

# THE PARADOX OF SAME-SEX PARENTAGE EQUALITY

NOY NAAMAN\*

## ABSTRACT

*There is a general scholarly consensus that the law of parental determination should conform to the principles of equality. But the precise meaning of equality itself remains contested in the era of assisted reproductive technology. Increasingly, legal scholars argue that the commitment to equality requires the law to be untethered from its biology-centric focus and that the relational elements of family configuration must be embraced. Prima facie, this scholarly vision seems promising for the future of same-sex families, as it accommodates their particular reproductive limitations. The present article, however, reveals the cracks in this scholarly logic, by presenting a classic tale of equality paradox: one person's gain becomes another person's hindrance to fair treatment within the same community.*

*Drawing on original and comprehensive case-law analysis of a relatively new mechanism for legal parental determination in Israel, the Judicial Parental Order, the article explains why this vision for equality is not as promising as it first appears. The research demonstrates that, to the extent that the principles surrounding parental determination (a) are enacted in line with (hetero)normative assumptions of family, (b) discourage the fluidity that is well documented within same-sex familial narratives, or (c) ignore the surveillance deployed to reinforce 'acceptable' heteronormative lifestyles, the current vision risks benefiting only certain sectors of the LGBTQ community. To further highlight the broad scale of the paradox I present, comparative references are made to regimes in the U.S. and Canada that, to some extent, operate under similar constraints. The article, then, offers a more nuanced position vis-à-vis equality—one that acknowledges the fact that gays and lesbians do not constitute one homogeneous mass—and therefore exhorts greater sensitivity toward the differences between, and within, the two collectives.*

---

\* Ontario Trillium Scholar, an SJD candidate at the University of Toronto Faculty of Law. This article benefited greatly from comments provided by Amanda Dale, Ben Ohavi, Hadas Raichelson, Lotem Naaman, and Eliran Uziel. Earlier versions of this Article were presented at the Law and Society Association Conference; the ICON-S-IL Conference; the Israeli Law and Society Association Conference; the Dalhousie Law Graduate Society Conference; the Socio-Legal Studies Association Conference; the Public Policy in Israel Seminar of EAIS; and the International Academy for the Study of the Jurisprudence of the Family Conference. I thank the participants in these forums for their helpful comments and especially to Laura Kessler, Jodi Lazare, Aeyal Gross, Avishalom Westreich, Ruth Zafran, and Ayelet Blecher-Prigat, who commented in some of these forums. Finally, I thank the editors of the *Washington University Law Review* for their excellent editorial work and valuable suggestions.

## TABLE OF CONTENTS

I. ORDERING PARENTHOOD .....	5
II. RELATIONSHIP .....	8
A. <i>The Nature of the Paradox</i> .....	9
B. <i>Reorienting Relationship in Legal Parenthood</i> .....	14
III. INTENT.....	18
A. <i>The Nature of the Paradox</i> .....	19
B. <i>Reorienting Intent in Legal Parenthood</i> .....	22
CONCLUSION .....	23

## INTRODUCTION

There is broad scholarly consensus that the law of parental determination in the context of assisted reproductive technology (ART)<sup>1</sup> should conform to the principles of equality.<sup>2</sup> But the precise meaning of equality itself remains contested in this context.<sup>3</sup> Recently, increasing numbers of prominent family law scholars have argued that the commitment to equality requires the law to be untethered from its biology-centric focus,<sup>4</sup> and that it should take into account the relational elements of family configuration, namely, the shared intent to raise the child *together*,<sup>5</sup> the relationship between the co-parents,<sup>6</sup> and the bond

---

1. This article focuses on both surrogacy and anonymous sperm donation. The practice of surrogacy is more complex than conception through sperm donation, as it entails various legal tensions regarding the surrogate and the intended parents. *See, e.g.*, Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 CALIF. L. REV. 401 (2021) [hereinafter Joslin, *Surrogacy*]. Where relevant, therefore, this article distinguishes between these methods of conception based on their respective unique features.

2. For early influential accounts of this consensus, see, for example, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461–64, 490, 542–73 (1990) [hereinafter Polikoff, *Two Mothers*]; Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 394–95 (1990). For more recent contributions, see, for example, Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 230–31 (2006) (evaluating the modern application of marital parentage to same-sex families); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2331–47 (2017) [hereinafter NeJaime, *The Nature*] (offering a comprehensive analysis of how laws of parental recognition in the U.S. fall short in attaining equality based on gender and sexual orientation); Courtney G. Joslin, *Nurturing Parenthood through the UPA* (2017), 127 YALE L.J.F. 589, 593 (2018) [hereinafter Joslin, *Nurturing*] (arguing that “[i]n recent years, opponents of equality for same-sex couples have suggested that the law properly elevates biological parenthood over other forms of parenthood”).

3. NeJaime, *The Nature*, *supra* note 2, at 2332.

4. “Biological relation” refers to genetic contribution and gestation. For further reading on the contingency of the biology-centric approach, see Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1 (2004).

5. *See infra* note 88.

6. *See, e.g.*, Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. WOMEN’S L.J. 119, 120–25 (2018) [hereinafter Blecher-Prigat, *Conceiving Parents*] (advancing an approach in which the relationship between the prospective parents should be the central factor in parental recognition).

developed with the child, once born.<sup>7</sup> At first glance, this vision seems promising for the future of same-sex families,<sup>8</sup> as it accommodates their particular reproductive limitations.<sup>9</sup>

This article seeks to scrutinize this vision and complicate the scholarly consensus by clearing space for a set of important questions that are largely sidelined—questions over whether this vision of parentage equality is attainable for *all* gays and lesbians, given the differences between, and within, these two collectives.<sup>10</sup> Who, within the LGBTQ community, is most likely to benefit? Would shifting the gaze from the binary of homo/hetero—which has long framed the ongoing academic conversation on parentage equality<sup>11</sup>—to other crosscutting hierarchies, such as class and race, enable us to reveal how these hierarchies operate through, and not just against, the category of sexuality?<sup>12</sup> Might this intersectional examination yield valuable insights into the field of parentage determination, be the partners of the same or different sexes?

To pursue this line of inquiry, the present article offers an innovative and comprehensive case law analysis of a relatively new mechanism for legal parental determination in Israel: the Judicial Parental Order (JPO).<sup>13</sup> This mechanism, born out of a commitment to sexual

---

7. For scholarship discussing the importance of the functional approach in the context of same-sex families, see Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 58 (2017) [hereinafter, Feinberg, *Equitable Parenthood*] (“[E]ven if in the future same-sex parents receive greater access to the formal avenues of establishing legal parent status available to different-sex parents, equitable parenthood doctrines will still serve an important function.”). *But see* Gregg Strauss, *What Role Remains for De Facto Parenthood?* 46 FLA. ST. U. L. REV. 909, 909 (2019) (questioning the role of the functional approach in an era where parentage presumptions apply regardless of gender or sexuality).

8. *But see* NeJaime, *The Nature*, *supra* note 2, at 2268 (examining how, although the law has long recognized nonbiological parenthood, this recognition is embedded in, and reinforces, discriminatory distinctions based on gender and sexuality).

9. Indeed, in some circumstances, the parties in same-sex couples are both biologically related to the offspring. Take, for example, female same-sex couples who conceive a child via reciprocal in-vitro fertilization, in which one woman gestates the embryo and the other provides the ovum.

10. See, in this regard, Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN ST. L. REV. 1, 35 (2018) [hereinafter Adler, *Inconceivable*] (offering a valuable account of how the landmark decision in *Pavan v. Smith*, 137 S. Ct. 2075 (2017) benefited female couples, but, to some extent, left male couples behind).

11. See *supra* notes 2, 5 & 7.

12. Cathy J. Cohen’s pioneering and influential work is known for this approach. Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics*, 3 GLQ 437 (1997).

13. I analyzed all court decisions since the enactment of the JPO in 2012, *infra* note 20, until December 31, 2021, through the two most widely-used legal databases: Nevo and Takin. In total, I collected 102 cases (87 officially published and 15 unpublished cases), representing various court opinions from Family (75 cases), District (22 cases), and Supreme Courts (5 cases). Since parental determination cases fall under the jurisdiction of the Family Courts, not all existing cases can be accessed, as, by law, Family Court cases are not made public. Therefore, only cases that judges chose to publish, after redacting the personal information of the parties, are available in databases. Yet, as Israel is a common-law jurisdiction, the published law reflects the law in action, and thus these data provide us with a relatively reliable picture of whose parental status relies on

orientation equality in the context of cross-border surrogacy, has become a common means of having same-sex parentage legally recognized in the context of ART.<sup>14</sup> Yet, a closer inspection of all cases published in legal databases reveals that this reform has, unwittingly, actually served to reinforce other longstanding hierarchies, leaving couples whose living arrangements do not comply with the normative image of family, or who possess fewer resources, more vulnerable to state surveillance or with insufficient legal protections for their child–parent relationships.<sup>15</sup> The present case study, then, is presented as a classic tale of equality paradox: one person’s gain becomes another person’s hindrance to fair treatment within the same community.

