



# Genetic citizenship: DNA testing and the Israeli Law of Return

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## ABSTRACT

The Israeli State recently announced that it may begin to use genetic tests to determine whether potential immigrants are Jewish or not. This development would demand a rethinking of Israeli law on the issue of the definition of Jewishness. In this article, we discuss the historical and legal context of secular and religious definitions of Jewishness and rights to immigration in the State of Israel. We give a brief overview of different ways in which genes have been regarded as Jewish, and we discuss the relationship between this new use of genetics and the society with which it is co-produced. In conclusion, we raise several questions about future potential impacts of Jewish genetics on Israeli law and society.

**KEYWORDS:** *aliyah*, Jewish genes, Israel, citizenship, Law of Return, *Cohanim*

Masha Yakerson, like many of her Jewish, college-age peers, attempted to sign up for a Birthright Israel<sup>1</sup> trip in the summer of 2013.<sup>2</sup> Birthright told Yakerson, whose family is from Russia, that to prove that she was Jewish, and eligible for the trip, she would need to take a DNA test.<sup>3</sup> Birthright claimed that the test was required by the Israeli consulate, and further that a DNA test would be required if Yakerson ever wanted to make

<sup>1</sup> 'Taglit-Birthright Israel provides a gift of peer group, educational trips to Israel for Jewish young adults ages 18 to 26.' Taglit-Birthright Israel, FAQ, <http://www.birthrightisrael.com/Pages/Help-Center-Answers.aspx?ItemID=1> (accessed Apr. 30, 2015).

<sup>2</sup> *Teen told she can't join Birthright without DNA test*, TIMES OF ISRAEL, July 28, 2013, <http://www.timesofisrael.com/teen-told-she-cant-join-birthright-without-dna-test/>.

<sup>3</sup> *Id.*

aliyah (immigrate to Israel).<sup>4</sup> Yakerson's father called the policy 'blatant racism toward Russian Jews'.<sup>5</sup> Generally, the requirements for teenagers from other countries to participate in Birthright are much less stringent and many participants do not meet strict definitions of Jewishness. In fact, '[s]ince Taglit-Birthright doesn't accept candidates who have visited Israel before, its participants often come from nonaffiliated homes, many of them the products of mixed marriages'.<sup>6</sup> Historically, '[t]rust was the default position' to determine if someone was Jewish.<sup>7</sup> It is only more recently, in 'an era of intermarriage, denominational disputes, and secularization' that doubt and skepticism have become the norm.<sup>8</sup>

After the news of this one student's experience made headlines, the Israeli Prime Minister's Office confirmed that many Jews from the Former Soviet Union ('FSU') are asked to provide DNA confirmation of their Jewish heritage in order to immigrate as Jews and become citizens under Israel's Law of Return.<sup>9</sup> According to one source, the consul's procedure, which was:

approved by the legal department of the Interior Ministry, states that a Russian-speaking child born out-of-wedlock is eligible to receive an Israeli immigration visa if the birth was registered before the child turned [three]. Otherwise a DNA test to prove Jewish parentage is necessary.<sup>10</sup>

The State of Israel defines itself as the homeland of the Jewish people, making it ethno-national in its own self-image<sup>11</sup> and raising perennial concerns over who is a Jew, how this can be determined, by what credible means, and what exactly this says about the 'legal nature' of citizenship in Israel.<sup>12</sup> The recent turn to genetics is an attempt to develop an objective, scientific means of defining the boundaries of the Jewish population. In light of the ambiguities around the materiality/immateriality of the basis of Jewish ethnicity, its connection to the State's founding narrative of exilic return, and its impact on rights to citizenship, it is not yet clear how and why biological definitions of Jewishness are becoming an important part of the way Israelis understand their

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Judy Maltz, *Jewish Enough For Birthright - But Not for Israel*, FORWARD, Jan. 23, 2014, <http://forward.com/news/israel/191456/jewish-enough-for-birthright-but-not-for-israel/>.

