that the argument that “everyone does it” cannot substitute the need for an independently normative justification for the nation-state model, with its various characteristics, including a preferential national immigration policy. Similar things can be said with respect to the argument that the right to self-determination, including the right to determine nationality-based immigration policy, is recognized by international law;<sup>90</sup> this is certainly a relevant datum, but it cannot substitute the need for an independently normative justification for the nation-state model and the preference of members of one particular nation in the immigration laws.<sup>91</sup> Even if international law justifies nation-states and the practice of preferring members of one nation in the immigration policy, we need to ask *ourselves* if this is a moral behavior. We will examine this question in the next section but, for now, we simply note that many scholars throughout the last century have taken up this question with similar conclusions. Henry Sidgwick notes that states can restrict immigration to protect “the internal cohesion of a nation,”<sup>92</sup> while James Hudson and David Miller list protecting the ethnic and cultural makeup of the society as one of the justifications for restricting immigration.<sup>93</sup> As a recent article noted, “whether one finds the justification in a liberal theory<sup>94</sup> or a communitarian theory,<sup>95</sup> the literature on the justifications to restrict immigration is vast and well-established.”<sup>96</sup>

Another possible answer to the question of *prima facie* discrimination proposes to distinguish between discrimination within the community (i.e. amongst community members) and discrimination in relation to non-members

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<sup>89</sup> See Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?*, 2 L. & ETHICS HUM. RTS. 128 (2008) (providing a useful review of immigration policies in the Western world).

<sup>90</sup> G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (Dec. 21, 1965).

<sup>91</sup> See generally AVIAD BAKSHI & GIDEON SAPIR, *A Jewish Nation-State: A Discussion in Light of the Family Reunification Case*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 487 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., Hart Publishing, 2013).

<sup>92</sup> See HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 309 (4th ed. 1919).

<sup>93</sup> See James L. Hudson, *The Ethics of Immigration Restriction*, 10 SOC. THEORY & PRAC. 201, 212 (1984); David Miller, *Immigration: The Case for Limits*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 193, 199 (Andrew Cohen & Christopher H. Wellman eds., 2005).

<sup>94</sup> See generally WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Stephen Macedo, *When and Why Should Liberal Democracies Restrict Immigration?*, in CITIZENSHIP, BORDERS, AND HUMAN NEEDS (Rogers M. Smith ed., 2010); Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 661 SOC. RES. 491 (1994).

<sup>95</sup> See Miller, *supra* note 93, at 204.

<sup>96</sup> Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENTARY 237, 296 (2010).

within the claim itself.<sup>97</sup> The argument is simply that the principles of justice apply within a particular community but are not binding in the same way regarding community members' attitudes towards non-members.<sup>98</sup> If this argument is true, it at least refutes the claim that the Law of Return "discriminates" against immigration applicants from other nationalities.

This possible distinction is accepted by a number of writers from the liberal camp.<sup>99</sup> In our view, however, this type of argument is not convincing, if only because it is anachronistic. The assumption underlying the position that the application of the principles of justice is confined to the political unit is probably the applicability of principles of justice derived from a type of social contract. Given the reality of life in the 21st century, where legal and physical boundaries between countries are blurred and many parts of the world are working in coordination and cooperation, one can certainly argue that the social contract crosses political boundaries. Indeed, international law increasingly develops tools for international intervention in matters that were considered internal not long ago.<sup>100</sup>

A milder version of the distinction between the interior and the exterior suggests that the degree of commitment of one person to another derives from his or her level of proximity. According to this version, the duty of a man towards his family is stronger than his obligation to the community in which he lives; the second duty is greater than the obligation to the citizens of his state, which, in turn, is greater than his duty towards the rest of humanity.<sup>101</sup> Interestingly, this is a traditionally Jewish position, at least in regard to the provision of charity and social services.<sup>102</sup> We tend to accept this version, but, in our opinion, this alone cannot justify a blatant preference of one nationality over other nationalities in immigration policy. As noted above, the inter-relationship between states around the globe today has been significantly

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<sup>97</sup> See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). But see Carens, *supra* note 94, at 251–73.

<sup>98</sup> See generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW (1996) (Aliens outside the sovereign territory have usually been considered outside the protections of the Constitution. They may have claims under international or statutory law, but the Constitution does not generally apply extraterritorially to noncitizens and, therefore, does not provide substantive constitutional protection to aliens outside the sovereign territory.).

<sup>99</sup> See, e.g., WALZER, *supra* note 97. But see Carens, *supra* note 94, at 251–73.

<sup>100</sup> See Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT'L. J. CONST. L. 611, 612 (2004).

<sup>101</sup> See, e.g., Ze'ev Maghen, *Imagine: On Love and Lennon*, 7 AZURE 119, 155 (1999).

<sup>102</sup> See Babylonian Talmud: Baba Mezi'a 71.

strengthened. If commitment is the result of a factual connection, strengthening the connection should strengthen the commitment. Accordingly, we believe that the attempt to reject the claim of discrimination against non-Jewish immigration applicants on the grounds that Israel has no pre-existing obligation towards them remains somewhat less than fully convincing.

Even if we were to accept the distinction between the internal and the external, it would only help in dealing with the problem of discrimination towards immigration applicants; it would not address the alleged discrimination against Israeli citizens who do not belong to the Jewish nation. At first glance, one could argue that an immigration policy favoring the dominant nationality has no bearing on the status of citizens who do not belong to this nation. This was apparently the position taken by the Supreme Court of Israel when it determined that “a special key to enter the house was given to the Jewish people (see the Law of Return), but when a person is inside as a lawful citizen, he enjoyed equal rights with all other household members.”<sup>103</sup> However, we tend to agree with Chaim Gans, who believes that “preferences in immigration are not only external preferences of potential immigrants from one type over another type of potential immigrants. They also reflect internal preferences, the preferences of one group of citizens in the host country over other citizen groups belonging to it.”<sup>104</sup> Thus, even if the Law of Return does not infringe upon the rights of non-Jewish immigration applicants, it certainly touches upon the lives of Israeli citizens who belong to the minority of Arab-Palestinians,<sup>105</sup> if only by sending a message about societal order and hierarchy.

Therefore, it is our opinion that the Law of Return cannot be fully justified by the claim that “everyone does it,” by the argument that Israel has no obligation towards people of other nationalities who wish to immigrate, or by the assumption that the Law of Return does not compromise the right to equal treatment of minorities living in Israel. The justification for the Law of Return has to be found elsewhere if it is to be convincing.

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<sup>103</sup> HCJ 6698/95 Kaadan v. Israel Lands Administration 54(1) PD 258 (2000) (Isr.).

<sup>104</sup> CHAIM GANS, FROM RICHARD WAGNER TO THE RIGHT OF RETURN 202 (2006); *see also* Gideon Sapir, *Book Review - Yakobson & Rubinstein: Israel and the Family of Nations*, 11 DEMOCRATIC CULTURE 295, 319–23 (2009).

<sup>105</sup> Shachar, *supra* note 25, at 263.

## 2. *Preferential Immigration Policy and the Right to Self-Determination*

### a. *The Right to Culture and Its Justifications*

In recent decades, many liberal thinkers have begun to suggest justifications for the right to culture. The various proposals can be usefully divided into four main formulations, which we will briefly review.<sup>106</sup>

[Will] Kymlicka holds that life within the framework of a certain culture serves as an imperative condition for affecting the right to autonomy. [Charles] Taylor feels that a person's right to preserve his specific culture derives from the right to dignity. In his opinion, a person's human need to be respected by his environment deserves recognition. In this framework the uniqueness of each person, which is expressed through his culture, must be honored. [Moshe] Halbertal and [Avishai] Margalit are convinced that a person's culture constitutes a fundamental component in his self-identity, and therefore the right to culture is a derivative of the right to identity. Finally, [Chaim] Gans feels that each person has the right to act for the realization of significant dreams and considers a person's cultural choices as the effectuation of such a dream.<sup>107</sup>

All of the formulations described conclude that the right of human beings to live within the framework of their culture should be recognized.

### b. *Does the Right to Culture Entail a Right to a Nation-State?*

If there is a right to culture, does it lead to a right to self-determination in a nation-state? There are two arguments that likely lead to a negative conclusion:

First, it can be claimed that it is possible to realise the right to culture to a sufficient degree in sub-state community frameworks, and if so, there is no justification to demand a nation-state. Second, effectuating the right to culture of a national group within the framework of a nation-state might entail infringing on the right of cultural minorities in that state, including those minorities' right to culture, so its realization should be limited only to sub-state frameworks.<sup>108</sup>

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<sup>106</sup> BAKSHI & SAPIR, *supra* note 91, at 487.

<sup>107</sup> *Id.* at 489.

<sup>108</sup> *Id.* at 489–90.

This is to say that even if a majority's right to culture cannot be fully realized in a sub-state framework, the benefits of full as opposed to partial realization are not offset by the costs to minorities' rights.

As a result, many "liberal thinkers who support the right to culture feel it should be realized only as part of a multicultural state, and not a nation-state."<sup>109</sup> Other liberal writers, though, believe that realization of the right to culture might require recognizing the right to a nation-state.<sup>110</sup>

Finally, it can be argued that providing a nation-state to certain cultural groups would in some way discriminate against other cultural groups in the world that do not receive the right to self-determination in their nation-state. This lack of equality obliges us, so the argument goes, to relinquish the idea of a nation-state also on the part of the cultures that do indeed benefit, or might benefit, from realization of the right.<sup>111</sup>

*c. The Right to Culture Does Entail a Right to a Nation-State*

While these arguments carry some weight, at the end of the day, we believe that they fail for three reasons: (i) a nation-state is necessary for sufficient realization of the right to culture; (ii) the harm to members of minority groups is minimal, and many are willing to accept it; and (iii) in this fulfillment, no harm is done to global justice.

*i. A Nation-State is Necessary for Realization of the Right to Culture*

While it is true that cultural rights can be realized to a certain degree in a multicultural system, the status of a nation-state grants protection to the national culture to an extent and power that cannot be compared to the protection given by a multicultural state.<sup>112</sup> For example, a nation-state can assign resources and operate in the international arena to foster the majority's culture among its members and protect cultural-national dispersion. In contrast, it is doubtful whether a multicultural state can shoulder the task of assisting the dispersion of each sub-member cultural group. In addition, the nation-state, by its very

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<sup>109</sup> *Id.* at 490.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 487–502.

<sup>112</sup> Lubna S. El-Gendi, *Illusory Borders: The Myth of the Modern Nation-State and Its Impact on the Repatriation of Cultural Artifacts*, 15 J. MARSHALL REV. INTELL. PROP. 485, 505–06 (2016). *See generally* Liav Orgad, *Illiberal Liberalism Cultural Restrictions on Migration and Access to Citizenship in Europe*, 58 AM. J. COMP. L. 53 (2010).

existence, constitutes a focal point that consolidates the consciousness of the members of the national culture around it.<sup>113</sup> The Israeli instance, and its relationship with the Jewish diaspora communities, serves as an excellent example of this last point.

In our opinion, the protection provided by a nation-state has become especially important in the modern era, marked by its accelerated secularization, emphasis on individualism and freedom, and the release of familial and communal bonds. In this reality, members of cultural groups can no longer lean only on the power of old communal frameworks and need a stronger tool, especially one that is institutionalized, to preserve their group culture. In an age where the framework of groups and communities has difficulty standing firm, state protection of national culture, within the framework of a nation-state, becomes especially vital.

*ii. The Harm to Members of Minority Groups Is Minimal and Many Are Willing to Accept It*

Even if we were able to show that the model of the nation-state is necessary to achieve the right to culture, it would still be necessary to show that one can keep safe the rights of cultural minorities living in that state, including their right to culture.

We believe that the protection of the rights of minorities is quite possible, even in a nation-state. In this context, it is necessary to distinguish between the protection of individual rights of members of minority groups and the protection of their collective minority culture. As for individual rights, certain practices within the framework of a nation-state may create a strain on various rights of minority group members. However, the inevitable tension between rights is a recognized reality in the discourse on constitutional rights and is nothing but the result that collisions between values are an integral and irrevocable element of human life. As we know, constitutional law develops different balancing mechanisms in cases of conflict between values.<sup>114</sup> As in our case, and in other constitutional dilemmas, a balance should be struck between the right to self-

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<sup>113</sup> See, e.g., DIASPORA AND MULTICULTURALISM: COMMON TRADITIONS AND NEW DEVELOPMENTS (Monika Fludernik ed., 2003).

<sup>114</sup> In recent years, proportionality has become the most widespread balancing formula. See, e.g., AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., Cambridge University Press 2012); MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (Cambridge University Press 2013).

determination of the majority group members and the rights of members of minority groups that are in question. At the end of the day, certain practices will be disqualified<sup>115</sup> or limited, while others are approved.