My findings lead to the conclusion that it is imperative to pay attention to the conditions that constrain the efforts of *all* people seeking to be recognized as parents. This closer attention, I argue, could allow us to identify the less normative, more hidden stories of parenting, and the drawbacks that may accrue in the most vulnerable sectors of the gay and lesbian community.<sup>16</sup> Nuanced acknowledgment of the *diversity* of same-sex couples could facilitate a more accurate evaluation of the possibilities that are both produced and foreclosed by legal reforms in Israel and elsewhere in the world, and accommodate the tensions that have surfaced in the era of assisted reproductive technology in particular.

One point I would like to note on the case study of this article: in Israel, a repro-normative society, societal belonging is heavily articulated through parenthood. Such a repro-normative culture also produces related norms within the LGBTQ community itself—where members experience pressure from their own LGBTQ friends and

---

the issuance of a JPO. The fact that my dataset includes over 100 cases across multiple regions and levels of courts (mostly of lower courts) enables me to make grounded claims pertinent to the particular inquiry this article aims to pursue. What is more, to expose the cracks in the current scholarly logic around the meaning of equality in the context of legal parental determination, not *all* litigated cases need to be reviewed. For examples of similar forms of analysis, see Yael Hashiloni-Dolev & Zvi Triger, *The Invention of the Extended Family of Choice: The Rise and Fall (to Date) of Posthumous Grandparenthood in Israel*, 39 *NEW GENETICS & SOC’Y* 250, 255 (2020) (using a dataset that includes 13 cases of posthumous assisted reproduction in Israel to explore this legal matter). See also Courtney Joslin & Douglas NeJaime, *How Parenthood Functions*, *COLUM. L. REV.* (forthcoming 2023) (using a dataset that includes approximately 600 appellate decisions in U.S. jurisdictions to explore the features of functional parenthood). To ascertain a more accurate picture in the present study, I also contacted several attorneys specializing in this field to request unpublished cases. To pursue my theoretical inquiry, aside from codifying factual elements—i.e., personal characteristics including gender, class, religious, race (if available), and residence status; characteristics of the parties’ relationship; and data relating to the circumstances of the child’s conception—I deployed textual analysis of the reasoning of the Attorney General and Court concerned.

14. See *infra* Part II.

15. See *infra* Parts II and III.

16. For this tension, more generally, see Robert Leckey, *Introduction: After Legal Equality*, in *AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP* (Robert Leckey, ed., 2015) [hereinafter Leckey, *Introduction*]; DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2015); LIBBY ADLER, *GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM* (2018) [hereinafter ADLER, *GAY PRIORI*].

acquaintances to become parents<sup>17</sup>—and exhorts LGBTQ-rights politics to focus on parenthood rather than on marriage (as centered, for instance, in the U.S.).<sup>18</sup> The mass-scale litigation in Israel, initiated by LGBTQ community members, along with the cultural importance ascribed to parenthood there, provides a valuable platform from which to contemplate what active, systemic commitment to equality in the legal institution of parenthood—across all forms of same-sex families—could look like. That said, although my analysis focuses on a specific regime, it remains pertinent to all readers engaged in matters relating to parental status and equality because the topic under consideration transcends jurisdictional boundaries. Contemporary struggles over questions of inclusion all over the world—from the mobilization around Black Lives Matter in the U.S. to the rapid regression of LGBTQ rights in Eastern Europe—illustrate the importance of the understandings of equality between, and inside, minority groups in their journey toward achieving full membership of society.<sup>19</sup> To further highlight the broad scale of the paradox centered in this article, comparative references are made to other regimes in the U.S. and Canada that, to some extent, operate under similar constraints.

This article proceeds as follows. Part I, which is primarily descriptive, provides an overview of the creation of the common method for parental recognition for same-sex couples conceiving through ART: the JPO. Parts II and III explore how two of the main criteria providing access to this mechanism—the *relationship* between the anticipated parents and their *intent* to raise the child together—demonstrate the paradox of same-sex parentage equality. Weaving between theory and practice in each Part, I also evaluate potential ways of mitigating, albeit not eradicating, this paradox.

## I. ORDERING PARENTHOOD

The JPO formalizes the parental status of the same-sex partner based on two relational elements: the *relationship* between the biological parent and their same-sex partner, and their shared *intent* to raise the child together. The JPO was officially introduced in 2014 by the Israeli Supreme Court in a case involving a male couple who became parents

---

17. See Efrat Knoll & Adi Moreno, *The Triumph of Surrogacy: Competing Social Scripts and the Rise of Family-Normativity in the Male-Gay Community in Israel* Authors, 15 NORMA 283, 283–84 (2020); ALONA PELEG, LESBIAN MOTHERHOOD IN ISRAEL 20–35 (2020) (Isr.). Indeed, the longing for procreation is not unique to the LGBTQ community in Israel. See, e.g., Michael Boucai, *Is Assisted Procreation an LGBT Right?*, WIS. L. REV. 1065 (2016). Nevertheless, studies highlight that this pressure is more salient in Israel. See, e.g., Geva Shenkman, *The Gap Between Fatherhood and Couplehood Desires Among Israeli Gay Men and Estimations of Their Likelihood*, 26 J. FAM. PSYCH. 828 (2012).

18. Noy Naaman, *Bordering Legal Parenthood*, 33 YALE J.L. & HUMANS. (forthcoming 2022) [hereinafter, Naaman, *Bordering*].

19. For the ambivalent relationship between sexual equality and belonging, see BRENDA COSSMAN, *SEXUAL CITIZEN: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 161–65, 196–200 (2017) [hereinafter COSSMAN, *SEXUAL CITIZEN*].

through a transnational surrogacy arrangement conducted in Pennsylvania (hereinafter, the *Mamet* ruling).<sup>20</sup>

The *Mamet* ruling constituted a landmark advance for male couples in Israel. Before then, to be recognized as the legal parent, the non-biological parent (the same-sex partner) had to apply to take the cumbersome and privacy-invading route of second-parent adoption<sup>21</sup>—an avenue that has long been criticized by legal commentators all over the world.<sup>22</sup> The *Mamet* ruling, then, enabled the non-biological parent who already self-identified as a parent to have this role recognized by the state<sup>23</sup>—without the need to ‘adopt’ their own child—shortly after the birth and usually without the intrusion of a social worker’s inspection.<sup>24</sup> Conferring the parentage close to the birth enables parents to fulfill their parental responsibilities without obstruction, ensuring the stability and continuity of the parent-child bond and enabling the family to benefit from financial safeguards.<sup>25</sup>

---

20. HCJ 566/11 Doron Mamet Meged v. Ministry of the Interior, Nevo Legal Database (Jan. 28, 2014) (Isr.). That avenue was dubbed a “judicial parental order” as the Court created it by analogy to the statutory parental order found in the Surrogacy Law and granted only in relation to internal surrogacy. Note that, before *Mamet*, in a case involving female couples, the Family Court issued a parental order formalizing the parental status of a *genetic* mother for a child who was conceived via reciprocal in-vitro fertilization. See FamC (TA) 60320-07 T.Z.N. v. Att’y Gen (Mar. 4, 2012) (on file with author). The transgressive potential of the *Mamet* ruling, though, lies in its focus on the legal recognition of a *non-genetic* parent. See Noy Naaman, *The Judicial Parental Order as a Means of Recognising Same-Sex Parenthood*, in INTERNATIONAL SURVEY OF FAMILY LAW 265, 272–73 (Margaret Brinig ed., 2021) [hereinafter Naaman, *Parenthood*].

21. The adoption avenue was first used to recognize the parental status of the biological parent’s partner with regard to female couples. CivA 10280/01 Yaros-Hakak v. Atty. Gen., 59(5) PD 64 (2005) (Isr.). In 2008, the Attorney General declared that second-parent adoption should be allowed under Israeli Adoption Law, provided that the adoption was consistent with the child’s best interests. Press Release 7751 (Feb. 10, 2008) (on file with author). Ever since, other courts have issued adoption orders for female couples as a matter of course. Such orders were later extended to male couples. FamC (TA) 58/07 Giora Shavit v. Atty. Gen., Nevo Legal Database (Mar. 11, 2008) (Isr.).

22. The main criticism is that adoption was designed to serve as a mechanism for the placement of children who had been abandoned or whose biological parents had been unable to care for them. See Ruth Zafran, *More than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple—The Israeli View*, 9 GEO. J. GENDER & L. 115, 131 (2008).

23. For the importance of embracing a person’s self-identification as a parent, see Noy Naaman, *Timing Legal Parenthood*, 75 ARK. L. REV. 59, 73–75 (2022).

24. As commentators have long observed, requiring same-sex parents to adopt their *own* child disparages their choice to become parents, situating them in a sort of second-class parental status. See, e.g., Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 268 (2009) [hereinafter Polikoff, *A Mother*]; Geri C. Sjoquist, *The Doctrine of Intentional Parenthood*, 52 FAM. L.Q. 385, 405–06 (2018). Adoption can also be costly and, in some jurisdictions, lengthy. See Feinberg, *Equitable Parenthood*, *supra* note 7, at 80–81.

25. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 346–47 (2002); Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL’Y REV. 31, 32 (2010); Alison Bird, *Legal Parenthood and the Recognition of Alternative Family Forums in Canada*, 60 U.N.B. L.J. 264, 285 (2010). I should clarify that this concern becomes especially tangible in cases of dissolution, as the non-biological parent may find themselves barred from making decisions relating to the child. Conversely, a non-biological parent may renounce responsibility for the child more easily than the biological parent, leaving the child with the support of only the latter.

Indeed, there was a good reason for the LGBTQ community to celebrate this moment. The rhetoric of the *Mamet* ruling clarifies that the commitment to equality should be played out with regard to *how* parentage is formalized. It is not enough to expand the accessibility of adoption to same-sex partners. Doing so retains the privileged position of biology in the law by imposing unduly burdensome demands on same-sex families once they wish to enter the institution of parenthood.<sup>26</sup>

Ever since the introduction of JPOs, courts have routinely issued them for couples conceiving through cross-border surrogacy—male couples, and, subsequently, female couples conceiving through IVF.<sup>27</sup> The JPO has thus become the most common means to formalize the parental status of same-sex partners in cases of ART.

Yet, this is not to say that the enactment of this order completely moderates the differences between families with same-sex versus different-sex parentage. The legal landscape is still far from ideal. I contend this because it is only in the latter group that the male partner is typically recognized as a parent *without* court adjudication, regardless of his genetic relation to the newborn.<sup>28</sup>

If the couple is married, the male partner is recognized by marital presumption. If the couple is unmarried and the male partner has no biological ties to the child, then as a *matter of law*, he is ostensibly subject to the JPO as a condition for formalizing the parental status of the biological parent's partner. In *practice*, however, the couple can easily bypass this procedure. This is because the parental status of the birth parent's partner is contingent on a written form provided soon after the birth, if not at the hospital, declaring that the partner is the biological parent. Though the form requires both the birth mother and the putative father to attest that the male partner is the child's genetic father, the form

---

26. The *Mamet* ruling expressed the understanding that it is critical to find a “way to ease the route [for male couples],” for whom the option of surrogacy abroad “is a major practical route, the only one at times, to become parents.” HCJ 566/11 Doron Mamet Megeed v. Ministry of the Interior, at § 41, Nevo Legal Database (Jan. 28, 2014) (Isr.) (opinion of Naor, C.J.). Note that, until January 2022, male couples had no choice but to cross the border to have a child through a surrogacy arrangement, which is still the preferable avenue for doing so. This is because adoption is unrealistic and because co-parenthood with a third party involves substantial barriers. Further, Justice Joubran acknowledged that imposing the undue burden of adoption on same-sex couples, once they return home with their new infants, perpetuates the hierarchy between biological and non-biological parenthood. *Id.* at § 10 (opinion of Joubran, J.); *id.* at § 1 (opinion of Danziger, J.).

27. FamC 57740-12-13 Family Court (Ramat-Gan) Jane Doe v. Att’y Gen. (Mar. 1, 2015) (Isr.) (on file with author). In the absence of legislation, the JPO jurisprudence has been developed in an incoherent way: its principles have gradually been shaped, on the one hand, on a case-by-case basis by courts and, on the other, by directives promulgated by the Attorney General and the Ministry of Labor and Social Affairs. See MINISTRY OF LABOR, SOCIAL AFFAIRS AND SOCIAL SERVICES, PROFESSIONAL COMMITTEE TO REVIEW CRITERIA FOR THE ISSUANCE OF THE JUDICIAL PARENTAL ORDER (INTER-MINISTERIAL COMMITTEE), *available at* [<https://perma.cc/QRW6-Z7R3>] [hereinafter *Committee Guidelines*]; see also Naaman, *Parenthood*, *supra* note 20, at 266.

28. See Noy Naaman, Ayelet Blecher-Prigat & Ruth Zafran, *Parenthood Based on Relationship: Dual Motherhood as a Case Study*, 36 IYUNEI MISHPAT [TEL-AVIV U. L. REV.] (forthcoming 2022) (Isr.), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4001994](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4001994).

is not scrutinized and there are no practical means for inquiring into the use of sperm donation. Another scenario in which a JPO *in practice* is not necessarily only secured by same-sex couples involves heterosexual couples seeking cross-border surrogacy. In this case, to be recognized and registered as parents, they simply have to undergo a DNA test to prove their genetic relationship to the child. *Only* if one of the parties is not genetically related to the child will they need to apply for a judicial parental order, just as in the same-sex couple scenario.

It should be noted that there are no published statistics on the parents of children born through cross-border surrogacy. However, out of more than 100 cases I examined in this research, I could identify only two cases concerning a JPO in the context of different-sex couples conceiving a child through cross-border surrogacy.<sup>29</sup> All the others concerned same-sex couples. Moreover, considering that the same-sex couple scenario ordinarily features a non-biological parent-child relationship, the JPO mechanism is arguably still discriminatory even if it withholds recognition from the non-biological parent in both different-sex *and* same-sex couples, especially if the former can easily circumvent this mechanism.<sup>30</sup>

In this article, however, I choose not to focus on this form of inequality, which many commentators (myself included) have discussed.<sup>31</sup> Instead, I look within the community that this mechanism was designed to regulate in the first place: same-sex families. In what follows, I examine the two aforementioned relational elements that have stood at the heart of litigation around the JPO: the relationship between the applicant and the biological parent and their intent to raise the child together.

## II. RELATIONSHIP

The first threshold criterion to qualify for the JPO is conjugality with the biological parent. To satisfy this requirement, the couple needs to submit proof of a lasting and stable relationship having started at least 18 months before the child's conception.<sup>32</sup> While the rationale underlying this criterion may be appropriate—ostensibly, to ensure a mutual intent to bring a child into the world to raise together in a stable setting—closer inspection of the underlying premises and how this criterion has been implemented reveals the paradox centered in this article.

---

29. FamC (Family Court Nz) 13637-06-15 Jane Doe v. Att'y Gen., Nevo Legal Database (May 5, 2016) (Isr.); FamA (DC TA) 27278-06-19 Att'y Gen. v. S.H.Z. and L.P.Z., Nevo Legal Database (July 30, 2019) (Isr.).

30. Cf. NeJaime, *The Nature*, *supra* note 2, at 2333 (discussing this proposition in the context of U.S.).

31. For literature in the context of the U.S., see *supra* note 8. For literature in the context of Israel, see Naaman, *Parenthood*, *supra* note 20.

32. *Committee Guidelines*, *supra* note 27, at 26.

### A. *The Nature of the Paradox*

The assumption inherent within the conjugality criterion is that mutual intent to raise a child can emerge only out of a long-term, stable, and romantic relationship. Yet, a ‘durable’ relationship at the moment of the child’s birth does not guarantee any suitability for parenthood further down the line.<sup>33</sup>

Conflating co-parenthood with long-lasting intimate relationships is even further removed from the current law on parental determination in Israel. As a matter of law, when it comes to different-sex couples, even a birth arising from a one-night-stand results in both individuals being recognized as the legal parents to the child born of the unplanned pregnancy, irrespective of their willingness to accept this recognition. Though this outcome can be seen as an expression of the importance of biological relatedness, it can also be read as a diminution in the importance of couplehood as a factor in legal parental determination. If we adopt the latter reading, it follows that, in the eyes of the State of Israel, the role of couplehood in parental determination has been rendered disproportionately important in cases of legal parentage in same-sex families.<sup>34</sup> In other words, the state, by conditioning the JPO on the existence of couplehood,<sup>35</sup> (ab)uses the legitimization of same-sex parentage as an anchor to resuscitate the very paradigm of the archetypical family: dyadic, conjugal, and exclusive kinship. This is a paradox, not only because how others might classify the relationship has nothing to do with bringing a child into the world through ART, but also, and perhaps more fundamentally, because gays and lesbians have long striven to obliterate this paradigm of kinship.<sup>36</sup> This regulation calls to mind what prominent queer scholars, such as Lisa Duggan, Puar Jasbir, and many others who follow them, have long documented regarding the many ways in which the *homo*-subject was and still is

---

33. While most Israelis still live in family households, Israeli society has experienced an increase in divorce rates, just like other Western societies. According to the OECD, between 1995 and 2019, the divorce rate doubled. See OECD, FAMILY DATABASE SF3.1 4 (2019), [https://www.oecd.org/els/family/SF\\_3\\_1\\_Marriage\\_and\\_divorce\\_rates.pdf](https://www.oecd.org/els/family/SF_3_1_Marriage_and_divorce_rates.pdf); see also Sylvie Fogiel-Bijaoui, *The Personal, the National, the Global: A Contemporary Look at Families*, 13 NETANYA L. REV. 15, 22–24 (2020) (Isr.).

34. Different-sex couples in which one of the parties lacks a genetic relation to the child easily circumvent this requirement. See *infra* Part I.

