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Neither Nature nor Contract: Toward an Institutional Perspective on Parenthood Essay

Abstract: The official narrative of parental laws in Israel describes biological parenthood as the natural legal basis for determining parenthood, while recognizing legal adoption and surrogacy, in specific circumstances, as the sole official exception to the rule (and even then with some remnants of the biological connection). However, closer examination of parental laws in Israel, as well as in other countries, reveals that biological parenthood has in fact never served as the sole basis for recognizing parental status. Familial status, explicit and implicit agreements, and functional parenthood have all served, and continue to serve in many cases, albeit not always officially, as key parameters in determining the parental relationship and its consequences. The objection against the exclusivity of natural, biological parenthood has seemingly been strengthened in light of the challenge facing lawmakers through technological reproduction advances such as sperm donations, egg donations, and surrogacy. As a result of these recent developments, prominent scholars have begun to seek alternative definitions for the biological definition. One such approach, which was influenced by cultural feminism, attempts to determine the identity of the parent based on a concrete psychological relationship between the parent and the child. Another, more radical approach, views individual autonomy and the voluntary contract as the new basis for legal parenthood. In this essay, I argue that both alternatives – natural-biological and voluntary contract – do not sufficiently narrate the story behind determination of parenthood in Israeli law nor do they supply a sound normative basis for proper regulation of parental determination. In addition, I argue that while these approaches, which focus on the concrete psychological relationship between parent and child, add an important element to the discussion of parental determination, they are too focused on the private aspects of specific parent–child relationships and in doing so, these approaches overlook important elements of the proper legal regulation of parenthood. In light of this insufficiency, I suggest a social-institutional perspective of parenthood, one emphasizing that parenthood is not merely a matter of nature, but instead an artificial construct structured and

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designed by society. In addition, this approach rejects the current dissonance that exists between (1) the legal determination of parenthood; (2) the regulation of reproductive technologies, on the one hand, and the regulation of parenthood's content in the sense of regulating parental status vs. state and vs. children, on the other hand. This approach maintains that the legal and social definition of parenthood will inevitably affect the content of parenthood. Therefore, I argue that on a normative level, various decisions regarding regulation of reproductive technologies and the determination of parenthood must take into account not only the involved parties but also the manner the decision can affect the conception "who is a parent" and more importantly, the ethos of parenthood that the law should encourage.

DOI 10.1515/lehr-2014-0011

Introduction

In the seminal case of *Anonymous v. Anonymous* (Civil Appeal, 3077/90)¹ – discussing an unmarried father's refusal to acknowledge his legal status and duty to pay child support for his biological daughter – Supreme Court Justice Cheshin articulated an impressive manifest establishing the biological-genetic relationship as a natural basis for the legal definition of parenthood in Israel. In additional cases as well, the Court stated that biological parenthood is the natural parenthood recognized – though not created by – the state as well as society.²

¹ Civil Appeal 3077/90 *John Doe Plonit v. John Doe Ploni*, 49(2) PD [1990] 578 (Isr.).

² HCJ Further Hearing 7015/94 *Attorney General v. Plonit*, 50(1) PD 48 [1995] (Isr.).

The law of nature is that the natural mother and father will hold their child, raise him, love him and care for his needs until he has grown into a man. This is the instinct of survival within us – the "call of blood," the primal yearning of a mother for her child – and it is common to man, animal beast and bird... this bond is stronger than any law, and lies beyond society, religion and state... state law did not create the rights of parents towards their children and towards the world. State law receives what is already made, and tells us to protect our innate instincts, and turns the "interests" of the parents, to a "right" ensured by law, to the rights of the parents to hold their children.

Id. at 102.

In this spirit, the Israeli legal system – like many others – invalidates agreements between biological parents signed prior to the birth of their child, stipulating that one of them – usually the husband – will not be legally recognized as the father.³ Indeed, the Israeli legal system requires those who have entered parenthood unwillingly – what is known in parental jargon as “unintentional parenthood” or “fathers against their will” – to fulfill their basic obligations arising from parental status.⁴

Generally, the official narrative of parental laws in Israel describes biological parenthood as the natural legal basis for determining parenthood,⁵ while recognizing legal adoption and in specific circumstances surrogacy⁶ as the sole official exception to the rule⁷ (and even then with some remnants of the biological connection⁸). However, closer examination of parental laws in Israel, as well as in other countries, reveals that biological parenthood has in fact never served as the sole basis for recognizing parental status. Familial status,⁹ explicit and implicit agreements,¹⁰ and functional

3 See CA 93/5464 Ploni v. Almoni, 48(3) PD 857 [1994] (Isr.).

4 See Fam. Ct. (Hi) 04/29051 Ploni v. Almoni (June. 29, 2006) Nevo Legal Database (by subscription) (Isr.) and Fam. Ct. (Jer)05/2470 S. Minor v. Almoni (Oct. 04, 2006) Nevo Legal Database (by subscription) (Isr.).

5 See, e.g. HCJ 6483/05 Kahadan v. Minister of the Interior (Aug. 09, 2010) Nevo Legal Database (by subscription) (Isr.). “The assumption in the Census Registration Law is that the registration of matters in the census concerning parenthood is based on the existence of a physical–biological relationship between the parents and the children. The law inherently excludes any such registration that is not based on biological parenthood.” *Id.* at 13. See also Fam. Ct. (KY) 08/1180 Plonit v. Ploni (Apr. 27, 2011) Nevo Legal Database (by subscription) (Isr.) “According to existing law, a bond of fatherhood can arise from a biological finding or as the result of a process of adoption.” *Id.* at 10.

6 See The Embryo Carrying Agreement (Approval of Agreement and Status of the New-born) Law, 5756–1996, SH No. 1577 p. 176 (Isr.).

7 The Child Adoption Law, 5741–1981, § 16 SH No. 1028 p. 293 (Isr.).

8 Inheritance Law, 5725–1965, § 16 SH No. 446 p. 63 (Isr.); SHAUL SHOHAT, MENACHEM GOLDBERG, AND YECHZKEL FLOMIN, *THE LAW OF SUCCESSION* (2005) [in Hebrew].

9 See, e.g. Pinhas Shifman, *The Status of the Unmarried Parent in Israel Law*, 12 ISR. L. REV. 194, 194 (1977). See in length *infra* Section “The Erosion of the Myth of Natural Parenthood I: The Case of Children Born to Married Women through Extramarital Relations”.

10 See, e.g. CA 449/79 Salma v. Salma 34(2) PD 779 [1980] (Isr.) (recognizing the commitment of a husband to provide for a child born to his wife through artificial reproduction with someone else’s sperm, based on an implied agreement) verified. See also Fam. App. Req. 4751/12 Almoni v. Almonit, Aug. 29, 2013) Nevo Legal Database (by subscription) (Isr.) in which the court recognized a husband’s commitment to provide for the adopted child of his wife, even after they had separated and even thought the child was not officially adopted by him. I should point out that at least officially, these two verdicts are limited to child support but do not constitute a status of consensual parenthood. In this way, both verdicts demonstrate the tension between

parenthood¹¹ have all served, and continue to serve in many cases, albeit not always officially,¹² as key parameters in determining the parental relationship and its consequences.

The objection against the exclusivity of natural, biological parenthood has seemingly been strengthened in light of the challenge facing lawmakers – technological reproduction advances such as sperm donations, egg donations, and surrogacy.¹³

the attempt to maintain the ethos of biological parenthood on the one hand, and the reality in which consent is increasingly becoming the basis for imposing parental obligations on the other. For extensive recognition of consensual parenthood in the United States, in which recognizing the parenthood of a non-biological father legally deems him the father, see Yehezkel Margalit, *Towards Determining Legal Parentage by Agreement in Israel*, 42 HEB. U. L. REV. 835, 856–57, (2012) [in Hebrew]. See also at length *infra* Section “The Normative Meaning of Parenthood as a Social Institution”. For an additional approach calling for the recognition of the unique status of the biological parent’s partner, see Ayelet Blecher-Prigat & Daphna Hacker, *Strangers or Parents: The Current and Desirable Legal Status of Parents’ Spouses*, 40 HEB. U. L. J.5, 5 (2011) [in Hebrew]. As I explain below, this approach is better suited to the approach presented here that attempts to differentiate between different types of familial institutions.

11 See 2 PINHAS SHIFMAN, FAMILY LAW IN ISRAEL vol. II 94 (1989) [in Hebrew] supporting the recognition of a semi de-facto adoption with regards to social matters. *But see* CA 8030/96 Yehud v. Yehud 52(5) PD 865, 872 [1999] (Isr.), rejecting de-facto adoption with regards to inheritance law. *See also* CA (Jer.) 2399/01 Sela v. Basher (Dec. 19, 2001) Nevo Legal Database (by subscription) (Isr.) (A discussion of de-facto adoption with regards to the application of the Tenant Protection Act as a social right). *Id.* At 4. *See also* Fam. Ct. (KY) 08/1180 Plonit v. Ploni (Apr. 27, 2011) Nevo Legal Database (by subscription) (Isr.). For an overview of case law on the subject and extensive support of the functional definition of parenthood, see Ruth Zafran, *The Family in the Genetic Era: Redefining Parenthood in Families Created Through Assisted Reproduction Technologies as a Test Case*, 2 HAIFA L. REV. 223 (2006) [in Hebrew]. For the approach according to which psychological parenthood is based on consensual parenthood, see Margalit, *supra* note 10. For more on these matters, see below, Section “The Erosion of Natural Parenthood II: The Case of Alternative Insemination”.

12 Indeed, as I previously demonstrated, in practice case law agreed to base certain parental obligations on consensual or psychological constructs. However, case law in Israel has not yet based a comprehensive construction of consensual parenthood or de-facto adoption as parenthood.

13 To survey the difficulties in establishing a solid foundation for parenthood in light of new age technologies, see Elizabeth L. Gibson, *Artificial Insemination by Donor: Information Communication and Regulation*, 30 J. FAM. L. 1 (1991); Judith Sandor, *Legal Approaches to Motherhood in Hungary*, in *CREATING THE CHILD: THE ETHICS, LAW AND PRACTICE OF ASSISTED PROCREATION*, 157 (Donald Evans & Neil Pickering eds., 1996); Ivanyushkin Alexander Yakovleitch, *Bioethics and New Reproductive Technologies in Russia*, in *CREATING THE CHILD: THE ETHICS, LAW AND PRACTICE OF ASSISTED PROCREATION* 267 (Donald Evans & Neil Pickering eds., 1996); Robert Blank, *Regulation of Donor Insemination*, in *DONOR INSEMINATION: INTERNATIONAL SOCIAL SCIENCE PERSPECTIVES* 131 (Ken Daniels & Erica Haimés eds., 1998).