As noted, the nation-state will be required to respect not only the individual rights of members of minority groups but also their cultural rights. Within this framework, there will be space to examine the option of granting autonomy, partial or complete, to the minority group members on various matters relating to the preservation of their culture. There is no reason to assume that this is not possible.<sup>116</sup> The cultural rights of minority groups will be maintained at the community level, while the cultural rights of the majority will be maintained at the state level; by definition, this means that the culture of the minorities will not enjoy equal status of the national culture.<sup>117</sup> But this fact should not, in our opinion, outweigh the benefits of the nation-state model. Optimal realization of the right to culture of majority groups in the various nation-states is preferable, in our opinion, even in the face of the partial inequality caused to minorities who enjoy the right to community (and not state) culture. Furthermore, from the point of view of minority groups within nation-states, there is, of course, the possibility that elsewhere in the world their culture does have a nation-state as well. In such a case, one could easily argue that the value of the existence of another state where their culture *is* a state culture is larger than the damage involved in defining their country of citizenship as a nation-state of another nation.

### *iii. No Harm is Done to Global Justice*

Some, like Chaim Gans, have argued that, since there are various cultural groups in today's world that do not have self-determination in their own states, there should be a waiver of the nation-state concept by those who do enjoy this

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<sup>115</sup> For example, a few years ago, the Supreme Court of Israel struck down an established policy according to which Arab-Israeli citizens were not able to join Jewish town communities. H.CJ 6698/95 Kaadan v. Israel Lands Administration 54(1) PD 258 (2000) (Isr.). The Court ruled that their right to equality overrides the community's interest in preserving its Jewish character. *See Id.*

<sup>116</sup> For instance, the State of Israel confers on minority religions a monopoly in matters of personal status. See Sec. 51-57 of The Palestine Order in Council, 1922, which is still valid.

<sup>117</sup> Certain aspects of the minority's culture could be nationalized. For example, we see no reason why democracies should not include some national holidays to coincide with a minority group's religious festivals, especially if the relevant minority is sizeable. In some countries, like Slovenia, South Africa, and Macedonia, the minority language is the official language of the state. *See Languages Spoken in Each Country of the World*, INFOPLEASE, <http://www.infoplease.com/ipa/A0855611.html> (last visited Nov. 17, 2017).

right to prevent inequality.<sup>118</sup> Others, like Charles Taylor,<sup>119</sup> disagree for two main reasons:

First, any social rectification takes place gradually, and one should not expect it to be effectuated all at once. Second, the fact that one group does not receive full protection of its rights does not justify detracting from the protection granted to another group.<sup>120</sup>

By way of analogy, just as the fact that the rights of citizens of a totalitarian state are curtailed does not justify undermining the rights of the citizens of a democratic neighbor, the fact that certain groups are unable to realize their right to national culture on a state level does not justify the denial of the right of members of national groups that can be realized.

*d. Justification on the Basis of Persecution*

Even those who are unconvinced by the attempt to establish the right to self-determination in a nation-state on the right to culture may accept another justification—this rationale, which is in some ways more limited in scope, argues for the right of the Jewish people (and peoples like it, with relevant characterization) to a homeland. These justifications are based on the circumstances of Jewish people as a nation that has suffered fierce persecution throughout its history and is still an object of hatred.

Some scholars, like A.B. Yehoshua, are of the opinion that the Holocaust revealed the fact that Jews could no longer exist without having a state of their own, and that “the right of survival” provides a normative justification for the establishment of a Jewish nation-state.<sup>121</sup> The argument includes the notion that a person under serious threat may defend himself, even at the expense of the legitimate interests of a third-party, provided that this will not lead to the third-party experiencing the same level of shortage or threat that the person himself is trying to escape from.<sup>122</sup> Although there may not often be a justification to establish a nation-state, as it could violate the right to equality of citizens who are not among the preferred nation, it is justified when there is a nation under

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<sup>118</sup> See BAKSHI & SAPIR, *supra* note 91, at 492.

<sup>119</sup> Charles Taylor, *Why Do Nations Have to Become States?*, in RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM & NATIONALISM 40 (G. Laforest ed., 1993).

<sup>120</sup> *Id.*; BAKSHI & SAPIR, *supra* note 91, at 492.

<sup>121</sup> BAKSHI & SAPIR, *supra* note 91, at 493–94.

<sup>122</sup> In some ways, the rationale is not unlike the tort law doctrine/defense of necessity. See *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

threat of persecution.<sup>123</sup> This is true even if those citizens who may be affected bear no special responsibility for the plight of the persecuted, so long as it does not put them into the same predicament that the persecuted faced.<sup>124</sup>

Yehoshua gives his argument in the context of a post-hoc rationalization, but in our opinion this argument is strong enough *ab initio* and would even obligate other nations to assist in the realization of this right, as there is a principal obligation of humanity to ensure that a persecuted group finds a haven.

### C. *Application*

To be clear, assuming that a nation-state's existence can be justified, it is not the case that this justification automatically extends to any practice that the nation-state claims is related or even necessary to the definition of the state as a nation-state. Each practice will still have to be reviewed to (a) determine the strength of the link between the practice and the justified nation-state, and (b) weigh the practice against the harm it could theoretically cause to minority rights. If we are correct that the arguments above justify the existence of a nation-state of Israel, the more focused question still remains: Does the Law of Return actually withstand this review?

The first question can be answered with relative ease. The Law of Return is not only linked with the idea of the nation-state, but a nation-state is also *required* based on this idea. We explained that the right to self-determination in a nation-state is based on two main considerations: the right to culture and the right to protection from persecution.<sup>125</sup> As Gans points out, each of the rationales leads one directly to the right to immigration:

If the purpose of the right to self-determination is to protect the interest of members of national groups to adhere to their culture and to live within its framework, what is the point in recognizing this right without seeing the will of the members of these groups to migrate to where they have self-rule in order to realize their desire to adhere to the culture and live within its framework the justification of allowing them to do so? And if the purpose of self-determination of many national groups is to serve as a security anchor and a refuge from persecution for their

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<sup>123</sup> See ABRAHAM B. YEHOASHUA, FOR NORMALITY (1980) [Hebrew].

<sup>124</sup> See *id.*

<sup>125</sup> See *supra* II(B)(2)(c)(i), II(B)(2)(d).

members, what is the point to recognize this right without recognizing their right to seek refuge as part of this self-determination.<sup>126</sup>

These two considerations base the Law of Return on the legitimate interests of Israeli immigration applicants. To these, one can attach a third consideration concerning the interests of citizens of the state who are of Jewish nationality. It seems clear that if a people of a certain nationality have the right to self-determination in any territory, then this right is accompanied by the right to take actions that will ensure the continued existence of that right. For our purposes, it is also apparent that one of the conditions defining any political entity as a nation-state is that that nation will constitute a clear majority of citizens in that state.<sup>127</sup> Of course, not all means to achieve such a majority can be justified, but it seems that among the range of existing means for the preservation of the majority, giving priority to immigration to the people of that nation-state is a reasonable means.<sup>128</sup>

What then do we do with the question about the degree of harm to citizens who do not belong to the majority group? We turn to this question in the next section.

#### *D. The Law of Return and the Geo-Political Reality*

As a general policy, it seems fitting that if a nation-state is entitled to prefer the national group members when formulating immigration policy, a somewhat preferential treatment in immigration should in due course be accorded to certain minority groups residing in it, especially if these minority groups are indigenous. Such a policy would greatly reduce the harm to members of the minority groups and the subjective sense of inferiority they experience. However, such a policy is contingent upon two conditions: First, that these minority groups are not accorded self-determination in another nation-state and, second, that these minority groups do not question the national character of the state in which they live and do not attempt to actually change it.<sup>129</sup> The first condition is required because the aforementioned preference in the immigration policy stems from the desire to allow members of the minority group to benefit from the opportunity to live among members of their culture. If members of the minority group have

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<sup>126</sup> GANS, FROM RICHARD WAGNER TO THE RIGHT OF RETURN, *supra* note 104, at 207.

<sup>127</sup> *Learning to Live Together*, UNESCO, <https://www.globalconnect.socsci.uci.edu/files/webppts/intro2intrelations/02%20-%20Nation-States.pdf> (last visited Nov. 17, 2017).

<sup>128</sup> See generally GAVISON, *supra* note 49, at 39–41.

<sup>129</sup> See generally GAVISON, *supra* note 49, at 39–41.

their own nation-state, their interest to live among their culture may be exercised in that state. This removes or at least weakens the commitment of another nation-state, in which some members of the minority group live, to allow them to migrate into its territory. The second condition is implied because one cannot require members of a majority group in a nation-state to actively assist those seeking to repeal the national character of their state.

In the Israeli context, the two conditions are not realized. As we know, Israel has faced difficult security challenges since its establishment.<sup>130</sup> In fact, the conflict began even before the establishment of a state, from the date when it became clear that the Jews were actively operating to fulfill their desire for self-determination in the Land of Israel.<sup>131</sup> From that date, the country's non-Jewish inhabitants started acting violently in order to thwart the fulfillment of the Jewish aspiration.<sup>132</sup>

On November 29, 1947, the United Nations decided to resolve the bloody conflict by the partition plan, dividing the land of western Israel into two states—an Arab-Palestinian state and a Jewish state.<sup>133</sup> The Jewish community in the Land of Israel accepted the decision, while the Arab-Palestinian public rejected it and started a war in order to wipe out the Jewish community.<sup>134</sup>

After the British military evacuated the area at the end of the U.N. mandate, Israel declared its independence and, at the same time, Arab armies invaded Israel and joined the battle against the Jewish community.<sup>135</sup> The war ended with Israel's victory, but much of the land between the Mediterranean Sea and the Jordan River remained under Arab control.<sup>136</sup> Surprisingly, an independent Palestinian state was not established in that territory; the territory and its inhabitants were divided between Egypt (Gaza) and Jordan (the West Bank).<sup>137</sup> For many years, the Arab states continued to try to destroy the Jewish state.<sup>138</sup> During those years, Palestinian terrorist organizations worked alongside the

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<sup>130</sup> See CHARLES D. SMITH, *PALESTINE AND THE ARAB-ISRAELI CONFLICT* 87–100 (Bedford/St. Martin's, 9th ed. 1992).

<sup>131</sup> *Id.* at 152–174.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*; G.A. Res. 181, Partition Plan (Nov. 29, 1947); see AHRON BREGMAN, *ISRAEL'S WARS: A HISTORY SINCE 1947* 7–9 (Jeremy Black ed. 2000).

<sup>134</sup> BREGMAN, *supra* note 133, at 9 (“If the Jews are going to take our land then by God we will throw them into the sea.”).

<sup>135</sup> *Id.* at 26–27.

<sup>136</sup> *Id.* at 13.

<sup>137</sup> *Id.* at 32.

<sup>138</sup> *Id.* at 40.

Arab armies.<sup>139</sup> These organizations tried to tip the scale of the battle through acts of terror against the civilian population in Israel.<sup>140</sup>

In the early 1990s, an historic breakthrough was achieved with the signing of a political agreement between Israel and the Palestinian leadership, at the base of which there was an agreement on mutual recognition and a division of the country into two states.<sup>141</sup> Unfortunately, the agreement has not yet been fully realized.<sup>142</sup> Without getting into the question of who is to blame, there are a number of facts of particular relevance to our purpose.

First, it has become increasingly clear that even if the Palestinian leadership, or at least part of it, agrees to accept the fact of Israel's existence, it is not prepared to recognize the Jewish people's right to self-determination within its borders.<sup>143</sup> In other words, there is a limited willingness to recognize Israel as an independent state, but there is no willingness to recognize Israel as the nation-state of the Jewish people.<sup>144</sup> This unwillingness to recognize the right to self-determination of the Jewish people is not limited to the leadership of the Palestinian public in the West Bank and the Gaza Strip;<sup>145</sup> many of the leaders of the Palestinian minority in Israel also refuse to recognize the legitimacy of Israel as the Jewish nation-state.<sup>146</sup>

The refusal of the Palestinians on both sides of the Green Line (separating Israel proper and the West Bank and Gaza Strip)<sup>147</sup> to recognize Israel as the Jewish nation-state seems puzzling, especially given that the State of Israel has repeatedly been willing to allow the creation of the nation-state of the Palestinian

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<sup>139</sup> *Id.* at 33.

<sup>140</sup> *Id.* at 49–50.

<sup>141</sup> *Declaration of Principles*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx> (last visited Nov. 17, 2017).

<sup>142</sup> Faisal Al Yafai, *The Dream of Oslo Has Not Died, It Has Just Faded Away*, THE NATIONAL (Sept. 12, 2017).