35. It should be clarified that, before the enactment of the JPO, the model used to formalize the parental status of same-sex partners (adoption) was not based on couplehood. It was based on an exception stipulated in Section 3(2) of the Adoption of Children Law, which enables adoption by a *single* parent, together with Section 25, which authorizes the court to deviate from the statutory condition in special circumstances where the adoption is in the best interests of the child. See CivA 10280/01 Yaros-Hakak v. Atty. Gen., 59(5) PD 64 (2005) (Isr.). But see Zvi H. Triger, *A License to Parent*, in CHILDREN’S RIGHTS AND ISRAELI LAW 389, 424 (Tamar Morag ed., 2010) (Isr.) (problematizing the fact that the legal discourse of recognizing same-sex parenthood by virtue of second-parent adoption is contingent upon a link being made between couplehood and parenthood).

36. Michael Warner, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES: J. FEMINIST CULTURAL STUD. 14 (2002); Jack Halberstam, *THE QUEER ART OF FAILURE* (2011).

domesticated to reinforce (hetero)national values.<sup>37</sup> What I wish to highlight here, however, concerns *how* that installation operates and hides in plain sight. This approach will help us to better understand the paradox of parentage equality.

Until a few years ago, the Israeli state conditioned the JPO on verification of the authenticity of the applicant's relationship and assessment of their suitability for parenthood. The state achieved this by sending a social welfare worker to the couple's home to conduct an assessment and subsequently produce a report on their findings.<sup>38</sup> Certainly, this is a blatantly invasive, onerous, and, some would say, humiliating procedure.<sup>39</sup> It is perhaps no surprise then that courts have refused to conduct such a routine inspection as a matter of course prior to issuing the JPO, now reserving it for specific cases deemed to require further scrutiny.<sup>40</sup> In responding to these judicial cases, the state now settles for documents attesting to the applicants' conjugal relationship—specifically regarding the degree to which the couple hold joint finances and the living patterns developed during their relationship (cohabitation versus separate households).<sup>41</sup> Looking at the judicial cases in which the state has refused to issue the JPO reveals that this apparently less invasive *documentary* requirement has nevertheless evolved into a technique of state surveillance through which gays and lesbians are disciplined. The objective remains to make them fit neatly into the traditional paradigms of family and, in turn, to enrich the very logic that,

---

37. Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in MATERIALIZING DEMOCRACY 175 (Russ Castronovo & Dana D. Nelson eds., 2002); Jasbir K. Puar & Rai S. Amit, *Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots*, 20 SOC. TEXT 117 (2002). As Brenda Cossman argues, with the modern incorporation of the *homo* subject, citizenship is being gendered, privatized, and self-disciplined. COSSMAN, SEXUAL CITIZEN, *supra* note 19, at 2. Cossman's position is especially applicable here, as parental status is an integral part of citizenship—and doubly so in a child-centric country like Israel. See also Aeyal Gross, *The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics*, 46 COLUM. HUM. RTS. L. REV. 81, 86–89 (2015); Zvi Triger, *The Reluctant Acceptance of Same-Sex Unions and Parents in Israel*, 16 NAT'L TAIWAN U. L. REV. 1, 5 (2021).

38. For the state's insistence on this requirement in cases of a child born to a male couple conceiving through cross-border surrogacy, see, for example, FamC (Family Court TA) 21182-04-13 John Doe v. Att'y Gen., Nevo Legal Database (Mar. 11, 2014) (Isr.); FamC (Family Court TA) 4355-08-13 John Doe v. Ministry of Welfare & Soc. Servs., Nevo Legal Database (Mar. 15, 2014) (Isr.); FamC (Family Court TA) 46455-02-19 John Doe v. Ministry of Welfare & Soc. Servs., Nevo Legal Database (Sept. 9, 2019) (Isr.). For the state's insistence on this requirement in cases of a child born to a female couple conceiving through a non-surrogacy method, see, for example, FamC (Family Court Hadera) 19291-12-15 Jane Doe v. Att'y Gen., Nevo Legal Database (Apr. 18, 2016) (Isr.); FamC (Family Court TA) 41802-08-19 Jane Doe v. Atty. Gen., Nevo Legal Database (Nov. 5, 2019) (Isr.); FamC (Family Court Kiryat Gat) 25730-09-18 Jane Doe v. Att'y Gen., Nevo Legal Database (July 30, 2019) (Isr.).

39. Cf. NeJaime, *The Nature*, *supra* note 2, at 2317. This also resonates with Nancy D. Polikoff's work focusing on the element of humiliation involved in the parental determination of female couples. See Polikoff, *A Mother*, *supra* note 24.

40. For recent cases in this regard, see FamC (Family Court Jer) 55728-06-21 The Mothers v. Att'y Gen., Nevo Legal Database (July 11, 2021) (Isr.); FamA (DC TA) 54000-12-19 Att'y Gen. v. Jane Doe, Nevo Legal Database (Dec. 6, 2021) (Isr.). Some scholars believe that the state should condition the issuance of a JPO on this procedure. See Yehezkel Margalit, *Legal Parenthood – Law and Justice*, 47 HEBREW U. L. REV. 131 (2018) (Isr.).

41. This settlement is evidenced by *Committee Guidelines*, *supra* note 27, at 35–36.

as discussed, has been socially and legally eroded in the case of heterosexual couples.

Take, for example, a case that found its way to the Family Court in 2019.<sup>42</sup> The state was unwilling to recognize the parental status of the female partner of a birth mother because the couple lacked evidence attesting to long-term coupledness, such as evidence of a joint bank account and purchase of a joint asset, in spite of the fact that they had signed a pre-conception parenting agreement. Such an agreement announced their relationship, declared their commitment to raising any future children together, and had been approved by the court. However, since the agreement was signed only a few months before the child's conception, the state declined their application. Given the existence of a clear declaration of pre-conception intent, verified by a court, one might wonder whether the insistence on a lengthier relationship was a matter of securing the couple's joint commitment to raising a child together or a deliberate, punitive obstruction.

In that particular case, the Family Court struck down the state's insistence on such documentation, holding that it was unnecessarily invading a family's privacy.<sup>43</sup> The Court held that, to the extent it is conceivable that a heterosexual couple may decide to have children after only a short period of time together, the same assumption is, and should be, applicable to same-sex couples.<sup>44</sup> While this legal rhetoric of sameness vis-à-vis heteronormative families may be an easy and well-intentioned way to strike down the intrusive policy, it nonetheless leaves the dominant norms intact.<sup>45</sup> Specifically, it is embedded in the 'like/in, unlike/out' binary that constrains us in attempting to imagine how kinships dissimilar to heterosexual couples could be otherwise legalized. A more transgressive rhetoric would legalize the parentage irrespective of—or, perhaps, notwithstanding—its difference relative to that of heterosexual couples.<sup>46</sup> Emphasizing what is *not* found in the dominant and legitimate model of family is more promising, as it widens the expanse of possibilities imaginable to us, thereby creating the

---

42. FamC (Family Court Petah-Tikva) 41543-04-19 Jane Doe v. Att'y Gen. § 13.4 (Sept. 18, 2019) (on file with the author).

43. *Id.* § 12.

44. *Id.* § 13.4.

45. For the scholarly critique of the rhetoric of sameness in the context of family law, see, for example, Brenda Cossman, *Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms*, 40 OSGOODE HALL L.J. 223 (2002) (discussing how a functional equivalency argument—in which same-sex kinships are described as being “just like” heterosexual kinships—utilizes a discourse of sameness that serves to collapse LGBTQ difference); Robert Leckey, *Law Reform, Lesbian Parenting, and the Reflective Claim*, 20 SOC. & LEGAL STUD. 331, 333 (2011) (“The equality-as-sameness approach has been charged with obscuring relevant differences, ‘stripping away the social particulars’ of lesbian parenthood.”) (citation omitted).

46. Legal scholars have made a similar argument in regard to rights assigned to same-sex couples by virtue of their *relationship*. See, e.g., Robert Leckey, *Must Equal Mean Identical? Same-Sex Couples and Marriage*, 10 INT'L J. L. CONTEXT 5, 6 (2014).

conditions under which a broader spectrum of gays and lesbians might achieve their eligibility for parenthood in the future.<sup>47</sup>

In some cases, to mitigate doubt, instead of rejecting the application for the JPO, the state conditions the order upon undergoing the contested procedure of social-worker inspection (in contrast to the past, when the state conditioned the issuance of *all* JPOs on this procedure by default). This move is evidenced in particular cases where the couple under consideration fails to adhere to the hetero-normative image of family: they do not share a joint home,<sup>48</sup> or they have not pooled their resources or shared their finances with each other during their relationship.<sup>49</sup> And one might continue to wonder whether the state would insist on this procedure in cases of a same-sex, non-monogamous relationship under the same rationale.<sup>50</sup>

The excessive surveillance imposed by the state on those who do not conform to (or, at the very least, do not externalize) the normative image of family is also worth careful consideration. We must remember that people who live “in the closet” or live in a more hostile environment regarding different sexualities are likely to experience more difficulties in proving the authenticity of their relationship and are therefore more susceptible to being navigated toward this invasive procedure of home inspection.

