

Bordering Legal Parenthood

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Why should borders matter to the legal field of parenthood? The sustained reification of the institution of Family requires borders—spatial, legal, and symbolic—that demand the exclusion of those who fail to adhere to its norms. Yet, as the present article exposes, this institution’s borders can also become a terrain in which new forms of agency and beneficial processes emerge, inviting a reconsideration of the traditional paradigms that sustain that institution. This article examines this dual understanding of the role of borders and assesses the transformative costs and trade-offs of crossing them. To pursue this inquiry, it focuses on the longstanding struggle of gay Israeli men to become parents via surrogacy, and contextualizes the trajectory of this struggle across different geopolitical scales, through the lens of “border-as-process”. This “bordering” lens reveals how borders—in their opening, closing, and transgressing—create new relations and offer new possibilities for legal and institutional change.

INTRODUCTION

This article is best introduced through the story of Etai and Yoav, an Israeli male couple who flew to the other side of the world to fulfill their dream of becoming parents. They crossed different countries to contract an egg donor and an overseas surrogate, relocated abroad for a month leading up to the birth, and, subsequently, endured lengthy legal procedures to bring their child home and be recognized in Israel as legal parents.

Etai and Yoav’s long journey is not rare in Israel, a pro-natalist country where, every year, many citizens cross the border to have a child using foreign surrogacy services, accounting for relatively high numbers in the

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global phenomenon of cross-border surrogacy.¹ Among them are male couples and single men, who are excluded by the Israeli Surrogacy Law and are willing “to pay and do anything on earth“ in pursuit of their dreams of parenthood.² These men, by crossing the Israeli territorial borders, are acting despite, and against, the exclusionary nature of their country’s regime, whose legal surrogacy route has long been open only to different-sex couples and single women.³ However, at least one aspect of Etai and Yoav’s story is unique: Their quest to have Israeli law amended so that they (indeed, all male couples *and* single people) may one day use the surrogacy services of their home country.⁴ This quest, which lasted more than a decade and attracted extraordinary public attention within Israeli society, recently came to an end. In July 2021, the Supreme Court announced a landmark decision that requires the state to allow male couples and single people to contract surrogacy services in Israel.⁵

Although the story of Etai and Yoav represents a journey in many ways—personal, political, and legal—first and foremost, it is about borders. This story centers their challenge to Israeli’s *legal* borders, of the kind that have prevented male couples from fulfilling their right to become parents through surrogacy without having to leave the country. It is about transnational *territorial* borders, of the kind that enabled and sustain the global reproduction market, and about those who cross these borders—with all that this entails. Lastly, it is about *social* borders, of the kind that construct who belongs and who does not—the latter being the Other, whose longing to become a parent is taken for granted and marginalized. As the experience of Etai and Yoav shows, we cannot capture their whole story of becoming parents—its richness, paradoxical injustices, and ever-changing implications—without understanding the *roles* of borders, both literal and figurative. This article therefore examines *how legal parenthood is bordered*.

The role of borders in family law is at the heart of a growing realm of

1. Ruth Zafran & Daphna Hacker, *Who Will Safeguard Transnational Surrogates’ Interests? Lessons from the Israeli Case Study*, 44 LAW & SOC. INQUIRY 1141, 1142 (2019).

2. *Id.* at 1148.

3. There are also heterosexual couples who *choose* to undergo cross-border surrogacy for various reasons (such as cost, time, and desire to distance themselves from the surrogate). Yet, their case is different from male couples and single men, who have been completely *excluded* from this avenue. See *infra* notes 91–93 and accompanying text.

4. Until recently, the Israeli law also excluded female couples. However, female couples have other options for attaining legal parenthood, while male couples do not. This is because adoption is unrealistic, and because co-parenthood with a third party involves substantial barriers. See *infra* notes 94–96 and accompanying text.

5. See *infra* Part I (iv). This decision was followed by new directives allowing same-sex couples and single men to undergo domestic surrogacy (Ministry of Health Israel Dec. 27, 2021, https://www.health.gov.il/Services/Committee/Embryo_Carrying_Agreements/Pages/Surrogacy.aspx). See Bar Peleg, *Israel Lifts Surrogacy Restrictions in Landmark Decision for LGBTQ People*, HAARETZ (Jan. 04, 2021), <https://www.haaretz.com/israel-news/premium-israel-legalizes-same-sex-surrogacy-in-landmark-decision-1.10512873>.

scholarship,⁶ especially as evidenced in recent scholarly discussion around cross-border reproduction.⁷ However, this article takes a different trajectory, seeking a better understanding of the role of borders in shaping the legal category of parenthood. Building on the concept of *bordering* from border studies,⁸ this article expands the conceptualization of “border” beyond its orthodox meanings, namely as a spatial phenomenon or a marker of classification between subjects and jurisdictions—typically, framed as an impediment—to encompass the notion of a border as a zone in which new relations, subversive forms of agency, and ameliorative possibilities may emerge.⁹

The concept of bordering offers an innovative way of thinking about the *dynamic* nature of borders. It considers the processual and contextual dynamics of borders in a “constant state of *becoming*,”¹⁰ and examines their construction, de-construction, and reconstruction.¹¹ This concept also offers alternative ways to understand the *function* of borders, considering the multiple manifestations of power-relations that are created or dissolved through them. This understanding is attested in different ways, from the border as an expression of governmentality—for instance, demarcating belonging¹² or citizenship,¹³ and policing individuals who are already

6. For prominent works discussing the role of legal borders in sustaining the institution of Family and its heteronormative vision, see, for example, Ayelet Blecher-Prigat, *Rights, Boundaries, and the Family*, 27 TEL AVIV U. L. REV. 539 (2003) (Hebrew); BRENDA COSSMAN, *SEXUAL CITIZEN: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 28 (2007). For valuable insights exemplifying how various family rights are delineated by the global movement of individuals and families, see, for example, DAPHNA HACKER, *LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION* (2017).

7. This scholarship focuses mostly on how the parties involved are situated in conflicts arising out of *territorial* and *jurisdictional* borders. Some studies, for example, look at the *intended parent's* needs. See, e.g., Zvi Triger, *A Different Journey: Experiences of Israeli Surrogacy Parents in India*, 44 THEORY AND CRITICISM 177 (2015). Other works pay attention to the *transnational surrogate's* vulnerabilities. See, e.g., Zafran & Hacker, *supra* note 1. Others address the conflicts that cross-border surrogacy raises with regard to the norms of the domestic regime of the intended parents. See, e.g., Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT'L L. 627 (2011).

8. The interest in borders has burgeoned across a range of disciplines aiming to capture how they permeate multiple aspects of our everyday lives. See David Newman, *Contemporary Research Agendas in Border Studies: An Overview*, in THE ASHGATE RESEARCH COMPANION TO BORDER STUDIES 34 (Doris Wastl-Walter ed., 2011).

9. See also HACKER, *supra* note 6, at 33–37.

10. Noel Parker & Nick Vaughan-Williams, *Critical Border Studies: Broadening and Deepening the 'Lines in the Sand' Agenda*, 17 GEOPOLITICS 727, 728 (2012) (emphasis added).

11. Geo-politics expert Chiara Brambilla terms these phenomena “bordering,” “de-bordering,” and “re-bordering” (a dynamic that will accompany us throughout this article), which are not necessarily linear or predictable but can present ambiguous, contradictory, and paradoxical performances. Chiara Brambilla, *Exploring the Critical Potential of the Borderscapes Concept*, 20 GEOPOLITICS 14, 27 (2015).

12. See Didier Bigo, *Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticon*, in BORDERSCAPES: HIDDEN GEOGRAPHIES AND POLITICS AT TERRITORY'S EDGE 3 (Rajaram Prem Kumar & Carl Grundy eds., 2007) (discussing the determination of foreigners as an illustrative example of a specific form of governmentality).