<sup>143</sup> See, e.g., Gabriel Avner, *Abu Mazen: 'We Will Not Recognize Israel as a Jewish State'*, JERUSALEM ONLINE (Mar. 8, 2014, 1:49 AM), <http://www.jerusalemonline.com/news/middle-east/israeli-palestinian-relations/abu-mazen-we-will-not-recognize-israel-as-a-jewish-state-4131>.

<sup>144</sup> See *id.*

<sup>145</sup> *Id.* See *At UN, Israel's Netanyahu Says Conflict is 'Not About Settlements' But Existence of a Jewish State*, U.N. NEWS CTR. (Sept. 22, 2016), <http://www.un.org/apps/news/story.asp?NewsID=55041#WbS0nNOGM6h>.

<sup>146</sup> See THE NATIONAL COMMITTEE FOR THE HEADS OF THE ARAB LOCAL AUTHORITIES IN ISRAEL, *FUTURE VISION OF PALESTINIAN ARABS IN ISRAEL* 5, 11, 28 (Ghaida Rinawie-Zoabi ed., 2006).

<sup>147</sup> See *Fact Sheets: The 1967 Border – The "Green Line"*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/the-1967-border-the-quot-green-line-quot> (last visited Nov. 17, 2017); see also *At UN, Israel's Netanyahu Says Conflict is 'Not About Settlements' But Existence of a Jewish State*, *supra* note 145.

people in the West Bank and the Gaza Strip.<sup>148</sup> Either way, this refusal could also explain the claim of the Palestinians that, if and when a permanent settlement is achieved, the descendants of Palestinians who left the territory of Israel within the Green Line during and as a result of wars will have the right to return to their original homes.<sup>149</sup> To be clear, this migration into the State of Israel is not a “Right of Return” to areas of the Land of Israel which will be included in the sovereign territory of the Palestinian state, a right that no one disputes. In Israel, there is a broad consensus against this requirement for the simple reason that accepting it will dramatically change the demographic balance in Israel and question the legitimacy of Israel’s definition as a Jewish nation-state.<sup>150</sup>

The Palestinian aspiration to move a massive Palestinian wave of immigration into Israel has already been partially realized. Immediately after the signing of the Declaration of Principles on Interim Self-Government Arrangements,<sup>151</sup> a large wave of Palestinians began moving from Gaza and the West Bank into the Green Line.<sup>152</sup> Over a period of approximately eight years, about 140,000 Palestinians immigrated to Israel, most of them via a “family reunification” rule enshrined in Israel’s immigration laws.<sup>153</sup> These immigrants joined the Israeli citizens who belong to the Palestinian minority.<sup>154</sup> Only in 2002 did Israel begin to limit the immigration; allowing the immigration to continue would have undermined the justification of the definition of Israel as

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<sup>148</sup> See, e.g., Ben Birnbaum & Amir Tibon, *The Explosive, Inside Story of How John Kerry Built an Israel-Palestine Peace Plan—and Watched It Crumble*, NEW REPUBLIC (July 20, 2014), <https://newrepublic.com/article/118751/how-israel-palestine-peace-deal-died>; Daniel Meir-Levi, *31 Opportunities for Statehood Squandered in Favor of Genocide*, FRONTPAGE MAG (July 14, 2011), <http://www.frontpagemag.com/fpm/98517/31-opportunities-statehood-squandered-favor-david-meir-levi>.

<sup>149</sup> See, e.g., *The Democratic Constitution: Draft*, ADALAH (Mar. 20, 2007), [https://www.adalah.org/uploads/oldfiles/Public/files/democratic\\_constitution-english.pdf](https://www.adalah.org/uploads/oldfiles/Public/files/democratic_constitution-english.pdf).

<sup>150</sup> See, e.g., Na’ama Carmi, *Immigration Policy: Between Demographic Considerations and Preservation of Culture*, 2 L. & ETHICS HUM. RTS. 14, 22, 25, 29 (2008); see also CHAIM GANS, A JUST ZIONISM: ON THE MORALITY OF THE JEWISH STATE 84–93, 132–33 (2008); GAVISON, *supra* note 49, at 33–34.

<sup>151</sup> See *The Declaration of Principles on Interim Self-Government Arrangements*, KNESSET (Sept. 13, 1993), [www.knesset.gov.il/process/docs/oslo\\_eng.htm](http://www.knesset.gov.il/process/docs/oslo_eng.htm).

<sup>152</sup> Information provided by the then Deputy Attorney General, Meni Mazuz, in a discussion of the Knesset’s Interior Committee on July 14, 2003, on the proposed Temporary Provision Law, [www.knesset.gov.il/protocols/data/html/pnim/2003-07-14-01.html](http://www.knesset.gov.il/protocols/data/html/pnim/2003-07-14-01.html) (Hebrew).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* According to the Central Bureau of Statistics, in 2013, Arabs constitute 20.6% of the Israeli population. See Press Release, *Selected Data from the New Statistical Abstract of Israel No. 64-2013*, CENT. BUREAU STATISTICS (Sept. 16, 2013), [http://www.cbs.gov.il/reader/newhodaot/hodaa\\_template\\_eng.html?hodaa=201311255](http://www.cbs.gov.il/reader/newhodaot/hodaa_template_eng.html?hodaa=201311255).

the Jewish nation-state,<sup>155</sup> although this restriction was actually justified on security grounds and *not* due to demographic reasons.<sup>156</sup>

The circumstances described have a double implication. First, they show that the two prerequisites we set out above as conditions for recognizing the special status of the Palestinian minority in Israel as part of an official immigration policy are not met in this case.<sup>157</sup> Second, they provide an independent justification for the Law of Return, in addition to the justifications described above.<sup>158</sup> In a reality in which the legitimacy of the definition of Israel as a Jewish nation-state is constantly being questioned—a reality in which demands are openly made to erode the Jewish majority in a way that would weaken the existence of the demographic prerequisite to justify the national character of Israel—it is logical and morally justifiable for Israel to continue its attempt to tilt the demographic balance back in favor of the Jewish side by means of a preferential immigration policy toward the Jewish diaspora.

### *E. Conversion and Ethnicity*

Setting criteria for immigration is a common practice in all Western countries.<sup>159</sup> Yet another criticism of the Law of Return is based on the argument that it is not right for the law to distinguish the way it does, allegedly on problematic racial and ethnic criteria.<sup>160</sup> In the international human rights discourse, such criteria are contested because they are neither self-selected nor are they subject to modification.<sup>161</sup> It is relevant to point out that international

<sup>155</sup> Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, SH No. 1901 p. 544 (Isr.).

<sup>156</sup> See BAKSHI & SAPIR, *supra* note 91, at 494.

<sup>157</sup> Michael Omer-Man, *This Week in History: Jewish Right to Aliya Becomes Law*, JERUSALEM POST (July 8, 2011).

<sup>158</sup> *See id.*

<sup>159</sup> *See* Jennifer L. Hochschild & John Mollenkopf, *The Complexities of Immigration: Why Western Countries Struggle with Immigration Politics and Policies*, in DELIVERING CITIZENSHIP (Bertelsmann Stiftung, European Policy Centre, Migration Policy Institute eds., 2009).

<sup>160</sup> *See* Roselle Tekiner, *Jewish Nationality Status as the Basis for Institutionalized Discrimination in Israel*, MIDDLE EAST POL'Y COUNCIL (1986), <http://mepc.org/journal/middle-east-policy-archives/jewish-nationality-status-basis-institutionalized-racial-discrimination-israel?print>.

<sup>161</sup> Orgad & Ruthizer, *supra* note 96, at 268–69. As Orgad and Ruthizer point out:

Applying international human rights law to an immigration context is not an easy task. *First*, international law norms are not always enforceable in domestic law. In the United States, for example, individuals do not have self-executing rights not to be discriminated against based on international conventions. *Second*, article 1(2) to the CERD makes clear that it does not apply to distinctions between “citizens and non-citizens.” *Third*, article 1(3) to the CERD provides that it should not be interpreted in any way to deprive States Parties’ power on issues of “nationality” and “citizenship or naturalization,” provided that the policies “do not discriminate against any

law specifically excludes immigration policies from the general prohibition against differentiation based on racial and ethnic criteria.<sup>162</sup> Article 1(1) of the International Convention on the Elimination of all Forms of Racial Discrimination provides that:

“racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>163</sup>

While this is possibly the broadest definition of racial discrimination,<sup>164</sup> it does not include religion. Critics argue that such immigration policies are nonetheless repugnant from a moral standpoint.<sup>165</sup>

The fact of the matter is that the premise on which the Law of Return operates, whether on racial and/or ethnic distinctions, is not self-evident. Indeed, while “belonging” to the Jewish people is a prerequisite for application of the Law of Return, this “belonging” is demonstrably not contingent on racial or ethnic factors.<sup>166</sup> Any person, regardless of race or ethnicity, is able to join the Jewish people, even if genealogically he or she has not a single drop of Jewish

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particular nationality.” In interpreting this clause, the U.N. Committee on the Elimination of Racial Discrimination has recalled that discrimination occurs only if the criteria “are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” That is, racial discrimination may be permissible under the CERD after fulfilling some conditions. Indeed, the International Court of Justice held that “international law leaves it to each State to lay down the rules governing the grant of its nationality.” Fourth, article 1(1) to the CERD defines racial discrimination only when it comes to discrimination of “human rights and fundamental freedoms.” As Professor Legomsky noted, the question whether entry and access to citizenship have become “human rights and fundamental freedoms,” which fall under the CERD’s definition, is at least controversial. And lastly, it is doubtful whether admission criteria fall under the protection of the CERD. International treaties usually apply within the state territory, or to people subjecting to its jurisdiction. The European Court of Human Rights ruled that under “international law, the jurisdictional competence of a State is primarily territorial,” and that treaties are not “designed to be applied throughout the world.

<sup>162</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(3), Dec. 21, 1965, 660 U.N.T.S. 195.

<sup>163</sup> *Id.* art. 1(1).

<sup>164</sup> KRISTIN HENRARD, *DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF DETERMINATION* 197 (2000).

<sup>165</sup> See Louis Henkin, *An Immigration Policy for a Just Society?*, 31 San Diego L. Rev. 1017, 1018–19 (1994). See generally, Tekiner, *supra* note 160.

<sup>166</sup> See Clayman, *supra* note 14.

blood in his or her veins.<sup>167</sup> Under these circumstances, it is not clear at all that the aforementioned moral objection to the Law of Return should even be taken into consideration.<sup>168</sup>

By way of response, one could argue that, although the option for acquiring the Right of Return through conversion does not infringe on the right to equality because it is not based on ethnic criteria, it still infringes on another right—the freedom of religion—because joining the Jewish people involves joining the Jewish religion.<sup>169</sup>

However, the right to freedom of religion is not affected in this case for two reasons. First, religious freedom is customarily understood to protect a person from being forced or coerced into actions that are against his or her religious conscience.<sup>170</sup> Here, no one is forced to convert to Judaism; in fact, no one is even encouraged to take this step.<sup>171</sup> An interpretation of freedom of religion that would include within it a prohibition of the above-mentioned practice is, in our opinion, undesirable in that it makes any benefit that is contingent on some religious affiliation suspect from the perspective of religion and conscience.

Second, even if we adopt this broad interpretation of freedom of religion, it is still doubtful that conversion-based conditions imposed on the application of the Law of Return would be considered an affront to the freedom of religion. The conversion that is required to trigger the benefits of the Law of Return is not of a religious nature in the strict sense of the term.

To clarify this point, we return to the historical review of the Law of Return that we described earlier in Part I. As explained, while the amendment to the Law of Return did define who is a Jew, it left open the question of which conversions shall be deemed to comply with the Law. This gave rise to an ongoing dispute between the different streams of Judaism. On one side, the Orthodox demand exclusive rights to conversion. On the other, the more liberal

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<sup>167</sup> OT/Jewish Bibl Bamidbar: Numbers ch. 9 v. 14. (“One statute shall apply to you, to the proselyte and to the native-born citizen.”).

<sup>168</sup> See *What is the Difference between Race and Ethnicity?*, LIVE SCIENCE (May 9, 2012), <https://www.livescience.com/33903-difference-race-ethnicity.html>.

<sup>169</sup> HCJ 2597/99 Rodriguez-Tushbeim v. Minister of Interior 59(6) PD 267, 280 (2005) (Isr.) (“Conversion is a religious concept. It invokes an act ‘of taking upon oneself the burden of Judaism and joining the Jewish People.’”) (citing HCJ 487/71 Clark v. Minister of Interior).

<sup>170</sup> See Gideon Sapir & Daniel Statman, *Why Freedom of Religion Does Not Include Freedom from Religion*, 24 L. & PHIL. 467, 475 (2005).