Such a concern was made tangible in a recent case concerning an application for a JPO by a female couple who were raised in Jewish conservative families that constituted an unwelcoming setting for same-sex relationships.<sup>51</sup> Because the couple had to hide their intimate relationship from their families, they could not produce any objective evidence proving their interdependence.<sup>52</sup> Given this lack of evidence, the Attorney General conditioned the issuance of the JPO on their undergoing a social-worker inspection.<sup>53</sup> The court, though, rejected that position, stating that “in the special circumstances that exist in the

---

47. As Martha Minow puts it, strategies for remaking difference include “disentangling equality from its attachment to a norm that has the effect of unthinking exclusion.” MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 16 (1990).

48. FamC (Family Court TA) 41332-07-21 Doe v. Att’y Gen. (Oct. 19, 2021) (Isr.) (on file with the author) (concerning a female couple conceiving through sperm donation).

49. FamA (Family Court TA) 10925-11-17 Doe v. Att’y Gen., Nevo Legal Database (Apr. 29, 2018) (Isr.) (concerning a female couple conceiving through sperm donation).

50. See, in this regard, Meg-John Barker & Darren Langdridge, *Whatever Happened to Non-Monogamies? Critical Reflections on Recent Research and Theory*, 13 *SEXUALITIES* 748 (attesting to the prevalence of non-monogamy within same-sex couples, especially among gay men); Hilo Glazer, *The Ministry of the Interior Expels an Israeli Man’s Spouse*, HAARETZ (July 17, 2019) (Isr.), <https://www.haaretz.co.il/magazine/premium-MAGAZINE-1.7565298> (discussing the case of Peter Piltov, a Russian legal resident in Israel, and Daniel Shmuta, an Israeli citizen). In that case, Peter and Daniel had been married for five years and lived together in Tel Aviv; notwithstanding this fact, the Ministry of the Interior terminated Peter’s residency permit simply because he and Daniel maintained an open relationship. *Id.*

51. FamC (Family Court Ashdod) 23973-08-19 Doe v. Att’y Gen., Nevo Legal Database (Feb. 2, 2020) (Isr.).

52. *Id.* § 8.

53. *Id.*

case of the applicants, when, according to them, their exit ‘from the closet’ could have dire consequences, to the point of endangering life, they should not be subjected to hardship yet again by way of the [social worker] inspection . . . .”<sup>54</sup>

Indeed, the state’s insistence on social-worker inspection is not only problematic in that particular case but also more generally. This procedure echoes the insidious sense of inferiority bestowed upon same-sex parents, especially considering the criminal ban historically placed on homosexuality (which still exists in some places in the world), according to which an inspection of (homo) love could easily render the subject an *outlaw*, marking them as an *illegitimate* citizen. Similarly, under the current policy of formalizing the parental status, the home inspection runs the risk of rendering the (homo) subject an *illegitimate parent*.

Such a correlation between the legal implication of ordering state surveillance of sexual criminalization and of parental constraint explicates another paradox. This is, while anti-gay-agenda politics is increasingly less common in this era in which same-sex couples are eligible to be recognized as parents, its logic continues to echo today, albeit under a more modern legal rhetoric.<sup>55</sup> This analogy not only highlights the humiliating element of such state surveillance but also helps us to acknowledge that the line that separates *legitimate/legal* from *illegitimate/outlawed* is still very much operational,<sup>56</sup> exposing the cracks in the premise of certain egalitarian legal reforms to achieve full equality. When it comes to subjects who fail to conform to the normative image of family, the insistence on home inspection also levies an extra burden on those same-sex subjects who are doubly marginalized—the undocumented, for instance. For them, excessive state surveillance potentially exposes them to incarceration or deportation,<sup>57</sup> rendering them, again, *outlaws*.

Such a state policy of applying the procedure of home inspection explicates how the inclusion of same-sex families in the desirable institution of parenthood renders them casualties of a system that promotes normative lifestyles, thereby distinguishing between “good” and “bad” legal subjects and between those who adhere to the mainstream image of family and those who do not.<sup>58</sup> The latter are,

---

54. *Id.*

55. For this logic of anti-gay agenda politics, see DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 18 (1997).

56. Eithne Luibhéid, *Sexuality, Migration, and the Shifting Line Between Legal and Illegal Status*, 14 GLQ: J. GAY & LESBIAN STUD. 289, 292 (2008).

57. Scholars have warned of the perils of excessive state interference in the lives of queer people of color. See, e.g., Maya Chinchilla, *Church at Night*, 24 GLQ: J. GAY & LESBIAN STUD. 3 (2018).

58. One is reminded of the queer critique of same-sex marriage that exemplifies this line of argument. Paula L. Ettelbrick, for example, decries the exclusion of patterns of lifestyle that do not conform to the marital model. See Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *LESBIANS, GAY MEN, AND THE LAW* 118, 121 (William B. Rubenstein ed., 1991).

legally speaking, left out in the cold. Indeed, this policy conveys a message that these families are, by their very nature, suspicious and therefore call for special scrutiny. Some subjects—often, those who can afford litigation—take this message as a label of inferiority and resist it.<sup>59</sup> Others internalize whatever is expected from them, adopting the required proxy characteristics of a heteronormative lifestyle: cohabitation and relationship-longevity.<sup>60</sup> Should they resist this molding, they risk never becoming legally recognized as parents, thereby losing access to crucial family-making rights and protections. It is not inconceivable that these couples avoid litigating their cases simply because they have insufficient resources to obtain legal assistance. Hence, their plight remains invisible under the current vision of parentage equality.

### *B. Reorienting Relationship in Legal Parenthood*

The paradox discussed above merits the search for a straightforward and effective method of parental determination that does not involve individualized and invasive assessment. When we think about parental determination that is based on relationships, the most obvious example that comes to mind is marital presumption. Recently, North America has witnessed a mobilization toward rendering this presumption more inclusive. A number of Canadian provinces have reformed their laws to be explicit about the gender-neutral application of this presumption in non-surrogacy conception,<sup>61</sup> and a similar trend is evidenced in the United States, pursuant to the federal legalization of same-sex marriage

59. See, e.g., *supra* notes 42–44 and accompanying text.

60. This concern resounds also with the queer critique of same-sex marriage, which highlights the self-disciplinary function of legal marriage. See, e.g., Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 97, 105–08 (Robert Wintemute & Mads Andenæs eds., 2001) (highlighting that the right to marry becomes a surveillance device through which intimate practices fall under the scrutinizing eye of the state); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *COLUM. J. GENDER & L.* 236, 244–48 (2006) (discussing how, by encouraging same-sex couples to access the institution of marriage—thus rewarding them with marital benefits—gays and lesbians negate the unique features of their unions). Indeed, cohabitation and relationship-longevity are not lifestyle characteristics associated exclusively with heterosexual couples. And, far from belittling gays and lesbians who chose this lifestyle pattern, my purpose is to encourage us to think in more diverse and plural terms, such that nobody should have to conform to an imposed template that marks cohabitation and relationship-longevity as prerequisites for being recognized as parents, if that is not their desired lifestyle. This point raises several questions I discuss at the end of this part.

61. In British Columbia, see Family Law Act, S.B.C. 2011, c 25, § 27(3) (Can.) (“Subject to section 28 . . . , in addition to the child’s birth mother, a person who was married to, or in a marriage-like relationship with, the child’s birth mother when the child was conceived is also the child’s parent . . .”). In Ontario, see Children’s Law Reform Act, S.O. 2016, c 23, § 8(1) (“If the birth parent of a child conceived through assisted reproduction had a spouse at the time of the child’s conception, the spouse is, and shall be recognized in law to be, a parent of the child”). In Saskatchewan, see The Children’s Law Act, S.S. 2020, c 2, § 60(1) (Can.) (“If the birth parent of a child conceived through assisted reproduction had a spouse at the time of the child’s conception, the spouse is, and shall be recognized in law to be, a parent of the child.”).

there in 2015,<sup>62</sup> which requires that states provide marriage rights to same-sex couples on the same terms afforded to heterosexual couples.<sup>63</sup> However, while this legal mobilization is laudable,<sup>64</sup> the potential of using marriage as a gateway to legal parenthood is still limited.<sup>65</sup>

First of all, marriage is still a marker of privilege and inequality. This is perhaps most strongly evidenced by the fact that marriage is still more prevalent among white, middle- or upper-class individuals.<sup>66</sup> Extending the presumption for parenthood *exclusively* to married couples, therefore, raises concerns about class- and race-based bias. Such a criticism acquires an additional layer in Israel because of the orthodox

---

62. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

63. The recent revision of Uniform Parentage Act (2017), which is designed to “ensure the equal treatment of children born to same-sex couples,” expressly removes the gendered terminology in marital presumption. UNIF. PARENTAGE ACT 1 (UNIF. L. COMM’N 2017); *see also* Joslin, *Nurturing*, *supra* note 2, at 598. Growing numbers of states have endorsed that application, including California, Connecticut, Maine, New Hampshire, Rhode Island, Vermont, Washington, and the District of Columbia, amending their statutes to be explicit about the gender-neutral language. In other states, such as in Arizona and New York, where the legislators did not remand their laws, courts have intervened to remand this application. In Arizona, *see* *McLaughlin v. Jones ex rel. Cnty. of Pima*, 401 P.3d 492, 496 (Ariz. 2017) (extending the marital presumption in the case of a married lesbian couple). In New York, *see In re Maria-Irene D.*, 153 A.D.3d 1203, 1204–05 (N.Y. App. Div. 2017) (applying the marital presumption to the biological father’s same-sex spouse where the child was born via surrogacy during the marriage). For further reading, *see* COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW § 5.22 (2021) [hereinafter JOSLIN ET AL., FAMILY LAW]. Furthermore, the U.S. Supreme Court in *Pavan v. Smith* held that states must treat married same-sex couples in the same way in which they treat married heterosexual couples, and thus extended the marital presumption to same-sex married couples as well. 137 S. Ct. 2075, 2078–79 (2017).

