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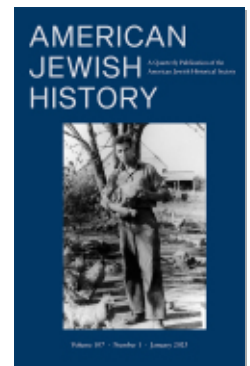
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American Jewish History, Volume 107, Number 1, January 2023, pp. 467-496 (Article)

Published by Johns Hopkins University Press

DOI: <https://doi.org/10.1353/ajh.2023.a909914>



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“Suppose the Mother Were Jewish”: Leo Pfeffer, the American Jewish Congress, and the Problem of Religious Protection Law¹

Susan A. Glenn

When the Executive Committee of the National Community Relations Advisory Council met in New York City in January 1956 to discuss issues of concern to the Jewish community, a heated debate erupted over the adoption of children born to women of one religious group by couples from a different religious group. Rabbi Israel Klavan, who represented the Orthodox Rabbinical Council, declared that any attempt to formulate a “Jewish position” would have to consider “the well-established principle of Jewish law that one who is born a Jew remains a Jew throughout his life.” Constitutional law expert Leo Pfeffer (1909–1993), the American Jewish Congress’s most formidable church-state litigator, replied that, “having been an Orthodox Jew throughout his life,” he understood the importance of “the principle” that “a child born of a Jewish mother is, under traditional Jewish law, a Jew.” However, cautioned Pfeffer, “the constitutional government of the United States, under which we all live, and under which our rights to observe and practice our respective religions are protected, is a secular government, without interest or concern for the religious laws to which its citizens may choose to adhere.” It must be remembered, he added, that “the security of the Jewish group in its free practice of the Jewish faith rests upon the maintenance of this unconcern or indifference of government toward religion.”²

This heated exchange was a continuing salvo in the American Jewish Congress’s controversial mid-century campaign to challenge the constitutionality of laws and judicial practices that made it difficult and sometimes impossible for couples to adopt children born to mothers

1. For their helpful comments on earlier drafts of this article, I thank James Gregory, Eli Lederhendler, Lynn Thomas, Nomi Stolzenberg, Joana Bürger, and the two anonymous reviewers for this journal. Thanks as well to Nina Bernstein, Susan Beth Pfeffer, and Alan Pfeffer.

2. Shad Polier to Isaiah M. Minkoff, January 12, 1956, quotes from the enclosed verbatim summary of Pfeffer’s remarks by Red Spiegler, Records of the American Jewish Congress, American Jewish Historical Society, New York, collection I-77, box 243, folder “Adoption and Custody, General Correspondence.” Hereafter, documents from the Records of the American Jewish Congress are cited as I-77.

whose religion differed from theirs. Pfeffer, whose personal devotion to Judaism was “intense and unshakable,”³ played a leading role in this campaign to loosen the grip of religious restrictions on adoption—a campaign, his Jewish critics charged, that would make it possible for Christians to adopt “Jewish-born” children.

In the 1950s Pfeffer earned a reputation as what one political scientist called the “dominant individual force in managing the flow of church-state litigation” and the figure responsible for turning the American Jewish Congress into the nation’s “unrivaled organizational force” in bringing First Amendment cases “up the judicial ladder to the Supreme Court.”⁴ Another scholar described Pfeffer as the dominant force in the “entire universe” of church-state litigation, noting that he “advised, planned, rehearsed, helped, and argued more church-state cases than any other attorney of his generation.”⁵ The scholarship on Leo Pfeffer focuses on his constitutional challenges to religion in the public schools, state aid to parochial schools, tax exemptions for churches and synagogues, and discriminatory Sunday closing laws.

In this article, I examine an arena of Pfeffer’s jurisprudence that has largely been ignored: his daring forays into the religious minefield of child adoption and custody law. Pfeffer singled out child adoption as the most challenging of all church-state issues. In his 1953 opus, *Church, State, and Freedom*, Pfeffer wrote: “Probably no problem in the area of the relationship of religion and state is more difficult of equitable solution than that arising out of the desire of a couple of one religious faith to adopt a child born into another faith.”⁶ Religion was the most

3. Quoting Susan Beth Pfeffer, telephone interview, October 14, 2022. See also Leo Pfeffer, “An Autobiographical Sketch,” in *Religion and the State: Essays in Honor of Leo Pfeffer*, ed. James E. Wood, Jr. (Waco: Baylor University Press, 1985). Alan Pfeffer notes that his father joined a Conservative synagogue when the family moved to Long Island in the 1950s but also remained “a lifelong member” of the (Orthodox) Young Israel Synagogue in Manhattan. Telephone interview with Alan Pfeffer, October 20, 2022.

4. Gregg Ivers, *To Build a Wall: American Jews and the Separation of Church and State* (Charlottesville: University Press of Virginia, 1995), 105. See also Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (New York: Oxford University Press, 1992); J. David Holcomb, *Guardian of the Wall: Leo Pfeffer and the Religion Clauses of the First Amendment* (Lanham: Roman and Littlefield, 2021); Joseph R. Preville, “Leo Pfeffer and the American Church-State Debate: A Confrontation with Catholicism,” *Journal of Church and State* 33 (1991): 37–53; and David G. Singer, “One Nation Completely Under God? The American Jewish Congress and the Catholic Church in the United States,” *Journal of Church and State* 26 (1984): 473–90.

5. Frank Sorauf, *The Wall of Separation* (Princeton: Princeton University Press, 1976), 159–60.

6. Leo Pfeffer, *Church, State, and Freedom* (Boston: Beacon, 1953), 587.

litigated issue in child adoption in the 1950s. Both historically distinct from and analogous to later debates about the adoption and fostering of African American and Indigenous children, the contest over religion involved competing claims about whose children belonged where.⁷ Pfeffer theorized the problem when he depicted transreligious adoption as a highly competitive, "emotion-laden" struggle involving children, parents, communities, and religious groups all "striving for judicial recognition."⁸ By 1970, Pfeffer's decades-long campaign to change the laws governing adoption had borne fruit. But his fervent desire to see the Supreme Court declare that "prohibitory" adoption statutes and legal rulings that made religion (or lack thereof) the decisive factor in adoptions were unconstitutional under the Establishment and Free Exercise clauses was never realized.⁹

This article makes two related contributions. First, it intervenes in the field of legal history by calling attention to the close relationship between Pfeffer's jurisprudence on child adoption and his church-state jurisprudence in other domains of American law. Second, it argues that Pfeffer's views on religion, the Constitution, and child adoption—and the controversies they stirred—constitute an important but unrecognized chapter in the broader field of postwar American Jewish history. In the aftermath of the Holocaust, and in the decades that followed, when religious and secular Jewish communal organizations were fervently committed to promoting "continuity" and "survival," some Jewish community members who otherwise supported Pfeffer's church-state litigation opposed his views on adoption. It was one thing to argue that the Constitution protected vulnerable children from the imposition of sectarian practices in the public schools but quite another to say that the First Amendment's religion clauses protected the rights of mothers to have their children adopted by couples of a different religious faith. Looking at the fraught subject of religion and adoption through the eyes of Leo Pfeffer, the twentieth century's foremost litigator of church-state issues, brings a fresh perspective to our understanding of postwar Jewish debates about religion, the family, and Jewish "continuity"—debates that

7. See, e.g., Laura Briggs, *Somebody's Children: The Politics of Transracial and Transnational Adoption* (Durham: Duke University Press, 2012) and Margaret D. Jacobs, *A Generation Removed: The Fostering and Adoption of Indigenous Children in the Postwar World* (Lincoln: University of Nebraska Press, 2014).

8. Leo Pfeffer, "Religion in the Upbringing of Children," *Boston University Law Review* 35 (June 1955): 337.

9. Leo Pfeffer, *Church, State, and Freedom*, rev. ed. (Boston: Beacon, 1967), 713–14 and Leo Pfeffer, *Religion, State, and the Burger Court* (Buffalo: Prometheus, 1984), 255–56.

historians have largely viewed through the writings of rabbis, sociologists, and psychologists who sought to “explain” the “Americanness” of Judaism to non-Jews and/or to teach Jews how to be more “Jewish.”¹⁰

Pfeffer had a different mission. A deeply religious Jew for whom the separation of church and state was also a sacred principle, Pfeffer maintained that what allowed Jews (and other religious minorities) in the United States the freedom to be more (or less) religious was the Constitution’s guarantee of a religiously neutral state. He argued that the religion clauses of the First Amendment contained an “American” conceptualization of religion as “voluntary” and freely chosen. Child adoption became a critical site of Pfeffer’s concern because, in states with mandatory religious protection laws, judges treated religion not as voluntary, but as fixed and immutable. Jews and Roman Catholics had every right to take that position, argued Pfeffer, but the state did not.

Pfeffer joined the Commission on Law and Social Action (CLSA) in 1945, when it was created as a special litigation and advocacy unit of the AJCongress dedicated to “outlawing every form of discrimination on grounds of race, creed, color and national origin.”¹¹ The leadership of the AJCongress believed that the goal of pursuing religious and racial equality for all Americans would not mean sacrificing Jewish “distinctiveness” and “historic identity.” On the contrary, the CLSA’s bold program of legal and social action was conceived as a mechanism for strengthening Jewish cohesion and “survival” through liberal activism.¹² But, as a church-state issue, the adoption of children across religious lines stirred deep divisions within the Jewish community and required Pfeffer to convince both the leadership and the membership of the AJCongress that the constitutional issues were worth fighting for.