<sup>7</sup> Gershom Gorenberg, *How Do You Prove You're a Jew?*, THE NEW YORK TIMES MAGAZINE, Mar. 2, 2008, [http://www.nytimes.com/2008/03/02/magazine/02jewishness-t.html?\\_r=2&](http://www.nytimes.com/2008/03/02/magazine/02jewishness-t.html?_r=2&); See also Naomi Darom, *So You Think You are Jewish Enough for an Israeli Wedding? Prove it*, HAARETZ, Nov. 7, 2013, <http://www.haaretz.com/weekend/magazine/.premium-1.556772> (citing the Shulhan Arukh, the authoritative codification of Jewish law); Rabbi Reuven Hammer, *On Proving Jewish Identity* YD 268:10.2011, COMMITTEE ON JEWISH LAW AND STANDARDS, CJLS, THE RABBINICAL ASSEMBLY, May 24, 2011, <http://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards/yoreh-deah>.

<sup>8</sup> Gorenberg, *supra* note 7.

<sup>9</sup> Asher Zeiger, *Russian-Speakers Who Want to Make Aliya Could Need DNA Test*, TIMES OF ISRAEL, July 29, 2013, <http://www.timesofisrael.com/russian-speakers-who-want-to-immigrate-could-need-dna-test/>.

<sup>10</sup> *Id.*

<sup>11</sup> THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, May 14, 1948; see also David Day, *A New Conception of the Israeli Grundnorm: The Jewish Immigration 'Trump Card' as the Solution to the Falasha Mura Exception*, 24 EMORY INT'L L. REV. 357, 357 (2010) ('Israel is not merely the state of its citizens but is the state of all Jews, everywhere.').

<sup>12</sup> See, e.g., 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, 1352 (2002).

Jewish ethnicity as something rooted in the body, transmitted by genes, and shared by the national group.<sup>13</sup>

Scholar of Science, Technology, and Society, Sheila Jasanoff, recently wrote that ‘periods of significant change in the life sciences and technologies should be seen as constitutional, or more precisely, *bio-constitutional* in their consequences’.<sup>14</sup> Given that Israel has no formalized constitution,<sup>15</sup> the recent advent of genetic tests for Jewishness necessitates a rethinking of Israeli law regarding the State’s definition of Jewishness, and rights to citizenship.

In this New Development, we discuss the historical and legal context of secular and religious definitions of Jewishness and rights to immigration in the State of Israel. We then give a brief overview of different ways in which genes have been regarded as Jewish, and we discuss the relationship between this new application of genetics and the society with which it is co-produced.<sup>16</sup> In conclusion, we raise several questions about future potential impacts of Jewish genetics on Israeli law and society.

### JEWISH ALIYAH (IMMIGRATION)

The establishment of the State of Israel problematizes a single definition of Jewishness; the State was founded on secular socialist principles, relies on religious Jewish law, and was built by waves of diverse Jewish immigrants from Europe, North Africa, and the Middle East, with varying levels of Jewish religious practice.<sup>17</sup> Maintaining a steady stream of Jewish immigrants is crucial to Israeli state-building, facilitating the integration of world Jewry, and fulfilling the State’s mission as homeland and refuge for all Jews.<sup>18</sup> But, the ‘authenticity’ of Jewish immigrants for Israeli state-building ‘has been judged (often simultaneously) in both religious and bioethnic terms’.<sup>19</sup> The Population Registry Law 5725–1965 requires residents to enter both their *le’oum* (nationality or ethnic group)<sup>20</sup> and religion in the registry.<sup>21</sup> A recent Israeli Supreme Court case affirmed an earlier precedent and distinguished *le’oum* or nationality, from secular

<sup>13</sup> NADIA ABU EL-HAJ, *THE GENEALOGICAL SCIENCE: THE SEARCH FOR JEWISH ORIGINS AND THE POLITICS OF EPISTEMOLOGY* (2012); Susan M. Kahn, *The Multiple Meanings of Jewish Genes*, 29 *CULTURE, MED. PSYCHIATRY* 179, 192 (2005); Susan M. Kahn, *Are Genes Jewish: Conceptual Ambiguities in the New Genetic Age*, in *THE BOUNDARIES OF JEWISH IDENTITY*, (Susan Glenn & Naomi Sokoloff eds., 2010); Harry Ostrer, *A Genetic Profile of Contemporary Jewish Populations*, 2 *NAT. REV. GENET.* 891 (2001); DAVID B. GOLDSTEIN, *JACOB’S LEGACY: A GENETIC VIEW OF JEWISH HISTORY* (2009).