64. There are various compelling arguments that marriage should also play a role in the path toward parental recognition long before that legal mobilization. Among them is the argument that individuals commonly understand parental relationships to coincide with marital bonds and the understanding that marriage has long captured the social parent-child relationship. *See* Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 289 (2003); Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 266 (2006). Another argument is that providing a child with two legal parents from the point of their birth promotes his or her interests. *See* Jennifer B. Mertus, Note, *In re Adoption of R.B.F.: A Step Toward the Recognition and Acceptance of Non-Traditional Families*, 3 WHITTIER J. CHILD & FAM. ADVOC. 171, 185 (2003). For other reasons, *see* Appleton, *supra* note 2, at 242–60; Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1242–43 (2016) [hereinafter NeJaime, *New Parenthood*]; Jessica Feinberg, *After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples*, 54 U.C. DAVIS L. REV. 1507, 1517–18 (2021).

65. For further reading on scholarship contending that there is no reasonable basis for treating nonmarriage differently from marriage, *see* Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1207–09 (2016); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 464–81 (2017) [hereinafter, Joslin, *The Gay Rights Canon*]; Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 171, 186–91 (2015). *But see* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 59 (2016).

66. *See* Allison C. De Marco, *Book Note on KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005), 33 J. SOCIO. & SOC. WELFARE 165, 165–66 (2006); Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 814 (2009); June Carbone & Naomi Cahn, *The Triple System of Family Law*, 3 MICH. ST. L. REV. 1185, 1190 (2013); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 550 (2015).

religious monopoly on issues relating to marriage and divorce.<sup>67</sup> Under this monopoly, civil marriage, regardless of the couple's gender composition, is unrecognized, unless it is conducted in a foreign regime and is recognized there as valid.<sup>68</sup> Only then, by virtue of international private law, can a marriage be registered in Israel.<sup>69</sup> Under these circumstances, same-sex marriage is available only to individuals who can meet the cost of marrying abroad.

Another limitation pertains to the fact that even those who *are* eligible to marry may choose to avoid this path. While, for some, that choice might be about pushing back against the patriarchal legacy of this institution,<sup>70</sup> for others, it may be based on religious or spiritual grounds or their rights of expression.<sup>71</sup> In Israel, for example, certain Jewish individuals, whether secular or observant, choose to marry through unrecognized ceremonies and avoid registering themselves as married.<sup>72</sup> Some choose that path because they oppose the ideology of the Orthodox Chief Rabbinate, which holds a monopoly over the content and form of religious ceremonies.<sup>73</sup> Others choose non-marriage despite sharing aspects of the Rabbinate ideology because they wish to embrace a different vision of marriage than what the Rabbinate offers<sup>74</sup> In that sense, conditioning parental determination on the legal status of marriage is also problematic from a perspective of the rights of religion and expression.

The third problem pertains specifically to male couples conceiving through surrogacy. Under various jurisdictions, the person who delivers the child is deemed the legal parent at the time of birth.<sup>75</sup> Applying the traditional marital presumption to this situation, therefore, results in one of two problematic outcomes. Either more than two legal parents have

---

67. AVISHALOM WESTREICH & PINHAS SHIFMAN, A CIVIL LEGAL FRAMEWORK FOR MARRIAGE & DIVORCE IN ISRAEL (Ruth Gavison ed., Kfir Levy trans., 2013).

68. See, e.g., HCJ 3045/05 Ben-Ari v. Dir. of Population Admin., 61(3) PD 537 (2006) (Isr.).

69. LFamA 9607/03 John Doe v. Jane Doe 61(3) PD 726 (2006) (Isr.); HCJ 3045/05 Ben-Ari v. Dir. of Population Admin., Ministry of the Interior 61(3) PD 537 (2006) (Isr.). See Ayelet Blecher-Prigat, *Same-Sex Relationships and Israeli Law*, in SAME SEX COUPLES – COMPARATIVE INSIGHTS ON MARRIAGE AND COHABITATION 131 (Macarena Sáez ed., 2015).

70. See, e.g., Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722–23 (2012).

71. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 619–20 (2013); Joslin, *The Gay Rights Canon*, *supra* note 65, at 425, 471; Feinberg, *Equitable Parenthood*, *supra* note 7, at 90–91.

72. Ayelet Blecher-Prigat & Noy Naaman, *The Abolition of Legal Marriage in Israel as a Potential Queer/Religious Project*, in QUEER AND RELIGIOUS ALLIANCES IN FAMILY LAW POLITICS AND BEYOND (Nausica Palazzo & Jeff Redding eds., forthcoming 2022).

73. *Id.*

74. *Id.*

75. As for the U.S., see David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMPAR. L. 125, 127 (2006). As for Canada, see Angela Campbell, *Conceiving Parents Through Law*, 21 INT'L J.L. POL'Y & FAM. 242, 250 (2007). As for Israel, see Naaman, Blecher-Prigat & Zafran, *supra* note 28.

to be recognized at the precise moment of the child's birth—which would be presumed based on the default rule that the person who delivers the child is the legal parent unless they relinquish their parental role—or the surrogate will have no parental status at the moment of the child's birth, meaning that only the intended parents' legal status can be recognized.<sup>76</sup> Indeed, this is a tangible tension: while the former outcome is non-feasible under many jurisdictions in North America (and in Israel),<sup>77</sup> the latter overlooks the autonomy of the surrogate, who may change her mind about her parental rights immediately after giving birth or even sometime later.<sup>78</sup> The tension surfaced by the latter outcome not only triggers the latent conflict between LGBTQ advocates and feminists regarding the interests surrounding surrogacy,<sup>79</sup> but also touches on the crux of this article: that the legislative filters governing parental determination for gay and lesbian couples often fail to fully capture the diversity of this community and the contemporary complexities generated by ART. One way to mitigate this tension is to craft a rule requiring a post-birth cooling-off period before that presumption becomes effective.<sup>80</sup>

Before bringing this Part to a close, I should clarify that the present critique does not aim to discourage policymakers from extending the application of the marital presumption. It affirms the continued utility of this presumption, but only as *one* among other bases for parental presumption for same-sex partners. Accommodating the law to same-sex families' characteristics should not stop at efforts to de-gender the determination of parentage. Instead, this continued impulse toward change should also challenge the supremacy of the marital model embedded in this presumption. One way to do so is simply to set forth a presumption based on coupledness, regardless of marital status.<sup>81</sup> But the

---

76. Appleton, *supra* note 2, at 262–63.

77. For further reading on emergent trends in this regard, see Haim Abraham, *A Family Is What You Make It: Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER SOC. POL'Y & L. 405 (2017); Nola Cammu, *Intent to Parent Is What Makes a Parent? A Comparative Analysis of the Role of Intent in Multi-Parenthood Recognition*, 32 2 CAN. J. FAM. L. 281 (2019).

78. For that reason, jurisdictions provide the surrogate with a waiting period after the child's birth to assert a claim to parentage. Joslin, *Surrogacy*, *supra* note 1, at 449–52.

79. On this tension more broadly, see Conor Cory, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. POVERTY L. & POL'Y 133 (2015).

80. NeJaime, *The Nature*, *supra* note 2, at 2340.

81. The suggestion to view the relationship between intended parents as an independent consideration for the purpose of recognizing parenthood is associated with Blecher-Prigat, *Conceiving Parents*, *supra* note 6. See also, in this regard, Merle Weiner, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW* (2015) This avenue could apply through formal registration procedures, as endorsed in several Canadian provinces. *Id.* The difficulty with this suggestion, however, lies in determining which principles should govern the coupledness sufficient to recognize the partner as a legal parent. For example, while using the length of coupledness as a proxy for the partners' interdependence—for instance, coupledness of one year at the moment of conception—could be an objective and predictable rule, it limits the anticipated parents' autonomy. Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2048 (2018). For further reading on the application of this regulatory model, see Ayelet Blecher-Prigat, Noy Naaman & Ruth Zafran,

suggested gateways should not obstruct our imagining of a world in which a shared commitment to raising a child that is framed within a non-sexual friendship could be legally recognized. Otherwise, we run the risk of falling into the trap of privileging relationships of a romantic nature, thereby imposing a higher burden on those who disobey the hegemony of the conjugal bioparental configuration.<sup>82</sup> Indeed, as Rosie Harding rightly put it, it is simply inappropriate to grant equal status to the non-biological parents in same-sex families and then to “undermine that very same recognition with a refusal to accommodate lived difference into that ‘equality.’”<sup>83</sup> A commitment to a substantial form of equality requires us to be mindful of the internal intersectionality existing within the community and to envision legal possibilities that resist the one ‘normal,’ legitimate, dominant definition.<sup>84</sup>

Recognizing the possibility of platonic parenthood within same-sex families is crucial for achieving a substantial form of equality. This possibility invites further consideration of the term ‘stability’, which is held to be a conditional principle for recognizing the status of those choosing non-biological parenthood. Specifically, which form of stability—physical, financial, or emotional—is necessary for parental determination? To the extent that stability, for the purpose of recognizing the same-sex partner as a legal parent, is framed neither in terms of living together (physical stability), nor in terms of sharing finances with each other (financial stability), as the Israeli case study reveals, why is the emotional stability of the partnership considered to matter? And, if emotional stability *should* matter for this legal purpose, should an intimate-partner relationship be a mandatory requirement? How can we frame the characteristics of ‘stability’ through a non-heteronormative lens? I will turn to this line of inquiry in subsequent work, equipped with the new insights presented in this Article.