Drawing upon archival material, court cases, and Pfeffer’s extensive public commentary on constitutional issues in adoption and the religious upbringing of children, in what follows I narrate a ground-level history

10. See, e.g., Lila Corwin Berman, *Speaking of Jews: Rabbis, Intellectuals, and the Creation of an American Public Identity* (Berkeley: University of California Press, 2009); Rachel Kranson, *Ambivalent Embrace: Jewish Upward Mobility in Postwar America* (Chapel Hill: University of North Carolina Press, 2017); and Andrew Heinze, *Jews and the American Soul* (Princeton: Princeton University Press, 2004). None discuss child adoption.

11. Shad Polier, “The Work of CLSA: A Bibliography of Representative Publications of the Commission on Law and Social Action, August 1945–June 1957 (New York: American Jewish Congress, 1957), iv–v.

12. Stuart Svonkin, *Jews against Prejudice: American Jews and the Fight for Civil Liberties* (New York: Columbia University Press, 1997), 78–112, here 81. See also Elizabeth D. Katz, “‘Racial and Religious Democracy’: Identity and Equality in Mid-century Courts,” *Stanford Law Review* 72 (June 2020): 1467–1572.

of Pfeffer's effort to keep the issues before the courts and the broader public. What interests me are the seeming paradoxes and conundrums of Pfeffer's constitutional highwire acts, in particular the ways in which his challenges to judicial decision-making in adoption disturbed bedrock understandings of what made Roman Catholics "Catholic" and what made Jews "Jewish." Pfeffer described Jews and Roman Catholics as equally "dogmatic" when it came to the religious status of children. Jews believed that "a child on birth acquires the religion of his mother," Catholics maintained that "under Catholic law, a child validly baptized as a Catholic, even without the knowledge or consent of his non-Catholic parents, becomes a Catholic," and neither group "recognized the possibility of a complete exit from the faith."¹³ He also observed that "there is within Judaism, an instinctive, emotional, and almost irrational repugnance to the thought of a Jewish-born child being raised in a non-Jewish faith."¹⁴ But Pfeffer insisted that the First Amendment not only prohibited the state from either recognizing or enforcing "in-born" and "no-exit" definitions of religious identity, it also protected the rights of mothers (including Jewish mothers) to have their children adopted by couples whose religious identity differed from their own.

While these claims challenged fundamental Jewish and Catholic values, they echoed Pfeffer's self-described "absolutism" on the separation of church and state. "If the separation of church and state means anything," he wrote, it means that the courts "may not hand down theological decisions, and may neither accept nor reject a declaration that the eternal happiness of a child depends on his being brought up in this or that religious faith."¹⁵ He famously asserted that "the language of the First Amendment encompasses two prohibitions: it forbids laws respecting an establishment of religion, and laws prohibiting the free exercise of religion." He called these two prohibitions the "unitary guarantee" of religious freedom encompassed in the First Amendment's Establishment and Free Exercises clauses. Just as "the church" (the religious body) was constitutionally forbidden from interfering in "state affairs," the state was constitutionally forbidden to interfere in "church affairs."¹⁶

But, as Pfeffer pointed out, it was not until 1947, in *Everson v. Board of Education*, that the Supreme Court laid the groundwork for "absolutist" jurisprudence.¹⁷ Writing for the majority, Justice Hugo

13. Leo Pfeffer, "Issues that Divide," *Journal of Social Issues* 12 (1956): 25.

14. Leo Pfeffer, *Creeks in Competition*, (New York: Harper & Brothers, 1958), 132.

15. Pfeffer, *Church, State, and Freedom* (1953), 587.

16. Pfeffer, *Church, State, and Freedom* (1953), 121.

17. Pfeffer, *Church, State, and Freedom* (1953), 133.

Black attempted to define what Thomas Jefferson had meant when he said that the “clause” was meant to erect “a high wall of separation between church and state.”

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.¹⁸

This paragraph from *Everson* interpreting the prohibitions against state “force,” “influence,” “support,” and “punishment” for religious beliefs and disbeliefs became a touchstone for Pfeffer.¹⁹ Indeed, the issue of “religion by compulsion” is a thread that runs through much of Pfeffer’s jurisprudence, including his briefs and writings on adoption. Starting with the landmark 1948 Supreme Court case *McCullum v. Board of Education*, where he challenged the constitutionality of a program that released children from public school classrooms to receive religious education on school grounds from outside instructors, Pfeffer argued a series of cases in which he maintained that even when public school programs made prayers and religious education “voluntary,” they created a “coercive” and “divisive” environment that shamed “impressionistic children.”²⁰ In adoption cases, Pfeffer’s briefs against compulsory religion took a different form. There the questions revolved around judicial decision-making that automatically yoked infant children to the religious status of their biological mothers, foreclosing the possibility that a mother might choose to allow her children to be raised in a religion other than her own.

Most states had “religious protection” statutes, a few dating back to the early nineteenth century. Originally intended to prevent proselytization, both the language and the degree of judicial enforcement varied widely. Some statutes had mandatory language such as “must” and “shall,” while others contained more discretionary phrases such as “may consider.” Enshrined in the state’s constitution in 1921, New York’s statutory law was one of the strictest in the nation. It specified that:

18. Pfeffer, *Church, State, and Freedom* (1953), 133.

19. Holcomb, *Guardian of the Wall*, 47 and Cohen, *Jews in Christian America*, 143.

20. Holcomb, *Guardian of the Wall*, 70, 76–79, 86–87, 92.

Whenever a child is committed to an institution or is placed in the custody of any person by parole, placing out, adoption or guardianship, it shall be so committed or placed, when practicable, to an institution governed by persons or in the custody of a person, of the same religious persuasion as the child.²¹

When Massachusetts strengthened its law in 1950 in response to the growing number of unregulated "independent" and "black market adoptions," lawmakers introduced the term "must." "In making orders for adoptions, the judge when practicable *must* give custody *only* to persons of the same religious faith as that of the child." In the event of a "dispute as to the religion of said child," the statute declared, "its religion shall be deemed that of its mother."²²

Religious leaders strongly favored these laws. The position of the Roman Catholic Church was that "the retention of a child within the religion of its parents must take precedence over any merely temporal considerations" such as health or psychological "adjustment."²³ Catholics maintained that if the mother had been baptized, the church was entitled to claim her children as Catholics.²⁴ Some members of the Jewish community were not far behind. Rabbis were united in their opposition to the adoption of Jewish children by non-Jews, and Orthodox rabbis typically opposed all forms of interreligious adoption even when the adopting couple was Jewish. Even Conservative and Reform rabbis, who might accept the adoption of a non-Jewish child by a Jewish family, reported they "would violently oppose adoption of a Jewish child by a non-Jewish family."²⁵ By contrast, Protestant religious leaders, who in any case defined religion as a faith rather than a status, cared less about matching children with couples of the same Protestant denomination than about

21. Quoted in Pfeffer, "Religion in the Upbringing of Children," 372. See also Walter Gellhorn, *Children and Families in the Courts of New York City: A Report* (New York: Dodd Mead and Co., 1954), 263–64.

22. Quoted in Pfeffer, "Religion in the Upbringing of Children," 378, emphasis mine.

23. Pfeffer, *Creeds in Competition*, 125; Justine Wise Polier, "Child Adoption across Religious Lines: What Policy for Jewish Community Relations Agencies[?]," October 17, 1955, 18. Records of the Boston Jewish Community Relations Council, collection I-123, box 42, folder 3, American Jewish Historical Society New England Archives (hereafter BJCRC).

24. Ellen Herman, "The Difference that Difference Makes: Justine Wise Polier and Religious Matching in Twentieth-Century Child Adoption," *Religion and American Culture: A Journal of Interpretation* 10 (2000): 70.

25. "Notes on Address by Rabbi Leon A. Jick," undated typescript, [1955], 1–2, I-77, box 82, folder 1. See also Abraham G. Duker, "Jewish Attitudes to Child Adoption," in *A Study of Adoption Practice*, ed. Michael Schapiro, 2 vols. (New York: Child Welfare League of America, Inc., 1955), 2:142–43.

making sure the child would be raised in a “Christian” environment.²⁶ Religious and secular adoption agencies, social workers, and state child welfare departments treated religious difference as “a bright line, never to be crossed, blurred, or erased,” even when making temporary child placements. They also treated Jewish applicants as members of both a religious and racial group.²⁷

“TWO LITTLE GIRLS”

Pfeffer was drawn into the world of adoption through his professional association with CLSA lawyer Shad Polier and New York City Family Court judge Justine Wise Polier, who also sat on the AJCongress Executive Committee. Her father, Rabbi Stephen Wise, had founded the AJCongress. Her mother, Louise Wise, had founded the Child Adoption Committee of the Free Synagogue of New York (later renamed Louise Wise Services). Justine served as the agency’s president and Shad as its legal counsel. It was through his involvement in Shad’s 1952 case, *Matter of Santos*, that Pfeffer began to formulate what would later become the official AJCongress position on the adoption of children across religious lines.