<sup>14</sup> Sheila Jasanoff, *Introduction: Rewriting Life, Reframing Rights*, in *REFRAMING RIGHTS: BIOCONSTITUTIONALISM IN THE GENETIC AGE 3* (Sheila Jasanoff ed., 2011).

<sup>15</sup> See Nancy C. Richmond, *Israel’s Law of Return: Analysis of Its Evolution and Present Application*, 12 *DICK. J. INT’L L.* 95, 100 (1993).

<sup>16</sup> SHEILA JASANOFF, *STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND THE SOCIAL ORDER* (2004).

<sup>17</sup> See Rabbi Lawrence S. Nesis, *Who is a Jew? Shalit v. Minister of Interior et al. The Law of Return (Amendment No. 2)*, 4 *MAN. L. J.* 53, 59 (1970).

<sup>18</sup> *Id.* [quoting ABBA EBAN, *MY PEOPLE: THE STORY OF THE JEWS* 191 (1984)].

<sup>19</sup> Elise K. Burton, *An Assimilating Majority?: Israeli Marriage Law and Identity in the Jewish State*, 8 *J. JEWISH IDENTITIES* 73, 82 (2015).

<sup>20</sup> ‘[T]he hebrew word *leoum* can be translated as ‘ethnic group’ or ‘nationality’ or ‘peoplehood’[.]’ Nesis, *supra* note 17, at 54.

<sup>21</sup> Population Registry Law, 5725–1965, 19 *LSI* 288 (1964–65) (Isr.) (replacing the Registration of Inhabitants Ordinance, 5709–1949); see also Gidon 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, 1239 (2006).

citizenship. The court rejected the petitioners' request to list 'Israeli' under the nationality rubric on their identity documents, to reflect their citizenship and belonging to the Israeli State, rather than 'Jewish', which reflects their ethno-religious affiliation.<sup>22</sup>

Immigration of Jews in Israel is governed by Israel's Law of Return 5710–1950, which provides: 'Every Jew has the right to come to this country as an *oleh* [Jewish immigrant]'.<sup>23</sup> '[I]n conjunction with the Citizenship Law, ... it enables every Jew to become a citizen of the state, almost automatically'.<sup>24</sup> For the first twenty years, the law did not define who was a Jew, and thus who had the right to immigrate.<sup>25</sup> In 1970, the Law was amended to include a definition of Jew: 'For the purposes of this Law, "Jew" means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion'.<sup>26</sup> The 1970 amendment also expanded citizenship rights to family members of eligible Jews:

The rights of a Jew under this Law ... as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.<sup>27</sup>

The amendment represented a compromise between the religious and secular perspectives.<sup>28</sup> The amendment adopted the religious definition of a Jew—someone with a Jewish mother or someone who has converted to Judaism.<sup>29</sup> However, the amendment extended citizenship rights to those who are referred to as 'seed of Israel'—'anyone either born to a non-Jewish mother and a Jewish father, or having at least one Jewish grandparent'.<sup>30</sup> Thus, the law grants citizenship rights both to those who are religiously Jewish but would not have Jewish biological links, such as Jews who converted, as well as those who do not have religious or biological connections to Jewishness, such as spouses of Jews.

The 1970 amendment was a response to a controversial Israeli Supreme Court case, *Shalit v. Minister of the Interior*, which permitted children of a Jewish father and non-Jewish mother to register as part of the Jewish *le'oum* or ethnic group in the Population

<sup>22</sup> Aeyal Gross, *Court Rejection of Israeli Nationality Highlights Flaws of Jewish Democracy*, HAARETZ, Oct. 3, 2013, <http://www.haaretz.com/opinion/premium-1.550336>; CA 8573/08 Ornan et al. v. Ministry of Interior (Oct. 2, 2013 amended on June 10, 2013), (Isr.); HCJ 8140/13 Ornan v. State of Israel (Dec. 9, 2013) (Isr.); see also CA 630/70 Tamarin v. State of Israel, 26(1) PD 197 [1972] (Isr.) (rejecting Tamarin's subjective feeling of belonging in the Israeli nation and refusing to let Tamarin 'change the entry of the rubric *le'om* in his identity card and in his file in the Registry from Jewish to Israeli').

<sup>23</sup> Law of Return, 5710–1950, 4 LSI 114 (1949–1950) (Isr.).