As a result of these recent developments, prominent scholars have begun to seek alternative definitions for the biological definition. One such approach, influenced by cultural feminism, attempts to determine the identity of the parent based on a concrete psychological relationship between the parent and the child.¹⁴ Another, more radical approach, represented in this symposium and in a recent volume edited by Prof. Ertman,¹⁵ but supported by other scholars as well, views individual autonomy and the voluntary contract as the new basis for legal parenthood. These approaches have entrenched themselves in Israeli legal scholarship,¹⁶ and, in various contexts, within the legal discourse regarding the laws of parenthood.¹⁷

In this essay, I argue that both alternatives – natural-biological and voluntary contract¹⁸ – do not sufficiently tell the story behind the determination of parenthood in Israeli law nor do they supply a sound normative basis for the proper regulation of parental determination.

In addition, I argue that while the approaches, which focus on the concrete psychological relationship between the parent and child, add an important element to the discussion of parental determination, they are too focused on the private aspects of specific parent–child relationships and in doing so, these approaches overlook important elements of the proper legal regulation of parenthood.

In light of this insufficiency, I suggest a social-institutional perspective of parenthood, one emphasizing that parenthood is not merely a matter of nature, but instead an artificial construct structured and designed by society. In

14 See Katharine T. Bartlett, *Re-expressing Parenthood*, 98 *YALE L. J.* 293 (1988); 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 (1990). The leading researcher of this position is Ruth Zafran. See Ruth Zafran, *Child to Whom do You Belong: The Flaws in the Existing Israeli Law Regarding Paternity*, 46 (B) *HAPRAKIT* 311, 311 (2003) [in Hebrew]; Zafran, *supra* note 11.

15 See MARTHA M. ERTMAN, *LOVE & CONTRACTS: THE HEART OF THE DEAL* (2012); see also in this issue, Martha M. Ertman, *Unexpected Links between Baby Markets and Intergenerational Justice*, 8(2) *L. ETHICS HUM. RTS.* (2014).

16 See Margalit, *supra* note 10.

17 A clear example of this is the “New Family” organization that has a significant public impact. At the heart of the organization’s agenda is the legitimacy of a variety of family patterns and maximal recognition of the individual freedom of parents and those striving to be parents in the contexts of spousal and parent–child laws.

18 See, e.g. 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); see also Yehezkel Margalit *Redefining Parenthood – From Genetic Essentialism to Intentional Parenthood*, *COLUM. U. J. BIOETHICS* 1 (2012), posing biological parenthood and contractual parenthood as two competing options.

addition, this approach rejects the current dissonance that exists between (1) the legal determination of parenthood; (2) the regulation of reproductive technologies, on the one hand, and the regulation of parenthood's content in the sense of regulating parent status vs state and vs children, on the other hand. This approach maintains that the legal and social definition of parenthood will inevitably affect the content of parenthood. Therefore, I argue that, on a normative level, various decisions regarding regulation of reproductive technologies and the determination of parenthood must take into account not only the involved parties but also the manner the decision can affect the conception "who is a parent" and more importantly, the ethos of parenthood that the law should encourage. Drawing upon an emerging construct of parenthood that combines parental responsibility, the autonomy of both parents and children, as well as a relational perspective on children–parents relationships¹⁹ I demonstrate how this modern construct, when properly combined into the parenthood as-a-social-institution framework, should affect not only the children–parents relationship but also the determining of parenthood and the regulation of reproduction.

The Rise and Erosion of the Biological-Natural Parenthood Myth in Israeli Law

The Myth of Genetic Parenthood

In contrast to the myth according to which the legal definition of parenthood is merely a matter of nature,²⁰ many legal systems have traditionally based the

¹⁹ For the application of the relation theory with regards to child custody, see Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071 (2003); along with; Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5 (2002). In continuing my approach according to which there should be a connection between the ethos guiding the regulation of parent–child relationships and the ethos guiding the determination of parenthood, I adopt these principles with regard to the laws of the determination of parenthood as well. I note that in these contexts, my approach follows in the footsteps of the approaches mentioned in *supra* note 10, which also seek to base the definition of parenthood on a relational theory regarding parent–children relationships.

²⁰ See *supra* notes 1 and 2. For an example of the existence of this partial "myth" see the official report submitted by the Public Commission for Fertility and Childbirth [hereinafter Mor Yosef Committee], available at <http://www.health.gov.il/PublicationsFiles/BAP2012.pdf> (last visited Mar. 20, 2014). The report states that maintaining a biological connection between at

legal definition of parenthood, or at least of paternity, not on the biological test, but rather the spousal status test, according to which the father is the mother's husband. Accordingly, in these legal systems, children born of extramarital relations were deemed illegitimate and their biological fathers were not legally recognized as such.

In Israel, while much of the laws of personal status are regulated by religious law, paternity is considered by most religions to be a civil matter. The exception is that of Islam, according to which the definition of paternity is a matter of personal status, to be decided according to Islamic law. This serves as the backdrop for the legal case I describe at the outset, which examines the claim of a Muslim child born out of wedlock to legally recognize the paternity of her biological father – allowing her to sue for child support.

As previously stated, in accordance with existing law prior to the case, the Islamic law applies to both issues (paternity and child support). The common interpretation of Islamic law determines that a child born out of wedlock is not considered the biological daughter of the father – who therefore is not obligated to pay child support.

While these rules guided the Sharia court in the aforementioned case, Supreme Court Justice Cheshin reversed the religious court's decision in a dramatic ruling, arguing that even in areas in which formal law determines paternity according to religious law, a parallel track of civil paternity exists drawing on biological paternity. Cheshin based his ruling, *inter alia*, on the Basic Law: Human Dignity and Liberty,²¹ as well as the natural right of children to a parent, and specifically one who will provide their basic needs. The ethos regarding the centrality of the natural-biological element in the definition of parenthood and the rights and obligations derived therefrom is significantly expressed in cases in which one of the parents – commonly the father – attempts to renounce parenthood in a prior agreement with the mother or when the father tries to evade parenthood by claiming it was forced upon him against his will.

In cases of the first type, Israeli case law, and other countries, has demonstrated a consistently resolute policy, stripping biological parents of the ability to renounce their parental obligations to their child and their legal status of parenthood.²² This policy has been more strongly enforced when extramarital

least one of the intended parents served as a principal goal of the committee (*id.* at 6.). See also Blecher-Prigat & Hacker, *supra* note 10, at 5.

²¹ Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391 p. 150, available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Mar. 20, 2014).

²² CA 664/71 Marchav v. Sherlin, 26(1) PD 701 [1971] (Isr.).

fathers attempt to renounce their parental status prior to or following birth. Case law has made it clear that such agreements harm public policy and are not to be validated.²³ Moreover, evidentiary rules create a presumption that a father who refuses to undergo DNA paternity testing is the biological father.²⁴

Cases of the second type – known as “unintentional parenthood” – generally discuss circumstances in which an individual engaged in sexual relations with a partner who gave the false impression of using contraception. Courts²⁵ have insisted that the circumstances of unintentional parenthood do not justify evading parenthood and the obligations derived therefrom.

In conclusion of this section and in order to complete the picture, I mention that the emphasis on the biological aspect of parenthood and its description as part of “natural law” is particularly prominent within rulings preferring biological parents over parents designated for adoption – even when the child’s bond with the adoptive parents was significantly more meaningful than that with the biological parents and when the adopting parents were seemingly better suited to fulfill the child’s best interests. The court in such cases employed the rhetoric – “the cry of blood” as an expression of the natural aspect of parenthood.²⁶

The Erosion of the Myth of Natural Parenthood I: The Case of Children Born to Married Women through Extramarital Relations

As we see briefly above, in cases of fathers of children born out of marriage, the determined statements regarding biological parenthood as natural parenthood and as the exclusive test for civil parenthood in Israeli law have been expressed in practice. However, children born to married women through extramarital relations do not benefit from the same practices. In some countries, these children are regarded as the children of the married husband. In Israel, however,

²³ See supra note 3, but compare to 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. 115–63 (2008). Zafran expresses her opinion that if the agreement was drafted and approved by the sides before the baby was born then it should be upheld by the court.

²⁴ CA 548/78 Sharon v. Levi, 35(1) PD 736 [1980] (Isr.). See also Genetic Information Law, 5760–2000, SH No. 1766 p. 62 (Isr.) allowing in certain situations to force the conducting of this test.

²⁵ CAL. FAM. CODE-SEC PART. 3: UNIFORM PARENTAGE ACT [7600–7730] explicitly states that whoever “supplies the genetic data” in child birth cannot be freed of parental obligations.

²⁶ See supra note 2. For more on the unique bond between a child and its biological parents, see Rhona Schuz, *The Right of a Child to be Raised by his Biological Parents-Lessons from the Israeli Baby of Strife Case*, 27 CHILD LEGAL RTS. J. 85 (2007).

in accordance with the biological-natural parenthood concept, the biological father – not the husband – should be recognized as the legal parent.²⁷ However, as Professor Shifman has demonstrated,²⁸ an entirely different arrangement has taken shape, leading in most cases to the recognition of the mother's husband, and not the biological father, as the legal father.

First, in contrast to the pressure applied to the assumed father to undergo DNA tests for children born to unmarried women, case law, and more recently legislation, have almost completely prohibited DNA paternity testing tests for children born to a married woman when the husband is not assumed to be the biological father.²⁹ Second, in absence of this option, the husband is considered the legal father based on evidentiary presumptions according to which in the absence of evidence to the contrary, the husband is the biological father based on the assumption that the woman is sexually active with her husband.³⁰

Originally, courts objected to paternity tests out of concern that these tests could reveal that the child was born to a married woman outside of marriage, and in these instance a Jewish child would be considered a bastard or *mamzer*. This issue is particularly important as the labeling of a child a bastard has dramatic and difficult consequences in its future,³¹ significantly the limited ability to marry according to Jewish orthodox law. It should be stressed that according to Jewish law bastardy stems from illicit sexual relations and not from using alternative fertility treatments.³² As such, it has been argued that DNA tests conducted to determine parenthood are actually detrimental to that child's welfare. The courts' focus on the fear of bastardy has been the target of much criticism in scholarly literature. Some critics argue that from the perspective of the child's best interests, the consideration of bastardy is too narrow and that certain circumstances justify conducting a paternity test, despite the fear of bastardy. In contrast, so argue the critics, there are other cases in which it is in the best interest of the child to avoid conducting the test, even when the fear of bastardy does not arise.³³ In addition, scholars point to the injustice caused to

²⁷ See Zafran, *Child to Whom do You Belong*, *supra* note 14.