To Pfeffer, *Santos* epitomized the dangerous consequences—both to children and to the constitutional guarantees of religious liberty—when the state acted to enforce theological doctrine at the expense of children’s psychological well-being. In *Church, State, and Freedom*, Pfeffer, a powerful storyteller, narrated the dramatic story of “two little girls,” Dorothy and Linda Southern, who, although baptized in the Catholic Church, felt themselves to be Jewish. In 1947, when the girls were ages three and four, their mother, Jandyra Santos, a Roman Catholic, convinced an Orthodox Jewish refugee caretaker named Ruth Benjamin that both she and the girls were Jewish and agreed that during their stay with Benjamin, the children would follow Jewish traditional dietary laws and observe the Jewish sabbath and holidays. When their mother stopped paying for their board, the Domestic Relations Court determined that the girls had been abandoned. They also “found that the children were Jewish (there being no evidence to the contrary)” and transferred them in 1950 to the Free Synagogue Child Adoption Committee, which placed the girls in

26. Charles G. Chakerian, “The Religious Component in Adoption, a Protestant Appraisal,” in *A Study of Adoption Practice*, ed. Michael Schapiro, 2 vols. (New York: Child Welfare League of America, Inc., 1955), 2:126–28.

27. Quoting Ellen Herman, *Kinship by Design: A History of Adoption in the Modern United States* (Chicago: University of Chicago Press, 2008), 126. See also Herman, “Difference,” 68–70. On racialization of Jews, see Barbara Melosh, *Strangers and Kin: The American Way of Adoption* (Cambridge: Harvard University Press, 2002), 82–86.

the home of a childless Jewish couple who were eager to adopt them.²⁸ Six months into their Jewish foster placement, a judge on the Domestic Relations Children's Court reported that the children "have been placed in a warm, loving and most adequate home" where "for the first time in their lives" they have "come to feel they truly have parents." Pfeffer notes that the judge's visit was prompted by the reappearance of their mother, who demanded custody. But the court declared her "unfit" to care for her children and determined that it was in the "children's best interests" to remain with the Jewish foster family.²⁹

Armed with their baptismal certificates and backed by lawyers for the Archdiocese of New York and the Catholic Home Bureau for Dependent Children, Jandyra Santos filed an appeal. Citing New York's mandatory religious protection law, which "leaves no room for judicial discretion," the Appellate Division (New York's intermediate court) determined that it "was and is still practicable" to place the children "under control of persons of their religious faith," which "shall be preserved and protected by the Court." These children are Catholic, said the Court, and "have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another prior to the age of reason." Accordingly, the girls were removed from the Jewish foster home and committed to the Catholic Home Bureau for Dependent Children.³⁰

In a technical sense, wrote Pfeffer, the *Santos* case concerned the issue of child custody, "but the real issue in this case," as in others that came before the courts, "was whether a non-Catholic couple could legally adopt a child born to a Catholic mother."³¹ Pfeffer noted that, "when the court spoke of the 'natural right' of a child to his 'religious faith' . . . it used theological terminology, and entered the field of theology—in which it was incompetent to act; it could determine only 'legal rights.'" Moreover, in removing the girls from the Jewish foster home, the court created a conflict "between the mother's religious liberty and the children's welfare."³²

Although the attorney of record in *Matter of Santos* was Shad Polier, archival records reveal that, in April of 1952, Pfeffer played a crucial behind-the-scenes role in preparing the appeal and soliciting support among the membership of the AJCongress and from legal organizations

28. Pfeffer, *Church, State, and Freedom* (1953), 588 and "Brief of the Free Synagogue Child Adoption Committee," Court of Appeals, State of New York, *In the Matter of Jandyra Santos and Thomas Southern* (1952), 13-14, I-77, box 245, folder 22.

29. Quoted in Pfeffer, *Church, State, and Freedom* (1953), 589.

30. Quoted in Pfeffer, *Church, State, and Freedom* (1953), 589. The case was *Matter of Santos*, 278 App. Div.(N.Y.) 373 (1951).

31. Pfeffer, *Church, State, and Freedom* (1953), 588.

32. Pfeffer, *Church, State, and Freedom* (1953), 590.

pressing for the separation of church and state. In a detailed memorandum, Pfeffer urged Polier to prepare two appeals on behalf of the Free Synagogue Child Adoption Committee: one to go directly to the Court of Appeals, New York's highest court, while the other, if necessary, would go all the way up to the United States Supreme Court. Outlining what he saw as the key constitutional issues, Pfeffer stressed that while Appellate Division had "found as a matter of law" that the children were Roman Catholic, the only evidence they considered was infant baptism. Moreover, the fact that the children's own mother, a Roman Catholic, had voluntarily placed her daughters in a Jewish boarding home and had done so with the understanding that they "would be brought up as Jews" implied that the mother herself "may have affected a change in [her children's] religion." But Pfeffer also raised a hypothetical that went more directly to the constitutional issues in the case. What if the mother, after being judged unfit to care for her children, had actually decided she wanted them to remain in a Jewish setting? Then the mandatory religious protection statute, as construed by the Appellate Division, would have prevented it. By finding that "a child baptized as a Catholic remains a Catholic, at least until he attains adulthood and changes his religion himself," the court had "ruled that baptism into the Catholic church is irrevocable even at the mother's will."³³

To Pfeffer, the concept of "irrevocable" baptism recalled the tragedy of six-year-old Edgardo Mortara in mid-nineteenth-century Bologna, a scandal that became an international cause célèbre. During a serious illness, the child, son of Jewish parents, was secretly baptized by his Catholic nurse and then, by order of the Inquisition, kidnapped by papal guards and brought to Rome to be educated in the Catholic faith on the grounds that, once baptized, a child could no longer be raised by Jews. "I had considered including a reference to this case in the brief," he told Polier, "but I concluded it would be too dangerous at this level. If you go to the Supreme Court, it certainly should be included."³⁴ Although Polier's brief made no direct reference to the Mortara case, it did accuse the court of refusing to consider any factor *except* the fact of infant baptism when it decided to commit the children to the Catholic Home Bureau. If "the mechanical jurisprudence" of the Appellate Division were allowed to stand, the brief declared, it would transform judges from "the guardians of children into the agents of religious groups. That the Constitution forbids."³⁵

33. Leo Pfeffer to Shad Polier, "Re: Southern Brief," April 28, 1952, box 12, Adoption I, Leo Pfeffer Papers, Special Collections Research Center, Syracuse University Libraries (documents from Pfeffer's Papers are hereafter cited as SYR).

34. Leo Pfeffer to Shad Polier, "Re: Southern Brief."

35. "Brief of the Free Synagogue Child Adoption Committee," 31.

In an effort to galvanize support for the appeal, Pfeffer sent numerous memoranda and "Dear friend" letters to convince Jewish community groups that the court had treated the girls as "religious objects" rather than "human beings and members of civic society."³⁶ Months earlier he had contacted influential "separationist" groups and individuals, among them Protestants and Other Americans United for the Separation of Church and State and the National Council of Churches of Christ, to publicize the case.³⁷ He even ghostwrote a draft for Polier to send to the head of the National Council of Churches, who had misconstrued the brief. Deploying a Jewish hypothetical that he would later incorporate into his own briefs, Pfeffer stressed: "The issue would be entirely the same" if the case involved a Jewish child who "was circumcised at birth as a Jew and thereafter raised as a Catholic by adoptive parents."³⁸

Pfeffer understood that the outcome of the *Santos* case was of vital interest to the Catholic Church, which had sent its most formidable litigator to represent the girls' mother: constitutional law expert Porter Chandler. Known as the "Cardinal's Lawyer" because he served as counsel for New York's Cardinal Spellman and as attorney for the Archdiocese of New York, Chandler also represented what Pfeffer called "individual low-income Catholics, providing them with some of the highest paid counsel in the nation."³⁹ Chandler told the New York Court of Appeals that "the children are Catholic" and "their mother (whose wishes are, or should be controlling) wants them to remain as such."⁴⁰ He challenged the Free Synagogue Child Adoption Committee's "extravagant" claim that the children "had become Jewish," arguing that it failed "to distinguish between Jewish religious faith, racial history, language and culture" and "cannot be distorted into a change of the children's religious faith, to be enforced by civil authority against the vehement objections of the mother."⁴¹

36. Leo Pfeffer to Jewish Community Relations Council, "Religious Liberty Issue in Adoption," March 3, 1952, 3 and Leo Pfeffer, "Dear Friend," CLSA Memorandum, May 19, 1952, SYR, box 12, Adoption I.

37. Leo Pfeffer to Sandy Bolz, November 15, 1951 and Sandy Bolz to Leo Pfeffer, November 26, 1951, SYR, box 12, Adoption I.

38. Leo Pfeffer to Shad Polier, June 2, 1952, SYR, box 12, Adoption I. See also Pfeffer, *Church, State, and Freedom* (1953), 593.

39. On Chandler, see Steven K. Green, *The Third Disestablishment: Church, State, and American Culture, 1940-1975* (New York: Oxford University Press, 2019), 258 and Leo Pfeffer, "Amici in Church State Litigation," *Law and Contemporary Problems* 44 (1981): 93.

40. "Brief of Respondent Jandyra Southern," Matter of Santos, Court of Appeals, State of New York, argued by Porter Chandler, 5, I-77, box 245, folder 22.

41. "Brief of Respondent Jandyra Southern," Matter of Santos, 9-10.