13. See COSSMAN, *supra* note 6, at Ch 4. In this chapter, Brenda Cossman implicitly draws on the incoherent nature of borders' performance to capture the ambivalences of the process of becoming a

entitled to be a part of certain cultural institutions¹⁴—to the border as a site of transgression that works within and against the state sovereignty.¹⁵ The concept of bordering also illuminates how certain borders can even generate constructive dialogue between the excluded subject and those authorities that imposed them.¹⁶

The operation of *bordering* is particularly noticeable in family law. Here, the law itself acts as a family-shaping border, creating an included subject and, conversely, an excluded subject, such that the latter is not entitled to acquire the rights associated with the legal institution of Family and is left outside of it. In doing so, the law creates and sustains the cultural meaning of what a family is.¹⁷ Yet, the interesting question is not so much *whom* the border leaves outside the legal institution but, rather, *how* these borders are operated and how *mobility* between them shapes the becoming of the legal subject and the law. What happens when the excluded subject crosses the border? What is opened and what is closed at these border crossings? How is this subject transformed by this crossing? How is the law—specifically, the discourses and norms informing its terms—transformed? These questions, all of which touch on the two key elements of the *bordering* concept—the *dynamic* and *function* of borders—will be discussed as this article progresses. Far from aspiring to provide the answers, my main aims are, first, to open up a new and critical conversation about how we can, and should, think about the legal category of parenthood via the framework of bordering, and second, to demonstrate the value of importing this framework into the legal field of parenthood.

I use the Israeli case of the struggle of dual-fatherhood-via-surrogacy to pursue these theoretical aims.¹⁸ The uniqueness of this case lies in the contradictory confluence of the longstanding prohibition of gay surrogacy, on the one hand, and the de-facto endorsement of this phenomenon via the global market, on the other. Such a contradictory stance provides a valuable platform to examine the interplay between the *different* borders—be they

citizen and the paradoxical dynamic occurring throughout this process.

14. See SANDRO MEZZADRA & BRETT NEILSON, BORDER AS METHOD, OR, THE MULTIPLICATION OF LABOR, 159–166 (2013).

15. See WENDY BROWN, WALLED STATES, WANING SOVEREIGNTY 24, 35 (2012) (discussing how borders in the form of wall-building, for example the wall between the US and Mexico, are an indication of the “weakening of state sovereignty” as they are ineffective); Chiara Brambilla & Reece Jones, *Rethinking Borders, Violence, and Conflict: From Sovereign Power to Borderscapes as Sites of Struggles*, 38 SOC. & SPACE 287 (2019).

16. For this holistic understanding of power-relations, see, for example, Parker & Vaughan-Williams, *supra* note 10, at 731; Suvendrini Perera, *A Pacific Zone? (In)Security, Sovereignty, and Stories of the Pacific Borderscape*, in BORDERSCAPES: HIDDEN GEOGRAPHIES AND POLITICS AT TERRITORY’S EDGE 205 (Rajaram Prem Kumar & Carl Grundy eds., 2007).

17. HACKER, *supra* note 6, at 4.

18. Far from providing a doctrinal analysis of the subject matter of this struggle, I draw on the Israeli case study to contemplate the dual understanding of borders. For further reading on this topic and, specifically, whether restricting access to surrogacy is discriminatory, see Ruth Zafran, *The Equal Right To Be a Parent? Resort to Surrogacy in Israel*, 8 MISHPATIM ONLINE 1 (2015).

legal, territorial, or cultural—that surrounds the evolution of the legal category of parenthood and the cultural norms underlying it.¹⁹

To capture the components of the Israeli case, I identify three domains reflected in the lived experience of Israeli gay men on their journey toward becoming parents through surrogacy. Each one is characterized by a legal family-building border but also sits within a dynamic of crossing different types of borders. The first domain involves the struggle to amend the Israeli Surrogacy Law, which excludes male couples and single men. The second relates to the growing phenomenon of Israeli male couples crossing territorial borders to become parents. And the third is concerned with the emergence of a judicial parental order (hereinafter, “JPO”), a new regulatory mechanism in Israeli family law that was recently created to formalize the status of parents to a child born through cross-border surrogacy. Although each domain involves its own borders, this article reveals that none of these domains operate in isolation. Rather, they actively participate in one another’s construction. Specifically, cross-border surrogacy developed as a result of the exclusionary Surrogacy Law, while the growth of cross-border surrogacy practice has, unintentionally, modified the law by creating the aforementioned JPO and exerting pressure to allow male couples and single males to secure surrogacy in Israel.

What I wish to emphasize here is that a border is not only a mechanism of governmentality. It can also act as a creative, disruptive force—an *enabler*—for new sources of agency to be produced and legal breakthroughs to be made, as the Other works to destabilize and weaponize borders against other borders. As I show through the Israeli case, the consequences of this counter-dynamic, termed here *de-bordering*,²⁰ are not always predictable or linear and can extend far beyond the interests of those who initiated the original attempt to challenge a particular border (in this case, male couples). And it is here that different domains of struggle seep through into one another, as other excluded groups begin to consider the possibilities of de-bordering, on the one hand, and its trade-offs, on the other—including what is termed here *re-bordering*.²¹ This refers to the process by which a new

19. While I focus on borders from the Israeli perspective, the relationship between family and borders is a universal phenomenon transcending jurisdictional boundaries. The insights offered here can be also relevant to European countries whose regimes also reflect this contradictory confluence with regard to different-sex couples more generally. See Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT’L L. REV. 117 (2013); Lydia Bracken, *Assessing the Best Interests of the Child in Cases of Cross-Border Surrogacy: Inconsistency in the Strasbourg Approach?*, 39 J. SOC. WELFARE & FAM. L. 368 (2017). Given the dominant pronatalist ideology in Israel (Part I), alongside the societal meanings ascribed to parental status within the LGBTQ community itself in Israel (Part II), this contradictory confluence is particularly prominent in the Israeli case. For valuable discussion of the paradox that exists in Israel regarding same-sex families, see Zvi Triger *The Reluctant Acceptance of Same-Sex Unions and Parents in Israel*, 16 NAT’L TAIWAN U. L. REV. 1 (2021).

20. Brambilla, *supra* note 11, at 27.

21. *Id.*

border-form is produced by the dynamic of de-bordering.²²

Paying attention to the processual counter-dynamic of borders and their transformative outcomes helps us better understand how the multi-dimensional dynamic of power- relations operates on different geopolitical scales, ranging from the highly personal to the international.

The article is structured in three Parts, each of which represents a distinct domain of the gay Israeli male experience of arriving at parenthood. **Part I** focuses on the first domain: the struggle to bring about change in the Israeli Surrogacy Law. A critical reading of Supreme Court and Parliamentary Committee decisions demonstrates how the trajectory of the Israeli Surrogacy Law should not be understood as linear or consistent. Rather, it is characterized by a contradictory dynamic of opening and closing different figurative borders around a contested terrain in which different assumptions on gender and sexuality work against each other. **Part II** focuses on the second domain: Cross-border surrogacy. Building on sociological studies on male couples who have crossed territorial borders to become parents, I demonstrate how mobility between these borders provides the conditions under which a new legal subjectivity—gay fatherhood—becomes visible and accepted, but also, unwittingly, begets new oppressive borders. **Part III** focuses on the third domain: The JPO. Based on case-law analysis of this order, I show how borders enable same-sex families not only to negotiate their own (legal) becoming but also that of the institution they strive to enter: Legal parenthood. This analysis also provides food for thought about what role the law *should* play in assisted reproductive technologies (“ARTs”).

Before entering into the analysis, I should foreground the centrality of procreation and parenthood within the Israeli-Jewish context. Israeli-Jewish society is regarded to be the most family-oriented among postindustrial countries, a conception attributable—perhaps first and foremost—to the highest fertility rate among the states associated with the Organization for Economic Co-operation and Development (OECD)²³ and its generous funding of fertility treatments.²⁴ This repro-normative culture—labeled by sociologists a “cult of fertility”²⁵—has been shaped by the history of the

22. See, e.g., *infra* notes 125-126 and accompanying text.

23. See *Society at a Glance 2019*, OECD, Ch. 4 (Mar. 27, 2019), <https://www.oecd.org/social/society-at-a-glance-19991290.htm>.

24. Daphna Birenbaum-Carmeli and Yoram Carmeli, *Reproductive Technologies among Jewish Israelis: Setting the Grounds*, in KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS 17 (Daphna B. Carmeli & Yoram S. Carmeli, eds., 2010).