²⁸ Shifman, *supra* note 9, at 194.

²⁹ SHIFMAN, *supra* note 11

³⁰ For more on the evidentiary presumption that “[a] woman’s sexual activity is preformed mainly with her husband,” see Zafran, *Child to Whom do you Belong*, *supra* note 14, at 326.

³¹ Yehiel S. Kaplan, *From Best Interest of the Child to Children’s Rights – Independent Representation of Minors*, 31 MISHPATIM 623 (2001) [in Hebrew].

³² As noted by the Mor Yosef Committee, according to Jewish Law bastardy is only a product of illegal sexual relations, meaning that alternative ways of fertility cannot render a child a *mamzer*. See *supra* note 20, at 24–25.

³³ For such criticism, see SHIFMAN, *supra* note 11, at 48–49.

the husband who must bear the financial commitment³⁴ as well as the injustice to the biological father who cannot fulfill parenthood.

For a time, some trial court rulings, as well as certain elements within Supreme Court rulings, pointed to the weakening of the prohibition against DNA testing for the purpose of proving paternity. However, a legislative arrangement was passed a number of years ago within the framework of the Genetic Information Law³⁵ that strengthened the previous trend.³⁶ Moreover, another legislative barrier was placed as the law prohibits any man, other than the husband of the mother, to be registered as the child's father.³⁷ Finally, in a number of rulings, the family court determined that the legislative spirit dictates that DNA tests, as well as other evidence aimed at proving paternity outside of marriage, are to be prohibited as well. Despite there being signs again of a counter trend, it seems that at present, the option of attempting to prove the paternity of the biological father or non-paternity of the husband in an additional manner is rarely used. Accordingly, it can be said that in the case of a child born to a married woman outside of marriage, Israeli law ultimately adopts – even if in a somewhat roundabout way – the family test.

The Erosion of Natural Parenthood II: The Case of Alternative Insemination

While the case of a child born to a married woman outside of marriage illustrates the diminished status of the biological test in favor of the family status test, the case of sperm and/or egg donation – and in a somewhat different context, the case of surrogacy agreements – demonstrates that under certain circumstances biological parenthood yields to contractual considerations as well as the desire of the intended parents.

One of the most dramatic medical developments in recent decades has been the increased birthrate through alternative insemination of various kinds, of which the most relevant for our purposes are egg donation,³⁸ sperm donation, and surrogacy agreements.³⁹ The call to examine the regulation of this field is

³⁴ For the circumstances in which the woman's husband can deny his parental obligation, see CA 1354/92 Attorney General v. Plonit, 48(1) PD 711 [1994] (Isr.).

³⁵ Genetic Information Law, 5760–2000, SH No. 1766 p. 62 (Isr.), see *particularly* sect. 28e.

³⁶ See Zafran, *supra* note 14, at 326–29; see also Margalit, *supra* note 10, at 849–51.

³⁷ See Mor Yosef Committee, *supra* note 20, at 6 and 25. See also Margalit *supra* note 10, at 849–51.

³⁸ Egg Donation Law, 5770–2010, SH No. 2242 p. 520 (Isr.).

³⁹ See Embryo Carrying Agreement (Approval of Agreement and Status of the New-born) Law 5756–1996, SH No. 1577 p. 176 (Isr.).

especially pertinent in Israel – which is the country with the highest per capita use of fertility treatments in the world.⁴⁰

Let us begin with the process of sperm donation – which has gained popularity worldwide as it is currently the most cost effective and efficient alternative fertility option available.⁴¹ Sperm donations in Israel usually occur when a man donates his sperm to a sperm bank and that sperm is then used to fertilize a woman's egg. In the past, regulations were passed that made it difficult for unmarried woman to receive a sperm donation. However, as a result of a Supreme Court ruling, unmarried women, as well as lesbian couples, can now benefit from sperm donations.⁴²

In a number of Western countries, the sperm donor's status is not the same as the legal father.⁴³ This position is supported by those in favor of strengthening the element of intent in determining parenthood⁴⁴ but criticized by those concerned with the best interests of children born to single-parent families.⁴⁵

In Israel, however, in the absence of a direct provision regulating sperm donation, the biological-genetic test ostensibly applies, according to which the donor is considered the father for legal purposes.⁴⁶ However still, the fact that

40 See Kaplan, *supra* note 31 (citing the opinion that Jewish law does not prohibit the use of alternative fertility treatments).

41 DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006).

42 HCJ 998/96 Chakak v. Health Ministry (Feb. 11, 1997), Takdin Legal Database (by subscription) (Isr.).

43 See ERTMAN, *supra* note 15. Chapter 2 discusses the legal ability of a sperm donor to renounce his paternal responsibility by signing an agreement at the time of his donation. See also Yehezkel Margalit *Artificial Insemination from Donor (AID) – From Status to Contract and Back Again?*, 20(2) B. U. J. SCI. & TECH. L. (2014, forthcoming).

44 See, e.g. *People v. Sorenson*, 437 P.2d 495 (Cal. 1968), which calls for abandoning the biological test in the case of sperm donation. “The anonymous donor of the sperm cannot be considered the “natural father”, as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney.” As noted by the trial court, it is safe to assume that without defendant's active participation and consent the child would not have been procreated.

45 Some researchers call for the obligation of the donor to assume parental responsibility in a case where the child will be brought up in a single parent home. See Marsha Garrison, *Law Making for Baby Making: An interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 902 (2000); DAVID POPENOE, *LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY* (1996).

46 Ruth Zafran, *The Family in the Genetic Era: Redefining Parenthood in Families Created Through Assisted Reproduction Technologies as a Test Case*, 2 HAIFA L. REV. 223, 258 (2006) [in Hebrew]. Although there is normally anonymity, Zafran is of the opinion that in the case of an identified sperm donor he is to be considered the father. For the status of the donor as a father by biological test and recognition of the right to resist further fertilization to not be a father, see

sperm donations in Israel are conducted anonymously⁴⁷ causes a reality in which the biological-genetic father is not recognized as such and is not obligated to fulfil parental commitments to their children.

And what is the status of the biological mother's partner? Here as well, reliance on the biological test makes it difficult to recognize the partner as the father. In spite of this difficulty, in many countries, in such cases the law rejects the biological test and views the partner of the biological mother as the legal father.⁴⁸

Affected by the myth of genetic paternity, Israeli courts have yet to fully recognize the partner of the recipient as the father. Still, in specific instances the courts have recognized his parental responsibility through various contractual constructs such as implied consent to child support.⁴⁹ Moreover, there has been a significant voice in scholarly literature calling to fully acknowledge the status of the mother's partner as a parent,⁵⁰ based on the functional parenthood test.⁵¹ Israeli courts have not fully adopted this position, but it has resonated within a number of its rulings.⁵²

Nevertheless, even if Israeli legislation and courts have not formally abandoned the biological test even in cases of alternative insemination, the legitimacy of anonymous donation in Israeli law, as well as its partial regulation,

recently HCJ 4077/12 Plonit v. Department of Health, Feb. 05, 2013) Nevo Legal Database (by subscription) (Isr.).

47 For more on the history of semen donations, see Ruth Landau, *The Management of Genetic Origins: Secrecy and Openness in Donor Assisted Conception in Israel and Elsewhere*, 13 HUM. REPRODUCTION 3268 (1998).

48 American case law recognizes the ability of the mother's partner to assume full parental responsibility via an "opt in" contract. For more on the legal construct of such agreements, see *Doe v. XYZ Co.*, 914 N.E.2d 117 (Mass. App. Ct. 2009), anonymous sperm donation the mother wishes to expose the father verified in *Lexis Culliton v. Beth Israel Deaconess Med. Ctr.* 756, N.E.2d 113 (Mass. 2001); the donors of sperm and ova wanted to be registered as the child's parents *Hodas v. Morin* 814 N.E.2d 320 (Mass. 2004). See also Margalit, *supra* note 10.

49 See *supra* note 10. See also the critique of Ruth Zafran, *More than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple*, 3 HAIFA L. REV. 351, 358 (2007) [in Hebrew]. The practice, in place since 1989, requires the woman's partner to sign a specific agreement accepting responsibility for the child.

50 See Zafran, *supra* note 49, at 374 (examining justifications for breaking the paternal bond between the donor and the child including, among others, the best interests of the child and our aspirations to allow for the freedom to create families). But Cf. SHIFMAN, *supra* note 11.

51 While Jewish Law's paternal test hinges explicitly on the biological test, the fact that the insemination was performed artificially allows for the breaking of the paternal bond between the donor and the child. See Pinhas Shifman, *Establishing Parenthood for a Child Born through Artificial Insemination*, 10 MISHPATIM 63, 71 (1980) [in Hebrew].

52 See in details the analysis in *supra* note 11.

opposes the biological test and all that stems from it including the rhetoric of “the cry of blood” and the natural commitment of the biological parent. This trend is expected to grow in the event that the conclusions of the Mor Yosef Committee are accepted and passed. The committee has called to recognize the partner of the owner of the fertilized egg as the father, as well as to formally sever the parental link between the donor and the child, even when a donation is not made in a completely anonymous fashion.⁵³ The abandoning of the biological test, at least in the genetic sense, is also reflected in Article 42(a) of the Egg Donation Law (2010) which states “a child born of an egg donation is the child of the recipient for all intents and purposes.”⁵⁴

In my opinion, there is a tension between the biological approach, including the objection to agreements in which the father attempts to opt out of his biological fatherhood, and the approach increasingly demonstrated by the courts regarding artificial reproduction. I now attempt to demonstrate this tension.