In the end, the girls remained exactly where the Appellate Division placed them: in the custody of Roman Catholics. Pfeffer had anticipated that if the New York Court of Appeals affirmed the Appellate Division's ruling, Polier could launch an appeal to the Supreme Court.⁴² Late in 1952, however, that possibility was foreclosed when the New York Court of Appeals declared that it lacked jurisdiction to review the case. The only option was to seek further hearing in the New York City Children's Court. But the girls had been living in a Catholic foster home for over a year, and Polier decided that a "retransfer" to a Jewish home would cause more emotional upheaval. Equally important was the fact that the children's mother continued to insist "that she wished them brought up as Catholics."⁴³

THE MOTHER'S CHOICE

This issue—the parents' right to determine the religious upbringing of their children—would become a guiding principle for Pfeffer and the CLSA. As Pfeffer later explained, it was precisely because Jandyra Santos, the girls' biological mother, was determined to have her children raised as Roman Catholics that the officers the AJCongress had strongly opposed CLSA intervention as *amicus curiae* in the *Santos* appeal. The "official position" of the AJCongress "is not against religious protection laws," he clarified, "but only against those which do not make an exception for cases where the natural parent consents to the adoption."⁴⁴ For that reason, Pfeffer refused to intervene in the infamous 1955 Hildy McCoy case in Massachusetts (*Ellis v. McCoy*), in which a Jewish couple was charged with kidnapping the child of a Roman Catholic mother who objected to the adoption.⁴⁵ He was also reluctant to enter the 1955 *Osnos* adoption case in Illinois, in which a Jewish couple appealed a lower court ruling favoring a Catholic mother who wanted her six-month-old child returned to her so she could be adopted by people of her own faith.⁴⁶

42. Pfeffer, *Church, State, and Freedom* (1953), 591.

43. Shad Polier to Dr. Myron Lieberman, October 14, 1954, SYR, box 12, Adoption I.

44. Leo Pfeffer to Will Maslow, re. "Re. Your letter to Bea Citrynell—Ellis Case," August 3, 1955, I-77, box 245, folder 1.

45. Susan A. Glenn, "The 'Kidnapping of Hildy McCoy': Child Adoption and Religious Conflict in the Shadow of the Holocaust," *Jewish Social Studies* 24 (Spring–Summer 2019): 80–123 and *Ellis v. McCoy*, 332 Mass. 254 (1955).

46. Leo Pfeffer to [Joseph] Minsky, May 11, 1955 and Shad Polier to Leo Pfeffer, May 16, 1955, I-77, box 245, folder 14.

The challenge for Pfeffer and the CLSA was to find test cases where the mothers approved of the adoption of their children across religious lines, but the courts acted to enforce the religious "heritage" of the child. While the *Santos* case was wending its way through the New York courts, Massachusetts became a special target of CLSA adoption litigation because, as Pfeffer told Will Maslow, although more than forty states had religious protection statutes on the books, it was only in Massachusetts—"the state of all 48 which is the most subject to [Catholic] church domination"—that the majority of judges attempted to "bar such adoptions."⁴⁷

On all matters, including child adoption, the CLSA chose its cases carefully, looking for projects that would have "durable results." Rather than "swatting mosquitos," the CLSA aimed to "drain the swamp" of discrimination not only against Jews, but "against all racial, religious, and ethnic groups."⁴⁸ Pfeffer believed that "the basic issue" in Massachusetts was whether it was "constitutionally and morally" permissible for the state to prohibit the adoption of a child by "persons of a different faith" if *both* the child's mother *and* the adoptive couple sought the adoption.⁴⁹ Accordingly, the CLSA began "keeping its ear to the ground" for a case that would allow it to test the constitutionality of judicial over-enforcement of the Massachusetts adoption statute.⁵⁰ In December 1951 they found it. A Protestant couple, Henry and Doris Gally, had been denied permission to adopt the child of an unmarried Roman Catholic mother who agreed to have her daughter raised as a Protestant. The probate judge, citing the statute, had ruled against the adoption strictly on religious grounds. The Gallys' lawyer, John Lombard, approached the CLSA for help with the appeal. Lombard considered the case "a perfect one" because of the "non-religious facts" that spoke for his clients' "fitness" to adopt the child.⁵¹ Shad Polier had a different reason for seeing *Gally* as a "perfect" test. He called it "a classic one because no Jews were involved."⁵²

47. Leo Pfeffer to Will Maslow, Re. "Your letter to Bea Citrynell—Ellis Case," August 3, 1955, I-77, box 245, folder 1.

48. Will Maslow, "How CLSA Selects its Projects," Confidential Memorandum, December 12, 1955, I-77, box 30.

49. Leo Pfeffer to Jules Cohen, June 3, 1953, SYR, box 12, Adoption I.

50. Memorandum from Gerald Berlin to Will Maslow, "New England Adoption Problem," December 13, 1951, I-77, box 243, folder 1.

51. Berlin to Maslow, "New England Adoption Problem," December 13, 1951, 2-3.

52. Memorandum from Jacob Joslow to Morris Michaelson "re: Action of the AJCongress in Adoption Cases," February 8, 1955, I-77, box 82, folder 1.

The fact that “no Jews were involved” did not, however, make the *Gally* case an easy sell to the local Jewish community. Boston-based CLSA lawyer Gerald Berlin reported that many Jews were “in violent opposition” to the CLSA’s plan to enter the case as *amicus curiae*. Opponents included “orthodox rabbinical circles, who, like the Catholics, asserted that it is theologically unthinkable for a baby to be adopted out of the faith in which it is ‘born.’” Equally determined resistance came from Jewish social workers affiliated with the Jewish Children and Family Service who were “even more articulate than, on a casework basis, religion should be all-controlling as a matter of successful adoption prognosis,” and who had already begun to “organize an anticipatory opposition.”⁵³ The New England branch of the AJCongress was itself sharply divided about the CLSA’s plans. One faction “bitterly fought the entrance of the [American Jewish] Congress in[to] the case,” arguing along with members of the Anti-Defamation League that their proposed actions would “antagonize our Catholic friends” and run “contrary to Jewish law.”⁵⁴ The fear of antagonizing non-Jews was hardly limited to the issue of adoption. Will Maslow, CLSA general counsel, reported that in cases where the plaintiff was “identified as a Jew or his cause is publicly sponsored by a Jewish organization,” the local Jewish community council may fear that other Jews who were not directly involved in the litigation might become “targets of ostracism or boycott” by non-Jews.⁵⁵ But Pfeffer refused to base his legal strategy on “what the Gentiles say.” He doubted whether Jewish-Christian relations could actually be “good” if Jews hesitated out of fear to call out “a grave wrong done to them,” questioned whether Jewish “survival” was possible if Jews “fear to shout out and kick when a wrong is committed,” and boldly declared: “The Hebrew prophets were troublemakers rather than pacifiers; their concern was with what was right and what was wrong, not what was good for community relations.”⁵⁶

Although AJCongress national headquarters in New York fully supported the plan to enter the *Gally* case, Associate Director Isaac Toubin, an ordained (Conservative) rabbi, urged that, before making the “fitness of the parents to adopt” the sole criterion for the CLSA’s position, the lawyers give “more serious consideration” to the issue. Using a hypotheti-

53. Berlin to Maslow, “New England Adoption Problem,” December 13, 1951, 2.

54. Joslow to Michaelson, “re: Action of the AJCongress in Adoption Cases,” February 8, 1955. See also “Notes on Address by Rabbi Leon A. Jick,” [1955], 1–2.

55. Will Maslow, “The Legal Defense of Religious Liberty” (September 1961), quoted in Sorauf, *Wall of Separation*, 47.

56. Leo Pfeffer, “Counterreflections on Church and State,” *Midstream* 8 (December 1962): 19.

cal, Toubin cautioned that if the court should decide that the Gallys were fit to adopt a child on the basis of nonreligious criteria, in the future "it would mean that a Christian parent more fit socially and economically to adopt a particular child, might thus be eligible in terms of fitness to adopt a known Jewish child and certainly Jewish law would not tolerate that." Jewish law would also not "permit the adoption by Jewish parents of a child known to be Christian who might be expected to be raised as a Christian," Toubin emphasized, adding that, "in any event Jewish law would not encourage such an adoption under any circumstances."⁵⁷ His concerns reflected the duality of the AJCongress mission. The leaders of the organization hoped that, by "acting through" the CLSA, the Congress could promote Jewish "equality" without sacrificing "Jewish distinctiveness."⁵⁸

The CLSA's 1952 amicus brief, submitted by Shad Polier, Leo Pfeffer, and Gerald Berlin, underscored the fitness of the Gallys to adopt the child, but the central argument of the brief was "the religious freedom of the mother to determine the religion of her own child." Citing the Establishment clause of the First Amendment, the Equal Protection clause of the Fourteenth Amendment, and the Religious Liberty and Free Exercise clauses of the Constitution of the Commonwealth of Massachusetts, CLSA lawyers claimed that in cases like this one, "[w]here . . . adoption is in the interest of the child, involves no disturbance of any religious convictions and beliefs already inculcated in the child, and represents the free and voluntary choice of the parent, such a statute represents an unwarranted and totally unjustifiable intrusion of secular authority in religious affairs."⁵⁹

Although the Supreme Judicial Court of Massachusetts reversed the lower court's decision and allowed the adoption, the opinion sidestepped the crucial constitutional issues. Writing for the majority, Chief Justice Stanley Qua asserted that it had not been "practicable" for the probate judge to deny the adoption of a child in need of a secure home, especially when "no person or persons of the same religious faith are seeking to adopt this child." The statute itself was not intended "to cast aside the familiar and obviously pertinent criteria which had been so long employed in determining questions of child custody, not only here but in other jurisdictions as well," he asserted. Nor was it intended to

57. Isaac Toubin to Shad Polier and Will Maslow, June 26, 1951, I-77, box 243, folder 1.

58. Svonkin, *Jews against Prejudice*, 81.

59. Commonwealth of Massachusetts, Supreme Judicial Court, "Brief of the American Jewish Congress, Amicus Curiae," January 1952, 5, I-77, box 245, folder 3.

suggest “that identity of religion should be the sole or necessarily the principal consideration.”⁶⁰