<sup>171</sup> See BABYLONIAN TALMUD: TRACTATE YEVAMOTH, Folio 47(a).

streams seek recognition of their conversions, too.<sup>172</sup> We also noted that, in 2005, the Supreme Court of Israel ruled on this dispute and determined that, for the purposes of the Law of Return, the State was required to recognize any conversion carried out in a recognized Jewish community abroad by any one of the mainstream Jewish denominations.<sup>173</sup>

Since 1893, the official position of the Central Conference of American Rabbis (CCAR), the rabbinic umbrella organization of the Reform movement, has been that it is lawful and proper for any officiating rabbi, assisted by no fewer than two associates, “to accept into the sacred covenant of Israel . . . any honorable and intelligent person . . . without any initiatory rite, ceremony, or observance whatever . . . .”<sup>174</sup> Unlike the immigration oaths of countries like Hungary, New Zealand, the Philippines, and Singapore,<sup>175</sup> the conversion process to Reform Judaism does not even require a single mention of God.<sup>176</sup> Instead, like in the immigration processes of the United States and the United Kingdom, people can choose whether or not to mention God.<sup>177</sup>

Note that we express no opinion here on the validity of reform conversion.<sup>178</sup> All we claim is that the process can be classified as more cultural than religious in the conventional sense of the word “religious.” If we are correct, then from a legal standpoint, the Law of Return provides for every single person the possibility to immigrate to Israel, provided that they accept and establish a clear link to the cultural characteristics of the State. Such a demand should be acceptable even to those who are most careful about the moral obligation to avoid discrimination on racial, ethnic, or even religious grounds.

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<sup>172</sup> See Shachar, *supra* note 25, at 244–48 (discussing the various definitions that were put forth by both the Orthodox and liberal factions in Israel prior to the adoption of the Amendment to the Right of Return’s official definition).

<sup>173</sup> HCJ 2597/99 Rodriguez-Tushbeim v. Minister of Interior 59(6) PD 267, 280 (2005) (Isr.).

<sup>174</sup> David Philipson, Kaufmann Kohler & H. Pereira Mendes, *The Declaration of the Conference on the Admission of Proselytes, Adopted at the New York Meeting in 1892*, JEWISH ENCYCLOPEDIA, <http://www.jewishencyclopedia.com/articles/4592-conferences-rabbinical> (last visited Nov. 17, 2017).

<sup>175</sup> See 1993 Art. 7(4) Hungarian Citizenship Act (Act 55 of 1993); Citizenship Act 1977, sch 1 (N.Z.); Commonwealth Act Rep. Act No. 473, § 12 (June 17, 1939) (Phil.); Oath of Renunciation, Allegiance and Loyalty, Second Schedule of the Singapore Constitution of the Republic of Singapore.

<sup>176</sup> Uriel Heilman, *Conversion to Judaism: Denomination to Denomination*, JEWISH TELEGRAPHIC AGENCY (Oct. 6, 2014), <http://www.jta.org/2014/10/06/life-religion/conversion-to-judaism-denomination-by-denomination/3>.

<sup>177</sup> See, e.g., British Nationality Act, 1981, c. 61, § 5(1) (“I, [name], [swear by Almighty God] [do solemnly, sincerely and truly affirm and declare] that, on becoming a British citizen, I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs, and successors, according to law.”) (2008). In the United States, “God” is in the standard text, but one can choose to omit it.

<sup>178</sup> 8 C.F.R. § 337.1 (2008).

While the use of racial immigration classifications is not clearly impermissible under international law, the use of cultural and nationality-based restrictions seems to be explicitly permissible. As Orgad and Ruthizer note:

[I]n 1984, the Inter-American Court of Human Rights ruled that preferences in naturalization criteria issued by Costa Rica for nationals of Central American countries, Spaniards and Ibero-Americans is compatible with the American Convention on Human Rights and presents no case of discrimination. . . . The Court justified granting preferences for Central American nationals by noting that they are “closer historical, cultural and spiritual bonds with the people of Costa Rica . . . [Central American nationals will] identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.” Similarly, the European Court of Human Rights upheld nationality-based distinctions when there is “an objective and reasonable justification” in such a policy.<sup>179</sup>

Such, as we shall demonstrate, is the case for Israel and the Law of Return.

### III. THE CONTEXTUAL ARGUMENT

#### A. *The Argument*

Having established that such a law is theoretically permissible, perhaps on the grounds of cultural preservation, we now examine the Law of Return in practice. To review, the Law of Return grants Jewish people an unconditional right to immigrate to Israel and become citizens.<sup>180</sup> While the Israeli populous nearly unanimously supported the Law of Return in the past, the consensus among the Jewish majority in recent years has been somewhat tempered with those who want to completely eliminate the Right of Return and those who seek only to qualify it.<sup>181</sup> In this section, we will first describe the various arguments against the current arrangement, then evaluate and respond to them.

While it is correct that respect for the right to culture indeed requires nation-states to grant to the members of the nation living in the diaspora an unconditional right to immigrate, this right is limited in time. Once a person is

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<sup>179</sup> Orgad & Ruthizer, *supra* note 96, at 269–70 (2010).

<sup>180</sup> See *Law of Return 5710–1950*, *supra* note 13.

<sup>181</sup> See generally Altschul, *supra* note 18, at 1367.

granted the right to immigrate to his nation-state and does not realize it, the right expires and he can no longer automatically claim to uphold it.<sup>182</sup>

Additionally, many immigrants today are not identified in any significant way with the Jewish people, its culture, or its destiny; therefore, the main reason, and sometimes the only reason, for their wish to immigrate to Israel is the desire to improve their standard of living.<sup>183</sup> As a result, so the argument goes, these applicants cannot base their applications to immigrate to Israel on the right to culture; thus, the State of Israel may (and perhaps should) deny them the automatic right to immigrate to Israel and avoid favoring them over other immigration applicants.<sup>184</sup>

Yet another consideration mentioned in this context is the effect the migration of these people will have on Israel's cultural identity.<sup>185</sup> If many of those eligible through the Law of Return are not culturally identified with the Jewish nation, some of whom even have an alternative cultural identity, their immigration to Israel would actually dilute and weaken the Jewish cultural identity of Israel, which contrasts with the interests of the Jewish majority.<sup>186</sup>

Finally, today, the Jewish people in most parts of the world are not exposed to persecution, and their status in their home countries is strong, unlike the situation in the first years of the State.<sup>187</sup> This relies upon the premise that during the early years of the State, the majority of the immigrants were either survivors of the crematoriums—persons who could not or did not want to return to their home countries—or refugees from Arab countries who were persecuted in their own lands because of their Jewish identity. Contrarily, many immigrants today have not experienced special difficulties on the basis of their nationality.<sup>188</sup> This claim then seeks to deny the relevance of the alleged justification on the basis of persecution.

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<sup>182</sup> See NA'AMA CARMİ, IMMIGRATION AND THE LAW OF RETURN: IMMIGRATION RIGHTS AND THEIR LIMITS 53–55 (2003); Asa Kasher, *Justice and Affirmative Action: Naturalization and the Law of Return*, 15 ISR. Y.B. HUM. RTS. 101, 112 (1985).

<sup>183</sup> See Carmi, *supra* note 150, at 29.

<sup>184</sup> See GAVISON, *supra* note 49, at 62–64.

<sup>185</sup> See Carmi, *supra* note 150, at 33.

<sup>186</sup> *Id.* at 69, 111.

<sup>187</sup> See, e.g., Shachar, *supra* note 25.

<sup>188</sup> See *id.* (quoting DON PERETZ & GIDEON DORON, *THE GOVERNMENT AND POLITICS OF ISRAEL* 62 (3d ed. 1997)).

## B. Discussion

### 1. *The Right of Return as an Identity Characterizer*

Below, we will discuss the various arguments cited for a call to reform the immigration policy. But before we do that, we would like to stress an important fact, which is relevant to the normative discussion.

As mentioned above, two groups exist among those seeking to reform the immigration policy: those who propose to eliminate the preference given to the Jewish people and those who offer to maintain the preference but seek to cancel the automatic right, which would effectively expand the State's discretion and allow it to set conditions for the absorption of Jewish immigrants and the subsequent granting of citizenship.<sup>189</sup> The second proposal is consistent with the migration arrangements in many nation-states that give preference to national diasporas in their migration arrangements but retain the right to set additional criteria and to exercise discretion within the framework of the decision on whether to accept migration applicants even if they belong to the preferred national group.<sup>190</sup> Thus, at least from a comparative perspective, the proposal to switch from a policy of granting an automatic right to a policy of a contingent preference is not far-reaching. However, in circumstances unique to Israel, it is still no less than a revolution—one that could significantly change the identity of Israel.

During the Knesset debate on the eve of passing of the Law of Return, Prime Minister David Ben-Gurion said the following:

The Law of Return recognizes our country's major purpose, the purpose of ingathering of the exiles. This law stipulates that it is not the state that gives the diaspora Jews the right to settle in it, rather this right is inherent in every Jew as a Jew . . . this right predates the State of Israel and it is it that built the state. The origin of this right is in the historical connection that never stopped between the people and the homeland.<sup>191</sup>

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<sup>189</sup> See GAVISON, *supra* note 49, at 14.

<sup>190</sup> For a further discussion of European states with similar considerations, such as Germany, Greece, and Ireland, see YAKOBSON & RUBINSTEIN, *supra* note 49, at 126–131.

<sup>191</sup> DK (1950) 5032 (Isr.). See generally Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration*, *supra* note 50.

In legal terms, Prime Minister Ben-Gurion sought to explain that the Law of Return is not a constitutive law that creates the right of Jews to return to Israel, but rather a declarative law, merely stating the existence of this right.<sup>192</sup>

This position of Ben-Gurion—that the immigration of Jews to Israel is based on the inherent right of every Jew in the world and *not*, as it is usually understood, on a benefit conferred by the State of Israel—has enjoyed a broad consensus among members of the Knesset. Based on this premise, there were Knesset members who opposed including in the Law any restrictions that would limit the entry of Jews in some cases.<sup>193</sup> In the end, it was decided to include a few restrictions in the law, but, as explained above, these restrictions were very limited in scope.<sup>194</sup>

Prime Minister Ben-Gurion's declaration did not remain empty rhetoric. It has withstood the test of reality and has dictated the immigration absorption policy of the State of Israel since its inception. During Israel's early years, a large number of refugees were absorbed; in the thirty months between the Proclamation of Statehood and the middle of 1951, more than half a million Jews made Aliyah at a rate of 15,000–20,000 Olim (returners) per month.<sup>195</sup> Thus, over the course of the first three years of the country's existence, the Jewish population in the country doubled.<sup>196</sup> The state barely restricted the flow of immigrants, despite the fact that it imposed a very heavy burden on the country's economy and reshaped the structure of Israeli society.<sup>197</sup>

The government and the public in Israel showed a similar commitment in the 1990s when, over the course of several years, the country absorbed roughly one million immigrants from the former Soviet Union.<sup>198</sup> Israel's economic situation was far better, and the number of its citizens was much larger then, but even

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<sup>192</sup> See generally Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration*, *supra* note 50.

<sup>193</sup> DK (1950) 2044 (Isr.).

<sup>194</sup> See Clayman, *supra* note 14.

<sup>195</sup> Shoshana Neuman, *Aliyah to Israel: Immigration under Conditions of Adversity 2* (Institute for the Study of Labor, Discussion Paper No. 89, 1999).

<sup>196</sup> A. BEIN, ALIYAH AND SETTLEMENT IN THE STATE OF ISRAEL (1982) [Hebrew] 46–47; DVORA HAKOHEN, IMMIGRANTS IN TURMOIL: MASS IMMIGRATION TO ISRAEL AND ITS REPERCUSSIONS IN THE 1950S AND AFTER (2003).

<sup>197</sup> HAKOHEN, *supra* note 196, at 251–63.

<sup>198</sup> Jewish Telegraphic Agency, *Da Aliyah // Two Decades On, Wave of Russian Immigration to Israel Is an Outstanding Success*, HAARETZ (Jan. 1, 2014), <http://www.haaretz.com/jewish/features/.premium-1.566484>.

here, the absorption of the immigrants demanded great effort and brought about significant change in the social structure of the State.<sup>199</sup>

Thus, it would not be an exaggeration to describe the commitment, rhetorical and practical, of Israel's unconditional absorption of Jewish immigration as one of the most important and defining elements of the country's national identity. Even if canceling this commitment would correspond with the dominant trend among nation-states, in the Israeli context, it would at least mean giving up one of the most fundamental and identity-building characteristics of the State.