Previously, *in vitro* fertilization was only available for women who were interested in fertilizing the egg with their husband’s sperm.⁵⁵ The Israeli Supreme Court overturned this in a decision that symbolizes the Israeli Supreme Court’s⁵⁶ abandonment of the fear of creating “genealogical bewilderment,”⁵⁷ i.e. a child with no biological connection between himself and his parents and in doing so replaced the biological test that was previously used.

Note in the previous section, I demonstrate the manner Israeli law strongly rejects contracts in which partners agree to allow the biological father to renounce his legal status as a father and the rights and obligations derived therefrom. However this stance, which seems so intuitive at first glance, now justifies revisiting the aversion to agreements renouncing the biological father’s parental status⁵⁸ after examining the implied contractual elements that form the basis for alternative fertility treatments, most notably sperm donations.

53 See Mor Yosef Committee, *supra* note 20, at 6 and 35 (calling to establish a rule that sperm donation should never establish parental responsibility). Cf. U.S. case law that calls to abandon the biological test when sperm donation is the donor.

54 However, Article 42(b) states that this does not apply in marriage and divorce matters. See *supra* note 39.

55 Public Health (In Vitro Fertilization) Regulations 5747–1987, § 13 KT No. 5035, p. 987.

56 See *supra* note 42.

57 See H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHO. 133 (1964).

58 American case law also shows disinclination to respecting “opt out contracts” of biological fathers in which the pregnancy came about through intercourse and not sperm donation. But See *Ferguson v. McKiernan*, 940 A. 2d 1236, 1239 (Pa. 2007).

Let us ask ourselves, what is the true source of society's aversion to these agreements? According to one option, the difficulty accepting agreements in which the genetic-biological father renounces his status and responsibility as a parent lies in the fact that this renunciation will cause the child to be raised in a single parent family. However, this option does not seem probable, for if Israeli law condemns the outcome of leaving a child to a single parent family, how is it that the Israeli High Court of Justice ruled not only against disallowing sperm donations for single mothers⁵⁹ but also opposed discrimination against single mothers as well as conducting economic or emotional capability tests based merely on the status of single mother.⁶⁰

Therefore, we must consider a second alternative: Society's condemnation stems from the biological father's shirking of his natural responsibility. However, this argument is problematic for two reasons: First, it assumes that even after it has been agreed upon by all parties involved that the biological father will no longer be considered such, it can still not affect his biological status, and therefore his denial of paternity is deemed an improper act. Second, if indeed the biological father's denial of his child is an improper act in and of itself, why does Israeli law allow the mechanism of anonymous donations in a manner which allows the biological father to renounce his status and responsibility?⁶¹

To conclude, the examples of various attempts to establish parenthood in the cases of a child born from an extra-marital affair and that of a child born from donated sperm highlight the reality that Israeli law does not consistently adhere to a unified definition of biological parenthood.

The Contractual Alternative

The failure of the natural parenthood paradigm to account for the legal state of affairs in a number of the above contexts has led some scholars to recognize, in

⁵⁹ See *Chakak v. Health Ministry*, *supra* note 42.

⁶⁰ In a decision establishing a single mothers' right to enter into a surrogacy agreement, the court noted that single parent families have become an acceptable phenomenon in our culture—HCJ 2458/01, “New Family” (*Mishpacha Chadasha*) v. The Regulatory Board of Agreements (*Havaada lishur Heskemim*), 57(1) PD 419 [2002] (Isr.).

⁶¹ It is clear from the deliberations above that the calls for disconnecting the parental bond between the donor and the child emanate from more than just institutional concerns of causing a decrease in the amount of sperm donors. See Ayelet Blecher Prigat, *On Borders, Rights and Family*, 27 *IYUNEY MISHPAT* 539, 561 (2003) [in Hebrew]. However, I hold that if Israeli law honestly and consistently follows the biological test, it is unclear that the moral price of relieving the father from his commitment to his children is an appropriate one to pay.

certain situations, alternative definitions of parenthood, such as functional parenthood.⁶² However, it seems that the most comprehensive alternative⁶³ to the natural-biological approach to parenthood lies in the voluntary contract approach, developed mainly in the United States, and as such it is based upon, for the most part, American law.

A distinct representative of this approach is Martha Ertman. Ertman is a firm believer in the fact that the contractual approach solves many complex cases in need of parental distinction and in turn provides maximum protection to children and their families.⁶⁴ Her approach can be summarized as she has so explicitly declared “love and contracts make a family.”⁶⁵

In a number of studies published in the last decade, Ertman has claimed that while on a declarative level Western legal systems often demonstrate a resolute stance against agreements determining legal parenthood, these agreements are actually recognized in far more cases than at first glance. Ertman discusses, among others, the case of sperm donation and contends that the relevant existing regulation is an expression of state recognition of the combined contractual relationship between the donor and the sperm bank, between the sperm bank and the recipient, and between the recipient and her partner.⁶⁶ Similarly, Ertman points to countries that recognize various surrogacy agreements as an example of legal recognition of agreements determining parenthood. Ertman does not stop there, suggesting state acknowledgement of additional types of agreements determining parenthood, including agreements for non-anonymous sperm donations and parental arrangements between two or three parties. Ertman contends that the fact that reproduction exchanges have

62 See Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determination*, 30 J. FAM. L. 847, 847 (1991); Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory and The Best Interest Standard*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 285 (Mary Ann Mason, Arlene Skolnick, & Stephen D. Sugarman eds., 2003). See also Ayelet Blecher-Prigat & Pamela Laufer-Ukeles, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419 (2013). See also in the context of Israel, *supra* note 11.

63 However, I note an alternative approach in Israel, led by Ruth Zafran, supporting a relational approach to defending parenthood.

64 See ERTMAN, *supra* note 15, at 26 and 32. See also Margalit, *supra* note 10; Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, And the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 957 (2006);

65 ERTMAN, *supra* note 15, at 12.

66 *Id.* at 28–30, notes that parenthood by contract is the law in most American states as evident by the adoption of the Uniform Parentage Act and the legality of donor opt in/opt out contracts. For additional examples of contractual or quasi-contractual recognition of parenthood, see Margalit, *supra* note 10.

made millions of new families in the last half century, with relatively few issues being brought to court, attests to the fact that the phenomenon is governed and functions through voluntary contracts between the sides. She adds that even when the cases are brought to court they are mainly decided by contractual doctrines and only in those cases that the agreements themselves pose a threat to public considerations are they voided.⁶⁷

In the context of Israeli law, at least within the theoretical literature, some have attempted to apply the contractual model.⁶⁸ Despite this, a closer examination of the existing laws reveals a more ambivalent reality. In the case of sperm donation – which according to Ertman’s analysis can be described from a consensual perspective – the Israeli legal system adopts, at least *de jure*, a biological approach that perceives the donor as the father. Yet, on a practical level, we have seen that overall Israeli law attempts to fulfill the wishes of the donor, at least the anonymous donor, not to obtain paternal status. In addition, Israel law allows quasi contractual constructs in order to cast parental obligations on the caregiving parent or the mother’s partner.

Another example of contractual regulation of parenthood in existing law is the Embryo Carrying Agreement Law,⁶⁹ allowing the designated parents to enter an agreement with a surrogate mother. It should be noted that the Embryo Carrying Agreement Law sets imposing state regulation on many aspects of surrogacy agreements, such as regulatory board approval, such that it is difficult to state whether there is true contractual freedom in the matter.⁷⁰ In addition, according to the law, the agreement itself does not determine parenthood, and as such ultimately requires a parenting order.⁷¹ Despite these sparse regulatory requirements, the example of surrogacy agreements makes clear that existing law in Israel as well is not entirely deterred by contractual regulation of parenthood.

The beginnings of acknowledging contractual regulation of parenthood integrate with a broader trend in Israeli society to fulfill the involved parties’

⁶⁷ ERTMAN, *supra* note 15, at 38. Situations where the donor does not stay in the familial picture are coined “one shot exchanges.” Ertman believes that family law should only disallow one shot exchange in extreme circumstances and should generally allow the sides to decide for themselves.

⁶⁸ See Margalit, *supra* note 10.

⁶⁹ Embryo Carrying Agreement Law, *supra* note 39.

⁷⁰ For more on the issues stemming from the surrogacy laws, see Carmel Shalev, *Halakha and Patriarchal Motherhood – an Anatomy of the New Israeli Surrogacy Law*, 32 ISR. L. REV. 51 (1998).

⁷¹ See Embryo Carrying Agreement Law, *supra* note 39, art. 12 (determining that even in surrogacy agreements in which the intended father donates his own sperm a parental order is required).

intent, and especially that of parties aspiring to parenthood, as a central, if not sole value, for parental determination and the regulation of artificial reproduction techniques.⁷² This state of mind is connected to another trend in Israel and worldwide, allowing testament-like arrangements for one's sperm while making use of the deceased's sperm based on his direct and implicit instruction to a relative, an arrangement known in Israel as a "biological will." Similar to those who acknowledge contractual agreements determining parenthood, those who support biological wills also base their view on a moral approach that considers parental free will to be the decisive parameter determining parenthood.⁷³

Toward a Social-Institutional Theory of Parenthood

The Shared Assumptions of the Natural and Contractual Approaches

Despite the obvious differences between the biological and contractual approaches determining parenthood, both approaches view parenthood as a private matter and deny the constructional aspect of parenthood. Thus, according to the biological approach, the definition of parenthood is perceived as a matter of nature and therefore, does not require a principled social resolution. Similarly, according to the contractual approach, the definition of parenthood is subject to an agreement between all involved parties, but it is not to be seen as an external, social, and public construct. The private perception of the determination of parenthood is of normative consequence, as these approaches focus on the parties' wishes to claim or renounce parenthood, but when determining parental identity or regulating reproduction do not integrate public considerations regarding the appropriate design of parenthood in our society.

In this part I suggest foundations for a competing approach. On a descriptive level, this approach views parenthood as an institution that is not individualized and private, but rather social and public. On a normative level, this approach analyzes the normative consequences of recognizing parenthood as a

⁷² See *supra* note 18 and notes 70–73.

⁷³ See Mor Yosef Committee, *supra* note 20, at 6, and 46, and *infra* Section "Legal Regulation of Postmortem Conception – Reflections on Children as Memorial Monuments and Kaddish".

social institution surveying the considerations that should be expressed within the design of the laws for determining parenthood. In addition, I critique the existing dissonance between the laws of defining parenthood and parent-child laws and attempt to display a more nuanced and complex theory regarding the link between the legal definition of parenthood and the regulation of its content. Finally, I discuss the application of this model to private arrangements regarding the determination of parenthood, as well as the regulation of various methods of alternative reproduction in general.