25. Ruti Kadish, *Israeli Lesbians, National Identity, and Motherhood*, in SAPPHO IN THE HOLY LAND: LESBIAN EXISTENCE AND DILEMMAS IN CONTEMPORARY ISRAEL 236 (Chava Frankfort-Nachmias & Erella Shadmi eds., 2005).

Jewish people (the Holocaust),²⁶ religious principles,²⁷ and ethno-national motivations (the demographic race between Jews and Arabs).²⁸ Israeli-Jewish society views procreation as a prime value to the extent that having children is key to social acceptance.²⁹ This modality, as scholars have lamented, is not articulated in terms of choice but rather in terms of civic duty³⁰—a pressure that is far from exclusive to heterosexuals, as will be discussed in further detail.³¹ It is essential to take into account the pivotal role of procreation and parenthood within the Israeli-Jewish collective, if we are to understand the broader stakes experienced by gay men in navigating and contending with the various borders they must face in their quest to become parents.

I. SURROGACY LAW IN ISRAEL

Surrogacy was first legalized in Israel through the enactment of The Embryo Carrying Agreements (Agreement Authorization & Status of the Newborn Child) Law (hereinafter, “the Israeli Surrogacy Law”) in 1996. The premise of the law was to provide recourse to childless heterosexual couples, in which the woman was unable to carry a pregnancy to full term or conceive without assistance.³² The law was revolutionary for its time: When it was enacted, “no other nation or American state [went] so far in permitting surrogacy,”³³ and its enactment, following enormous campaign pressure from a group of a dozen childless heterosexual couples, was unanimously endorsed by both religious and secular parties in the Knesset (Israeli Parliament).³⁴ The strong legislative support for this law is perhaps not surprising, given Israel’s repro-normative culture.³⁵ In fact, the enactment of the Surrogacy Law is both informed by and entrenches this

26. The ethos is viewed as a collective effort to “recover” from the near-extinction of the European Jewish population. Yoram Carmeli & Daphna Birenbaum-Carmeli, *Ritualizing the Natural Family: Secrecy in Israeli Donor Insemination*, 9 SCIENCE AS CULTURE 301, 305 (2000).

27. This is the Jewish order (*halakha*) to “be fruitful and multiply” (Pru U’rvu). See JACQUELINE PORTUGUESE, *FERTILITY POLICY IN ISRAEL: THE POLITICS OF RELIGION, GENDER, AND NATION* (1998).

28. Nira Yuval-Davis, *Women and the Biological Reproduction of “The Nation,”* 7 WOMEN’S STUD. INT’L F. 17, 19 (1996).

29. Yeshua-Katz, Daphna, *Childless in an IVF-Nation: Online Stigma-Coping Strategies in Support Groups for Childless Israeli Women*, 21 INFORMATION, COMMUNICATION & SOCIETY 1436 (2017).

30. See Carmeli & Carmeli, *Setting the Grounds*, *supra* note 24, at 17.

31. See *infra* notes 98-100 and accompanying text. Indeed, the longing for procreation is not unique to the LGBTQ community in Israel. See, e.g., Michael Boucai, *Is Assisted Procreation an LGBT Right?* WIS. L. REV. 1065 (2016). Nevertheless, studies highlight that this pressure is more salient in Israel. See, e.g., Geva Shenkman, *The Gap Between Fatherhood and Couplehood Desires Among Israeli Gay Men and Estimations of Their Likelihood*, 26 J. OF FAMILY PSYCH. 828 (2012).

32. Elly Teman, *Surrogacy in Israel: State-Controlled Surrogacy as a Mechanism of Symbolic Control*, in HANDBOOK OF GESTATIONAL SURROGACY 165 (Scott Sills ed., 2016).

33. KELLY WEISBERG, *THE BIRTH OF SURROGACY IN ISRAEL* 2-4 (2005).

34. Elly Teman, *The Last Outpost of the Nuclear Family: A Cultural Critique of Israeli Surrogacy Policy*, in KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS 107 (Daphna B. Carmeli & Yoram S. Carmeli, eds., 2010).

35. See *supra* notes 23-28 and accompanying text.

culture.

Such entrenchment, though, has operated selectively. Until 2018, the statutory definition of the term “intended parent” in the Israeli Surrogacy Law (hereinafter, “statutory definition”) stipulated that *only* heterosexual couples, in which the woman was unable to conceive naturally, were eligible to enter into this process.³⁶ In a sense, the statutory definition became a family-building border delimiting eligibility,³⁷ designed to ensure that “only Jewish-Israeli citizens are born from these contracts to heteronormative, two-parent, ‘natural’ families.”³⁸

This state-patrolled family-building border has been constantly challenged by those whom the law excluded: male couples and single people.³⁹ There have been four milestone attempts to destabilize this legal border, each of which has invoked the emergence of the next one and produced the next iteration in the cultural dialogue on the terms of the legal institution of parenthood. I now examine each attempt in turn.

A. Heterosexual Couples—In; Single Women—Out

The first attempt to challenge the statutory definition was made in 2002 via the petition filed at the Supreme Court by a family-rights organization called New Family, on behalf of a single woman. The woman could not

36. § 1, Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) Law, 5756-1996, S.H. 1577, 176 (1996) [hereinafter the Israeli Surrogacy Law].

37. To better understand how this border controls and is controlled, one could turn to the dense regulatory fabric of the Israeli surrogacy regime. This regime is regulated by the Israeli Surrogacy Law and a list of stipulated directives, all of which are organized to ensure that this practice is operated under state-controlled supervision, through a two-step procedure. The first involves a pre-conception administrative procedure managed by a state-appointed committee. This committee evaluates the profile of the intended parents (such as age, number of existing children, and whether they present one of the listed medical issues) and the surrogate; and the terms of *any* surrogacy agreement *have* to be approved by the committee before fertility attempts can begin. See Teman, *supra* note 32, at 165. The second part of the procedure involves the Family Court issuing a post-birth order so that the intended parents can be registered as the legal parents. Israeli Surrogacy Law, § 11a; See also Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT'L L.J. 313, 318-21 (1999); Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL'Y 91, 95-98, 112-15 (2002).

38. Teman, *supra* note 32, at 172. For further reading on the ethno-national politics of assisted reproductive technology in Israel, specifically how this politics is contingent on the (im)mobility between Israel and the West Bank, see Daphna Birenbaum-Carmeli and Ronit Haimov-Kochman, *Fertility Treatments Under Semi/Occupation: The Case of East Jerusalem*, F, V & V IN OBGYN, 35, 35 (2010) (discussing the difficulties that Palestinian residents in East Jerusalem encounter when they attempt to access fertility treatments in Israel) and Nadera Shalhoub-Kevorkian, *The Politics of Birth and the Intimacies of Violence Against Palestinian Women in Occupied East Jerusalem*, 55 BRIT. J. CRIMINOL. 1187 (2015) (discussing how “Palestinian women’s reproductive capabilities, including their experiences with pregnancy and childbirth, are implicated in Israel’s colonial settlement project.”).

39. For different forms of resistance against the state-patrolled family-building border in Israel embedded within the ethno-natalist ideology, see, for example, Gala Rexer, *Borderlands of Reproduction: Bodies, Borders, and Assisted Reproductive Technologies in Israel/Palestine*, 44 ETHNIC & RACIAL STUD., 1549, 1564. Rexer argues that the phenomenon of sperm-smuggling in the West Bank “constitutes an example of how [geo-political] borders, such as the Green Line, but also the border of the prison, are challenged by Palestinian families through a communal practice of reproductive resistance.”).

carry a pregnancy for medical reasons and had wished to conceive a child through the services of a surrogate, but her request was denied because of her single status.⁴⁰ While the Court was sympathetic to her longing to become a mother,⁴¹ it dismissed the petition—reasoning that, since the Israeli Surrogacy Law was still in an experimental phase, more experience was required before any changes could be contemplated.⁴²

Although the Court stopped short of relaxing the statutory definition, its reasoning merits attention to understand the dynamic of bordering described in this Part. First, it clarified that the purpose of the Israeli Surrogacy Law was “to solve the problems of spouses, men and women, who are childless, and these problems alone.”⁴³ Second, it found that the distinction based on couplehood, namely between a woman who is in a relationship with a man and a single woman, was unjustified for this purpose of the law.⁴⁴ The Court, therefore, referred the matter to the legislature to consider whether this discrimination should be amended, calling for single women’s predicament to be considered.⁴⁵ Finally, the Court went a step further, pronouncing, *in obiter*, that “although single women are under consideration, [the Court] cannot ignore the status of single men,” and declaring the Israeli Surrogacy Law to be, *prima facie*, just as discriminatory against single men and male couples as it was against single women.⁴⁶ These observations, as we will explore in greater detail, initiated a longstanding dialogue between the Supreme Court and the Knesset on this statutory definition—a dialogue that has endured for almost two decades.