## 2. *The Question of Time and Motivation*

The first argument in favor of narrowing the automatic Right of Return is based on the long amount of time that has passed since the establishment of the State of Israel.<sup>200</sup> The reasoning is that, even if we recognize the right of one to immigrate to the State of his nationality, it is legitimate and even required to limit this right in time.<sup>201</sup> This is a weak *prima facie* argument since human rights—particularly personal and fundamental ones—are never limited in time.<sup>202</sup> For example, it is inconceivable to think that a person who has not expressed himself regarding a certain matter at the first opportunity would lose his freedom of speech on the matter at some later date.

One could say that, in this case, the elapsed time does not *negate* the existence of the right to immigrate—it only serves as an indication that the conditions for its existence are not realized. As noted, the right to immigrate to a nation-state is based on the recognition of the individual's interest to live in a cultural-political framework best suited to one's cultural identity. It is possible, then, to claim that the fact that a person avoided immigrating to his nation-state for a long time, although it was possible, shows that his decision to immigrate now is not based on the interest in question, and therefore he has no vested right to that. We are of the opinion, however, that such a conclusion completely ignores the complexity of the human existence. Life's realities change frequently, and people change, develop, and mature over the course of their lives. Change in a person's conduct may arise from differing circumstances or shifting priorities, and the fact that a given individual did not exercise his or her

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<sup>199</sup> YAKOBSON & RUBINSTEIN, *supra* note 49, at 175.

<sup>200</sup> See GAVISON, *supra* note 49, at 55–56.

<sup>201</sup> See *id.* at 46.

<sup>202</sup> *Human Rights Principles*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/resources/human-rights-principles> (last visited Nov. 17, 2017).

right to immigrate in the past cannot teach us anything about his or her motives now when he or she is asking to realize this right. Moreover, even if we accept the above, it is at most only relevant to adult immigration applicants who have had a real opportunity to immigrate. We cannot raise it with regard to youths or anyone else who may wish to immigrate to Israel but have not yet had a realistic chance to try.

It is also interesting to evaluate the normative premise behind the evidential argument we rejected. The assumption is that it is not enough to be a formal member in a particular nation to give a person the right to immigrate to the State of that nation; seemingly, the feeling is that the right is reserved only to members of the national group seeking to immigrate based on cultural-national motives. This assumption has far-reaching significance well beyond the question of whether it is legitimate to limit the time to exercise the right to immigrate. If we adopt this assumption, it may justify (or perhaps even require) pre-screening *all* applicants for immigration and accepting only those whose motives prove suitable.

In theory, this might be a justified claim. As noted, the right to immigrate to the nation-state derives from the right to self-determination.<sup>203</sup> The main justification for the right to self-determination is the justification of the right to culture.<sup>204</sup> If one's wish to immigrate to one's nation-state is not based on one's recognized interest in preserving and strengthening one's cultural identity, he cannot make use of the justification from the right to culture, and therefore cannot claim for himself the right to automatic immigration.

In practice, however, how does one determine the motives for immigration? It is quite difficult to discover the motivations of immigration applicants.<sup>205</sup> In fact, it is much more effective to use an objective test to gauge the degree of association of an immigration applicant to his national culture, as some countries already do. In this context, we can examine data like the fluency of the immigration applicant in the national language, a basic knowledge of national history, and, in the case where the nation is traditionally identified with a particular religion, even familiarity with basic elements of that religion.<sup>206</sup>

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<sup>203</sup> See *supra* Part II(B).

<sup>204</sup> *Id.*

<sup>205</sup> For example, while some motivations may be serious, such as escaping persecution, others may be frivolous. See David Kilimnick, *18 Reasons for Making Aliyah*, AISH.COM, <http://www.aish.com/j/f/18-Reasons-for-Making-Aliyah.html> (last visited Nov. 17, 2017).

<sup>206</sup> *Id.* See Amitai Etzioni, *Citizenship Tests: A Comparative, Communitarian Perspective*, 78 POL. Q. 353–63 (2007); Ariel Loring, *The Meaning of Citizenship: Tests, Policy, and English Proficiency*, 24 CATESOL J.

Indeed, many nation-states that give priority to immigration applicants from their national diaspora pose such tests as a prerequisite for granting the right to immigrate.<sup>207</sup> Of course, you can connect these prerequisites to the interests of nation-states, the desire to ensure that immigration applicants will be culturally absorbed and that the cultural element that unites the State's citizens will not weaken due to the absorption of unsuitable immigration applicants.<sup>208</sup> However, the placing of these conditions can also be explained as stemming from the basic assumption that the right to immigrate is only given to those who need it in order to strengthen their own cultural identity.

### 3. *The Question of National Interest*

On a related note, giving preference to the people of one nation in immigration can be based not only on the right of the migration applicants, but also on the interest of the members of the majority group in the state to strengthen their national culture.<sup>209</sup> As noted earlier in this article, some argue that in terms of policy, the current arrangements in the Law of Return do not serve this interest, and in fact, the arrangements run counter to and harm it.<sup>210</sup> Critics point out that even if in the past the majority of the immigrants who came to Israel under the Law of Return had a clear Jewish identity, and the desire to immigrate was due, among other reasons, to cultural-national reasons, currently many immigrants are not culturally identified with the Jewish nation at all, and their immigration stems from a desire to simply improve their standard of living.<sup>211</sup> In this reality, the Law of Return does not strengthen the Jewish identity of Israel, but harms it. Below, we will examine this argument.

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198 (2012), [http://www.catesoljournal.org/wp-content/uploads/2014/06/cj24\\_loring.pdf](http://www.catesoljournal.org/wp-content/uploads/2014/06/cj24_loring.pdf); Bridge Byrne, *Testing Times: The Place of the Citizenship Test in the UK Immigration Regime and New Citizens' Responses to It*, SAGE (Feb. 2, 2016), <http://soc.sagepub.com/content/early/2016/02/02/0038038515622908.full>; *Want Citizenship? Take the Spanish Culture Test*, LOCAL (Apr. 23, 2014), <http://www.thelocal.es/20140423/immigrants-sit-language-test-exam-immigration-spain-gallardon>.

<sup>207</sup> For example, according to Article 16 of the Law on Croatian Citizenship, it is possible to acquire Croatian citizenship if you are “[a] person who belongs to the Croatian people with no domicile in the Republic of Croatia,” but you still need to fulfill the requirements of Article 8.5—“that it can be concluded from his behavior that he respects the legal order and customs of the Republic of Croatia.”

<sup>208</sup> See GAVISON, *supra* note 49, at 69.

<sup>209</sup> Etzioni, *supra* note 206, at 353.

<sup>210</sup> See generally Altschul, *supra* note 18, at 1346-47; HAZONY, *supra* note 23.

<sup>211</sup> See generally Carmi, *supra* note 150.

a. *The Nature of Immigration in Recent Years*

Today, the relative weight of immigrants lacking a cultural affinity to the Jewish people in the general immigrant population is heavier than its relative weight in the past.<sup>212</sup> The difference is due to two main reasons. The first is the improvement in the general economic situation and the security of Israel.<sup>213</sup> During the first decades of Israel's existence, a real existential threat was present and always felt.<sup>214</sup> Today, the situation is somewhat different. While Israel still faces complex security challenges, Israel's military is powerful and effective and Israel has many means at its disposal that reinforce its deterrent capability.<sup>215</sup> The general feeling is that if no massive use of non-conventional weapons is launched against it (i.e., as in the threat posed to it by Iran), Israel's very existence is not under immediate threat.<sup>216</sup>

Israel's economic situation is firm, too.<sup>217</sup> Despite the fact that, throughout its existence, Israel has been forced to devote a large portion of its budget to

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<sup>212</sup> *Changing Patterns of Global Migration and Remittances*, PEW RESEARCH CTR., <http://www.pewsocialtrends.org/2013/12/17/changing-patterns-of-global-migration-and-remittances/> (last visited Nov. 17, 2017); *International Migrants by Country*, PEW RESEARCH CTR., <http://www.pewglobal.org/interactives/migration-tables/> (last visited Nov. 17, 2017); *U.S. Immigration Trends*, MIGRATION POLICY INSTITUTE, <http://www.migrationpolicy.org/programs/data-hub/us-immigration-trends#source> (last visited Nov. 17, 2017); *Vital Statistics: Latest Population Statistics for Israel*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/latest-population-statistics-for-israel> (last visited Nov. 17, 2017). Increased earlier rise of Jewish immigration was caused by:

[T]hree large spurts associated with upheavals outside the country: the rise of Nazism in the 1930s; the immigration of displaced persons from Europe and from Muslim countries in the years immediately following the establishment of the state; and the mass movement of immigrants from the former Soviet Union following the end of the Cold War.

Ian S. Lustick, *Israel's Migration Balance: Demography, Politics, and Ideology*, 26 ISR. STUD. REV. 33, 34 (2011).

<sup>213</sup> See, e.g., *Economy*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, <http://mfa.gov.il/MFA/AboutIsrael/Economy/Pages/ECONOMY.aspx> (last visited Nov. 17, 2017); *Israel*, HERITAGE, <http://www.heritage.org/index/pdf/2017/countries/israel.pdf> (last visited Nov. 17, 2017); *Israel*, WORLD ECON. FORUM, <http://www3.weforum.org/docs/GCR2013-14/Israel.pdf> (last visited Nov. 17, 2017); see also ILAN GOLDENBERG ET AL., *ADVANCING THE DIALOGUE: A SECURITY SYSTEM FOR THE TWO-STATE SOLUTION* (2016); GABRIEL SHEFFER & OREN BARAK, *ISRAEL'S SECURITY NETWORK* 31–34 (2013); Daniel Bar-Tal, Tamir Magal & Eran Halperin, *The Paradox of Security Views in Israel: A Social Psychological Explanation*, in *EXISTENTIAL THREATS AND CIVIL-SECURITY RELATIONS* 119–20 (Oren Barak & Gabriel Sheffer eds., 2009).

<sup>214</sup> Bar-Tal, Magal & Halperin, *supra* note 213, at 120–25; COMMANDERS FOR ISRAEL'S SECURITY, *CHANGING THE RULES OF THE GAME: A PLAN TO IMPROVE ISRAEL'S SECURITY AND INTERNATIONAL STANDING* 12 (2016).

<sup>215</sup> YAAKOV KATZ, *THE WEAPON WIZARDS* 7 (2017); see also GOLDENBERG ET AL., *supra* note 213.

<sup>216</sup> Guy Bechor, *IDF Stronger Than Ever*, YNETNEWS (Nov. 25, 2010), <http://www.ynetnews.com/articles/0,7340,L-3989257,00.html>.

<sup>217</sup> See *Economy*, *supra* note 213.

defense measures and operations,<sup>218</sup> and, unlike some of its neighbors, it has no significant natural resources within its borders,<sup>219</sup> the Israeli economy is stable, its foreign currency reserves are high, and its national product per capita is significantly higher than other Middle Eastern countries.<sup>220</sup> Israel is considered a high-tech superpower,<sup>221</sup> and many technology companies have established Research and Development centers in Israel.<sup>222</sup> The economic crisis felt throughout the Western countries in recent years was almost unnoticed in Israel, and it is considered a legitimate member in the community of developed countries.<sup>223</sup> In light of the prosperity and the relative stability in security, it is understandable why many eligible for return exercise their right to immigrate to Israel even in the absence of a special relationship to Judaism or Jewish culture.<sup>224</sup>

A second reason for the increase in immigration among people lacking an affinity to Israel is tied to the history of the Jewish Diaspora in the Soviet Union during the twentieth century and the amendments to the Law of Return of 1970

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<sup>218</sup> Israel comes second to only the United States in total defense expenditures as a percentage of GDP. Niall McCarthy, *The Biggest Military Budgets as a Percentage of GDP*, FORBES (June 25, 2015), <https://www.forbes.com/sites/niallmccarthy/2015/06/25/the-biggest-military-budgets-as-a-percentage-of-gdp-infographic-2/#6a1260094c47>; see also Jordin S. Cohen et al., *Defense Expenditures and Economic Growth in Israel: The Indirect Link*, 33 J. PEACE RES. 341, 341 (1996) (“since the mid-1980s, Israel has been slashing its defense budget while its economy has grown”); *Military Expenditure (% of GDP)*, THE WORLD BANK, <http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?end=2015&locations=IL&start=1988&view=chart> (last visited Nov. 17, 2017) (providing a breakdown of the percentage of gross domestic product spent on defense between 1988 and 2015).