Publicly, the AJCongress applauded the outcome of the appeal. Privately, Shad Polier called it a “shocking opinion,” which failed to state that: “when a mother has placed her child for adoption with a particular family and has consented to the adoption by that family . . . it is never ‘practicable’ to insist on the application of a religious doctrine contrary to the wishes of the mother since she has or should have the final say as to whether there is to be any adoption at all.”⁶¹ The Catholic Church and the Massachusetts Department of Public Welfare also found the court’s opinion in *Gally* “shocking” but for completely different reasons. *The Pilot*, newspaper of the Archdiocese of Boston, denounced the AJCongress for promoting a “secularist philosophy which considers religion, any religion, of secondary or minor importance and the material advantages of life as of prevailing consequence” and accused the court of making “this philosophy its own.”⁶²

The Massachusetts Department of Public Welfare threw down the gauntlet. Commissioner Patrick A. Tompkins—a man Pfeffer privately referred to as “the *momzer*” (“bastard”)—pledged that his office would “never” under any circumstances allow a non-Catholic family to adopt a Catholic-born child, even if no Catholic family was available.⁶³ The sectarian agencies, long the champions of religious matching, announced that they would enforce the commissioner’s “binding rules.” Dora Margolis, Executive Director of the Jewish Children and Family Service informed the AJCongress that “under no circumstances” would her office approve adoptions “if they cross religious lines.”⁶⁴

“HOLY WARS, THE INQUISITION, TORRENTS OF BLOOD”

In the aftermath of *Gally*, Pfeffer and the CLSA pushed forward with their plans to find a second constitutional test case. In the spring of 1954, the adoption petitions of a Jewish couple, Rouben and Sylvia Goldman, had been rejected by the Essex County Probate Court even though the

60. *Gally petitioner*, 107 N.E.2d 21 Mass. (1952) and Pfeffer, *Church, State, and Freedom* (1953), 592–93.

61. Shad Polier to Florence Brown, June 27, 1952, I-77, box 243, folder 1.

62. *The Pilot*, June 28, 1952, I-123, box 42, folder 1, BJCRC.

63. “Minutes of Meeting of Group of People from Council and Jewish Family and Children’s Service interested in H2636,” May 11, 1954, box 42, folder 1, BJCRC. On the “momzer” reference, see Leo Pfeffer to Shad Polier, March 12, 1956, I-77, box 245, *Goldman v. Fogarty* Case Correspondence.

64. Dora Margolis to Gerald Berlin, June 16, 1955, box 42, folder 2, BJCRC.

children's mother, a Roman Catholic named Pearl Dome, had given the couple permission to adopt her twins and raise them as Jews. Acting on reports filed by the Massachusetts Department of Public Welfare, which was determined to prevent all interreligious adoptions, the Probate Court had taken the unusual step of appointing a guardian *ad litem*—a Roman Catholic attorney named John M. Fogarty—who contacted Catholic Charities in an effort to locate Roman Catholic couples who were willing to adopt the twins.⁶⁵ When Probate Court Judge John Phelan denied the Goldmans' adoption petition, he emphasized that, but for the fact that they were Jewish, they were otherwise "fit" to adopt the twins, who were now three years old. Not only had the Goldmans, who received the twins shortly after they were born, treated them with affection and cared for them "as if they were their own," they were "well equipped financially and physically" to become their adoptive parents. The judge based his decision to deny the Goldmans' petition on testimony from Catholic Charities that a number of childless Catholic couples in and around the city of Lynn (near the Goldmans' residence) "were ready and willing" to adopt Catholic children "of the type of the twins"—described as "blond, with large blue eyes and flaxen hair"—and who could provide them with the same level of emotional and material support as the petitioners, "[who have] dark complexions and dark hair." Thus, it was "practicable" under the terms of the statute "to give custody only to persons" of the Catholic faith.⁶⁶

Beyond the gratuitous description of racially associated physical traits, Pfeffer found the judge's legal reasoning constitutionally indefensible. The effect of the court's interpretation of Massachusetts statute, argued Pfeffer, was to enforce the church's dogma of no exit from the faith. When the Goldmans appealed their case to the Supreme Judicial Court of Massachusetts in April 1954, Pfeffer threw himself into the case, advising the couple's attorney of record, John Lombard (who had previously represented the Gallys), on constitutional principles to cite in the brief, appearing in court to share the time allotted for oral arguments, and crafting an amicus brief for the CLSA that placed the issues on the

65. John F. Lombard to Shad Polier, February 23, 1954, I-77, *Goldman v. Fogarty* Case Correspondence; *Petitions of Goldman*, 331 Mass. 647 (1954), 121 N.E. 2d 843.

66. Appendix A, "Findings of Fact of the Trial Court," Commonwealth of Massachusetts Probate Court, *Goldman v. Fogarty* (November 3, 1953), 3-4 and Appendix B, "Opinion of the Supreme Judicial Court," Rouben Goldman and another, April 5, 6, 1954, 7-8, I-77, box 245, *Goldman v. Fogarty* Court Documents.

same constitutional plane as public school prayer and government aid to religious institutions.⁶⁷

Pfeffer's amicus brief is worth a close examination. Not only does it stage a dramatic assault on the state's effort to impose and enforce in-born and no-exit theology, it also raises fascinating conundrums in terms of its implications for the Jewish community. It opens with a statement about the "interest of the amici" clearly intended to deflect concerns about Jewish special pleading.

Our concern is in no way dependent upon the fact that the adoptive parents in this controversy happen to be Jewish and that the faith in which they seek to rear the children is Jewish. We would be equally concerned were the adoptive parents non-Jewish and the children born of a Jewish parent. For, whatever else religious freedom and separation of church and state may mean, the least they mean is the equality before law of persons of all religious faiths and of no religious faith.⁶⁸

Pfeffer's aim was to demonstrate that "a statute which seeks to declare what constitutes the religion of a new-born child without regard to the wishes of its mother is unconstitutional."⁶⁹ In seeking to establish that the twins' religion was Catholic, and in prohibiting their mother from electing to have them raised as Jews, the court had construed the adoption law in ways that violated both the Establishment and Free Exercise clauses. "The purpose sought to be achieved by the statute" and enforced by the court was the "preservation of ecclesiastical sovereignty over new-born children."⁷⁰ While religious organizations may consider "eternal interests" paramount, "unless we accept a union of church and state," wrote Pfeffer, "a secular court may concern itself only with secular interests." Since the petitioners had taken custody of the children since birth, "we do not have here an instance of possible traumatic psychological consequences of a change in religious upbringing."⁷¹

67. Leo Pfeffer to Gerald Berlin, March 15 and March 19, 1954; John F. Lombard to Leo Pfeffer, March 19, 1954; Leo Pfeffer to John F. Lombard, March 22, 1954; John F. Lombard to Leo Pfeffer, October 1, 1954; and Pfeffer to Gerald Berlin, October 4, 1954, SYR, box 13, Interreligious Adoption-Goldman Case, 1955.

68. Brief of Leo Pfeffer, Shad Polier, Will Maslow, and Gerald Berlin, *Amici Curiae*, in Behalf of the American Jewish Congress, Supreme Judicial Court of Massachusetts, Essex County, April Sitting, 1954. In Equity, No. 5325, Rouben Goldman et al., Appellants vs. John M. Fogarty, Guardian Ad Litem, Appellee, 2, I-77, box 245, *Goldman v. Fogarty* Court Documents.

69. Brief, I-77, box 245, *Goldman v. Fogarty* Court Documents.

70. Brief, 24, I-77, box 245, *Goldman v. Fogarty* Court Documents.

71. Brief, 21, I-77, box 245, *Goldman v. Fogarty* Court Documents.

The body of Pfeffer's brief, which reads in part like an effort to relitigate the church-state issues raised by *Santos* case, is rife with irony and paradox. It begins by interrogating the theological basis of the court's claim that Pearl Dome and her twins were "Catholic," asserting that there is "no direct proof that the mother was ever a Catholic or had been baptized as such."⁷² Then he asked what made the twins "Catholic"? "Not only did their mother refrain from having them baptized," she "delivered them shortly after birth to a Jewish couple, and expressed the wish—never revoked—that they be brought up in the Jewish faith."⁷³ By "establishing" the religion of the twins in "complete disregard of their parent's expressed desire," the court had "entered a domain . . . forbidden by the First Amendment and the principle of separation of church and state."⁷⁴

Then, drawing on one of his favorite historical analogies—the Inquisition—Pfeffer noted that barely a decade before the [First] Amendment was adopted, heretics were still being burnt at the stake by the Spanish state "for refusing to accept 'imposed religion.'"⁷⁵ Quoting James Madison's cry that "[t]orrents of blood have been spilt in the world in vain attempts of the secular arm to extinguish religious discord by proscribing all differences in religious opinions," Pfeffer declared it was irrelevant that the religion the court sought to impose on the twins is the "religion of origin of their mother for it must be remembered that the orthodoxy sought to be imposed by the secular arm of the Inquisition was likewise the heretics' religion of origin."⁷⁶ Pfeffer insisted that, while the church had every right "to exercise all of its spiritual influence upon the twins' mother to induce her not to consent to the adoption of the twins by any other than a Catholic couple" and even to "employ ecclesiastical sanctions to that end," when "these means prove unavailing," the church may not "employ the Probate Court and the secular law of adoption to achieve its end."⁷⁷

After reading Pfeffer's brief, Harvard Law Professor Louis Jaffee predicted that the "Holy Wars" statement would provoke even an "ordinary judge to find against you."⁷⁸ But Pfeffer strenuously defended the analogy:

72. Brief, 8, I-77, box 245, *Goldman v. Fogarty* Court Documents.

73. Brief, 12, I-77, box 245, *Goldman v. Fogarty* Court Documents.

74. Brief, 13, I-77, box 245, *Goldman v. Fogarty* Court Documents.

75. Brief, 14, I-77, box 245, *Goldman v. Fogarty* Court Documents.

76. Brief, 15, I-77, box 245, *Goldman v. Fogarty* Court Documents.

77. Brief, 18, I-77, box 245, *Goldman v. Fogarty* Court Documents.

78. Louis L. Jaffee to Will Maslow, November 12, 1954, November 18, 1954, I-77, box 245, *Goldman v. Fogarty* Court Documents.