B. Single Women—In (?); Male Couples and Single Men—Out

The second attempt to challenge the statutory definition was marked by the *Arad–Pinkas* petition, filed in 2010.⁴⁷ This petition was filed by the gay couple Yoav Arad and Etai Pinkas, who called for the Israeli Surrogacy Law to be amended to allow also same-sex and single people to pursue surrogacy in Israel. That petition, however, was withdrawn after the state announced it was setting up a public committee of experts in reproduction (the so-called Mor-Yosef Committee), led by the Ministry of Health, to examine the regulation of fertility in Israel more broadly. Again, as part of the dialogue, the Court stopped short of striking down the statutory provisions but led the

40. See HCJ 2458/01 *New Family v Approvals Committee for Surrogate Motherhood Agreements*, Ministry of Health, 57(1) PD 419, 457 (2002) (Isr.) [hereinafter, *New Family*].

41. *Id.* at 445.

42. *Id.* at 457.

43. *Id.* at 437.

44. *Id.* at 456.

45. *Id.* at 461.

46. *Id.* at 458–9.

47. See HCJ 1078/10 *Arad–Pinkas v. The Approvals Committee for Surrogate Motherhood Agreements*, Ministry of Health (Jun. 30, 2010) Nevo Legal Database (Hebrew).

Knesset to consider its terms. In doing so, the Court, again, created the conditions under which the borders of the surrogacy regime could, one day, be relaxed.

The Mor-Yosef Committee discussed whether to expand legal access to surrogacy, among other reproductive practices.⁴⁸ In May 2012, the Committee published its recommendations, advising that single women with fertility or gestation problems and single men, regardless of their sexual orientation, be allowed to pursue the option of an Israeli surrogate. However, with regard to single men and male couples (hereinafter “the male group”), the Committee’s recommendation applied only to altruistic surrogacy and not to the paid surrogacy route that exists in Israel.⁴⁹ Although the recommendations refer to “single men” as opposed to single men *and* male couples, it is clear that male couples constitute the major part of this group, given the very reason for establishing this Committee (the Arad–Pinkas petition) and since, for male couples, surrogacy is a primary route for parenthood.⁵⁰

The Committee offered two main justifications for these recommendations, which distinguish between single women and the male group. The first, which I term the *medical justification*, is that the Israeli Surrogacy Law is designed to provide recourse to women with a “medical deficiency” that prevents them from conceiving or carrying a pregnancy to full term. Since this deficiency is not shared by men, there is a “relevant difference” that justifies the disparate treatment.⁵¹ The second, which I term the *market-behavior* justification, is that expanding access to surrogacy could lead to a situation in which the demand for surrogates surpasses the level of supply, prompting a rise in prices due to market forces and thus impeding the financial capability of women—for whom the Surrogacy Law was originally enacted—to contract a surrogate. To avoid this risk, these recommendations in relation to the male group were made applicable only to the separate path of altruistic surrogacy.⁵²

One can observe the “heterosexual matrix” underlying these

48. Ministry of Health, RECOMMENDATIONS OF THE PUBLIC COMMITTEE FOR THE REGULATION OF FERTILITY AND REPRODUCTION IN ISRAEL, 62 (May 2012), <https://www.health.gov.il/PublicationsFiles/BAP2012.pdf> (Hebrew) [hereinafter, MOR-YOSEF RECOMMENDATIONS].

49. *Id.*

50. See *infra* notes 95–96 and accompanying text.

51. MOR-YOSEF RECOMMENDATIONS, *supra* note 48, at 62. The state also presented this argument against the petition that challenged the exclusion of male couples from the Israeli Surrogacy Law. See HCJ 781/15 Arad–Pinkas v. Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) Law, at § 17 (Chief Justice Hayut’s opinion) 5756-1996, (Feb. 27, 2020), Nevo Legal Database (Isr.) [hereinafter, Arad–Pinkas Part III].§ ’

52. MOR-YOSEF RECOMMENDATIONS, *supra* note 48, at 62. Arad–Pinkas Part III at § 29 (Chief Justice Hayut’s opinion).

justifications.⁵³ Specifically, both justifications assume female longing for reproduction is an impulse that should be fulfilled at all costs, while male longing is an anomaly to be marginalized.⁵⁴ In this way, certain attachments and desires are privileged above others, which resounds with the heteronormative ideology of Family. More troubling is the moral panic echoed through the “market behavior” justification, which presents the male group—specifically, same-sex couples, seeking surrogacy—as a dominant group that threatens to “overshadow” the needs of a more deserving population: infertile women. Under the Israeli State’s rhetoric, another concern also looms large: Equating the access to surrogacy with a threat to the national order, in which the reproductive role, charged with fortifying the nation, is still assigned exclusively to women.⁵⁵ To be clear: It is not homosexual parenthood *per se* that entails a national threat but rather the concern, even a hypothetical one, that some Jewish women might not become mothers.⁵⁶ Paying attention to this heterosexual matrix and how it is operated through the ethno-national image of Israel exposes another *figurative* border created by the Surrogacy Law: Its distinction between those who are a part of the national imagination and those who are perceived as a “threat” to it. In this reading, the narrow statutory definition is a product

53. Judith Butler, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

54. The heterosexual matrix hinges on the assumption that the eligibility to surrogacy is a “matter of medicine.” One could instead argue that surrogacy is a social practice—that it is about *contracting* with another person for the purpose of conceiving a child. And, even if we hold the position that surrogacy should be determined by medical principles, the decision to label the *biological impediment* of a woman in conceiving naturally a “medical problem” (thereby justifying her eligibility) but not apply the same logic to the *biological impediment* of same-sex couples is not an objective principle. It is a decision motivated by moral values. The moral principle of supporting only a *certain* idea of nature—namely, the scenario of different-sex couples seeking to conceive—suppresses other ideas of nature associated with different groups, such as the biological impediment of same-sex couples to conceive a baby together. See Elizabeth Emens, *Against Nature*, in *EVOLUTION AND MORALITY: NOMOS LII* 293 (James E. Fleming & Sanford Levinson eds., 2012). Further, we only have to look back at the history of gay rights to see how the medical justification is constructed and operated today. In the past (and even today, in some parts of the world), the criminalization of gay men’s *sexual autonomy* was informed by the medicalization of homosexuality, in which it was treated as “moral insanity” or “sexual perversion.” This discourse of knowledge is now deployed by some states to limit the *reproductive autonomy* of gay men, albeit manipulatively, by pathologizing the physical inability of opposite-sex couples to bear a child, labeling it a medical issue. This framing paves the way for allowing *only* opposite-sex couples to fulfill their reproductive autonomy through surrogacy. Such a shift from sexual criminalization to reproductive constraint explicates that, notwithstanding the de-medicalization of homosexuality, today, “ideas of same-sex sexuality as nonprocreative continue to shape institutional practices concerning appropriate and actual users of assisted reproduction.” 54. Laura Mamo, *QUEERING REPRODUCTION: ACHIEVING PREGNANCY IN THE AGE OF TECHNOSCIENCE* 56 (2007). This shift also illustrates that, while the anti-gay-agenda politics of pathologization seems anachronistic now, its logic echoes today throughout modern liberalistic rhetoric of “relevant difference” underlying the medical justification. For further reading on this shift, see Didi Herman, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 18 (1997).