<sup>219</sup> Sarah Bronson, *List of Israel’s Natural Resources*, USA TODAY, <http://traveltips.usatoday.com/list-israels-natural-resources-63037.html>. Recently, though, there have been offshore discoveries of natural gas, recoverable oil, and scattered deposits of minerals that have potential for a “large and sophisticated chemicals industry.” See, e.g., MINISTRY OF ENERGY, ISRAELI GAS OPPORTUNITIES (2015) (discussing the gas revolution in Israel); Simon Henderson, *Israel’s Natural Gas Challenges*, THE WASHINGTON INST. (Sept. 7, 2012), <http://www.washingtoninstitute.org/policy-analysis/view/israels-natural-gas-challenges>; Shmuel Levin, *A New Milestone – Israel Begins Exporting Gas*, AUSTRALIA/ISRAEL & JEWISH AFFAIRS COUNCIL (Mar. 9, 2017), <http://aijac.org.au/news/article/a-new-milestone-israel-begins-exporting-gas>; Oren Liebermann, *Big Gas Fields Could Make Israel Energy Independent*, CNN MONEY (May 26, 2016), <http://money.cnn.com/2016/05/26/news/israel-gas-exports-energy-independence/>; *Israel’s Natural Resources*, FACTS ABOUT ISRAEL, <http://www.factsaboutisrael.uk/israels-natural-resources/> (last visited Nov. 17, 2017).

<sup>220</sup> See *Economy*, *supra* note 213.

<sup>221</sup> *Beyond the Start-Up Nation*, ECONOMIST (Dec. 29, 2010), <http://www.economist.com/node/17796932?fsrc=scn/fb/wl/ar/beyondstartup>.

<sup>222</sup> Inbal Orpaz, *Multinational R&D Emerges as Main Source of Israeli Innovation*, HAARETZ (Aug. 8, 2013), <http://www.haaretz.com/israel-news/business/.premium-1.540333>.

<sup>223</sup> Israel joined the OECD on Sept. 7, 2010.

<sup>224</sup> For further discussion on the fact that Israel is currently considered by many to be a desirable destination for immigration, see SHLOMO AVINERI, LIAV ORGAD & AMNON RUBINSTEIN, *MANAGING GLOBAL MIGRATION: A STRATEGY FOR IMMIGRATION POLICY IN ISRAEL* (2010).

that added family members of Jews to the circle of eligibility.<sup>225</sup> After the Holocaust that obliterated the majority of European Jews, most of the survivors emigrated from the continent—some to Israel and some to other countries.<sup>226</sup> With the establishment of the nation-state, a large immigration influx of Jews from Arab countries took place because of the persecution that they had been experiencing.<sup>227</sup> These changes made the Jewish community in the Soviet Union the second largest Jewish diaspora, after the United States.<sup>228</sup> Since the time of the Bolshevik Revolution, the Soviet government had consistently persecuted religion in general—and the Jewish religion in particular.<sup>229</sup> Additionally, during the Cold War, the ties between Soviet Jews and the rest of the Jewish people were severed.<sup>230</sup> These two factors weakened the cultural affinity of Soviet Jews to Judaism, as reflected, among other things, by a high rate of intermarriage.<sup>231</sup>

Taken together, the two amendments of 1970 created a somewhat inconsistent arrangement: the new law defined a “Jew” for the purposes of Return according to an almost religious definition, but, at the same time, it expanded the extent of Aliyah eligibility to include the relatives of a Jew, even if the eligible individuals are not connected to Judaism or to the Jewish people.<sup>232</sup> On one hand, this expansion of eligibility to return significantly expanded the number of those eligible to exercise the right of return in the Soviet Union.<sup>233</sup> On the other hand, it diluted the relationship between most members of this group and the Jewish people, a relationship that, as noted, was already weak after so many years of persecution.<sup>234</sup>

Despite this reality, until the beginning of the 1990s, the immigration to Israel from the Soviet Union was still of an ideological nature, partly because the Soviet Union impeded the path of immigration applicants, and the Soviet government persecuted and jailed many of those who wanted to immigrate to Israel.<sup>235</sup> Under these circumstances, the ones who insisted and sometimes

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<sup>225</sup> *Beyond the Start-Up Nation*, *supra* note 221.

<sup>226</sup> See *The Aftermath of the Holocaust*, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005129> (last visited Nov. 17, 2017).

<sup>227</sup> Ada Aharoni, *The Forced Migration of Jews from Arab Countries*, 15 PEACE REV. 53, 53 (2003).

<sup>228</sup> Anatoly Vishnevsky, *The Dissolution of the Soviet Union and Post-Soviet Ethnic Migration: The Return of Diasporas?*, in DIASPORAS AND ETHNIC MIGRANTS 144 (Munz & Ohliger eds. 2005).

<sup>229</sup> HARRY G. SHAFER, THE SOVIET TREATMENT OF JEWS 8–24 (1974).

<sup>230</sup> JONATHAN D. PORATH, JEWS IN RUSSIA 148 (1974).

<sup>231</sup> See HOWARD M. SACHAR, A HISTORY OF ISRAEL 733–34 (2007).

<sup>232</sup> *Id.* at 606–07.

<sup>233</sup> See generally PORATH, *supra* note 230.

<sup>234</sup> See generally SACHAR, *supra* note 231.

<sup>235</sup> NATAN SHARANSKY, FEAR NO EVIL (1998).

managed to break through the Iron Curtain and immigrate to Israel were primarily characterized by a strong Jewish consciousness and a desire to express it.<sup>236</sup> However, with the fall of the Communist Bloc, the gates of the Soviet Union opened wide and a great wave of immigration began.<sup>237</sup> A precarious economic situation in the Soviet Union encouraged many who were eligible to immigrate to try their luck in the Holy Land.<sup>238</sup> In the first few years afterwards, many of the immigrants who arrived still had some cultural affinity with Judaism.<sup>239</sup> At some point, while the main potential of ideological-cultural immigration was exhausted, the number of immigrants with no Jewish affinity grew.<sup>240</sup>

*b. The Effect of the Change on the Nature of Israeli Society*

The description of the change in nature of the immigration to Israel is indeed relevant to clarify whether giving the right to unrestricted immigration is consistent with the interests of the Jewish majority in the land. However, in our opinion, using those numbers alone, one cannot reach a clear conclusion; there is a real need to examine what happens to immigrants under the Law of Return *after* they become Israeli citizens. Although an exhaustive research study has not yet been conducted, the existing data indicates that an overwhelming majority of immigrants to Israel still fit into the Jewish majority and adopt its culture, even if not practicing its religion.<sup>241</sup> This is true especially with regard

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<sup>236</sup> See Vladimir (Ze'ev) Khanin, *Institutionalization of the Post-Communist Jewish Movement: Organizational Structures, Ruling Elites, and Political Conflicts*, 14 JEWISH POL. STUD. REV. (2002); see also Maria Saleh, *Former Soviet Union Immigrants: The Impact on Israel, Israeli Politics, and the Arab-Israeli Conflict* 1, [http://ucollege.wustl.edu/files/ucollege/imce/iap\\_saleh.pdf](http://ucollege.wustl.edu/files/ucollege/imce/iap_saleh.pdf) ("first wave in the 1970s was largely a result of Zionist conviction.")

<sup>237</sup> See, e.g., MARK TOLTS, POST-SOVIET ALIYAH AND JEWISH DEMOGRAPHIC TRANSFORMATION (2009) (offers statistical data for the emigration); 1989–2014: *Russian-Speaking Jews 25 Years Later*, JEWISH PEOPLE POL'Y INST., [http://jppi.org.il/uploads/Russian-Speaking\\_Jews\\_25\\_Years\\_Later.pdf](http://jppi.org.il/uploads/Russian-Speaking_Jews_25_Years_Later.pdf) (last visited Nov. 17, 2017).

<sup>238</sup> See Saleh, *supra* note 236, at 3 ("From its onset, immigrants were driven by fear and uncertainty associated with the collapsing Soviet political system, the failing economy, and rising social and ethnic tensions.")

<sup>239</sup> See generally LARISSA REMENNICK, RUSSIAN JEWS ON THREE CONTINENTS: IDENTITY, INTEGRATION, AND CONFLICT (2012).

<sup>240</sup> See Theodore Friedgut, *Immigrants from the Former Soviet Union (FSU): Their Influence and Identity, in ISRAELI IDENTITY IN TRANSITION* 185–214 (Anita Shapira ed., 2004); Yfaat Weiss, *The Golem and Its Creator: Or How the Jewish Nation State Became Multi Ethnic*, in CHALLENGING ETHNIC CITIZENSHIP 82–103 (Yfaat Weiss and Daniel Levy eds., 2002).

<sup>241</sup> See, e.g., Asher Cohen & Bernard Susser, *Jews and Others: Non-Jewish Jews in Israel*, 15 ISR. AFF. 1, 52–65 (2009); Yakobson, *Joining the Jewish People: Non-Jewish Immigrants from the Former USSR, Israeli Identity and Jewish Peoplehood*, *supra* note 29, at 226–27 (arguing that regardless of formal definitions, these

to those who immigrated at a young age and with regard to the second generation of the immigrant families.<sup>242</sup> The difference between younger and older immigrants regarding integration is natural and familiar in all countries that absorb immigration, but is particularly evident in Israel. Israel has a lengthy mandatory military service.<sup>243</sup> The service, which involves intensive exposure to the Jewish-Israeli culture and contribution to the society and the nation, strengthens the affinity of the immigrants and of the second generation to Israel and to the Jewish people.<sup>244</sup> In addition, the Israeli military invests considerable time and effort to expose the immigrant soldiers to the national culture and the Jewish religion, even helping those interested to go through the conversion process.<sup>245</sup>

If, over time, a considerable number of immigrants did avoid being integrated into the Jewish society and culture, it might strengthen the argument that the provision of an unconditional right to immigration is against the interests of the Jewish majority.<sup>246</sup> However, once it becomes clear that most immigrants eventually integrate into the Jewish-Israeli culture, the argument that the main interest of the Jewish majority is to strengthen and preserve its culture is weakened. This weakening is directly due to the automatic absorption of immigrants under the Law of Return.<sup>247</sup>

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immigrants, through their successful social and cultural integration in the Hebrew-speaking Jewish society in Israel, are joining, *de facto*, the Jewish people).

<sup>242</sup> See Yakobson, *Joining the Jewish People: Non-Jewish Immigrants from the Former USSR, Israeli Identity and Jewish Peoplehood*, *supra* note 29, at 224, 228; see also Revital Blumenfeld, *Study: Children of Soviet Immigrants Fully Assimilated into Israeli Society*, HAARETZ (Dec. 26, 2011), <http://www.haaretz.com/israel-news/study-children-of-soviet-immigrants-fully-assimilated-into-israeli-society-1.403749>.

<sup>243</sup> Security Defense Service Law, 5746-1986, §§ 13, 15 (Isr.).

<sup>244</sup> See Yakobson, *Joining the Jewish People: Non-Jewish Immigrants from the Former USSR, Israeli Identity and Jewish Peoplehood*, *supra* note 29, at 232, n. 29; see also Joshua Mitnick, *The Israel Defense Forces*, MY JEWISH LEARNING, <http://www.myjewishlearning.com/article/the-israel-defense-forces/> (last visited Nov. 17, 2017).

<sup>245</sup> This project is called NATIV, which is a branch of the Jewish Studies Institute—the official authority for pre-converting studies. During their military service, soldiers can join the course of Jewish studies. At the end of the course—after seven to ten weeks—soldiers who are interested will continue to a conversion process, accompanied by the course staff. Anshel Pfeffer, *IDF Program Quietly Carries Out Nearly Half Israel's Conversions*, HAARETZ (Oct. 1, 2007), <http://www.haaretz.com/news/idf-program-quietly-carries-out-nearly-half-israel-s-conversions-1.230299>.

<sup>246</sup> See generally Sammy Smooha, *The Mass Immigrations to Israel: A Comparison of the Failure of the Mizrahi Immigrants of the 1950s with the Success of the Russian Immigrants of the 1990s*, 27 J. ISRAELI HIST. 1, 21 (2008), [http://soc.haifa.ac.il/~s.smooha/download/Mass\\_Immigrations\\_to\\_Israel.pdf](http://soc.haifa.ac.il/~s.smooha/download/Mass_Immigrations_to_Israel.pdf).

<sup>247</sup> See generally Christian Joppke & Zeev Rosenthal, *Ethnic-Priority Immigration in Israel and Germany: Resilience Versus Demise*, CTR. FOR COMPARATIVE IMMIGRATION STUD. (Dec. 2001), [https://ccis.ucsd.edu/\\_files/wp45.pdf](https://ccis.ucsd.edu/_files/wp45.pdf).