Parenthood as a Social Public Institution

The attempt to display parenthood as a private relationship and the design of the laws for determining parenthood stemming from this perspective are insensitive to the status of parenthood as a social institution, an object of social norms, and the role of law within these contexts. In order to clarify this point, a brief sociological background is necessary. In sociological literature – with legal and economic literature following suit – there is much preoccupation with the subject of social norms. Without delving into existing subtleties between various definitions, a social norm is generally a behavioral standard designed and enforced by a social group in light of its values, through which it defines the expected behavioral pattern in a particular social context. As such, social institutions are commonly viewed in sociological discourse as a group of norms designing the accepted performance of social actions considered to be central in a given society. Social institutions establish a system of meanings and content commonly known as “culture.” Through these meanings, humans organize their perceptions concerning their identity, their status, and their relationships with other humans. In recent years, legal scholars have focused on the way in which legal rules integrate with social norms, social institutions, and culture in general. They emphasize the dependency society has on law as well as the fact that the contents of law play an important role in determining the manner humans define the nature of their social relations.⁷⁴

This has clear implications in the legal determining of parenthood. In contrast to the myth of biological parenthood, the historical and legal analysis in previous sections proved beyond doubt that the definition of parenthood has never been based solely on biological tests, but rather an artificial construct

⁷⁴ See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY – A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973). For a legal examination, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

deriving from social and moral considerations. As a result, the question of whether individuals will be accepted by others and allowed to function as parents is affected not only by specific personal preferences but also by the social construct of parenthood as an institution within their culture.

Legal regulation of parenthood plays a crucial role in this context, as the law is an important tool for designing social institutions. The role of law becomes especially important in cases of modern, relatively novel institutions, not yet fully developed in extralegal culture. Therefore, the law plays a vital role in the design of the institution of parenthood and its compatibility with recent, novel technologies of reproduction and family patterns that those technologies enable. The public aspect of such innovative parenthood is emphasized even more in states such as Israel, in which a substantial amount of medical treatments vital to the creation of innovative parenthood is funded by the state and its medical institutions.⁷⁵ Under circumstances in which artificial fertilization and the maintenance of sperm banks are carried out by public agencies, they are almost inevitably perceived by society as actions carried out under public auspices.⁷⁶ Therefore, actions concerning the creation of parenthood and its moral consequences will not be perceived by society merely as decisions by the involved parties, but rather as resolutions and actions taken by the state, or at the very least under its patronage, thereby designing the public perception as to what is proper and appropriate.⁷⁷

The Normative Meaning of Parenthood as a Social Institution

The analysis of parenthood as a social construct, the role of law in designing parenthood, and the claim that innovative reproduction technologies require involvement and funding by the state and thus are perceived as state sponsorship and even moral approval are have important normative consequences.

⁷⁵ See Mor Yosef Committee, *supra* note 20, at 6 and 20. The committee acknowledged that while third party interference into pregnancy and fertility is clearly not ideal, when the couple requires involvement of an outside body in order to create a child, the considerations are altered due to the societal involvement.

⁷⁶ See *id.* at 4–5. This is evident in numerous European countries where fertility treatments are publicly funded such as England and Germany and certain practices are more prominently promoted and others less as they hold wider social ramifications.

⁷⁷ DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995). The author is of the opinion that in cases in which a third party donor is required the court should give less significance to the involved parties rights to autonomy and dignity.

First, the mere existence of the social institution of parenthood is a public interest, as social institutions contribute to stability and interpersonal communication and serve as a platform allowing social regulation of parenthood. Therefore, appropriate legal regulation of parenthood should seek to outline a variety of well-defined and distinguished institutions, such as donors, surrogacy, parents, the parent's partner, etc. in order to serve as a stable social anchor. Therefore, alongside the required flexibility aimed to ensure the autonomy of various individuals, the law should attempt to create a somewhat rigid framework of the various parental institutions in order to draw clear borders between them and other institutions eliminating confusion between the latter and parenthood.⁷⁸ For example, the law should set clear and firm rules as to when one is considered a sperm donor to which the status of parenthood does not apply, and when one is considered a father to which the obligations, rights, and responsibilities toward the child apply.⁷⁹

Second, in adopting the private perspective, the natural approach – and to a greater degree the contractual one – focuses entirely on the involved parents' perspective while completely avoiding the wider public consequences to determination of parenthood, and more generally the ethos at the base of defining parenthood in that society. In this manner, the natural approach rejects the need to weigh public considerations when determining parental identity, as this identity has already been determined by natural consequences and cannot be changed. In comparison, the contractual approach, and more general approaches that primarily focus on the explicit and implicit intention of the adults involved, acknowledge that parenthood is not exclusively a biological matter. It, however, does hold that the law must disregard the public and public perceptions on decisions regarding reproduction and the determination of parental status.

In contrast, the approach recognizing the social construct of parenthood may make use of the definition of parenthood in order to push individuals toward specific behavior. For example, a public approach to parenthood may decide that parenthood as a result of surrogacy or alternative insemination will be recognized only if these processes were conducted in certain labs or carried out through specific procedures necessary to protect the health and dignity of participants.⁸⁰ The natural approach on the other hand, viewing genetics as the

78 For the approach that seeks to establish an intermediate stage between a parent and a functional parent, similar to that of a step-parent, see Blecher-Prigat & Hacker, *supra* note 5, at 6.

79 For the situations in which a sperm donor can be declared the father of the child in current Israeli legislation, see Zafran, *supra* note 11.

80 See Mor Yosef Committee, *supra* note 20, at 6 and 68 (suggesting the adoption of such a provision while citing numerous internal and external concerns).

natural basis of parenthood, cannot accept such regulation. Similarly, the contractual approach, focused on the parties and their voluntary agreement, would find it difficult to invalidate agreements reached outside of supervised institutions, where these agreements reflect the will of the actual participants.⁸¹

Third, while the private approaches to parenthood focus on the parties' rights, desires, and interests in a specific set of circumstances, acknowledging the social aspect of parenthood leads to the conclusion that the determination of parenthood in a specific case has wider consequences, not only toward the involved parties but also toward other cases. This effect could justify intervention in a parental arrangement when wider consequences deemed it appropriate.⁸² Take for example, an adoption agency with a "product return" policy according to which the adopting parents could return the adopted child within a year of adoption. Beyond the specific harm to that child's best interests, if such a contractual rule was to be validated by the state, there would be far reaching consequences regarding the perception of the parenthood of adopting parents as well as the ethos that society wishes to build through the law, according to which an adopting parent is considered a parent for all intents and purposes.

Similarly, recognizing contractual arrangements in which the known biological father can, through an agreement with the biological mother, "opt out" of his obligations to his child may have far reaching consequences for the ethos according to which parental obligation is a total and unconditional matter. For instance, state approval and furthermore, state funding, of a sperm bank that allows non-anonymous sperm donations legally backed by an opt out clause establishing that the donor will never be considered a parent, may have severe consequences for the ethos according to which fatherhood cannot be renounced.

It should be emphasized that I do not argue whether or not the wider implications mentioned in these previous examples are positive or negative, but rather my intention is to show such consequences exist. Moreover, acknowledging them requires lawmakers to internalize the fact that they cannot evade the design of the social institution of parenthood and therefore must focus on the content, values, and interests they believe should lie at the heart of the institution of parenthood in our society.

81 Such an approach negates the legitimacy of other suggestions of the Mor Yosef Committee such as not respecting surrogacy agreements that clearly involve exploitation.

82 This is clearly one of the main differences between my approach and that of Zafran's which requires that frequent ad hoc decisions be made.

The Dissonance between the Regulation of Reproduction and the Laws of Determining Parenthood on the One Hand and Parent–Child Laws on the Other

My previous conclusion, according to which lawmakers must take into account the effect that laws of determining parenthood have toward the design of the institution of parenthood in our society, conflicts with a dominant trend in legal discourse. This trend – influenced by the natural and contractual approaches toward the determination of parenthood – creates a dissonance between the regulation of reproduction and determination of parenthood on the one hand, and child–parent laws on the other, a dissonance which in my opinion could damage the proper ethos regarding parenthood in our society.

Parent–child laws have undergone dramatic change. In the past, children were perceived as the property of the parents, as the right to be a parent was considered to hold near constitutional significance.⁸³ However, even after time and this rhetoric has been replaced, the law still mainly spoke of parent–child laws in terms of parental rights. In contrast, during the twentieth century the approaches that focused on parental rights yielded to approaches that centered on the rights and the best interests of the children involved. According to these approaches, the parental right is not an ordinary right focused on the interests of its owner, but rather it is a right that imposes an obligation on the parents themselves to ensure the realization of the best interests of the children as well as their rights.⁸⁴ To date, 193 countries have ratified the Convention on the Rights of the Child,⁸⁵ which sets out different principles involving children's rights, including the best interests of a child. Moreover, in some countries, the concept of parental right has given way to the idea of parental responsibility as the key concept to describing the parent–child bond. The best interest of the child has become the main consideration in cases pertaining to fertility

83 CA 2401/95 Nahmani v. Nahmani, 50(4) PD 661 [1996] (Isr.). During this deliberation the right to be a parent was held in the highest esteem, and the judge even echoed the sentiment that “one who has no children is considered to be dead.” However even during this period of supremacy of parental rights, the right to be a parent was not absolute and was balanced by consideration of the best interests of the child.

84 See Zafran, *supra* note 11 (calling for the tempering of establishment of parental responsibility in cases there is doubt as to the identity of one of the parents). Zafran feels that it is important for the child to have parents who are responsible to ensure their wellbeing. See also Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centred Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1746 (1993).

85 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

treatments and its regulation.⁸⁶ The discussion has swayed so heavily to the side of the interests of the children that some of the modern liberal approaches in the matter reject the very existence of a protected interest of the parents with regards to their children, besides of course their interest to ensure their children's welfare.

In light of modern trends in parent–child laws, it has become clear that a dissonance between these laws and those of parental determination and regulation of reproduction exists. On the one hand, according to the natural-biological and contractual approaches the law should show disregard for the interests of the child in the regulation of reproduction and the determination of legal parenthood, but on the other hand it should focus solely on the welfare of the child and disregard the welfare of the parents following birth.