This has become more or less a standard operating procedure in our briefs Actually, the issue in the Goldman case is much closer [*sic*] related to the ‘Holy Wars, the Inquisition, torrents of blood’ than is public funds for parochial bus transportation or distribution of the bible in public schools. The purpose of the ‘Holy Wars, the Inquisition, and torrents of blood’ was to enforce the church’s dogma on no-exit I don’t think the analogy to the statute involved in the Goldman case, as interpreted by the court, is too far[-]fetched.⁷⁹

Whether or not the judges of the Supreme Judicial Court of Massachusetts took offense at the Inquisition analogy, their 1954 decision upholding the lower court’s ruling against the Goldmans represented a stunning blow to Pfeffer and the CLSA. Chief Justice Qua declared that the probate judge had not offended the Constitution: “There is no ‘subordination’ of one sect to another. No burden is placed upon anyone for maintenance of any religion. No exercise of religion is required, prevented, or hampered.”⁸⁰

Even before the highest court in Massachusetts throttled the Goldmans’ appeal, Pfeffer had vowed that, if necessary, he would take the case all the way up to the United States Supreme Court.⁸¹ In October 1954, Pfeffer, now acting as the Goldmans’ attorney of record, petitioned for a writ of certiorari, asking the Supreme Court to review the case.⁸² He also decided the time was ripe to approach the local Jewish community about amending the Massachusetts adoption law so that an exception could be made in cases where parents agreed to have their children raised by people of a different faith. “While I have little [*sic*] illusions as to our ability to obtain an amendment of the law at the present time,” said Pfeffer, “I still think that it is important to keep the issue alive.” The proposed amendment might “strengthen the courage of lower court judges,” put “the other side on the defensive,” and enable the CLSA to “consolidate” support among local Protestant allies.⁸³ Although it was

79. Leo Pfeffer to Louis L. Jaffee, November 18, 1954, SYR box 13, Interreligious Adoption—Goldman Case.

80. Advance Sheets, Opinions of the Supreme Judicial Court, Rouben Goldman and Another, Petitioners, Essex, April 5–6, 1954 and September 27, 1954, 5, I-77, box 245, *Goldman v. Fogarty* Court Documents.

81. Leo Pfeffer to Gerald Berlin, October 4, 1954, I-77, box 245, *Goldman v. Fogarty* Case Correspondence.

82. Leo Pfeffer, “Petition for a Writ of Certiorari,” Supreme Court of the United States, October Term 1954, Rouben Goldman and Sylvia Goldman Petitioners v. John M. Fogarty, Guardian ad Litem, 5. Copy in I-77, box 245, *Goldman v. Fogarty* Court Documents.

83. Leo Pfeffer to Gerald Berlin, October 29, 1954, I-77, box 245, *Goldman v. Fogarty* Court Documents. See also Gerald Berlin to Shad Polier, December 10, 1954, I-77, box 243, folder 7.

not totally unexpected, the CLSA met a wall of resistance from Boston's Jewish Community Council, which immediately vetoed the very idea of a bill that would lead to "mixed religious" adoptions and threaten "interfaith good will."⁸⁴ Pfeffer concluded that it would not be possible to persuade Jewish naysayers on theological grounds: "I think you will have to fight it out the best you can on constitutional and public policy considerations," he told Gerald Berlin. "You might be able to break through among the Reformed [*sic*] rabbinate but perhaps the most you can hope for is neutrality."⁸⁵

Then came the disheartening news. On February 14, 1955, without offering any comment, the Supreme Court denied certiorari and would not review the case.⁸⁶ The next day, a front-page story in the *New York Times* carried the headline: "Jewish Couple Loses Court Fight to Adopt Roman Catholic Twins."⁸⁷ In May, before process servers from the Massachusetts Department of Public Welfare arrived to remove the children, the Goldmans, armed with an affidavit signed by their mother giving her consent for the adoption, fled to Maine with the twins. At that point, the Pfeffer and the CLSA stepped out of the case on the grounds that legal issues that might arise out of their departure would best be handled by a private attorney.⁸⁸

The Jewish community remained deeply divided about the implications of the court's decision in the case. Some Jews—including those with still-fresh memories of how Christian benefactors who hid Jewish children from the Nazis had them baptized and refused to surrender them to Jewish families and organizations after the war—breathed a sigh of relief, fearing that if the AJCongress had been successful, Jewish children would end up in Christian homes.⁸⁹ Educator Abraham Duker also observed that the recent loss of six million Jews led Orthodox leaders to question the principles advanced in the *Goldman* case. As they saw it: "The very notion that the mother alone has the right to decide the religious future of her child, particularly so, a mother who is willing

84. Gerald Berlin to Shad Polier, December 10, 1954, I-77, box 243, folder 7.

85. Leo Pfeffer to Gerald Berlin, November 1, 1954 and Gerald Berlin to Leo Pfeffer, November 5, 1954, I-77, *Goldman v. Fogarty* Case Correspondence.

86. Pfeffer wrote in confidence that he had doubted whether the US Supreme Court "was ready to take jurisdiction of this type of controversy inasmuch as this is the first time the issue has been brought to the court" (Leo Pfeffer to Herbert S. Falk, Jr., February 18, 1955, I-77, box 245, *Goldman v. Fogarty* Case Correspondence).

87. Luther A. Huston, "Jewish Couple Loses Court Fight to Adopt Roman Catholic Twins," *New York Times* (February 15, 1955), 1.

88. Leo Pfeffer to Shad Polier, April 13, 1955, I-77, box 243, folder 1.

89. Julius Fishman, "Likes Adoption Law," *Jewish Advocate*, February 24, 1955, clipping, I-77, box 82, *Goldman v. Fogarty* Case Clippings.

to abandon her own child” wrongly placed her individual rights above the “perpetual sovereignty of the [Jewish] group.”⁹⁰

“I AM OPPOSED TO ALL RELIGIOUS PROTECTION PROVISIONS”

The day after the Supreme Court denied Pfeffer’s petition for a writ of certiorari, Will Maslow told the AJCongress’s New England office: “We may have been stunned by the Goldman decision, but we haven’t given up the fight and will continue to press this issue.”⁹¹ In an April 1955 article published in the [American Jewish] *Congress Weekly*, Pfeffer explained why this fight mattered to the “entire Jewish community” and the “grave implications” of the *Goldman* decision for the “American principle of religious freedom and the separation of church and state.” The courts in Massachusetts had relied on “propositions” that were “completely alien to American concepts of freedom of conscience,” wrote Pfeffer. The “proposition” that children were “born with a religion” violates “the American concept that religion is a matter of choice or election, not blood status.”⁹² Reiterating a key point from his amicus brief, Pfeffer assured his readers that “Jews and Catholics may and do consider religion inheritable,” and that this was both “entirely proper” and “constitutionally protected insofar as its effectuation remains within the religious group.” But, he cautioned, once the secular arm of the government used its “machinery” to enforce these views, it violated the “American” principle of religious freedom, which “implies free exit and voluntary entry.” Emphasizing that “Judaism neither seeks nor needs the compulsory arm of the government to retain its adherents,” he urged the Jewish community to resist any and all efforts to enforce “religion by compulsion.”⁹³

By that time, however, Pfeffer’s personal position on religious protection laws radically diverged from the official view of the AJCongress, which supported religious “matching,” provided that there were “escape clauses” for parents who consented to an out-of-religion adoption. In his June 1955 law review article, “Religion in the Upbringing of Children,” Pfeffer declared: “This writer believes that ‘religious protection’ laws have no place in adoption proceedings.”⁹⁴ Pfeffer maintained that

90. Duker, “Jewish Attitudes to Child Adoption,” 142.

91. Will Maslow to Gerald Berlin, February 15, 1955, I-77, box 245, *Goldman v. Fogarty* Case Correspondence.

92. Leo Pfeffer, “Religion by Compulsion,” *Congress Weekly* (April 25, 1955), 6.

93. Pfeffer, “Religion by Compulsion,” 7.

94. Pfeffer, “Religion in the Upbringing of Children,” 377.

in all disputes over the religious upbringing of children, including those involving custody proceedings in divorce, the only circumstance in which "judicial determination of the future religious upbringing of a child is justifiable" on constitutional grounds was where "the child's temporal welfare" was clearly at stake.⁹⁵ In some cases, Pfeffer allowed, the child's prior religious training must also be considered along with other factors, such as when a significant change in the child's religious upbringing "may have a serious traumatic effect upon its mental welfare."⁹⁶ But, he argued, the psychological "consequences of such a change in religious upbringing are likely to be less serious than those of compelling a person to rear a child in a religion which to him is hateful and false and which he deeply believes is certain to carry the child to eternal damnation." He added that it took no special psychological training "to picture the confusion, guilt feelings and mental disorganization of a child compulsorily brought up in the Catholic faith by an orthodox Jew, or compulsorily brought up by a devout Roman Catholic as a Jehovah's Witness."⁹⁷