Another indication that the massive absorption of immigrants lacking a strong affinity to Judaism does not harm the Jewish cultural identity of the Israeli society can be found in the fact that public opinion polls conducted in Israel every few years show that, in general, the cultural-national identity of Israeli Jews has become stronger over time.<sup>248</sup>

*c. The National Interest Against Changing the Law*

The data provided thus far show that granting unrestricted immigration rights to Diaspora Jewry is not contrary to the interest of the Jewish majority in Israel.<sup>249</sup> Below, we will describe a number of considerations that establish the much stronger claim that granting an unconditional immigration right coincides with the Jewish interest.

The existence of a solid majority of members of a nationality group in a specific territory is a prerequisite for recognizing their right to self-determination in this territory.<sup>250</sup> In the Israeli-Palestinian context, the demographic aspect has a special weight both in the debate about the future of the territories and within the framework of the immigration policy debate in Israel regarding Palestinians living in the Palestinian territories and in Arab countries. As we explained, the Jewish identity of Israel within the Green Line is not a self-evident reality for several reasons, including: the attempt of many Palestinians to immigrate to Israel,<sup>251</sup> the demand of the Palestinian leadership to give the descendants of the refugees a right of return to the Green Line;<sup>252</sup> and the refusal of the leadership of the Palestinian minority in Israel to accept the Jewish identity of Israel.<sup>253</sup> Under these circumstances, the Jewish majority in Israel likely has a particularly strong interest in establishing, reinforcing, and expanding its numerical dominance. One of the effective ways to achieve this goal would be to significantly increase absorption.<sup>254</sup> As long as most immigrants eventually join

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<sup>248</sup> ASHER ARIAN & AYALA KEISSAR-SUGARMEN, *A PORTRAIT OF ISRAELI JEWS: BELIEF, OBSERVANCE AND VALUES OF ISRAELI JEWS* (2009) (finding stronger affinity to Jewish identity in 2009 in comparison to 1991, the year of massive Aliya from the USSR).

<sup>249</sup> See *supra* Part III(B)(1)–(3)(b).

<sup>250</sup> See *supra* Part II(B); Allison Beth Hodgkins, *Beyond Two-States: Alternative Visions of Self-Determination for the People of Palestine*, 28 FLETCHER F. WORLD AFF. 109, 123 (2004).

<sup>251</sup> See generally Ephraim Tabory, *Jewish Identity, Jewish Nationalism, and Soviet Jewish Migration*, 33 J. CHURCH & ST. 287 (1991).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> See Lidar Gravé-Lazi, *A New Tool to Foster Jewish Identity in the Diaspora: Israel Education*, JERUSALEM POST (Jul. 10, 2014), <http://www.jpost.com/National-News/Israeli-education-A-new-tool-to-foster-identification-with-both-Jewish-state-Judaism-362181>.

the Jewish majority, the goal is achieved, even if some of them were not culturally identified as Jews upon arrival.<sup>255</sup> Placing significant restrictions on the automatic right to immigrate to Israel will inevitably lead to a significant decrease in the volume of immigration and would harm the long-term Jewish interest to strengthen its numerical dominance in Israel.<sup>256</sup>

Placing restrictions on Jews' right to immigrate to Israel is contrary to the Israeli interest for an additional reason. The State of Israel maintains a strong relationship with the Diaspora for the benefit of both sides. Israel is a central identity element in the self-definition of Diaspora Jews and serves as a source of pride for many of them.<sup>257</sup> On their end, Diaspora Jews provide Israel with a lot of financial and political support.<sup>258</sup> The affinity between Israel and the Jewish Diaspora is based, in part, on the premise that every Jew has the right to become a citizen of Israel, which he or she can exercise at will. This grants every Jewish person, wherever they may be, the secure feeling that there is always a welcoming home—even away from home.<sup>259</sup> An erosion of this right will not end the relationship between Israel and the Jewish Diaspora, but it will certainly weaken the mutual commitment, which Israel's Jewish majority group has a strong interest in maintaining and cultivating.

*d. If We Do Need to Limit, Who Should Be Limited?*

So far, we have explained why Israel's national interest does not support setting conditions on the right of automatic immigration granted in the Law of Return. However, in our opinion, there is a certain justice in the opposite claim with regard to a particular group, which is described below.

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<sup>255</sup> Uzi Rebhun & Gilad Malach, *Demographic Trends in Israel*, THE METZILAH CTR. FOR ZIONIST, JEWISH, LIBERAL AND HUMANIST THOUGHT, 1, 52 (Ruth Gavison ed., 2009).

<sup>256</sup> *Israel Ploys to Attract Migrants, Prevent Reverse Immigration*, AWD NEWS (Sept. 15, 2015), <http://awdnews.com/political/israel-ploys-to-attract-migrants,-prevent-reverse-immigration>.

<sup>257</sup> Taglit-Birthright is a good example of the shared interest and effort undertaken by Israel and Diaspora. The vision of this project is “[t]o strengthen each participant’s identity as a Jew; to build an understanding, a friendship and a lasting bond with the land and people of Israel; and to reinforce the solidarity of the Jewish people worldwide.” Because of this enterprise, about 50,000 Jewish students are visiting Israel every year. Taglit-Birthright is funded both by philanthropists and the Government of Israel. *About Birthright Israel*, TAGLIT BIRTHRIGHT ISRAEL, <http://taglitww.birthrightisrael.com/TaglitBirthrightIsraelStory/Pages/default.aspx> (last visited Nov. 17, 2017).

<sup>258</sup> Eric Fleish & Theodore Sasson, *The New Philanthropy: American Jewish Giving to Israeli Organizations*, COHEN CTR. FOR MOD. JEWISH STUD. 7–8 (2012), [www.brandeis.edu/cmjs/pdfs/TheNewPhilanthropy.pdf](http://www.brandeis.edu/cmjs/pdfs/TheNewPhilanthropy.pdf).

<sup>259</sup> Jeffrey Goldberg, *Is It Time for the Jews to Leave Europe?*, THE ATLANTIC, <https://www.theatlantic.com/magazine/archive/2015/04/is-it-time-for-the-jews-to-leave-europe/386279/> (last visited Nov. 17, 2017).

The Law of Return uses an ostensibly religious test for defining a Jew, although it does not require immigration applicants to be religious Jews according to the current definition of the concept.<sup>260</sup> However, the law explicitly denies the Right of Return from those who are formally defined as Jews but belong to a different religion.<sup>261</sup> Underlying this assertion is a position, probably accepted by an overwhelming majority of the Jewish people—members of various religious denominations as well as secular Jews—that joining another religion revokes the Jewish national identity.<sup>262</sup>

If the Law of Return expressly excludes a member of a different religion from the definition of a Jew for the purpose of determining eligibility to the Right of Return, how is it possible that the same law grants a right to immigrate to Israel to active members of other religions? The answer lies in Article 4A of the Law of Return—the Amendment expanding the eligibility for spouses of Jews and their descendants and their descendants' spouses to a third generation.<sup>263</sup> All of these people are entitled to return, even if the Jew by whose right they obtained the right to immigrate to Israel does not join them.<sup>264</sup> Among immigrants who came under this section, there are quite a few people who are not only not considered Jewish under the Law of Return but also actively belong to another religion.<sup>265</sup>

The expansion of the circle of people eligible to return through the 1970 Amendment was carried out as a complementary step to the restrictions of the definition of a Jew in the same amendment.<sup>266</sup> Supporters of the expansion presented a number of justifications for the move. According to one explanation, without this expansion of eligibility, many Jews would in effect be prevented from exercising their right to immigrate to Israel since they would have to leave some of their non-Jewish family behind.<sup>267</sup> This argument assumes that, in the

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<sup>260</sup> *Israel Ploys to Attract Migrants, Prevent Reverse Immigration*, *supra* note 256.

<sup>261</sup> *Id.*

<sup>262</sup> *See Rufeisen v. Minister of Interior*, 16(4) PD 2428 (1962), reprinted in Special Volume SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL, 1–35 (Asher Felix Landau & Peter Elman, eds., 1971); HCJ 72/62 *Rufeisen v. Minister of Interior* 16(4) PD 2428 (1962). *Rufeisen*, who was born in Poland to a Jewish family, became a Christian. *Id.* He wanted to have an Israeli citizenship by virtue of the Law of Return and was refused, a decision that the Court confirmed later on. *Id.* The Court held that although he was Jewish according to the Halacha, *Rufeisen* lost his Jewish identity in the Law of Return aspect by converting to Christianity. *Id.*

<sup>263</sup> Law of Return (Amendment No. 2), *supra* note 65.

<sup>264</sup> *Id.* at 4A(b).

<sup>265</sup> *See generally* Mordecai Plaut, *Should Non-Jews “Return” Under the Law of Return?*, CHAREIDI, <http://www.chareidi.org/ATCOTU/snjrutlor.html> (last visited Nov. 17, 2017).

<sup>266</sup> Law of Return (Amendment No. 2), *supra* note 65.

<sup>267</sup> GAVISON, *supra* note 49, at 77.

balancing test of social benefits, it is better to be over-inclusive. As stated by another explanation, many people are considered Jewish in their own countries, even though religiously they are not, and their self-identification as Jews resulted in discrimination and persecution.<sup>268</sup> If Israel refuses to open its gates to them, they will be punished again.<sup>269</sup> In this context, there were those who pointed to the Nazi racial laws as a perverse and reverse inspiration.<sup>270</sup> If the Nazis defined a person as a Jew, despite the fact that his blood was “mixed blood,” then Israel has the moral obligation to recognize such a person as a member of the Jewish nation and allow him to immigrate to Israel.<sup>271</sup>

These considerations are serious and cannot be written off with the stroke of a pen. However, it seems that, in the overall balance, a certain limitation on the automatic right to immigration granted in Section 4A should be considered by adding a restriction similar to that provided in the section defining a Jewish person in the Law of Return.<sup>272</sup> Just as a Jew by origin loses the automatic right to immigrate to Israel if he is an active member of another religion, it is perhaps appropriate to deny this right to Jewish descendants and their spouses to the third generation if they are active members of another religion. This restriction is not exclusively based on religious grounds, but uses religious affiliation as a relatively reliable predictor (one that can be easily corrected, if the individual in question wishes to convert) for the chance of integration of the immigration applicant into the Israeli-Jewish culture.<sup>273</sup> The State of Israel has an interest in strengthening its Jewish cultural identity.<sup>274</sup> Absorbing immigrants who are active members of other religions not only fails to reinforce this interest, but it also weakens this interest since it is highly likely that these immigrants will constitute a foreign element in the Jewish-Israeli culture and may even help establish an additional religious-cultural minority in Israel on top of the indigenous minorities that are already living in the country.<sup>275</sup>

To be clear, we do not propose the cancellation of Article 4A of the Law of Return. According to our proposal, many immigration applicants will continue

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<sup>268</sup> Nissim Leon, *Secular Jews: From Proactive Agents to Defensive Players*, 27 ISRAELI STUD. REV. 23, 21–26 (2012).

<sup>269</sup> *Id.* at 27.

<sup>270</sup> ASHER COHEN, *JEWIS NON-JEWISH: ISRAELI-JEWISH IDENTITY AND THE CHALLENGE OF EXPANSION THE JEWISH NATION* (2006) [Hebrew].

<sup>271</sup> *See id.*

<sup>272</sup> Nachon Perez, *Israel's Law of Return: A Qualified Justification*, 31 MOD. JUDAISM 59, 59.

<sup>273</sup> *See generally* Plaut, *supra* note 265.

<sup>274</sup> Yehuda Lav, *The Integration Process in Israel*, 1 ÖIF-DOSSIER 3, 3–36 (2009).

<sup>275</sup> *See* GAVISON, *supra* note 49, at 69.

to receive an automatic right to immigration under their family attachment to Jews. The door will be closed only to immigration applicants actively belonging to another religion. The truth is that even this modest change is somewhat at odds with the justifications for the arrangement of Article 4A described in this section, which we do not believe have moral weight. Our proposal suggests that we reduce this tension in two ways. First, it will not apply to members of other religions if they immigrate to Israel together with the Jewish family member by whose virtue they are eligible to immigrate. This should prevent the breaking up of families and ensure that no one is left behind. Second, the limitation will not apply to individuals or even the family members of “Jews” who are persecuted because of their ties to the Jewish people. Therefore, we propose that members of a Jewish family should be entitled to return under Article 4A, even if they are active members of another religion, provided that they immigrate with their Jewish family member or they show that they are persecuted in their country of origin because of their affinity with the Jewish people.