It seems to me that even from a philosophical analytical perspective, it is difficult to reconcile the complete recognition of the right to parenthood while utterly ignoring considerations in the best interest of the child before parenthood, together with a complete focus on the best interest of the child and the lack of recognition of a protected parental interest immediately following birth. However, for the purposes of this essay, focused on the social construct of parenthood, we shall put aside and not focus on this philosophical tension. What is indeed more pertinent is the possible effect of the laws of parental determination prior to birth – as well as the regulation of reproduction focused entirely on the potential parent, his needs and supposed desires⁸⁷ – including the desire for perpetuation and continuity after death, on the attempt to create a social ethos according to which children are not the property of their parents. According to such an ethos, children are not given to commodification and bequeathing and parental actions must focus on the interests of the children and not those of the parents for self-realization, continuity after death, or even preservation of a symbol of remembrance for their loved ones.

In light of the understanding that the various contents of the laws of determining parenthood, as well as the regulation of reproduction, may affect not only the question of parental identity but also the question of the substantive content of parenthood itself, the approach proposed in this essay views

86 See Assisted Human Reproduction Act 2(a), 2004 of Canada: “The health and wellbeing of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use.”

87 Throughout numerous decisions Judge Ila Prokatschia raised the right to parenthood to constitutional proportions noting the sources of the right to be Basic Law: Human Dignity and Liberty (*supra* note 21) along with the right to autonomy and self-determination. See HCJ 377/05, Plonit and Ploni (the Intended Parents for Adoption of the Child) v. Biological Parents 60(1) PD 124 [2006] (Isr.); CA 3009/02 Plonit v. Ploni, 56(4) PD 872 [2002] (Isr.).

parenthood as a social institution and connects between – if not fully identifying one with the other – considerations regarding the laws of determining parenthood and the substantive content of parent-child laws. This approach holds that when regulating and determining parenthood, a cardinal consideration must be the perception of parenthood that the law wishes to endorse.

What in fact is that perception of parenthood that the law should promote and which as discussed above will affect the laws of determining parenthood? I briefly touch upon a few central characteristics, as I hope to expand upon the subject in future research.

First, the best interests of the child must be a guiding principle in parenthood laws.⁸⁸ Second, the term “parental rights” must be replaced by a more complex discourse centered on the concept of paternal responsibility,⁸⁹ emphasizing the unconditional commitment of a parent to fulfill the child’s best interests and the unique authority and status granted to him in order to fulfill those interests as he perceives them.

Third, there is room to consider a separate, independent interest of parents to educate their children in a certain way or to maintain a relationship with them.⁹⁰ However, the defense of these interests is to be limited in any case in which their realization may harm the welfare or the child or make instrumental use of him.

Fourth, in the context of parent-child laws, the atomistic individualistic rhetoric of rights, emphasizing the confrontational aspect between the involved parties, is to be replaced with a discourse taking into account the complex relationships between family members, their shared interests and the attempt to resolve disputes in a manner suited to the needs and desires of the participants. In this final context, I should mention that in Israel, Dr. Ruth Zafran,⁹¹ influenced by cultural feminism, has recently suggested an impressive relational model for determining parenthood, based on the ethics of care. According to Zafran, despite the fact that the law must recognize the separate autonomy of

88 For a model of children’s rights and possible interpretations see Kaplan, *supra* note 31, at 17. See also Yehiel S. Kaplan, *The Rights of a Child in Israeli Court Decisions – The Beginning of the Shift from Paternalism to Autonomy*, 7 *HAMISHPAT* 303, 305 (2002) [in Hebrew].

89 See UN Convention on the Rights of the Child, *supra* note 85, arts. 7–9, expressing the right of every child to parents who will care for them.

90 Yair Ronen, *The Right of a Child to Identity and Belonging*, 26 *IYUNEI MISHPAT* 935, 935 (2004) [in Hebrew]. Ronen establishes the “right to parenthood” as a right to maintaining a long-lasting relationship.

91 For a comprehensive survey of Zafran’s proposed method, see Zafran, *Child to Whom do you Belong*, *supra* note 14; Ruth Zafran, *Children’s Rights as Relational Rights: The Case of Relocation*, 18 *AM. U. J. GENDER, SOCIAL POLICY & L.* 163 (2010).

parents and children, there is reason to criticize the reduction of existing discourse to the rhetoric of colliding rights, and to prefer emphasizing the ongoing relationship and shared interests of the parties. Zafran objects to the determination of a singular principle guiding the determination of parenthood (biological, functional or contractual) and attempts to suggest a number of guidelines related to the desires of both parties, the de-facto relationship forged between them, the attempt to cause the least possible amount of damage and the best interests of the child as the guiding criteria for determining parenthood.

While Zafran does not connect between the issues of determining parenthood and parent-child laws and does not discuss the way in which the laws of parental determination affect the perception of parenthood in our society,⁹² the values she presents as guiding the laws of parental determination certainly seem worthy. However the relational approach as presented by Zafran focuses on the relationship between the specific, concrete parent and child. Therefore, Zafran's model does not give enough consideration to the wider social implications of the definition of parenthood stemming from the fact that parenthood is not a natural or contractual relationship nor a social construct, and the proposed definition's effect on the perception of parenthood in society. As such, this approach focuses nearly exclusively on the concrete relationship between the specific parent and child without considering how decisions regarding parental status and the acceptance of certain arrangements and agreements regarding parenthood could affect the perceptions of parenthood in our society. Therefore, Zafran ultimately recommends in too many cases, making ad hoc decisions that do not lend themselves to offer a stable social perception concerning the questions of who is a parent and what is the meaning of parenthood. In addition, the "relationship" model suggested by Zafran, focusing on the specific relationship between the caregiving parent and the child, is biased in favor of considerations in the best interest of the child ex-post, after the birth, while allowing less room for considerations of dictating behavior ex ante, such as attempting to ensure orderly procedures to create parenthood, and a promise to care for all involved in the process.

Moreover, Zafran's emphasis on the concrete context sometimes leads her to support certain consensual arrangements that may indeed reflect the will of the parties involved, but at the same time may undermine social ethos worthy of promotion. Therefore, while I do adopt the basic principles of Zafran's view, I believe they are to be integrated within the institutional framework suggested in the current essay.

92 Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 (1984).

In the next chapter I discuss several applications of my approach. In doing so I focus mainly on the distinction between the biological and contractual approaches; however, I also examine in a number of contexts the way in which the public institutional approach may lead to a different perspective and different conclusions than the existing relational approach when it is not supported by institutional considerations.

Applications

The Social Distinction between a Donor and a Parent and the Distinction between Legitimate Sperm Donation and an Invalid Agreement to Evade Parental Obligations

In previous sections we touched on the difficulties facing the natural approach – which places genetic parenting as the sole basis for determining parenthood – to explain the willingness of existing law to defend certain practices such as egg and sperm donation that eventually allow genetic parents to evade parental status and the obligations it entails. In addition, we have noted that the contractual approach has a hard time explaining the reasons the law invalidates explicit and voluntary agreements in which the biological parents of a child born of ordinary sexual relations agree that one of them will not be considered a parent, while at the same time rendering valid a similar agreement, according to which a sperm/egg donor will not be considered a parent.

In my view, the social perspective regarding parenthood may explain this “puzzle.” According to this approach, the law seeks on the one hand, to maintain the ethos according to which parental commitment does not require the consent of the parent, while on the other hand, it promotes technologies of sperm and/or egg donation in order to allow those who cannot reproduce naturally to realize their parenthood. For this purpose, the law has developed two distinct social categories. One is the category of parent, toward which the ethos that parental commitment is not dependent on will and is cogently applied. Alongside this category, the law creates a social category of “donor,” distinct from that of a parent and towards which the parental obligations do not apply from the outset.⁹³

⁹³ See Michael Serazio *Seminal Case*, HOUSTON PRESS (Mar. 10, 2005), <http://www.houstonpress.com/2005-03-10/news/seminal-case/>. The author lists situations in which the American courts will allow a donor to assume parental responsibility via an “opt in contract.”

However, according to the social approach to parenting, the mere declaration of the existence of two separate social institutions – parent and donor – is insufficient. In order to reinforce the distinction between the father and the donor, all while maintaining the ethos of parental obligation, certain clear characteristics of the donor category should be maintained while clearly differentiating between itself and the parent category.

One type of distinction may be based on an objective test focused on the procedure preceding birth: According to this option, a parent is one who gave birth to a child as a result of natural sexual relations, while a donor is one who gave birth to a child as a result of alternative insemination.⁹⁴ However, this distinction is not sufficient, as in the case of those requiring alternative insemination for the purpose of parenthood, no one would consider the insemination itself as negating the parental status.

Against this backdrop, we may offer a second institutional distinction based on the subjective will of the donor. According to this distinction, a parent is one who has had sexual relations and/or used an artificial technique of reproduction in order to become a parent, while a donor is one who has had sexual relations and/or used an artificial technique of reproduction in order to enable others⁹⁵ to become parents.⁹⁶ However, this distinction still fails to explain why one who engages sexual relations accompanied by an agreement that he is not going to be considered a parent, will still be considered as such according to existing law.

In light of the failure of the previous criteria – the objective one discerning between reproduction through natural sexual relations and an artificial process of alternative insemination as well as the subjective distinction focused on the donor's motivation – one may consider combining the two. According to such a proposal, a donor is simply one who donated sperm in a laboratory out of the desire to help others become parents.

However, it seems to me that settling for the combination of donating in a laboratory together with the original desire of the donor that others will use his sperm, is not enough in order to create a clear and total distinction between the institution of parents and that of donors and will ultimately undermine the institution of parenthood. Consider for example the cases described in Ertman's book of a known donor (a donor who maintains the relationship with

⁹⁴ See the rhetoric used in *Kesler v. Weniger* 744 A. 2d 794 (Pa. Super Ct. 2000).

⁹⁵ See TEX. CODE FAM. 160, 702 (West 2001) (defining a donor as someone who performs an act to assist in reproduction).