<sup>24</sup> Sapir, *supra* note 21, at 1239.

<sup>25</sup> See Burton, *supra* note 19, at 79; see also *id.* at 1236.

<sup>26</sup> Law of Return (Amendment 5730–1970), SH No. 586 p. 34 (Isr.).

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

<sup>28</sup> Altschul, *supra* note 12, at 1356.

<sup>29</sup> The amended law did not define what conversion meant, which led to future challenges. Sapir, *supra* note 21, at 1239–1240; see also Noah Baer, *Casenotes: Who is a Jew? A Determination of Ethnic Status for Purposes of the Israeli Population Registry Act*, 10 COLUM. J. TRANSNAT'L L. 133, 145 (1971).

<sup>30</sup> Judy Maltz, *How a Former Netanyahu Aide is Boosting Israel's Jewish Majority, One 'lost tribe' at a Time*, HAARETZ, Feb. 19, 2015, <http://www.haaretz.com/news/national/1.643020>. The term 'seed of Israel' also has a [slightly different and] broader definition that applies to anyone with demonstrated Jewish ancestry dating back several generations'. *Id.*

Registry.<sup>31</sup> [T]he amended law “overruled” the *Shalit* case by adopting the religious law test of defining who is considered Jewish, but the law saved the spirit of the *Shalit* decision by ‘granting non-Jewish family members the right to immigrate under the Law of Return.’<sup>32</sup>

Since the law was amended, and especially in the wake of the fall of the Soviet Union in the 1990s, Jews from the FSU have arrived to Israel en masse.<sup>33</sup> Many had assimilated and secularized in the FSU and intermarried with non-Jewish Russians. Thus, although many Russian immigrants are Jewish by descent, and are entitled to citizenship, their Jewishness is questioned by the Ministry of Interior, and they are often required to show additional proof.<sup>34</sup> These individuals face even more skepticism by rabbinic authorities, as many are not considered Jews under Orthodox Jewish law.<sup>35</sup>

### SECULAR AND RELIGIOUS JEWISHNESS

The discrepancy between eligibility for Israeli citizenship and classification as part of the Jewish nation creates challenges for Israeli citizens who are not considered religiously Jewish. Israel is governed by a dual legal system, where both civil and religious courts have jurisdiction over various areas of the law. The laws governing personal status, such as marriage and divorce, are part of the exclusive jurisdiction of the religious courts.<sup>36</sup> Only Jews who are *halakhically* (under religious Jewish law) Jewish are eligible to marry in the religious courts, belong to synagogues, or be buried in Jewish cemeteries; there is no civil marriage in Israel.<sup>37</sup> One of the main functions of the rabbinic courts is to provide judicial rulings on whether a person is Jewish.<sup>38</sup>

The number of immigrants who are eligible to immigrate under the Law of Return, but are not religiously Jewish is quite staggering. Demographer Sergio Della Pergola suggested that by a religious definition there are roughly 14 million Jews around the world, but over 23 million people eligible for citizenship under the Law of Return.<sup>39</sup> This potentially leaves a large segment of the population in limbo—eligible for immigration and citizenship but ineligible to legally marry and participate as full members of

<sup>31</sup> The *Shalits* attempted to register their children as Jewish under the *le’oum* or nationality designation and leave the religion category blank. Baer, *supra* note 29, at 133,134. The Ministry of Interior refused to permit this since Mrs. *Shalit* was not Jewish, and thus the children were not Jewish under religious law. *Id.* at 134. The Court ruled 5-4 that the Ministry clerk did not have the right to question the *Shalits*’s application. *Id.* at 135. The majority limited the decision: ‘the question is not “Who is a Jew?,” since the term has many meanings, but rather who is considered a Jew for purposes of this law’. *Id.* at 142. Because the Court interpreted a secular law, the Court found that religious law should not control. *Id.* In response, the Knesset amended the Law of Return and the Population Registry Law to mandate that anyone who registers as Jewish under either the nationality or religion classification must meet the religious definition. *Id.* at 145.

<sup>32</sup> Altschul, *supra* note 12, at 1357; see also Richmond, *supra* note 15, at 109, 110.

<sup>33</sup> According to some estimates, nearly a million people have come to Israel from the FSU under the Law of Return. Hammer, *supra* note 7, at 1.