#### 4. *The Relevance of the Justification Based on Persecution*

On its face, the justification based on persecution depends on the existence of a present or future danger to the wellbeing of members of the national group, and it is not enough that such risk existed at some point in the past.<sup>276</sup> Accordingly, there are those who argue that, in the reality of the 21st century, this justification loses its validity in the Jewish-Israeli context since the Jews are not persecuted for being Jewish anymore.<sup>277</sup>

Unfortunately, this claim is simply not true. Jews have been persecuted for thousands of years, with varying ferocity, but they have never been granted a refuge from anti-Semitism.<sup>278</sup> The Holocaust marked an unprecedented low point in Jewish and world history, and given its magnitude, the question arises whether it can even be treated as just another point on the infinite continuum of persecution against the Jews. But, there is no doubt that before and after the Holocaust there were, and still are, periods and places where one’s Jewishness served and serves as sufficient reason to justify murder or other forms of persecution.<sup>279</sup>

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<sup>276</sup> THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT 226 (Rhoda E. Howard-Hassmann & Margaret Walton-Roberts eds., 2015).

<sup>277</sup> See GAVISON, *supra* note 49, at 43.

<sup>278</sup> See *The 2013 Top Ten Anti-Israel Groups in the U.S.*, *supra* note 31.

<sup>279</sup> Eitan Na’eh, *Jews Killed Simply for Being Jews*, TELEGRAPH (Oct. 13, 2015), <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/11929445/Jews-are-being-killed-simply-for-being-Jews.html>.

One hope nurtured by generations of leaders of the Zionist movement was that the establishment of a Jewish State would lead to a normalization of the Jewish people and thereby to the eradication of anti-Semitism.<sup>280</sup> Sadly, their hopes were dashed. Paradoxically, the establishment of the State of Israel not only failed to result in the abolition of anti-Semitism, but it also provided anti-Semitism a new cover in the form of the “anti-Israel” movement.<sup>281</sup> Indeed, as noted by a number of historians, anti-Semitism alters its shape over time and place.<sup>282</sup> Sometimes it has a religious nature, sometimes racial, sometimes national, and, in recent decades, it has even found a new shape—the State of Israel and the Zionist movement, which, in one of the lowest points in its history, was defined by the United Nations as racist.<sup>283</sup>

Even now, the unfortunate reality of the hatred and persecution of Jews has not disappeared from the world. Synagogues and Jewish community institutions in many parts of the world, including European countries, look more like fortified sites than houses of worship and civic institutions due to the amount of defense measures that the community leaders are forced to employ.<sup>284</sup> Blatant anti-Semitism exists even in countries where there are hardly any more Jews to hate after all of the murders and expulsions.<sup>285</sup> Anti-Semitism is present both on the surface and below, even in countries like the United States, where there is a large and prosperous Jewish community and robust, benevolent government protections.<sup>286</sup>

Is there a basis for hope that anti-Semitism will fade away in the near future? Of course—the fight against hatred and prejudice is extremely important, and to muster the strength to battle it, one always needs to find hope. But, it is also

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<sup>280</sup> The “Political Zionism” movement was led mainly by Theodore Herzl. See AMNON RUBENSTEIN, *THE ZIONIST DREAM REVISED* 6 (1994).

<sup>281</sup> Irwin Cotler, *Identifying the New Anti-Semitism*, AISH, <http://www.aish.com/jw/s/48892472.html> (last visited Nov. 17, 2017).

<sup>282</sup> See ROBERT WISTRICH, *A LETHAL OBSESSION: ANTI-SEMITISM FROM ANTIQUITY TO THE GLOBAL JIHAD* 6–7 (2010).

<sup>283</sup> G.A. Res. 3379 (XXX), *Elimination of All Forms of Racial Discrimination* (Nov. 10, 1975) (determining that Zionism is a form of racism and racial discrimination).

<sup>284</sup> Recently, a synagogue in Paris was severely attacked. See JTA, *Anti-Israel Protesters Attack Paris Synagogue*, JERUSALEM POST (July 13, 2014, 11:36 PM) <http://www.jpost.com/Jewish-World/Jewish-News/Anti-Israel-protesters-attack-Paris-synagogue-362643>.

<sup>285</sup> The ten most anti-Semitic countries are Arab states. See *ADL Poll of Over 100 Countries Finds More than One-Quarter of Those Surveyed Infected with Anti-Semitic Attitudes*, ANTI-DEFAMATION LEAGUE (May 13, 2004), <http://www.adl.org/press-center/press-releases/anti-semitism-international/adl-global-100-poll.html?referrer=https://www.google.com/#.V-UknZMrLEY>.

<sup>286</sup> See *The 2013 Top Ten Anti-Israel Groups in the U.S.*, *supra* note 31.

important to look at reality with open eyes and be wary of confusing hope with illusion. Recent nationalist and religious upheavals in the world apparently refute declarations about the end of history.<sup>287</sup> Unfortunately, they also refute the assumption that Jewish persecution has reached the end of its long road.<sup>288</sup>

This reality makes it unnecessary to examine the question of “what would happen if . . . ?” However, there is one normative point we want to stress—the justification on the basis of persecution actually serves two functions: it establishes the right of a persecuted people to a homeland generally and it establishes the right of individuals of that persecuted people to immigrate to their nation-state specifically.<sup>289</sup> We agreed above that the validity of the justification on the basis of persecution depends on the current risk to the safety of the members of the national group. However, in our opinion, this point has to be qualified. The requirement of current risk is relevant only as a condition for establishing the right of the people to a nation-state (together with the justification of the right to culture).<sup>290</sup> It is *not* required as a condition for establishing the right of individual members of a persecuted people to immigrate to their nation-state.<sup>291</sup> An individual member of a persecuted people is entitled to immigrate to his nation-state under the justification of persecution, even if he is not persecuted because of his national identity.<sup>292</sup>

The right to immigrate to a nation-state on the basis of persecution is not only meant to protect just the life and property of a member of the persecuted nationality but also his or her sense of security and well-being. When members of one group of a particular nation are persecuted because of their nationality, it has a severe psychological impact on all the other members of that nation, even those who have not experienced such persecution in their countries of residence.<sup>293</sup> This is in part due to a sense of solidarity that characterizes members of national groups and also stems from the fact that people tend to project the lives of similar people onto their own lives. In the case of national persecution, the projection has a solid rational basis—if people attach negative attributes to a particular nationality as a basis for its persecution in one place,

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<sup>287</sup> Daniel Byman, *Israel's Pessimistic View of the Arab Spring*, 34 WASH. Q. 123, 123 (2011).

<sup>288</sup> See GAVISON, *supra* note 49, at 43.

<sup>289</sup> See generally Shachar, *supra* note 25.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *But see* Nahshon Perez, *Israel's Law of Return: A Qualified Justification*, 31 MOD. JUDAISM 59, 68 (2011).

<sup>293</sup> Madison Margolin, *Why Jewish Anxiety Is No Laughing Matter*, FORWARD (Aug. 9, 2015), <http://forward.com/culture/318509/is-jewish-anxiety-no-laughing-matter/>.

there is reason for concern that the same reasons will one day be used for its persecution elsewhere. In a reality where anti-Semitism thrives in various locations around the world, it undermines the sense of security of all Jews, including those who have not personally experienced anti-Semitism.<sup>294</sup> In this reality, any Jew who wishes to immigrate to Israel can honestly say that this is due to the desire to live in a place where he will never be persecuted due to his being Jewish.

### CONCLUSION

The right to culture, which is well known and attested to in the context of international human rights instruments, establishes the right to self-determination for the members of a national group to define itself as a nation-state, and not only as a sub-national community. From the right to self-determination within a nation-state derives the right, and even the obligation, of the nation-state to give preference to its nationals in its immigration policies. There are three driving forces behind this matter: the right of the nation's diaspora to live in their nation-state; the interest of the national majority group to strengthen the nation-state's culture; and the interests of this same group to ensure its demographic dominance—a reality whose existence is critical to maintaining the definition of the state as a nation-state.

The right of the Jewish people to their homeland and the right of Jewish people to emigrate there is of course based on the right to self-determination. It is also based on the unique and special circumstances of this people in particular, a group that has suffered and still suffers from hatred and persecution and, therefore, needs its own state to ensure the safety and security of its members. The fact that the Jewish people's right to self-determination is not acceptable to the countries that surround it, as well as to the Israeli-Palestinian minority, only strengthens Israel's interest in favoring the members of the Jewish diaspora in its immigration policies to strengthen the national identity of the country and to ensure its existence by securely establishing the threshold demographic conditions that will continue to define it as a Jewish nation-state.

The Law of Return grants immigration rights not only to Jews by birth but also to anyone else who chooses to join the Jewish people. This "joining" is not conditioned upon participation in religious ritual, ceremony, or behavior—a fact

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<sup>294</sup> THE JEWISH PEOPLE POLICY PLANNING INSTITUTE PLANNING ASSESSMENT, 2004-2005: THE JEWISH PEOPLE BETWEEN THRIVING AND DECLINE (Della Pergola et al. eds., 2005).

which greatly weakens the criticism of the Law of Return that it is based on the assumption that the preferential treatment in the policy is based on problematic ethnic, racial, or religious criteria, which it is not.

The Law of Return also grants a right of Israeli immigration to Jews and non-Jews alike that have no connection to Jewish culture as long as they are officially or formally Jewish or have Jewish family ties. Since the 1990s, many of the immigrants to Israel, under the Law of Return, have not even had this kind of connection. Such immigration applicants cannot establish the basis of their desire to immigrate to Israel on the right to self-determination.

Recently, a proposal was raised to cancel the automatic right of immigration for those people lacking any cultural affinity to the Jewish people, based on the claim that immigration like this does not strengthen the Jewish culture's dominance; in fact, immigration may even weaken it.<sup>295</sup> This proposal should be rejected because the reality shows that the vast and overwhelming majority of immigrants to Israel who belong to this group do, at the end of the day, join the Jewish majority, adopt Jewish culture, and assimilate into Jewish-Israeli society,<sup>296</sup> even if they never end up formally joining the Jewish people. Under these circumstances, especially factoring in the demographic considerations mentioned above, the Jewish majority has an interest in preserving the existing arrangement and continuing to provide immigration rights to this group.

Still, while most of the immigrants who do not have a cultural attachment to Judaism end up joining the Jewish majority and assimilating into its culture over time, immigrants who are active members in another religion usually do retain their own cultural identities and even form their own distinct communities and affiliation groups. For these immigrants, there is no acquired right to immigrate, and the State has no special interest in their absorption. Indeed, the Law of Return today already negates the right of return for immigrant applicants that are members of another faith, but only those immigrant applicants whose claim under the Law of Return is based on a formal affiliation with the Jewish people and not for those whose claim is based on familial kinship. In light of the above, however, it might be appropriate to expand the exemption and apply it to non-Jews whose eligibility is dependent on a family connection, unless they are immigrating with a Jewish family member or are subject to persecution.

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<sup>295</sup> See generally Altschul, *supra* note 18.

<sup>296</sup> See generally Netanel Fisher & Avi Shilon, *Integrating Non-Jewish Immigrants and the Formation of Israel's Ethnic-Civic Nationhood: From Ben Gurion to the Present*, 53 MIDDLE EASTERN STUDIES 166 (2017).

Another argument raised as a possible justification to cancel the automatic Right of Return granted to Jewish people is that, unlike in the past, Jewish people today are not persecuted because of their national affiliation and, therefore, the right to protection from persecution, which once served as the basis for the claim of the Jewish people to self-determination, is no longer relevant. This claim is factually incorrect in the sense that, to our great sorrow, Jewish people all across the world are still being persecuted for being Jewish. In these circumstances, the Jewish nation is still obligated to self-define in order to provide its members with a place to be protected from hatred and persecution. A similar proposal—one more limited in scope—seeks to base immigration on a claim of persecution, conditional on the ability of the applicant to show that he or she was in fact being persecuted because of his or her Jewish origin. This claim, too, must be rejected. The broad extent of the hatred directed against the Jewish people validates the tendency of the Jewish people to feel threatened and afraid, even if they have not personally experienced a manifestation of anti-Semitism. Under these circumstances, it can be assumed that any Jew that immigrates to Israel does so, among other reasons, to strengthen his or her sense of security and peace of mind. Therefore, so long as anti-Semitism is not completely eliminated and eradicated, every Jewish person retains the moral right to immigrate to Israel based also on the right to be protected from persecution.

In the words of Prime Minister Netanyahu, Israel is still their home. And to return to our initial question—Is it ever morally or legally acceptable for a nation-state to favor one or another group in its immigration policies based on their nationality or religion?—we conclude that the answer is yes, given all of the above factors. We leave it to others to apply these rationales in other countries and to other laws, but we stand by the proposition that such criteria are not inherently immoral or illegal and are sometimes justified and correct. Certainly, from a religious perspective, these laws are not necessarily problematic, and while Pope Francis may be right that “one who thinks only of building walls and not bridges is not Christian,” it is also true that one who builds bridges with express lanes may very well be Jewish.