⁹⁶ See Zafran, *supra* note 49, at 374 (discerning between a donor and a parent through subjective intention).

the mother and sometimes even with the child as well).⁹⁷ Would a person who is in contact daily with his children not be considered a father in public perception? And if that is the case, would not such a legal state of affairs, allowing such a person to enter agreements renouncing their status as parents or renewing them as they wish, seep towards regular parenthood and harm its unconditional and total nature. Against this backdrop, I would suggest anonymity – and as a result the distance between the donor and the child, certainly until adolescence – as an additional property of the institution of donors. In this way, the difference between parent and donor would be clearer and it would be emphasized that a person aware of the existence of his children will never be able to fully renounce them even by way of private contract between the parties involved.

Indeed, the probation on choosing the sperm/egg donor entails a reduction of the range of options available to the men and/or women requiring artificial insemination, however it does not prevent them from realizing their dreams of parenthood. In my opinion the price of reducing the option of non-anonymous donation is justified in light of the damage to the institution of parenthood that may occur as a result of a state of affairs in which the law allows one to willingly renounce his biological child known to him. This price is certainly justified when considering the danger towards the welfare of the children who, instead of receiving a stable family framework, will be exposed to an in between status of father-donor-friend of the mother.

Supervising the Use of Technologies of Reproduction due to Age and Capacity

One of the issues facing lawmakers dealing with technologies of reproduction is that of the state's legitimacy to screen those who wish to receive these services

⁹⁷ *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. S Ct. 2007) coined by Ertman to be the “case of the friendly donor.” The discussion in the text focuses mainly on the distinction between the consensual and social approaches, concerning the status of the non-anonymous sperm donor. In my opinion, this issue may expose the differences between the social approach and the functional parenthood approach. The latter focuses on de-facto relationships forged between the involved parties and fulfilling their desires as much as possible. Therefore, it is safe to assume that this approach will honor an agreement in which the non-anonymous donor agrees with the biological mother that he will not be defined as a father. In contrast, as I argued extensively, from the social perspective, the damage caused to the institution of parenthood by the existence of the non-anonymous donation may justify invalidating such an agreement, even if it reflects the will of most of the parties involved as well as the practice created by the agreement.

for reasons of age, capacity to function as a parent, etc.⁹⁸ Traditionally the main legitimate reason for intervention was presented as defending the best interests of the child to be born through these methods.⁹⁹ The Mor Yosef Committee, when discussing the legitimacy of establishing an age limit for publicly funded fertility treatments, stressed the fact that foresight is required to overlook the current rights of the parents and ensure that the child is raised by parents who are equipped to do so. However, this argument has been attacked by analytical philosophers demonstrating the non-identity problem (see for example Professor Heyd's fascinating article in the current symposium).¹⁰⁰ According to this argument, in order to oppose technologies of reproduction for reasons concerning the best interest of the child, we must assume that this child is better off not having been born at all rather than being born into the current circumstances.¹⁰¹

For example, Glen Cohen¹⁰² has recently argued that unless the state's failure to intervene would foist upon the child a "life not worth living," any attempt to alter whether, when, or with whom an individual reproduces cannot be justified on the basis that harm will come to the resulting child, since but for that intervention the child would not exist.¹⁰³ Therefore, according to this argument, even when technologies of reproduction are intended to enable a difficult life, or one of unconventional conditions, society must refrain from intervening in these techniques in the name of the best interest of the child, save for those extreme cases in which we truly believe that one is better off not having been born.¹⁰⁴ As the Mor Yosef Committee noted when discussing this issue, the concept of protecting the best interests of the child is of different

98 For a study of the success rates and risks involved in advanced age fertility treatment see: CENTRE FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 30, 33 (2008).

99 See Mor Yosef Committee Findings, *supra* note 20, at 29, which lists situations in which a person's ability to receive fertility treatment is influenced by age, and where in certain cases the treatment which is usually publicly funded will require payment.

100 See in this volume, David Heyd, *Parfit on the Non-Identity Problem, Again*, 8 (1) L. & ETHICS HUM. RTS. (2014).

101 Marjorie Mcguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 322, 327 (1990). Shultz believes that the courts should only interfere in situations of extremely extenuating circumstances.

102 Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011).

103 See Mor Yosef Committee, *supra* note 20, at 6 and 19; The *European Society of Human Reproduction and Embryology* allows for fertility treatments even in cases where it is clear that the parents will not be able to provide the child with the best possible care.

104 See *id.* adopted the "middle ground approach" denying treatments only in those situations in which the prospective child will be placed in extremely difficult conditions.

stature when discussing the cases of a person yearning to become a parent compared with custody disputes.

Viewing parenthood as a social institution may assist us in avoiding the barrier preventing us from opposing reproduction in the name of the child not yet born. Affected by the private perception of parenthood, the existing approaches focus solely on the relations between the potential parent and the theoretical child. In contrast, the social-institutional approach to parenthood argues that the justification for regulating reproduction is not the protection of a specific child, but rather the institution of parenthood as a whole. As I previously explain, the institution of parenthood requires balance between the interests of the parents and their commitment to the children as well as a distinction between the privileges and responsibilities of parenthood. Indeed, there are differences in the emphasis and balance between the interests of the parents and the children in the planning stage and following birth. During the planning stage of a pregnancy, the legitimacy of a parent to grant his personal interests crucial status is more appropriate than in the state of affairs following birth. However, the social-institutional approach rejects the ability to completely disconnect between the ethos of parent–child relations and the ethos of reproduction. Therefore, giving complete legitimacy to any and all types of fertility treatments, even where – while not reaching the level of “better to have not been born” – there is the potential for a difficult and miserable life may reflect a problematic social message regarding the proper balance between the interests of parents and their responsibilities towards their children. Hence, in situations of potential elderly parents, or in cases of reasonable concern over the capacity of the person receiving treatment, fostering the ethos of parenthood as responsibility justifies limiting the state’s assistance in technology of reproduction. The Mor Yosef Committee has proposed in this regard the establishment of a regulatory board in order to gauge whether the best interests of a prospective child is jeopardized by allowing those specific candidates to receive fertility treatments, along with pre-determined situations in which medical refusal to treat is justified.¹⁰⁵

Recognizing Surrogacy Overseas

Lacking a suitable solution for same-sex couples, unmarried couples, and individuals, many of those wishing to become parents look abroad and wish to enter surrogacy agreements, some of which involve egg donation as well. Upon their

¹⁰⁵ *Id.* at 22.

return, the couple seeks legal recognition of their recently attained parenthood. Much of the existing case law attempts to define the laws of parenthood in such cases, determining that the laws of egg donation and surrogacy do not directly apply to such couples according to the biological approach. Therefore, with regard to fathers of children born of their sperm, the biological approach usually dictates automatically that following a certain procedure, known as an overseas parental procedure, these fathers will be recognized as parents. The position expressed concerning mothers is different: First, in the spirit of the genetic-biological approach, existing law distinguishes between cases of surrogacy including the intended mother's egg, and between cases of surrogacy combined with an egg donation. In the first case, the genetic mother will usually be recognized as the mother, while in the second, she will be required to undergo adoption.¹⁰⁶

In contrast, the “New Family” organization – representing the consensual position in Israel, which is focused on almost complete fulfillment of the will of the intended parents – wishes to promote a policy that views overseas surrogacy as a path to bypass legislation, entirely founded on the recognition given to parenthood in foreign countries. In one case,¹⁰⁷ the family court adopted this approach; however, the decision was overturned in the appeal to the district court.¹⁰⁸

A heated public debate recently took place in Israel when the courts discussed the case of a severely disabled woman who, through a difficult process of

106 See most recently Fam. Ct. (TA) 07/60320 T.Z et al. v. Attorney General (Mar. 4, 2012) Nevo Legal Database (by subscription) (Isr.) (discussing the registration of a lesbian partner who donated an egg to her spouse as an additional mother of the minor). From this discussion it seems that a biological relationship is a precondition for recognizing, ex-ante, the parenthood of both partners. For another indication of the staying power of the genetic-biological approach, see Fam. Ct. (Ta) 11-10-10509 Y.P. v. Attorney General (Mar. 5, 2012) Nevo Legal Database (by subscription) (Isr.) and Fam. Ct. (Ks) 11-09-21535 S.A. v. Attorney General (Jun. 17, 2012) Nevo Legal Database (by subscription) (Isr.). See also Fam. Ct. (Ta) 12-07-21170 Ploni v. Attorney General (Feb. 03, 2013) Nevo Legal Database (by subscription) (Isr.). In these cases, the court ruled that in the event that the intended mother has the genetic makeup, and the surrogate has no link to the newborn based on her geographic location, there is no need for an additional legal procedure to recognize the genetic mother as the legal mother. In contrast, in cases where the surrogate took part in the egg donation, existing case law requires adoption in order to recognize the parenthood of the intended motherhood in cases of surrogacy performed overseas. For a discussion of these matters, see Zafran, *supra* note 11.

107 See App. Fam. Ct. (TA)12-38 Plonit v. Attorney General (Nov. 9, 2012) Nevo Legal Database (by subscription) (Isr.)

108 App. Fam. Ct. (TA) 12-11-43811 Attorney General v. Plonit (May 9, 2013) Nevo Legal Database (by subscription) (Isr.)

both egg and sperm donation, entered a surrogacy agreement with a family member.¹⁰⁹ After the family member gave birth, the child was taken for adoption by social services. The media dedicated a number of articles in which the intended mother described herself as the initiator of the “project” of the birth of the child. She complained that, because of the desire to punish her after the fact for not working according to the rules, the child will eventually be taken away from her.

From a biological point of view, it is clear that the initiator cannot be viewed as the mother. In contrast, from a consensual perspective, it is clear that she is the mother, and considering that, it is not surprising that “New Family” supported the intended mother’s position. The functional approach also tends to support this position, as clearly most of the ties currently exist between the mother and the child.

The social approach can add to the discussion of this case – similar to the discussion of overseas surrogacy – a number of perspectives not emphasized enough by the theoretical approaches.