<sup>34</sup> This proof is difficult for Russian Jews to produce ‘because of the lack of reliable documentation’. *Id.*

<sup>35</sup> Some rabbis ‘do not believe anyone coming from Russia without specific proof. Rather they must see a birth certificate and that of the person’s mother’. *Id.* at 11.

<sup>36</sup> Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953 §1, 7 LSI 139 (1953) (Isr.); Law and Administration Ordinance, 1948, 1 LSI 9 (1948) (Isr.).

<sup>37</sup> See Burton, *supra* note 19, at 82.

<sup>38</sup> Gorenberg, *supra* note 7.

<sup>39</sup> Kobi Nachshoni, *Chief Rabbi: Stop Allowing Non-Jews to Make Aliyah*, YNET NEWS, Nov. 3, 2014, <http://www.ynetnews.com/articles/0,7340,L-4587242,00.html>.

society. The move to mandate genetic tests of Jewishness as a requirement for immigration threatens to increase this divide because it cannot grant Jewish status recognized by the rabbis.

The Prime Minister's Office attempted to distinguish the purpose of the DNA test as a secular immigration regulation rather than a marker of religious identity. The Prime Minister's Office reported: 'We're not talking about a test to determine Jewishness. We're talking about a test to determine a family bond that entitles [the child to] *aliyah*'.<sup>40</sup> The Prime Minister's Office thus emphasized the line between secular citizenship and religious belonging in the Jewish nation.

### JEWISH GENES

While racial divisions are classically ideological, high-tech science has entered the arena, and has further complexified the borders of Jewish identity and ethnicity. Molecular genetic tests can now be used to measure individuals' whole genomes, and scientific research has begun to describe the genetic basis for a common ancestry of the whole of the Jewish population.<sup>41</sup>

There are three key ways in which Jewishness has moved to the molecular realm, with genes being defined as Jewish: population genetics; genetic testing for both disease and Jewish identity; and human ova and sperm donation, as in the field of assisted conception.<sup>42</sup> In these different conceptual arenas, Jewish genes and inheritance are defined in different ways, opening up a wider space of ambiguity around Jewish identity and definition.<sup>43</sup>

With population genetics or 'tracing Jewish history through DNA',<sup>44</sup> these types of studies attempt to trace Jewish history through genetics, and elucidate a common historical origin of the Jewish people in the biblical land of Israel. Here, Jewishness is determined by genomic analysis as 'statistical probabilities that DNA haplotypes will be more prevalent' within identified groups. But the presence of a certain haplotype within an individual is not a guarantee that the individual is Jewish or not.<sup>45</sup> Moreover, the historical claims that are entangled with these scientific studies are heavily debated.<sup>46</sup>

The Cohanim Modal Haplotype (CMH), the Jewish genetic marker that has received the most attention, was first publicized in the journal *Nature* in a study that identified six differences in the DNA sequence of male Jews that identified as *Cohens* or *Cohanim* (Jewish priests).<sup>47</sup> Some scientists think that the *Cohanim* signature could represent the inheritance of over 100 generations from the founder of the patrilineal

<sup>40</sup> Richard Silverstein, *Birthright, Israeli Government Demand DNA Tests to Prove Jewishness*, TIKKUN OLAM BLOG, Aug. 4, 2013, <http://www.richardsilverstein.com/2013/08/04/birthright-israeli-government-demand-dna-tests-to-prove-jewishness/> (accessed May 24, 2015).

<sup>41</sup> ABU EL-HAJ, *supra* note 13, at 2; Doron M. Behar, et al., *The Genome-wide Structure of the Jewish People*, 466 NATURE 238, 242 (2010).

<sup>42</sup> Kahn, *Are Genes Jewish*, *supra* note 13, at 21.

<sup>43</sup> *Id.*

<sup>44</sup> Kahn, *The Multiple Meanings*, *supra* note 13, at 181.

<sup>45</sup> Kahn, *Are Genes Jewish*, *supra* note 13, at 21.

<sup>46</sup> Jeff Wheelwright, *Defining Jews, Defining a Nation: Can Genetics Save Israel?*, ATLANTIC, March 2013, <http://www.theatlantic.com/global/archive/2012/03/defining-jews-defining-a-nation-can-geneticssave-israel/254428/>.