### III. INTENT

As we have seen, another threshold criterion for issuing the JPO is mutual intent to raise the child. According to the State of Israel, the applicants need to show that they signed a pre-conception parenting

---

*A New Marital Presumption for Parental Recognition of Unmarried Couples Parenthood* (forthcoming) (on file with author).

82. ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 91 (2012). For the canonical position in this regard, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 226–30 (1995).

83. Rosie Harding, *(Re)inscribing the Heteronormative Family: Same-Sex Relationships and Parenting ‘After Equality’*, in *AFTER LEGAL EQUALITY* 184, 196 (Robert Leckey ed. 2015). Some commentators, however, may argue that, since the concept of the family requires clear definitions, it is unsurprising that the law is limited in embracing the “messiness” of non-normative family forms. See Lois Harder, *How Queer!? Canadian Approaches to Recognizing Queer Families in the Law*, 4 *WHATEVER: TRANSDISCIPLINARY J. THEORIES & STUD.* 303, 304 (2020).

84. DAVID HALPERIN, *SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY* 62 (1996).

agreement.<sup>85</sup> Recognizing intent as the main factor in determining the legal parentage of same-sex families seems promising for the future of these families. This model shifts the focus from the bionormative ideology of family<sup>86</sup> toward the unique dimension of these families' experience: the commitment to raise a child together.<sup>87</sup> It also offers "an opportunity for gender neutrality."<sup>88</sup> Yet, I argue, to the extent that the gateway to parentage is heavily conditioned upon a pre-conception written agreement—as per the current JPO guidelines<sup>89</sup>—issues of other cross-cutting social hierarchies should be on our radar.

#### A. *The Nature of the Paradox*

One of the concerns that come to mind is that planned parenthood is a class-based, racially selective luxury. Data in the U.S. demonstrate that those on a low income, people of color, and people living in non-urban areas are less likely to plan their families<sup>90</sup> because, as one may suspect, they are less likely *to be* in a position to plan. While planning seems a significant element of procreation through ART, these data seem nonetheless applicable for our purposes as well. This is because it is not inconceivable that many members of these groups could not even

---

85. *Committee Guidelines*, *supra* note 27, at 27.

86. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 653 (2008).

87. Shultz, *supra* note 2, at 378.

88. *Id.* at 297. For a foundational contribution on the intent-based model, see John Lawrence Hill, *What Does It Mean To Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 370 (1991). For the potential of the intent-based model to benefit same-sex families, see, for example, Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 924–30 (2007) (arguing that contractual parenthood allows both the biological and non-biological parent to enter the best-interests evaluation on an equal footing); Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. CHILD. & FAM. ADVOC. 39, 41 (2013) (exploring how parental recognition based on intent benefits same-sex families); Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465 (2016) (arguing that parenthood based on intent attains equality between parents, regardless of their sex, sexual orientation, or class). *But see* JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 177–180 (raising concerns regarding the use of the intent-based model in the context of ART).

89. To compare, jurisdictions in the U.S. are divided over whether to require a written consent under the intent-based model. JOSLIN ET AL., *FAMILY LAW*, *supra* note 63, § 3:7 (2021). However, usually, even in states in which the statute requires the written consent of the non-biological parent, most courts hold that, despite a lack of written consent, the non-biological parent cannot deny the parentage of the resulting child where there is evidence showing that they did consent to the procedure. *Id.* § 3:8. The guidelines for JPOs, by contrast, not only require written consent but also stipulate that a failure to consent, on the record, before the conception precludes the court from finding consent to parentage. Furthermore, contrary to the trend evidenced in the U.S., Israel has *not* endorsed a gender-neutral version of marital presumption. *See supra* note 63 and accompanying text.

90. Adler, *Inconceivable*, *supra* note 10, at 36, n.200–03 (referring to Amira Hasenbush, Andrew R. Flores, Angeliki Kastanis, Brad Sears & Gary J. Gates, *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States*, UCLA WILLIAMS INST. 7 (Dec. 2014); Angeliki Kastanis & Gary J. Gates, *LGBT African Americans and African-American Same-Sex Couples*, UCLA WILLIAMS INST. (Oct. 2013). *See also*, in this regard, Feinberg, *Equitable Parenthood*, *supra* note 7, at 91–95.

afford to have a formal parenthood agreement drafted, or might have insufficient resources to obtain the relevant knowledge from professional advisers. This concern is especially tangible with regard to women. Specifically, male couples who wish to conceive a child via surrogacy are accompanied by an attorney who is likely to inform them of the requirement to enter into a parenthood agreement. By contrast, female couples who seek conception via non-surrogacy means are more likely to find out about this requirement only *after* the conception, or even after the child's birth, once they apply for the JPO. By then, it will be too late for them to satisfy the requirement of a pre-conception written agreement. One way to minimize this divergence is to condition access to ART on the intended parents signing a declaration that they acknowledge this requirement. This simple step could be incorporated into either the sperm bank procedures or as a part of the impregnation process during fertility treatment.

Recently, the State of Israel stipulated that having a client record at the sperm bank that is registered in both names could be used to satisfy the pre-conception written consent requirement.<sup>91</sup> A careful reading of the cases that have come to court explicates how this relief unwittingly perpetuates, rather than helps dismantle, this form of class-based inequality. This is because, in practice—to my best of my knowledge—only private clinics have offered this option for same-sex couples, to date.<sup>92</sup> In the context of social inequality, where conceiving through private clinics remains a luxury for the few, this solution further privileges the already most privileged sectors of the community. Others, by contrast, and as the cases examined in the present study demonstrate, cannot take advantage of this relief.<sup>93</sup> This is an alarming outcome, as no one should have to purchase protections that are accorded by law to other citizens.<sup>94</sup> This also demonstrates, as Professor Libby Adler highlights, the need to orient our gaze toward “the gritty, low-profile rules, doctrines, and practices that condition daily life on the margins.”<sup>95</sup>

Moreover, my finding shows that making the pre-conception agreement requirement more accessible may not necessarily stop other ludicrous outcomes from emerging. Take, for example, a situation in

---

91. *Committee Guidelines*, *supra* note 27, at 27.

92. In Israel, alongside independent private sperm banks, there are public, partly state-subsidized sperm banks that operate from within hospitals.

93. In one case, for example, where the Attorney General had rejected the application of a female couple concerning a child conceived through sperm donation, the counsel explained in Court: “at Beilinson [public] hospital, such as that in which the fertility treatment of the applicants was carried out, registering a client record at the sperm bank in joint names is not an option and there is no form available at the hospital of the type required by the [Attorney General].” The counsel continued, “only in a private sperm bank, where other sums are taken for purchasing sperm doses, can a joint client record be registered, as required by the [Attorney General].” FamC (Family Court Petach Tikvah) 25461-02-19 Jane Doe v. Att’y Gen. § 4 (May 21, 2019) (on file with author).

94. *Cf.* SANDRA PATTON-IMANI, QUEERING FAMILY TREES: RACE, REPRODUCTIVE JUSTICE, AND LESBIAN MOTHERHOOD 55 (2020) (raising a similar argument with regard to adoption).

95. ADLER, GAY PRIORI, *supra* note 16, at 15.

which the intended biological parent meets his partner immediately after the conception, and the latter decides to embark on the journey to parenthood and fully engage with all its consequences.<sup>96</sup> Or another situation, where the intended biological parent meets his partner long *before* the moment of conception, but the latter's decision to raise the child together with the future genetic parent evolved only during the process itself. In both situations, under the rigid rule of the pre-conception agreement, the non-biological parent could not be granted the JPO, even when the child is born into a reality in which he or she has two parents. One could wonder: why should the intent be relevant *only* if it is expressed before the conception? Why is this particular period of time (pre-conception) preferable to a later point in time?<sup>97</sup>

Such questions were put before the District Court in Tel Aviv (the Court of Appeal) recently in a case concerning a child born through cross-border surrogacy for male couples.<sup>98</sup> There, the genetic parent's partner initially refused to take the role of co-parent when his partner opted to instigate the surrogacy process. Thus, he did not sign any pre-conception agreement as required by the Attorney General.<sup>99</sup> However, as his partner went ahead and the process unfolded, his intention to become a parent flourished after all—evidenced by the role he took throughout the process and the fact that he raised the child as a co-parent.<sup>100</sup> The Court, which issued the JPO, stated that the state's insistence on the pre-conception agreement “paints a romantic picture” in which the institution of parenthood is open only to those “who embroidered the dream of parenthood with them [the biological parent] from the beginning.”<sup>101</sup> The state's position is normatively problematic because, as the Court rightly emphasized, “the intent to become a parent is not a momentary decision.”<sup>102</sup> Intent “may develop over the pregnancy's course, at the time of the birth or immediately afterwards.”<sup>103</sup> Such judicial rhetoric is worth close attention as it helps illuminate the problematic binary that underpins this rigid rule of the pre-conception agreement: that intended conception is wanted and

---

96. These families are vulnerable to inconsistencies in the absence of a coherent body of binding precedents in this regard, which has yet to be made available to the Supreme Court. In a recent case heard at the District Court, for example, the judges were split on this question. FamC (DC TA) 65030-12-18 Att'y Gen. v. John Doe, Nevo Legal Database (May 4, 2020) (Isr.).