55. Karin Carmit Yefet, *Feminism and Hyper-Masculinity in Israel: A Case Study in Deconstructing Legal Fatherhood*, 27 *YALE J.L. & FEMINISM* 47, 50 (2015).

56. This observation is supported by the fact that the state does not prohibit men from becoming parents via cross-border surrogacy. Gay people are not excluded from the pro-natalist culture but rather are marginalized within it.

of “anxieties of patrolling moving borders”⁵⁷ that must be controlled and maintained.

Equipped with this observation, let us now turn to the subsequent event that occurred in the Knesset, which laid the foundation for the third attempt to challenge the Israeli Surrogacy Law in the Supreme Court. In 2012, the Mor-Yosef Committee’s recommendation was endorsed by the Health Minister, in the form of a bill amending the Surrogacy law. This bill offered to expand access to surrogacy, to include single women unable to carry a pregnancy to full term and single men (the latter only being offered the altruistic path).⁵⁸ That bill was approved in the first reading in the Knesset—a cause for celebration within the LGBTQ community.⁵⁹ But the celebrations turned out to be premature, due to unexpected elections resulting in a new government being formed that withheld parliamentary approval of the bill.

C. *Single Women—In; Male Couples and Single Men—Out*

Given this outcome, the Arad–Pinkas case made its way back to the Israeli Supreme Court—the third attempt to challenge the Israeli Surrogacy Law. This time, the petition was filed by two male couples and two single women.⁶⁰ The Court expressed serious concerns regarding the constitutionality of the statutory definition of the Israeli Surrogacy Law but, once again, refrained from deciding the issue, to enable the Knesset to complete the ongoing legislative process.

Although the Court opted not to strike down the law, the rhetoric of Vice Chief Justice Salim Joubran, who wrote the majority opinion, merits attention. Joubran highlighted the impact of precluding men from enjoying the opportunity to have children as single parents or as part of a gay couple, emphasizing the collective pain of Israeli society, which parallels the petitioners’ personal pain stemming from the current law.⁶¹ This allusion to

57. COSSMAN, *supra* note 6, at 23–28.

58. The Surrogacy Law was approved at the First Reading. See Knesset News (Oct. 27, 2014), <https://main.knesset.gov.il/News/PressReleases/Pages/press271014-hkhk.aspx> (Hebrew).

59. *Cabinet Approves ‘Surrogacy Equality’ Bill for Gay Couples*, THE TIMES OF ISRAEL (Jun. 1, 2014), <https://www.timesofisrael.com/cabinet-approves-surrogacy-equality-bill-for-gay-couples/>.

60. HCJ 781/15 Itay Arad–Pinkas, Yoav Arad–Pinkas et al. v. The Committee for Approval of Agreements for Carrying of Embryos (Aug. 3, 2017) Nevo Legal Database (Hebrew) [hereinafter, Arad–Pinkas Part II].

61. *Id.* § 16, Vice Chief Justice Joubran’s opinion (“one must not deny that suspending the decision on the petition is significant for the petitioners as well as for many others in the Israeli public; these will be members of the community itself or other citizens who identify with their pain.”). Interestingly, this rhetoric, which universalizes the infringement of gay men’s rights, resounds with Eve Sedgwick’s discussion of the tension between *minoritizing* and *universalizing* approaches. See EVE SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990). Such rhetoric was also echoed subsequently, in the legislative discussion around the proposed amendment. For example, prior to voting on the amended Surrogacy law in 2018, Revital Swid, a former Member of the Knesset (MK) asserted that barring gay men from equal access to surrogacy is not only an “individual infringement” but also an “intergenerational infringement” because preventing one person from becoming a parent affects not only that person but

collective pain exposes the contested gap invoked by the surrogacy debate; namely, the gap between those who view gay men's longing to become parents through surrogacy as a threat to the national imagination (echoed by the Mor-Yosef Committee's rhetoric)⁶² and those who view the national imagination as incapable of tolerating the pain of childlessness, regardless of sexual orientation. As one may notice, this rhetoric echoed the same "collective pain" expressed in 1996 by the group of different-sex couples that pressed the state to enact this family-building mechanism in the first place—the very same mechanism that enabled certain women to enter the institution of parenthood despite their infertility.⁶³ Deploying a reparative reading of these two moments alongside one another implies that the relational process accompanying the dynamic of de-bordering wielded two decades ago is very much alive today, exhorting us to search for what could potentially be opened—rather than foreclosed—by the border.⁶⁴

In 2018, the Knesset amended the Surrogacy Law to expand the entitlement to opt for surrogacy to single women with medical justifications (hereinafter, "2018 amendment"),⁶⁵ leaving male couples and single men on the wrong side of this border and only partially implementing the Mor-Yosef recommendations.⁶⁶ However, in making this move, the state generated another border, this time distinguishing between single women and single men.⁶⁷ This border rendered more visible than ever the exclusion of male couples, for whom the surrogacy arrangement is the only practical route to expanding their family,⁶⁸ underlining their "otherness" within the Israeli child-centric collective. Moreover, the details of this amendment—in conjunction with the directives of the state-appointed committee and Knesset Protocols—reveal that it *broadened* the access to surrogacy for

whole generations reaching back into history. See The Knesset. Protocol 359, 20 (Jul. 17, 2018), <https://main.knesset.gov.il/Activity/plenum/Pages/Sessions.aspx> (also on file with author). This rhetoric raises the question of how the legal institution of parenthood is contingent upon politics of emotions, an issue that extends beyond the scope of this article. See in this regard, Noy Naaman, *Affective Reproductive Legality: Navigating the Borderland of Life and Death* (forthcoming) (on file with author).

62. See *supra* notes 51-52 and accompanying text.

63. See *supra* note 34 and accompanying text.

64. The reparative reading searches for positive affect and creative possibilities, notwithstanding structures of homophobia. EVE KOSOFKY SEDGWICK TOUCHING FEELING: AFFECT, PEDAGOGY, PERFORMATIVITY 123 (2003). We should bear in mind, though, that as powerful as de-bordering can be, the very existence of a border still forecloses access to the institution of Family for others, on the basis of other cross-social hierarchies, such as social class or nationality.

65. *The Surrogacy Law Has Been Finally Approved*, Knesset News (Jul. 18, 2018), <https://main.knesset.gov.il/News/PressReleases/pages/press18.07.18k.aspx>. Bill for Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) (Amendment no. 2), 5777-2017; <https://main.knesset.gov.il/Activity/Legislation/Laws/pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=2019559> (Hebrew).

66. See *supra* note 48 and accompanying text.

67. Although female couples are also excluded by this mechanism, they are not dependent on this method, unlike male couples, for whom a surrogacy arrangement is the only practical route to expanding their family. See *supra* note 4.

68. See *infra* notes 94-96 and accompanying text.

different-sex couples that already had children,⁶⁹ while at the same time justifying the exclusion of the male group due to the small supply of surrogacies in Israel.⁷⁰ That contradictory outcome exposes not only the homophobic discourse informing the surrogacy regime but also how the dynamic of bordering is far from being as linear as we might expect.

Therefore, it is perhaps no surprise that this amendment invoked the largest LGBTQ-rights protest in Israeli history,⁷¹ with massive rallies accompanied by a one-day strike organized by private companies.⁷² Dozens of lawmakers protested against this amendment, and, in an unusual step, the Prime Minister delivered a public declaration promising to amend the law so that single men could be included.⁷³ With that momentous reaction—alongside the rhetoric of “collective pain” echoed in the Supreme Court—it became clear that the struggle over the Israeli Surrogacy Law was far from being over.