First, as opposed to the philosophical approaches viewing the right to parenthood as almost illimitable and opposing to regulation of fertility services due to considerations in the best interest of the future child, the public approach argues that we must examine the effect of recognizing parenthood in a given situation on the institution of parenthood. Therefore, despite the sympathy and the natural tendency toward the initiating mother in this case, this approach is deterred by the commercial, property oriented rhetoric through which she described her relationship to the child in the courts and in her interviews with the media throughout the case, and also by the negative influence of such rhetoric on the institution of parenthood. In addition, despite the pain involved, the public approach will argue that it is the state’s obligation to examine whether this mother could realistically provide the child with the requisite standard of care, and that if the answer is negative, preferring her motherhood over the future wellbeing of the minor may send a problematic message regarding the institution of parenthood in general. I note that Justice Geula Levin’s ruling in this case reflects, in my opinion, the correct message, emphasizing the public aspects of parenthood and the need for regulation.¹¹⁰

Second, and more generally, the contractual approach, as well as the functional approach, often focuses on the involved parties, and less on the wider

109 Fam. Ct. (BS) 12-12-50399 A.M. I. v. Jane Doe (Jun. 20, 2013) Nevo Legal Database (by subscription) (Isr.)

110 Fam. Ct. (Ta) 12-07-21170 Ploni v. Attorney General, *supra* note 106 (clearly criticizing the lack of regulation concerning this matter).

consequences of policy decisions. In contrast, I hold that granting extensive legitimacy to overseas surrogacy and fertility treatments that are not governmentally supervised in “third world” countries, all while severely damaging the individual rights of mothers, is highly problematic. Therefore, I welcome the conclusions of the Mor Yosef Committee that wish to create a supervised track of overseas surrogacy and create incentives to use this track.

At this point I must emphasize that in the existing legal reality, in which the law completely alienates and excludes the option for same-sex couples to fulfill their right to parenthood, is a terrible situation that must be corrected. However, one injustice should not be corrected by another injustice, and a situation in which the state recognizes almost any creation of parenthood, while reflecting the right to parenthood, completely ignores the effect of realizing this right on the design of the institution of parenthood, and also grants legitimacy to processes causing severe harm to the human rights of those involved in surrogacy.

Legal Regulation of Postmortem Conception – Reflections on Children as Memorial Monuments and *Kaddish*

In conclusion of this section, I suggest a rudimentary approach to cases of postmortem conception through the use of sperm cells extracted from the deceased prior to his death or even posthumously. In existing law, the central criterion for postmortem use of sperm cells is the explicit or assumed desire¹¹¹ of the deceased.¹¹² It must be made clear that the postmortem use of sperm cells is inherently different than a case of a sperm donation, as here the subjective intention of the deceased was to leave behind offspring to carry on his name, and not to assist others in this goal. However, there are rules as well as suggestions to expand this ability to grandparents under the assumption that one wants to leave behind something to continue them. In this spirit, in the Mor Yosef Committee report, Professor Kasher¹¹³ describes the human will to leave life behind, or in Jewish terminology *Kaddish*, as justification for determining a default permission of postmortem use of sperm cells even in cases where the deceased left no written or verbal request to do

¹¹¹ Attorney General’s Instruction, *Postmortem Use of Sperm Cells*, Instruction # 1.2202 (Oct. 27, 2003) [in Hebrew], <http://index.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/12202.pdf>.

¹¹² See Mor Yosef Committee, *supra* note 20, at 44, requiring that the court establish that the posthumous use of sperm reflects the will of the deceased himself and not any third party.

¹¹³ *Id.* at 50.

so.¹¹⁴ Professor Kasher operates under the assumption that it is the subconscious will of all humanity to leave behind children in the world.

The issue of postmortem conception is a complex one as evident by the fact that many countries either limit the cases it is allowed or prohibit it altogether.¹¹⁵ At this time, I have not yet formed a concrete opinion on the subject. However, as someone who joined Ruth Zafran in the call to base parenthood on continuing relationships and care, the view of sperm as inheritance as well as that of children as memorial monuments and perpetuation, even when under the circumstances there is no real bond between the parent and his children, is troubling and may have a negative effect on the design of the concept of parenthood in our society. This potentially crippling influence on the ethos of parenthood as one of a continuous relationship and responsibility toward the child serves as the very basis of Prof. Kasher's opinion for flexibility in allowing postmortem use of sperm. Prof. Kasher maintains that the parental bond of a father to his child differs from that of a mother, as the essence of the relationship does not hinge upon him being present to raise the child, but rather suffices with a genetic bond between the two.¹¹⁶

In Israel for example, the "New Family" organization has recently developed a "product" called a biological will. I have reservations regarding the inheritance related terms of "will" and "bequeathing" which also contribute to the objectification of children. The combination of the objectifying language with the view of the child as an object independent of any real relationship with his parents is very troubling. As said before, I have yet to fully develop an alternative coherent model dealing with postmortem parenthood and for now, presenting the issues that may trouble those wishing to view parenthood as a social institution in today's reality will suffice.

The Social Understanding of the Institution of Parenthood: Individual Autonomy and the Fear of Public Aggression

Those supporting private ordering/contractual regulation of parenthood are very wary of state supervision of reproduction techniques as well as state

114 *Id.* at 47.

115 English law requires written approval of the deceased. See Article 3 of the Human Fertilization and Embryology Act 1990 (c 37), s. 3. Many countries have called not to allow, in any circumstances, the postmortem use of sperm, see G. Bahadur, *Death and Conception*, 17 HUM. REP. 2769, 2775 (2002).

116 See Mor Yosef Committee, *supra* note 20, at 46–47.

intervention within the content of the parenthood agreements reached by the involved parties. Their arguments are divided into two. First, in principle, they contend that regulating unique reproductive technologies as well as intervening in the content of private arrangements harms the autonomy of the involved parties.¹¹⁷ Second, as Martha Ertman noted, the history regarding this subject is not promising and full of examples in which public intervention within reproduction ultimately becomes biased towards minority groups, such as same-sex couples. She brings examples of extreme government intervention in the ability of people to become parents from pressuring low income families to use contraceptives as a pre-condition for receiving welfare,¹¹⁸ to states trying to pass legislation banning homosexuals from adopting or serving as foster parents.¹¹⁹

Both fears are not unfounded and should be taken into consideration when designing the regulation of parenthood. Nevertheless, I insist that rejecting the public aspect of parenthood as well as presenting it as a private matter unrelated to the public at large, is not the proper solution. I hope to illuminate this issue with an example from a related field I recently dealt with, namely the debate regarding same-sex marriages.

Within the existing literature on the subject, those who support same-sex marriage often tend to emphasize the private-contractual dimension of marriage and the illegitimacy of state intervention in such a private matter.¹²⁰ In contrast, those opposing same-sex marriage emphasize the public element of marriage. They wonder whether those who support same-sex marriage would at the same

117 See ERTMAN, *supra* note 15. While she does not believe that any right is absolute, Ertman believes that allowing for expanded autonomy of the parties involved is the lesser of two evils when countered with overzealous government regulation.

118 Board of Trustees of the American Medical Association, *Requirements or Incentives by Government for the Use of Long Acting Contraceptives*, 267 J. AM. MED. ASS'N 1818, 1820 (1992).

119 The practice was invalidated in *Arkansas Department of Human Services v. Cole*, 2011 Ark. 145, 380 S.W.3d 429 at 24–25 (2011). For a comparative review of homosexual parental rights, see P. Batens & A. Brewaeyts, *Lesbian Couples Requesting Donor Insemination: An Update of the Knowledge with regard to the Lesbian Mother Families*, 7 HUM. REPR. UPDATE 512, 512 (2001). For the law in Israel, see Miri Bombach & Ronli Shaked, *A Revolution in the Institution of the Right to Parenthood: Considerations in the Israeli Society Discussion Regarding Homosexual Parenthood*, 26 REFUA V'MISHPAT 121, 129 (2002) [in Hebrew].

120 NAOMI R. CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* (2009). Cahn repeatedly calls on the abolishment of “outdated” definitions of families. See also Frank van Balen & Henny Bos, *Children of the New Reproductive Technologies: Social and Genetic Parenthood, Patient Education and Counseling*, 81 PATIENT EDU. & COUNS. 429, 429 (2010), a study aimed at proving that children that grow up in the framework of an “alternative” family do not experience any psychological damage as a result.

time support polygamous marriage or marriage between siblings. Supporters of same-sex marriage struggle to reject the threat of breaching the borders of the institution of marriage that is posed by expansion of the private-contractual discourse.

In my opinion, those who criticize the private approach to marriage are correct in that they argue that recognition of same-sex marriages may affect not only the specific couple, but also the collective social understanding of marriage. Therefore, they are also correct in that public responsibility toward the social institution of marriage requires examining whether same-sex marriages have a positive or damaging influence on the public at large. This type of examination involves public considerations that are not taken into account by the private/neutral approaches. However, it is at this point that I part ways with those who oppose same-sex marriage.

In current legal discourse, the use of public rhetoric serves the “traditional” camp in its argument aimed against the recognition of same-sex marriage. In my view, however, it is a mistake to assume that the public nature of marriage necessitates non-recognition of same-sex marriages. On the contrary, one can think of a number of public considerations in favor of officially recognizing same-sex relationships. These considerations include; the desire to provide an appropriate framework for raising children growing up within this family unit, the desire to allow same-sex couples an economically stable framework for managing an intimate relationship, and finally, the desire to moderate the gender-related implications and patriarchal practices still identified with marriage, and, in doing so, designing marriage as an egalitarian institution. Therefore, the discussion regarding recognition of same sex couples must contain not only an examination of individual rights, but additionally a reference to the social meaning of supposedly private agreements and to the manner in which recognition of same sex relationships could affect the institution of marriage.

In my opinion, the issue of same sex marriage can teach an invaluable lesson to those currently dealing with the issue of establishing parenthood. Indeed, history has taught us that the public establishment of parental rights poses certain dangers. However, this research has proven that lack of public discourse is not only undesirable but impossible. Therefore, I believe that the true aim that should stand before future lawmakers in the subject of parenthood is not the rejection of the public aspect of parenthood, as such a rejection is impossible and inappropriate, but rather the attempt to manufacture

a conception of parenthood taking into account values of personal autonomy and ethics of care, with constant willingness towards dynamism¹²¹ and rejecting stereotypes of less conventional lifestyles not grounded in a modern, analytical and pluralistic system of arguments.¹²²

121 See Mor Yosef Committee, *supra* note 20, at 57, 61. The committee boldly stated that although by nature two men cannot reproduce, society should embrace technological advancements to make their dreams a reality.

122 See Zafran, *supra* note 49, at 380 (acknowledging that an institutional response is necessary in light of the modern day approach that is accepting of homosexuality).