97. Cf. Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 661 (2012).

98. FamA (DC TA) 65030-12-18 Att'y Gen. v. John Doe, Nevo Legal Database (May 4, 2020) (Isr.).

99. *Id.* § 5 (opinion of Shohat, J.).

100. FamC (Family Court TA) 50078-04-15 I.I. v. I.G. §§ 59, 231–34, 258–60, § 281–87, Nevo Legal Database (Aug. 5, 2018) (Isr.) (the trial court decision that was being reviewed by the District Court).

101. FamA (DC TA) 65030-12-18 Att'y Gen. v. John Doe, § 16, Nevo Legal Database (May 4, 2020) (Isr.) (opinion of Shohat, J.).

102. *Id.*

103. *Id.*

unintended conception is unwanted. As Professor Ayelet Blecher-Prigat, a family law expert, reminds us more generally, the reality of reproduction and parenthood choices is irreducible to this binary.<sup>104</sup>

The flaw in the two aforementioned scenarios becomes more apparent if we compare them to a case involving a heterosexual married couple. Specifically, because of the marital presumption, the husband of the birth mother is legally recognized as the father of the child at the moment of birth, regardless of his genetic relation to that child and despite the lack of a written pre-conception agreement. Marriage is rightly understood as a valuable proxy for a biological relationship and for responsibility and commitment to raising a child together.<sup>105</sup> Yet, to the extent it is possible to set forth *relationship* as a proxy for this commitment, why cannot other proxies be applicable? Is a pre-conception agreement the only way to ensure that the child's best interests are put first?

### *B. Reorienting Intent in Legal Parenthood*

Courts have long proven themselves capable of making the factual determination for actual consent to raise the child together demonstrated by tangible evidence. Among this evidence is testimony that the non-biological parent took part in the fertilization or gestational process, such as paying for the insemination or being present at the insemination, attending antenatal classes with the gestational party, and being present at the hospital when the child was born.<sup>106</sup> Another indication is that the couple informs others that they are going to have a child together and present the partner of the biological parent as the parent.<sup>107</sup> To ease this

---

104. See Blecher-Prigat, *Conceiving Parents*, *supra* note 6, at 151 (“The fact that a pregnancy is *unplanned* does not necessarily mean it is *unwanted*. Although decisions regarding parenthood are made in a world of limited reproductive choice, the reality of reproduction and parenthood choices is more complex than can be captured in a binary description of options: planned (intended) parenthood or unplanned (unintended parenthood).”) (footnote omitted). While Blecher-Prigat’s discussion was framed in the context of natural conception, her critique is very much applicable to ART.

105. See NeJaime, *New Parenthood*, *supra* note 64, at 1242.

106. See FamC (Family Court Ashdod) 8095-04-18 Mami v. Mother §§ 51.1–10, Nevo Legal Database (Mar. 1, 2020) (Isr.) (concerning a dispute between the biological mother and her female ex-partner regarding the parental status of the latter after the relationship broke down); FamC (Family Court Haifa) 29592-03-19 Jane Doe v. Jane Doe §§ 16, 35, Nevo Legal Database (Dec. 5, 2021) (Isr.) (concerning a dispute between the biological mother and her female ex-partner regarding the parental status of the latter after the relationship broke down); FamC (Family Court Jer) 55728-06-21 Jane Doe v. Mother §§ 11–14, Nevo Legal Database (July 2, 2021) (Isr.) (concerning a dispute between a female couple and the Attorney General regarding the parental status of the non-biological mother of a child conceived through sperm donation).

107. See FamC (Family Court TA) 50078-04-15 I.I. v. I.G. §§ 271–78, Nevo Legal Database (Aug. 5, 2018) (Isr.) (concerning a dispute between the biological father and his male ex-partner regarding the parental status of the latter for a child conceived via surrogacy); FamC (Family Court TA) 41802-08-19 Jane Doe v. Att’y Gen. § 10, Nevo Legal Database (Nov. 5, 2019) (Isr.) (concerning a dispute between a female couple and the Attorney General regarding the parental status of the non-biological mother of a child conceived through sperm donation, where the child was six years old when the application for the JPO was submitted); FamA (Family Court Ashdod) 8095-04-18 Mami v. Mother §§ 51.11–14, Nevo Legal Database (Mar. 1, 2020) (Isr.).

factual inquiry, policymakers could determine different rebuttable presumptions for the intent to become a parent. Yet, these presumptions should not be undertaken in a way that collapses into rendering specific norms of family formation (such as marriage) superior, but rather encompasses a broader array of lifestyles, such as living an interdependent life together or jointly financially participating in the process of procreation,<sup>108</sup> to allow a broader array of lifestyles to be fulfilled.

In proposing such an approach, I do not seek to claim that formalizing the consent in writing does not help reduce the indeterminacy of the intent-based model.<sup>109</sup> Indeed, written consent is a powerful indication of a commitment to raise the child together, it helps clarify the rights and responsibilities regarding the anticipated child, and it reduces the likelihood of future disputes about the parties' respective preconception intentions.<sup>110</sup> Parties *should* be encouraged to finalize their choice before they initiate the journey, and this should be the preferable rule. My critique is intended as a call to consider the costs of implementing this requirement as a bright-line rule, and to imagine a legal approach that accommodates the diversity of same-sex families' needs.<sup>111</sup> Focusing on the apparent "choices" made by people, rather than on how the law structures access to family-making protections, creates an illusion of equality. A commitment to equality requires us, at the very least, to be mindful of who is more vulnerable under this illusion.

#### CONCLUSION

This article offers a more nuanced position vis-à-vis equality—one that acknowledges the fact that gays and lesbians do not constitute a single, amorphous collective and therefore exhorts more awareness of the *differences* between gays and lesbians. Showing active concern for the internal intersectionality of the non-heteronormative community, rather than solely for the differences between same-sex and different-sex couples, could expand the array of choices of parentage and lifestyle to which same-sex families enjoy access. In doing so, policymakers

---

108. For a similar proposal, see Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1227 (2010) [hereinafter Joslin, *Protecting Children*].

109. DOLGIN, *supra* note 88, at 177–81.

110. Shultz, *supra* note 2, at 323; Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 20–22 (2008).

111. Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2056–68 (2014).

could better accommodate the law to acknowledge the vulnerabilities that arise during the process of “transitional equality.”<sup>112</sup>

While this article focuses on equality between adults, my proposed approach does not overlook the place of the child.<sup>113</sup> On the contrary: advancing commitment to equality in the way suggested here—through the recognition of the diversity of choices and lifestyles in relation to parenthood—promotes the interests of children. Recognition of parents, regardless of whether their relationship conforms to conventional norms and how they choose to mark their consent to become a parent, enables us to better protect, rather than sever, the bond between children and the adults with whom they form parental relationships. Moreover, that position advances equality between children of families regardless of these differences, ensuring equality with regard to familial stability and emotional and financial security.<sup>114</sup>

This is not to say that this position is without costs. Allowing flexibility involves more judicial discretion. Under this approach, therefore, judges would need to keep playing a crucial role in considering whether, and how, to tailor the law to the families who “fail” to adhere to the state requirements. Advocates, in turn, should be prepared to marshal tools designed to challenge the terms and content of these requirements, so that the needs of evolved forms of family will be duly acknowledged. Continuous negotiation of the definition of who is recognized as a parent and *how* that recognition is achieved is an inevitable—and, some may say, even *desirable*—dynamic of the legal institution of parenthood.<sup>115</sup>

---

112. Suzanne A. Kim, *Transitional Equality*, 53 U. RICH. L. REV. 1149, 1152 (2019) (defining transitional equality as “a process of transitioning from one legal status category to another”) (citation omitted).

113. For scholars who implement a child-centric approach, see, for example, Angela Campbell, *Conceiving Parents Through Law*, 21 INT’L J.L. POL’Y & FAM. 242, 243–44 (2007).

114. For further reading on this position more generally, see Polikoff, *Two Mothers*, *supra* note 2; Joslin, *Protecting Children*, *supra* note 108.

115. Naaman, *Bordering*, *supra* note 18.