D. Male Couples and Single Men—In (?)

The 2018 amendment ironically *facilitated* the ability of male couples to challenge this law in the Supreme Court. A few months after the 2018 amendment, the Arad–Pinkas petition returned to the Israeli Supreme Court in its fourth and final (for now) attempt to challenge the law. This time, in

69. One of the new changes relates to the *profile* of the intended parents, requiring that, if they are already parents, they share no more than two genetic children prior to seeking surrogacy (Surrogacy Law § 5(a)(1c)(b)). The previous directives had allowed this option only among couples with a maximum of *one* child (other than in exceptional circumstances). Another support for my argument that this amendment broadened access to surrogacy for different-sex couples is evidenced in Knesset protocols concerning the legislative discussions on the 2018 amendment that took place in the Labor, Welfare and Health Committee, which is a standing committee of the Knesset. In these discussions, the MKs had initially decided to permit surrogacy among couples with up to *three* children as middle ground given that some MKs requested to allow surrogacy also for couples with *four* children. See the Labor, Welfare and Health Committee, Comm. Protocol 830, 20 (Jul. 09, 2018). It was only after a heated debate about how many children a “classic” Israeli family has that the decision was revised to permit couples with up to *two* children. See the Labor, Welfare and Health Committee, Comm. Protocol 834, 20 (Jul. 15, 2018). The option that, in August 2023, couples with as many as three children could opt for surrogacy was left on the table and was codified in § 20(d) (“The Minister of Health, with the approval of the Knesset Labor, Welfare and Health Committee, may determine, by order, that the maximum number of joint children in the case of intended parents . . . shall be three, provided that such order is not brought to the approval of the committee before the 14th day of Av 5733”) (Aug. 1, 2023)”. The protocols are available at <https://main.knesset.gov.il/Activity/Committees/Labor/Pages/CommitteeProtocols.aspx> (also on file with author).

70. See Arad–Pinkas Part II, *supra* note 60, at § 6 (Chief Justice Naor’s opinion).

71. Naomi Lanzkron, *100,000 Protest in Tel Aviv over Anti-LGBT Discrimination*, THE TIMES OF ISRAEL (Jul. 22, 2018), <https://www.timesofisrael.com/tens-of-thousands-protest-in-tel-aviv-over-lgbt-exclusion-from-surrogacy-law/>.

72. Ruti Levy & Lee Yaron, *Israel-Wide Strike Slated as Tech Firms Protest Anti-LGBT Legislation*, HAARETZ (Jul. 19, 2018), <https://www.haaretz.com/israel-news/.premium-israel-wide-strike-slated-as-tech-firms-protest-lgbt-discrimination-1.6292108> (“local tech companies and Israeli units of multinationals . . . agreed to give their employees the day off on Sunday to protest . . .”).

73. Chaim Levinson, *Netanyahu Voices Support for Surrogacy Births for Gay Men*, HAARETZ (Jul. 18, 2018), <https://www.haaretz.com/israel-news/netanyahu-votes-against-surrogacy-births-for-gay-men-despite-voicing-support-1.6289718>.

February 2020, the Supreme Court, with an enlarged panel of five judges, unanimously ruled that such a legal amendment disproportionately violated the right to equality enshrined in the Israeli Basic Law on Human Dignity and Liberty,⁷⁴ as it discriminates (i) against single men and same-sex couples (vs. women) based on gender and sexual orientation and (ii) against same-sex couples (vs. heterosexual couples).⁷⁵ Three judges, among them Chief Justice Hayut, also stated that the Israeli Surrogacy Law violated the right of male couples and single men to parenthood.⁷⁶

In this ruling, the Court gave the Knesset one year to amend the law before the Court would expand the right to surrogacy to single males.⁷⁷ However, since the Knesset failed to adhere to this ruling, in July 2021, the Court delivered its final decision. It held that, within six months, the interpretation of the statutory definition of “intended parents” in the Israeli Surrogacy Law should be expanded to include “heterosexual couples, same-sex couples, single women and single men.”⁷⁸

A careful reading of the judicial reasoning behind this ruling reveals that *Arad–Pinkas* has far-reaching implications: it not only affected the excluded groups, who are now eligible to more easily enter the legal institution of parenthood, but it is also *de-bordering* the very premises on which this institution is founded. To begin with, Chief Justice Hayut referred to the state’s argument that the Surrogacy Law is designed to provide a solution to infertile women’s medical needs, which are not shared by single men and same-sex couples (the “medical justification”).⁷⁹ Chief Justice Hayut rejected this position, stating that, as far as ARTs are concerned, the physiological difference does not constitute a “relevant difference” that could justify the law’s disparate treatment.⁸⁰ As Hayut explained, “this disparate treatment is, in fact, grounded on a [narrow] concept of the role of fertility that relies on what is considered ‘natural’.”⁸¹ Hayut not only de-naturalized the bio-politics disguised by the rhetoric of medicalization but also offered another interpretation of the purpose of ART—one that was not limited to medical issues but rather extended to any “person who is childless for a non-medical reason.”⁸² This reasoning reflects a gender-neutral understanding of parenthood that accommodates

74. The Basic Law: Human Dignity and Liberty, 5752-1992. LSI 1391-150 (1991–1992) (Isr.).

75. HCJ 781/15 *Arad–Pinkas* Part III, 5756-1996 (Feb. 27, 2020), Nevo Legal Database (Isr.).

76. *Id.* at Chief Justice Hayut’s opinion, § 1, Vice Chief Justice Melzer’s opinion, and § 1, Justice Fogelman’s opinion.

77. *Id.* at § 37, Chief Justice Hayut’s opinion.

78. HCJ 781/15 *Arad–Pinkas* v. Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Agreement Approval & Status of the Newborn Child) Law, 5756-1996, at § 6 (Jul. 11, 2021), Nevo Legal Database (Isr.).

79. *Arad–Pinkas* Part III, *supra* note 75, at § 14, Chief Justice Hayut’s opinion.

80. *Id.* at § 17, Chief Justice Hayut’s opinion.

81. *Id.* at § 18.

82. *Arad–Pinkas* Part III, *supra* note 75, at § 17, Chief Justice Hayut’s opinion.

the biological impediment faced by same-sex couples but could also benefit different-sex couples who cannot (or perhaps do not want to) conceive a child themselves for non-medical reasons. Similarly, Chief Justice Hayut adopted a broader understanding of the right to parenthood as a right that encompasses *all* medical reproductive techniques.⁸³ This is a consequential declaration because, for years, the Supreme Court avoided conceptualizing this right in such a broad manner.⁸⁴ In that sense, Chief Justice Hayut's reasoning also exposes the transformation of the Surrogacy Law—from a mechanism designed to resolve extreme cases of couples with fertility issues (as framed in the first milestone of this debate),⁸⁵ to an essential means of exercising the right to parenthood, almost, some would say, as a *natural* right.⁸⁶

By allowing male couples to undergo surrogacy, this dynamic *Arad–Pinkas* ruling also opens up a new possibility in the Israeli Surrogacy Law: The recognition of a man as the legal father of a child conceived through surrogacy even when *his* sperm was not used in the procedure. This possibility weakens the genetics-centric view of fatherhood enshrined in the statutory requirement that it must be the intended father whose sperm is used.⁸⁷ Following this relaxation, different-sex couples in which the man is infertile *may* be eligible for surrogacy as well.⁸⁸ While the full implications of this ruling are, as of yet, unknown,⁸⁹ the dynamic of the Israeli case—

83. *Id.* at § 22, Chief Justice Hayut's opinion (referring to *Arad–Pinkas* Part II, *supra* note 60, at § at § 27, Vice Chief Justice Joubran's opinion).

84. *See, e.g.*, HCJ 5771/12 Moshe v. Committee for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Approval of Agreement and Status of the Newborn) Law, 5756-1996, (Sept. 18, 2014).

85. *Arad–Pinkas* Part III, *supra* note 75, at § 17, Chief Justice Hayut's opinion (referring to *New Family*, *supra* note 40).

86. This observation is supported by various declarations highlighting the intersection between genetic parenthood and human necessity, both in *Arad–Pinkas* Part II, at § 16, Vice Chief Justice Joubran's opinion, and in *Arad–Pinkas* Part III, at § 11, Justice Fogelman's opinion (stating that a “[person] do[es] have many intersections in a life that express his freedom and establish his identity, like the choice to become a parent. The desire to become a parent is one of the deepest longings of the human psyche. For those who want it, the right to become a parent, to love a child, to raise him, to take care of all his needs, to educate him, to instill in him an educational value and moral burden, is a first-rate expression of his humanity.”).

87. Surrogacy Law § 2(2).

88. However, single men who cannot provide sperm may not be entitled to seek surrogacy. This is because, in 2017, the Supreme Court held that the genetic link requirement found in the Israeli Surrogacy Law (of at least one of the intended parents) which is a condition of entering into a surrogacy agreement, *is* constitutional. *See* HCJ 781/15 *Arad–Pinkas* Part II, at § 44, Vice Chief Justice Joubran's opinion.