"SUPPOSE THE MOTHER WERE JEWISH"

Judicially enforced religious compulsion in child custody was precisely the issue at stake in a controversial Iowa case that the CLSA entered in the fall of 1955. Gladys Lynch, a divorced Protestant mother, had been found guilty of contempt by a district court judge who declared that she had violated the terms of her 1953 divorce decree requiring her to raise her (now nine-year-old) son in the Catholic faith of his father. Facing the possibility of prison time, she appealed the decision on constitutional grounds to the Iowa Supreme Court.⁹⁸

AJCongress director Isaac Toubin initially refused Pfeffer's request to intervene. But Pfeffer insisted that the principles were so important that if Rabbi Toubin would not change his mind, he would ghostwrite an amicus brief on behalf of the American Civil Liberties Union (ACLU). "The issue is simple, Pfeffer explained. "Does it constitute an infringement of religious liberty and the separation of church and state for an American court to throw a mother in jail because she refuses to bring up her child in a religion in which she disbelieves?" To emphasize the

95. Pfeffer, "Religion in the Upbringing of Children," 376, 359.

96. Pfeffer, "Religion in the Upbringing of Children," 359, 371.

97. Pfeffer, "Religion in the Upbringing of Children," 359.

98. Leo Pfeffer to Gladys M. Lynch, September 15, 1955, SYR box 22, Lynch Child's Religion Case. The case was widely reported; see, e.g., "Divorce Has Religious Test," *New York Times* (September 13, 1955), 25 and "Religious Stipulation in Divorce Pact Voided," *Washington Post and Times Herald* (September 19, 1956), 3.

gravity of the case, Pfeffer compared *Lynch v. Uhlenhopp* to the landmark 1948 case *Shelley v. Kraemer*, in which the CLSA had submitted an amicus brief challenging the enforcement of racially restrictive housing covenants. "The fact that a person signs a racial restrictive covenant does not mean that the law can compel him to abide by it," said Pfeffer. And in the case of Gladys Lynch, "the fact that the mother had previously agreed to raise the child in her divorced husband's religion does not alter the situation."⁹⁹

To persuade Rabbi Toubin that the Jewish community would welcome AJCongress intervention in the case, Pfeffer presented a hypothetical that framed the issues in terms of Jewish law and communal values:

*Suppose the mother were Jewish and the father Catholic, would the Jewish community accept a decision which compelled a Jewish mother to raise her child in the Catholic faith? Even if the situation were reversed and the father were Jewish, I am sure the Jewish community would have no sympathy for a father who insists upon not taking the child into his own home, but having the child raised as a Jew in a Catholic home. I think the religious Jewish community at least would realize that such a situation is absolutely impossible.*¹⁰⁰

The 1955 amicus brief Pfeffer authored on behalf of the AJCongress argued that for the state to compel the custodial parent to perform a religious act and then imprison her for refusal to do so against her religious "conscience" violates "the basic principles of American democracy."¹⁰¹ The government could not restrict the rights of any individual to exercise his or her religion or to raise a child in that religion "except where and solely to the extent necessary to avert a clear and present danger to a public interest that the government has the power to protect." But "what interest within the competence of the state of Iowa is endangered by the act of Mrs. Lynch in rearing her child in her own faith?"¹⁰² The constitutional issues were clear, declared Pfeffer: "Freedom to worship God as one believes is, in the words of the Declaration of Independence, an 'unalienable right' And the same is true in respect to freedom to teach one's children how to worship God." A contract between parents that prohibited a person from changing their own religion or that of the child was both a violation of public policy and the "Federally secured right

99. Leo Pfeffer to Mr. [Isaac] Toubin re: "Iowa Custody Case," October 4, 1955, SYR, box 22, Lynch Child's Religion Case.

100. Leo Pfeffer to Mr. [Isaac] Toubin re: "Iowa Custody Case," October 4, 1955, SYR, box 22, Lynch Child's Religion Case.

101. Leo Pfeffer, Will Maslow, and Shad Polier, "Brief of Amicus Curiae," *Gladys M. Lynch v. Harvey Uhlenhopp*, Supreme Court of Iowa (1955), 18-19, SYR, box 22, Lynch Child's Religion Case.

102. Pfeffer, Maslow, and Polier, "Brief," 8, SYR, box 22.

of religious liberty" and "no less unconstitutional than judicial enforcement of an agreement not to sell one's house to a Negro."¹⁰³ Although in 1956 the Iowa Supreme Court reversed the lower court's contempt citation, it left the constitutional question unresolved, indicating that it was "indefiniteness" of the religious provisions of the couple's divorce decree that would keep Lynch from going to jail.¹⁰⁴

If *Shelley v. Kraemer* (1948) provided the analogy for Pfeffer's brief in the *Lynch* child custody case, it was another the landmark United States Supreme Court case, *Torcaso v. Watkins* (1961) that provided a precedent for his intervention in a 1970 case involving a New Jersey couple, John and Cynthia Burke, whose adoption petition had been denied because they did not believe in God. A decade earlier, Roy Torcaso, an atheist, had been denied a commission as a notary public in Maryland because he refused to take an oath that he "believed in the existence of God." Serving as Torcaso's co-counsel, Pfeffer helped convince a unanimous Supreme Court that Maryland's religious oath was unconstitutional not only because it preferred religion over nonreligion, but also because it preferred some religions over others, in particular those based on a "personal deity."¹⁰⁵

The 1970 *Burke* adoption case also concerned the constitutional rights of nonbelievers. As Pfeffer explained, in adoption practices, having no religion was just as disqualifying, and sometimes more so, than having the wrong religion. It was the practice of adoption agencies across the country to exclude "religiously unaffiliated couples" from consideration. Some agencies went further still by excluding religiously affiliated couples who demonstrated "less piety" than the agency deemed appropriate. It was also not unusual, noted Pfeffer, for an adoption agency to demand "certification" by a clergyman who could attest to the fact that the couple regularly attended religious services and, if they already had a child in their home, that "they were bringing it up religiously."¹⁰⁶

But New Jersey law made religious matching discretionary, and it fell to the judge making orders for an adoption to determine how much weight should be given to religious considerations.¹⁰⁷ The Burkes' adoption petition had been denied "solely" on the grounds that they had no "religious affiliation" and did not believe in a "Supreme Being." However,

103. Pfeffer, Maslow, and Polier, "Brief," 10, SYR, box 22.

104. *Lynch v. Uhlenhopp*, 78 N.W.2d 491 (1956).

105. *Torcaso v. Watkins*, 367 U.S. 488 (1961); Pfeffer, "Autobiographical Sketch," 511-12; and Holcomb, *Guardian of the Wall*, 58-60.

106. Leo Pfeffer, *God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon, 1975), 124-28, quote 124.

107. *In Re Adoption of 'E'*, 59 N.J. 36 (1971), 279 A.2d 785.

both the adoption agency and the trial court judge himself had found the couple to be “persons of high ethical and moral standards.” In addition, the Burkes had already demonstrated to the court that they were model parents to another child they had adopted from the same agency. However, the trial judge ignored all other evidence of the couple’s fitness to adopt. Quoting from the New Jersey constitution, he pronounced that the infant’s religious rights had already been violated. “No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience.” He added that “the child should have the freedom to worship as she sees fit, and not be influenced by prospective parents who do not believe in a Supreme Being.”¹⁰⁸

The trial judge claimed that the First Amendment issues in *Torcaso* were “inapplicable” to the present case, but Pfeffer, who became the Burkes’ co-counsel on appeal to the New Jersey Supreme Court, was determined prove him wrong. Pfeffer not only questioned whether the judge had the power “to utilize a religious test in its judicial discretion in adoption proceedings,” he also argued that preventing an adoption because the prospective parents did not believe in a “Supreme Being” violated the First Amendment’s “ban on laws respecting an establishment of religion or prohibiting its free exercise and the Fourteenth Amendment’s ban on denial of equal protection of the laws and deprivation of liberty without due process of law.”¹⁰⁹ The “crux of the matter,” argued Pfeffer, was that in asking the couple to return sixteen-month old “E” to the adoption agency “so that she might be turned over to some other couple who would have agreed to raise her in a recognized religion,” the judge had not ensured “freedom of choice” either for the plaintiffs or for the child but had imposed a religion upon a child.¹¹⁰ These arguments helped persuade the New Jersey Supreme Court to reverse the lower court’s decision. Calling the case “analogous” to *Torcaso*, the court held that, in making religion the “decisive” factor, the trial judge had placed an unconstitutional burden on “the opportunity to adopt a child.”¹¹¹

108. “Judge Refuses to Authorize Adoption by Non-Believers,” *Religion News Service* (November 19, 1970), I-77, box 243, folder “Adoption and Custody, General Correspondence,”

109. Leo Pfeffer, “Burke Brief” (draft), December 27, 1970, 1-2, 4-5, I-77, box 243, folder “Adoption and Custody, General Correspondence.” Co-counsel was New Jersey lawyer Albert G. Besser.

110. Pfeffer, “Burke Brief (draft),” 8, I-77, box 243.

111. *In Re Adoption of ‘E’*, 279 A 2nd N.J.(1971). See also H. Kivlin, “A Study of Religious Requirements for Adoption,” *Dickinson Law Review* 76 (1971-72): 529-54.