<sup>47</sup> Karl Skorecki et al., *Y Chromosome of Jewish Priests*, 385 NATURE 32 (1997).

genetic line.<sup>48</sup> The signature is traced to a date over 3000 years ago, in accordance with the oral tradition that the *Cohens* maintain a line of patrilineal descent from Aaron, the first Jewish priest.<sup>49</sup>

In the second domain of Jewish genetics, inheritable diseases common in Jewish groups, DNA mutations can be read to indicate a higher likelihood of developing a specific disease.<sup>50</sup> Consequently, there has been a move to test individuals for genetic markers of disease before they form partnerships and have children together.<sup>51</sup>

The third sphere of Jewish genetics is in assisted conception, which resonates with the Jewish tradition and its emphasis on fruitful reproduction.<sup>52</sup> Accordingly, Kahn found that the Orthodox Jewish community has been receptive to the use of technologies to assist with fertility and has developed approaches to reconcile the genetic realities with Jewish law. Many rabbis will permit married couples to use non-Jewish genetic donor material when no other measures exist to solve infertility challenges,<sup>53</sup> and since Jewishness is *halakhically* passed from mother to child, non-Jewish sperm can create a Jewish child if the mother is Jewish. However, the inheritance of Jewishness is problematized when a surrogate mother carries a baby. This begs the question of whether a baby who has genetically Jewish parents, i.e. who donate the egg and sperm, but who is carried by a non-Jewish surrogate, will be deemed Jewish. In a recent case with those facts, a rabbi opined that the baby technically had three parents, and because the surrogate was not Jewish, the child was not Jewish.<sup>54</sup> Although most rabbis believe that the mother is determined by gestation and birth, some ‘recognize both the genetic and birth mothers as having maternal status’.<sup>55</sup> A minority believe that if Jewish parents contribute genetic material ‘the child’s status should follow that of the genetic/intended social mother’.<sup>56</sup>

The DNA tests described by the Prime Minister’s Office and brought to light by Yakerson’s case suggest a policy decision to enshrine Jewishness at the level of DNA, render ‘Jewish genes’ legally legible by the State, and make DNA signatures a basis for basic rights and citizenship. In practical terms, Jewish genes are ambiguous entities and often do not match legal definitions of Jewishness. For example, non-Jewish donor sperm and ova can be used in assisted conception clinics to produce babies that are legally Jewish in the eyes of the State, though only if the gestating womb is Jewish.<sup>57</sup> DNA markers that could be read as Jewish on an individual level, however, need not be identified in these individuals. Conversely, a child could have Jewish genetic material, but without a Jewish mother would not be considered Jewish. These varying possibilities point to the

<sup>48</sup> GOLDSTEIN, *supra* note 13.

<sup>49</sup> Kahn, *Are Genes Jewish*, *supra* note 13, at 14.

<sup>50</sup> Center for Jewish Genetics, *Dor Yeshorim*, <https://www.jewishgenetics.org/dor-yeshorim> (accessed Apr. 30, 2015).

<sup>51</sup> Kahn, *The Multiple Meanings*, *supra* note 13, at 181.

<sup>52</sup> *Id.* at 184.

<sup>53</sup> *Id.*

<sup>54</sup> Caren Chesler, *What Makes a Jewish Mother*, THE NEWYORK TIMES, June 3, 2013, <http://well.blogs.nytimes.com/2013/06/03/what-makes-a-jewish-mother/?r=0>.

<sup>55</sup> Rabbi Aaron L. Mackler, *Maternal Identity and the Religious Status of Children Born to a Surrogate Mother*, YD 268:6.1997, COMMITTEE ON JEWISH LAW AND STANDARDS, CJLS, THE RABBINICAL ASSEMBLY, Sept. 17, 1997, 143, <http://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards/yoreh-deah>.

<sup>56</sup> *Id.* at 144.

<sup>57</sup> Kahn, *The Multiple Meanings*, *supra* note 13, at 184.

ambiguity or outright contradictions across the field of Jewish genetics and the rabbinical sphere.