89. Although Israel's Health Ministry published the new directives governing the enactment of this ruling, *supra* note 5, it is still unclear how exactly this rule will be implemented in practice, leaving a range of questions unanswered, such as: How will the Committee address the concern regarding the potential for market-driven price rises for surrogacy following this ruling? Will it allow surrogates to receive higher compensation than at present? Another set of questions relates to the implications of the unprecedented interpretation of the right to parenthood as a right that encompasses the right to become a parent through ARTs. That ruling, one could assume, may sow the seeds for future petitions against the state funding of ART treatments, such as domestic or cross-border surrogacy, similar to the existing state subsidy of IVF treatment for women. Israeli law provides full funding for IVF treatment with parents' gametes even when the chances of success are remote. *See* Daphna Birenbaum-Carmel, *Thirty-*

specifically, the sweeping consequences of challenging the borders—demonstrates what Martha Minow was already signaling in the 1990s: Those who are marginalized have the agency to push the law to accommodate difference by “challenging and transforming the unstated norm used for comparisons . . . [and] disentangling equality from its attachment to a norm that has the effect of unthinking exclusion.”⁹⁰

One might wonder why the border has been relaxed only now, given that the Supreme Court repeatedly asked the Knesset to consider changing the law but stopped short of intervening for two decades after the *New Family* ruling. What might the outcome have been, had the state prevented the law from being amended to include single women wanting surrogacy (i.e., the 2018 amendment)? Under that hypothetical circumstance, might the discrimination between different-sex and same-sex couples (and male parenthood and female parenthood) have been so blatant that the Court would have unanimously decided that the Surrogacy Law should be amended? Have events that occurred outside the legislative terrain, i.e., the massive reaction of the public following the 2018 amendment, helped shape this victory? These questions are beyond the scope of this article and merit a different type of analysis. But, certainly, it is not inconceivable that one legal change has contributed to the other—the opening of one border led to an opportunity to open another. To further understand such a constant state of transition and its multiple functions—specifically, how such a dynamic becomes an essential condition under which both the legal subject and the law are operated—I turn to the *transnational* scale accompanying the Israeli story: Cross-border surrogacy.

II. CROSS-BORDER SURROGACY

While the Israeli legal infrastructure strictly polices the borders around domestic surrogacy, it does not stop its citizens from pursuing this reproductive route abroad and no authorization needs to be sought prior to instigating the surrogacy process in another country.⁹¹ Israel merely verifies that the surrogacy agreement was signed according to the jurisdictions in which it was issued and that the surrogate waived her parental rights without

Five Years of Assisted Reproductive Technologies in Israel, 16, 20 REPRODUCTIVE BIOMEDICINE & SOCIETY ONLINE (2016).

90. Minow, Martha, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 16 (1990).

91. It should be clarified that some different-sex couples are also eligible to enter a surrogacy agreement locally but *choose* to undergo cross-border surrogacy abroad—because surrogacy is cheaper than Israel in some foreign states, because they wish to distance themselves from the surrogate, or because they aim to shorten the wait for a surrogate in Israel, where availability is limited. See Zafran & Hacker, *supra* note 1, at 1144-45. Aside from this group, because of the legal restrictions on surrogacy (Surrogacy Law § 5), heterosexual couples in which both parties are older than 54 or already have several children might be likely to take advantage of this route as well. Yet, these cases differ from that of male couples and single men who have been complexly *excluded* by the domestic regime.

coercion.⁹² Israeli citizens have capitalized on this option in relatively high numbers as part of the global phenomenon of cross-border surrogacy.⁹³ Surrogacy has been documented as the method preferred by Israeli gay men to become parents,⁹⁴ as other options are less attainable. Specifically, adoption is unrealistic,⁹⁵ and co-parenthood with a third party involves substantial barriers as Israeli law does not allow more than two parents to be registered.⁹⁶

A. Crossing into Israeli Society

From the perspective of male couples (hereinafter, “the excluded subject”), cross-border surrogacy is an act of *de-bordering*. By crossing the territorial borders, the excluded subject circumvents the prohibition on domestic surrogacy, the family-shaping border codified in the Israeli Surrogacy Law.⁹⁷ In so doing, the excluded subject also crosses another border, one that distinguishes between who fully belongs to Israeli society and who is left outside, marginalized or signified as Other—because the meaning of belonging in Israel is heavily articulated through child-bearing.

Studies demonstrate how same-sex couples are accepted by society in an entirely different way after becoming parents, a fact that manifests in Jewish ceremony, such as the circumcision of baby boys (*Brit Milah*) and childbirth celebrations for girls (*Simchat Bat*).⁹⁸ These processes, which designate a

92. *Id.*

93. According to data provided by Israeli authorities, at least 188 babies were born to Israeli citizens through cross-border surrogacy between 2005 and 2011. Since then, the number has rocketed, with at least 1,325 babies born to Israeli citizens through this route between 2012 and 2017, a large proportion of which were brought into the world for male couples and single men. See Oriana Almsai, *Surrogacy in Israel and Abroad and Its Cost Components in Israel, Funded by the State*, Knesset Research and Information Center 8–9 (Oct. 7, 2018), <https://m.knesset.gov.il/activity/info/mmm/pages/document.aspx?docid=cas-65808-j4c9y6> (Hebrew). To compare, the UK has a population of about 67 million. This is more than seven times greater than Israel, which, at that time, had a population of about 8.5 million yet recorded a similar number of cross-border surrogacy births during the same period. See Adi Moreno, *Crossing Borders: Remaking Gay Fatherhood in the Global Market*, at 20–21 (Aug. 1, 2016) (Ph.D. Dissertation, University of Manchester) (on file with University of Manchester).

94. Maya Tsfati & Adital Ben-Ari, *Between Subversion to Re-Affirmation: Homonormativity, Homonationalism and Male Same-Sex Family*, 28 J. GEND. STUD. 861, 863 (2018).

95. This is both because of the scarcity of children placed for adoption and the Welfare Service’s policy, which considers different-sex married couples preferable for children, and because same-sex couples are disadvantaged compared to different-sex couples. As for international adoption, same-sex couples are permitted to adopt children from abroad, although they need to satisfy the conditions for adoption under the law of the child’s country of origin. Therefore, it is only possible for same-sex couples to adopt children from countries that permit same-sex adoption and that have an agreement with Israel allowing it (at present, Israel allows adoption only from countries that do not permit same-sex adoption). See Zvi Triger & Milli Mass, *LGBT Adoption*, in *LGBT RIGHTS IN ISRAEL* 437 (Alon Harel, Einav Morgenstern, & Yaniv Lushinsky eds., 2016).

96. FAC 203848-05-19 District Court (Tel Aviv) *John Doe v. Jane Doe* (April 20, 2020), Nevo Legal Database (Isr.).

97. See *supra* note 38 and accompanying text.

98. Sibylle Lustenberger, *Conceiving Judaism: The Challenges of Same-Sex Parenthood*, 28 ISRAEL STUD. REV. 140 (2013).

newborn child as a member of society, affirm not only the child's social belonging but also the legitimacy of same-sex families.⁹⁹ By becoming parents, gay men escape what constitutes dominant prejudice that stereotypes them as irresponsible and hyper-sexual citizens who consume drugs, have unprotected sex, and are unwilling to commit to a long-term intimate relationship.¹⁰⁰ Some argue that because bearing children has historically been viewed as the antithesis of homosexuality, the option of bearing children allows gay men to cleanse what constituted and governed their subjectiveness as inferior¹⁰¹ and instead to become assimilated into Israeli society as “respected” members,¹⁰² thereby producing new “homonormative” subjects.¹⁰³ That assimilation is evidenced also by the emergence of a new social script of dual-fatherhood within Israeli society.¹⁰⁴ As studies have recently demonstrated, it is a script that now dictates the norms within the LGBTQ community itself, where members express pressure from their own LGBTQ friends and acquaintances to become parents.¹⁰⁵ This is a script that renders what was termed *repro-normativity* two decades ago with regard to women just as applicable to the LGBTQ community today in Israel.¹⁰⁶ This process of crossing and challenging legal borders by groups that were once prohibited from even approaching them can set in motion an organic process of *re-bordering*, of creating a new and previously inconceivable border. Here, this new border arose between members of the LGBTQ community who act on the freedom to choose parenthood and those who choose not to exercise that freedom. Tensions then arise around the *new* border as well.