CHANGING THE LAWS

Meanwhile, by 1970 the ground was dramatically shifting in Massachusetts and New York. For more than a decade Pfeffer and Polier had pursued legislative action to complete what they had initially set out to do through litigation. "The work we did 15 years ago in Massachusetts in the *Goldman* case has finally borne fruit," Pfeffer wrote with evident satisfaction to Shad Polier. On June 5, 1970, Massachusetts governor Francis Sargent had signed into law a bill "practically removing religious difference as a bar to adoption," except in cases where the parent requested a religious placement, and then only if such a placement was otherwise judged to be in the child's "best interests."¹¹² That year the New York legislature also voted into law a "parental choice" provision that allowed parents relinquishing a child for adoption to decide on its future religious upbringing, provided that the proposed adoption was otherwise "consistent with the best interests of the child." This change was the culmination of more than a decade of work by the CLSA and the New York Board of Rabbis to create greater flexibility in judicial decision-making, a campaign that met strong opposition from Orthodox leaders outside of these organizations.¹¹³

Pfeffer had wanted an even more radical revision of the New York law. In his 1969 testimony before the Subcommittee on Family Law of the Assembly Judiciary Committee, he had urged the passage of a constitutional amendment that would completely "rule out" consideration of the religious wishes of parents in adoption cases and in awards of permanent custody, except in situations where "by reason of the age and prior religious training of the child" a change in religious environment would "create psychological and emotional injury." He testified that the only situation in which considerable "weight" should be given to parental "religious wishes" was when the transfer of custody was temporary, as in foster care.¹¹⁴

Through church-state litigation and legislative activism, Pfeffer had challenged the constitutionality of "prohibitory" statutes and legal rulings on the religious upbringing of children. His arguments amounted to a radical rewriting of the American child welfare script. With very few exceptions, insisted Pfeffer, the welfare of children did not depend on

112. Leo Pfeffer to Shad Polier, August 17, 1970, I-77, box 244, folder "Adoption and Custody, Massachusetts 1970 Legislation and Litigation."

113. "Statement of the American Jewish Congress and the New York Board of Rabbis by Leo Pfeffer," June 14, 1957, I-77, box 243, folder 1.

114. Memorandum from Shad Polier to Florence Kreech re: "Religion in Adoption," November 20, 1969, Shad Polier Papers, American Jewish Historical Society, P-572, box 10, folder 10.

their being raised “in this or that religious faith” or even by parents who professed a belief in a Supreme Being, but only on finding a secure and loving environment. At the same time, Pfeffer was adding complicating dimensions to postwar Jewish debates about the role of the family in promoting religious and cultural continuity. “Suppose the mother were Jewish.” This legal hypothetical played a crucial role in Pfeffer’s efforts to galvanize Jewish support for his child adoption and custody cases.

But the hypothetical also presented a conundrum. If the mother in the *Lynch* case had actually been Jewish rather than Protestant, the religion clauses of the First Amendment would protect her from having to raise her child as a non-Jew. On the other hand, if the biological mothers in the *Goldman* and *Gally* cases had actually been Jewish rather than Roman Catholic, the Free Exercise and Establishment clauses would protect their rights to give their “Jewish-born” children to non-Jews. One hypothetical supported Jewish continuity, while the other, Pfeffer’s critics worried, appeared to threaten it. However, to Pfeffer, the greatest threat to Judaism was “religion by compulsion.” Religious groups could permanently fix the status of mothers and their children on the basis of birth, blood, and baptism. But under the constitution, the state must respect “voluntary” entry and “free exit.”

MORALLY AND CONSTITUTIONALLY INDEFENSIBLE

Pfeffer’s campaign to loosen the grip of religious protection laws governing adoption and his ongoing constitutional challenges to public funding for religious institutions came together in unexpected ways in 1973 and the decade that followed. That year he was involved in a furious debate about a federal class action foster care lawsuit that, in the words of one former CLSA officer, “virtually tore the American Jewish Congress apart.”¹¹⁵ The lawsuit, *Wilder v. Sugarman* (1973), which later became *Wilder v. Bernstein*, alleged that Black Protestant children, the most numerous group in New York City’s foster care system, were routinely denied care by high quality Jewish and Catholic child welfare institutions that received 70–90 percent of their funding from the government but gave preference to “their own.” As a consequence, children like thirteen-year-old Shirley Wilder, the lead plaintiff in the lawsuit, were lucky to be placed in one of the few Protestant-run agencies. More often than not, Black children were consigned to dangerous and overcrowded public shelters and prison institutions such as New York State’s “training schools.” Brought by lawyers for the New York Civil Liberties Union

115. Nathan Z. Dershowitz to Alvin Hellerstein, December 15, 1980, I-77, box 578, folder 4.

and the Legal Aid Society, the *Wilder* lawsuit named as defendants six New York City welfare administrators and seventy-seven privately run but publicly funded sectarian agencies, six of them Jewish, charging all of them with using the state's religious protection statute to justify entrenched policies of racial discrimination.¹¹⁶

Deeply divided about whether to intervene and on whose side, the leadership of the AJCongress held meeting after meeting, debated and prevaricated. Although Pfeffer believed it was "unwise" for an organization so deeply divided to enter the lawsuit at that time, he also insisted "it was the right and obligation of the [Congress] membership to know what is at stake." He called the New York foster care system morally and constitutionally indefensible, "unjustifiable in principle and practice." Any institution that "receives funds from the tax of all the people may not close its doors to any people because of race or religion," declared Pfeffer. In other states, sectarian and nonsectarian institutions accepted children "regardless of religion" but still provided opportunities for "training according to their religion." New York must do the same.¹¹⁷

As the lawsuit dragged on, Pfeffer, who was in and out of the hospital and no longer the loudest voice in the room on church-state issues, watched from the sidelines as the leadership of AJCongress abandoned the organization's previous stance of neutrality and announced their opposition to the 1984 *Wilder* settlement. Negotiated by lawyers for the City of New York and the Civil Liberties Union, the settlement stipulated that children be served on a "first-come, first-served basis" *regardless of religion or race*. The wishes of the parents that a child be placed with an agency of a particular religious affiliation would be considered only if it did not put that child ahead of others "for whom the program was also appropriate." The only exception, the city's concession to Orthodox Jewish leaders, went to "specially designated agencies" serving children whose religious beliefs "pervade and determine the entire mode of their lives."¹¹⁸ Pulling back from Pfeffer's absolutist stance on the separation of church and state, and abandoning their organization's long-standing

116. Nina Bernstein, *The Lost Children of Wilder* (New York: Pantheon, 2001); Herman, "Difference," 79–82; and Nomi Maya Stolzenberg, "Righting the Relationship Between Race and Religion in American Law," *Oxford Journal of Legal Studies* 31 (Autumn 2011): 583–602.

117. "Excerpt from Met Council Minutes of Nov. 8, 1973," 7, I-77, box 577, folder 11. See also Leo Pfeffer, "Position Paper on Wilder v. Sugarman," August 1973, I-77, Box 577, folder 12.

118. Martin Guggenheim, "State-Supported Foster Care, the Interplay between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children: *Wilder v. Bernstein*," *Brooklyn Law Review* 56 (1990–91): 622–26 and Bernstein, *Lost Children*, 323–26.

philosophy that what was “good for democracy” was also “good for the Jews,” the leadership of the AJCongress denounced the settlement as a threat to Jewish “continuity” and declared, along with the Federation of Jewish Philanthropies, that *all* Jewish children, and not just the Orthodox, belonged in a “Jewish environment” and must be the “first served” by high quality publicly funded Jewish foster care institutions.¹¹⁹

In the wake of the *Wilder* settlement and the reactionary stance of the Jewish community, Pfeffer entered what he admitted was a period of “despondency.” Not only was his influence in the AJCongress fading, he also sensed that the Supreme Court in the 1980s was drifting from its earlier stance of “absolutism” on the separation of church and state toward a posture of “accommodationism.” Pfeffer used the occasion of his 1985 autobiography to reaffirm his “deep commitment to the religion clauses as a matter of sincerely held principle,” writing that “absolutists serve an important function in church-state law; any compromise becomes too often the starting point for further compromises.”¹²⁰ Without ever naming *Wilder*, he also let it be known that he wished to be remembered not only for his uncompromising work on church-state litigation but also for his involvement in the struggle for racial equality.¹²¹

Leo Pfeffer died in 1993. Over the course of his long career as a church-state litigator, he helped change the landscape of American law, including adoption law. His cases and campaigns against rigidly enforced religious protection statutes helped loosen the grip of “prohibitory” adoption laws and practices, not only in New York and Massachusetts but in other jurisdictions as well. From the 1950s to the 1970s, Pfeffer also managed to convince some, but certainly not all, Jewish leaders that the “welfare” of children should not be calculated according to in-born and no-exit views of religious identity, and that the “fitness” of couples to adopt did not depend on their religious beliefs or affiliations or the lack thereof. But these were fragile accomplishments, neither decisive nor permanent. Although he saw the handwriting on the wall, Pfeffer could not predict the degree to which the *Wilder* debacle would hasten the demise of the American Jewish Congress as he had known it. Nor could he fully anticipate how a conservative majority on the United States Supreme Court might upend decades of his Establishment clause jurisprudence while elevating Free Exercise to new and unprecedented heights.

119. Theodore R. Mann to “Dear Friend,” July 20, 1984, I-77, box 578, folder 4; AJ Congress “Confidential Minutes of Executive Committee Meeting,” June 10, 1984, I-77, box 577, folder 11; Theodore A. Mann to Marc Stern, June 15, 1988 and Marc D. Stern to Editor, *America*, July 29, 1987, I-77, box 578, folder 5.

120. Pfeffer, “Autobiographical Sketch,” 529–30.

121. Pfeffer, “Autobiographical Sketch,” 502–6.