In fact, the religious Orthodox community has had a mixed response to the increase in genetic technology among Jewish definition and reproduction. In general, they have embraced the genetic tests, and have relied on them to ensure safe and healthy reproduction.<sup>58</sup> However, when it comes to genetics as a means of testing Jewishness, many rabbis remain skeptical. One rabbi said he believed genetics could be a ‘consultant’ to Jewish law.<sup>59</sup> For other rabbis, concerns remain about the ‘dangerous eugenic overtones.’<sup>60</sup>

Alternatively, genetic tests offer the possibility to legitimize those whose Jewishness is often questioned. For example, an Eastern European woman in Israel sought rabbinic permission to marry.<sup>61</sup> ‘To bolster her claim for a marriage license, [she] ... had her DNA analyzed’.<sup>62</sup> The DNA test ‘tipped the balance in her favor’ and the ‘rabbi granted her a marriage license as a bona fide Jew’.<sup>63</sup>

Further, underserved Jewish communities in Israel, whose Jewishness is questioned, could benefit from proof of authentic Jewishness. For example, the Lemba people of southern Africa not only claim descent from a tribe of Israel with descent passed from father to son, and maintain some Jewish traditions such as a kosher diet, but ‘[t]he CMH appears in the Lemba with a frequency similar to that in the general Jewish population (in just under one out of every ten men)’.<sup>64</sup> This adds support to their demands to be treated as equals. Although arguably claims for equality should stand on their own, and not depend on proof of Jewish lineage, the marginalized groups of the Beta Israel of Ethiopia,<sup>65</sup> the Kuki-Chin-Mizo from Northeast India,<sup>66</sup> or the Lemba, could all likely benefit from scientifically certifiable Jewishness to support their campaigns toward equal rights.

Regardless of the indexical power or validity of these genetic tests, when they are recognized by the State, the reality of Jewishness as a measurable biological category can implicate access to basic rights and citizenship in Israel. Kahn thus argues that genetic studies must be read within the larger sociopolitical context where the meaning of claiming Jewish identity can make a direct impact in terms of access to rights and resources.<sup>67</sup>

## BIOPOLITICS

In light of the ambiguity of the meaning and importance of Jewish genes, coupled with the prospect that they may become a criterion for citizenship in Israel, it is not yet clear:

<sup>58</sup> *Id.*

<sup>59</sup> Wheelwright, *supra* note 46.

<sup>60</sup> Kahn, *Are Genes Jewish*, *supra* note 13, at 17.

<sup>61</sup> Wheelwright, *supra* note 46.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See ABU EL-HAJ, *supra* note 13, at 287; Kahn, *Are Genes Jewish*, *supra* note 13, at 13; Mark G. Thomas et al., , *Y Chromosomes Traveling South: The Cohen Modal Haplotype and the Origins of the Lemba: The ‘Black Jews’ of Southern Africa*, 66 AM. J. HUM. GENET. 674, 686 (2000).

<sup>65</sup> Ethiopian Jews who immigrated to Israel in the 1980s and 1990s.

<sup>66</sup> A small group that claim to be descendants of the tribe of *Menashe*.

<sup>67</sup> Kahn, *Are Genes Jewish*, *supra* note 13, at 15; see also Katya G. Azoulay, *Not an Innocent Pursuit: The Politics of a ‘Jewish’ Genetic Signature*, 3 DEV. WORLD BIOETHICS 1471 (2003).



Why genes? Why now? And why the move to control the borders of the nation in this new genetic way?

The development of Jewish genetics can be seen as a golden example of a hybrid fusion of statecraft and technoscience, or what philosopher Michel Foucault and others describe as the management of populations through ‘biopolitics’,<sup>68</sup> the governance of life itself.<sup>69</sup> The prospect of genetic tests to determine Jewishness in Israel raises concerns over a reinscription of ethnic essentialisms, entailing a project that could foster a new regime of biopower<sup>70</sup> at the level of an individual’s genes, with potential for governments cataloging the biological citizen at the molecular level. Crucially, however, the legitimacy of the diverse manifestations of Jewish genetics hinges on its utility as a ‘regulatory technique’<sup>71</sup> in managing Israel’s population.

Similarly, Barbara Prainsack argues that Israel’s permissive laws regarding the use of artificial reproductive technologies can be traced to their utility in tackling Israel’s ‘demographic problem’, that is in maintaining a Jewish majority.<sup>72</sup> Moreover, she finds that Israel’s pro-natalist culture rests on a notion of ‘risk’ to the population that serves to bolster the State’s mandate to reproduce the nation at the level of individuals.<sup>73</sup> Genetic Jewishness may thus offer possibilities for a demographic ‘boost’.<sup>74</sup> Genetic legitimation might only be meaningful, however, if it is recognized by the rabbis or others in power as a verifiable source of knowledge. In the unlikely eventuality that genetic tests are routinely used to determine rights to citizenship in Israel, the foregrounding of Jewish genes as the basis of Israeli citizenship would be a novel form of governmentality. We would be seeing the management and administration of populations and citizens by their states through ethnic genetics.

## CONCLUSION

The Yakerson case revealed that the State of Israel may rely on genetic tests as proof of Jewishness. A genetic definition of Jewishness, however, breaks with traditional *halakhic* law and reconfigures the terms of authentic belonging in the Jewish State.

Although DNA testing may offer the possibility of legitimation, for Yakerson, genetic testing was used as a barrier to prevent access for someone who meets the expansive definition laid out in the Law of Return, but still was not ‘Jewish enough’. Although Masha was ultimately denied access to the 10-day Birthright trip to Israel, her older sister, Dina, reportedly immigrated to Israel as an *oleh* in 1990.<sup>75</sup> In this case, the turn to genetics failed to provide an accurate measure of familial connections.

There are several ways to interpret the Israeli government’s increasing reliance on genetic testing to determine eligibility for citizenship or other rights. It could be a

<sup>68</sup> MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978, 1979* (2010).

<sup>69</sup> NIKOLAS ROSE, *THE POLITICS OF LIFE ITSELF: BIOMEDICINE, POWER, AND SUBJECTIVITY IN THE TWENTY-FIRST CENTURY* (2006).

<sup>70</sup> MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977, 1978* (2009); Paul Rabinow & Nikolas Rose, *Biopower Today*, 1 *BIOsocieties* 195, 217 (2006).

<sup>71</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977).

<sup>72</sup> Barbara Prainsack, ‘*Negotiating Life: The Regulation of Human Cloning and Embryonic Stem Cell Research in Israel*’, 36 *SOC. STUDIES SCI.* 173, 205 (2006).

<sup>73</sup> *Id.* at 173.

<sup>74</sup> Maltz, *supra* note 30 (describing the efforts of a former Netanyahu aide to promote the immigration of the Bnei Menashe from northeastern India, who have purported Jewish links, but are not legally Jewish).

<sup>75</sup> Zeiger, *supra* note 9.

trend toward more restrictive immigration policies that seek to guard access to state resources.<sup>76</sup> Advocates have seen similarly restrictive policies advanced to require Jewish verification from those seeking temporary student or work visas.<sup>77</sup> One rabbi, who helps potential immigrants navigate the rabbinic bureaucracy, explained this as xenophobia: ‘It manifests itself in the way we treat people born Jewish who don’t fit the description of what a Jew should look like’.<sup>78</sup>

The tests may also become a means to expand the pool of potential new Jewish immigrants who have verifiable ancestral ties.<sup>79</sup> Jewish genetic tests could become a way to recognize different and broader articulations of Jewish identity and thereby expand the limits of who is deemed to have legitimate connections. The potential move to legally recognize genetic tests for Jewishness could equally shift some of the authority away from the rabbis, and toward scientists, who may recognize secular manifestations of Jewish identity.

Although genetic tests for Jewishness may have been intended to increase certainty and validate Jewish identity, they may provoke more confusion by adding another layer of definitional uncertainty. On the one hand, the existence of Jewish DNA could verify Jewish connections and provide the requisite proof to grant certain individuals access to citizenship and its associated benefits. On the other hand, it is worth paying attention to who might be excluded—those who claim belonging within the Jewish community but do not have genetic links to prove this biological connection, as well as those who will be granted limited access via citizenship but who will not be recognized as equal members of the Jewish nation. It remains to be seen how this new categorization will bear on notions of belonging and legitimacy within the Jewish community. In the area of Jewish identity—already fraught with definitional ambiguity—this attempt to concretize what it means to be a Jew in genetic terms adds another layer of contestation and confusion. Crucially, the latest efforts to define Jewishness in genetic terms have not yielded the certainty that the State seeks over how to determine who is a Jew.

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<sup>76</sup> See Richmond, *supra* note 15, at 121–125.

<sup>77</sup> Maltz, *supra* note 6.

<sup>78</sup> *Id.*

<sup>79</sup> Maltz, *supra* note 30.