From that perspective, crossing territorial borders is not solely a reproductive path. Rather, it can also be read as a subversive practice by which male couples construct membership of their society despite its domestic laws excluding them and marginalizing their longing. This reading reveals the dual role of the border, both as a means of exclusion *and* as an opportunity for the excluded subject to exercise agency.¹⁰⁷

99. Tsfati & Ben-Ari, *supra* note 94, at 865-867.

100. Gary Spitko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, 24 ST. LOUIS U. PUB. L. REV. 195, 220-221 (2005).

101. Ruti Kaddish, *Israeli Gays and Lesbians Encounter Zionism*, in *QUEER JEWS* 363 (David Shneer & Caryn Aviv eds., 2002).

102. Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415 (2012).

103. Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in *MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITICS* 175 (Russ Castronovo & Dana D. Nelson, eds., 2002). See also in this regard, Aeyal Gross, *The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics*, 46 COLUM. HUM. RTS. L. REV. 81 (2015).

104. Efrat Knoll & Adi Moreno, *The Triumph of Surrogacy: Competing Social Scripts and the Rise of Family-Normativity in the Male-Gay Community in Israel* Authors, 15 NORMA 283, 283-284 (2020).

105. ALONA PELEG, *LESBIAN MOTHERHOOD IN ISRAEL* 20-35 (2020) (Hebrew).

106. Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. HUM. RTS. L. REV. 181, 185 (2001).

107. Perera, *supra* note 16, at 205.

Capitalizing on this opportunity, the excluded subject re-constitutes not only his social status but also the system into which he integrates, allowing the “conception” of a new subjectivity—gay fatherhood—that was once restrained by the regime but is now flourishing as a new norm within Israeli society.¹⁰⁸ However, as encouraging as this reading is, and as much as I subscribe to it, it overlooks the irony of inclusion through exclusion and, I contend, naively oversimplifies reality, as we shall now explore.

B. The Old Border

Cross-border surrogacy raises a paradox. Gay men, as Israeli citizens, are pressed to fulfill the ethos of procreation. But their choice to live in accordance with their sexual identity prevents them from fulfilling this ethos unless they leave the territorial borders of their nation behind. This paradox can be articulated as an internal division between the subject’s national identity and sexual identity. Such a division is evident in every step of the cross-border surrogacy process.

First, the idea of having to move to the other side of the world to form a family is, in and of itself, contradictory. Permitting a person to form a family—and thus build the nation—only by doing so outside the territorial borders of their home country is antithetical to the formation of their subjecthood, given that *home* is “one of the major milieus of political subject formation,”¹⁰⁹ and the norms associated with building a family are heavily implicated in the idea of “the construction of the nation” in Israel.¹¹⁰

Next, forcing gay men to travel between different foreign states to find their own belonging produces an effect of national alienation. This effect resounds with the perception of *The Wandering Gay*,¹¹¹ referring to the phenomenon in which homosexual subjects are signified by the state as Other under the belief that they pose a threat to the nation. Forcing the homosexual subject out, if he wishes to become a parent, reinforces that othering. It also disadvantages him economically, compared to his heterosexual counterparts, who enjoy the privilege of access to a highly-organized and more affordable regulatory arrangement in their own country.¹¹²

In other words, under the reading I offer here, the option of cross-border

108. Compare with Atina Krajewska and Rachel Cahill-O’Callaghan, *When a Single Man Wants to Be a Father: Revealing the Invisible Subjects in the Law Regulating Fertility Treatment*, 29 SOC. LEG. STUD. 85 (2020).

109. Kirsi Pauliina Kallio, *Living Together in the Topological Home*, 19 SPACE & CUL. 373, 385 (2016).

110. COSSMAN, *supra* note 6, at 71.

111. Zvi Triger, *Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships*, 8 INT. J. L. CONTEXT 268, 268–270 (2012).

112. While, in Israel, surrogacy costs about 230,000 Shekels (equivalent to US\$71,000), in the US, where most gay people seek surrogacy, it costs in the region of 485,000 Shekels (equivalent US\$150,000).

surrogacy is far from being a means of inclusion, let alone a subversive means. Instead, I contend, it is an exclusionary symptom of a nation that is unable to liberate itself from its homophobic relics but still presses its members, including the excluded ones, to procreate as part of its reproductively normative culture.¹¹³

The internal division is also reflected *tangibly* throughout this journey. Ethnographic studies on the experience of Israeli male couples undergoing transnational surrogacy offer insights into this conflict and its effects. One study, for example, demonstrates that Israeli men feel frustrated and anxious throughout the long-distance surrogacy process, and highlights their perceived lack of control over its various stages.¹¹⁴ Other studies reveal how the feelings of national abandonment are amplified throughout multiple dimensions of this process, from the bureaucratic hurdles that gay men must face alone, with no help from their state, to financial extortion and mistreatment by the foreign authorities, and the barriers they encounter to forming a relationship with the surrogates.¹¹⁵ All of these elements of the journey situate the excluded subject in a fragile position and explicitly interfere with their sense of agency and control over the process of becoming a parent.

They are also accompanied by legal challenges. Cross-border surrogacy involves movement between at least two countries (if not three), and, as such, operates within different and sometimes contradictory legal regimes, which can leave the intended parents in uncertainty. For example, the sudden ban imposed on single and same-sex parents in 2012 in India left many Israeli intended parents in legal limbo, forcing them to live in India for several months while they awaited a legal order for their newborn.¹¹⁶ In times of catastrophe, such vulnerability becomes especially salient. The current COVID-19 pandemic has inflicted chaos on cross-border surrogacy, as lockdowns, travel restrictions, hospital visit bans, and unprecedented bureaucratic challenges bar intended parents from being present at the birth and returning home with their newborn.¹¹⁷ These restrictions have resulted in a petition being filed at the Israeli Court on behalf of dozens of male couples who were stranded abroad and could not obtain the necessary travel

113. See *supra* notes 23-31 and accompanying text.

114. Ido Ziv & Yael Freund-Eschar, *The Pregnancy Experience of Gay Couples Expecting a Child Through Overseas Surrogacy*, 23 THE FAMILY JOURNAL: COUNSELING & THERAPY FOR COUPLES & FAMILIES 158, 161 (2015).

115. Triger, *supra* note 7; Sibylle Lustenberger, "We Are Citizens": Vulnerability and Privilege in the Experiences of Israeli Gay Men with Surrogacy in India, 48 J. COMP. FAM. STUD. 393, 396 (2017).

116. Sayani Mitra, *Cross-Border Reproflows: Comparing the Cases of India, Germany, and Israel*, in CROSS-CULTURAL COMPARISONS ON SURROGACY AND EGG DONATION: INTERDISCIPLINARY PERSPECTIVES FROM INDIA, GERMANY AND ISRAEL 92-93 (Sayani Mitra et al. eds., 2018).

117. Aaron Engelberg, *Coronavirus Leaves One-Month-Old Baby Stranded*, THE JERUSALEM POST (Apr. 1, 2020), <https://www.jpost.com/israel-news/coronavirus-leaves-one-month-old-baby-stranded-623196>.

documents to bring their babies back to Israel.¹¹⁸ In many cases, these vulnerabilities remain invisible to the eyes of the Israeli legislature.

Religious hurdles are also a factor. Male couples face the concern that their child will not be deemed Jewish because, more often than not, the surrogate is not Jewish (bearing in mind that the Jewish identity is based on matrilineal descent).¹¹⁹ The Orthodox Chief Rabbinate, which has sole authority over multiple aspects of Jewish life in Israel, has rejected same-sex families and refuses to convert any children born to them through surrogacy.¹²⁰ It should be stressed that, in Israel, religion is both an administrative tool used to determine citizenship and a ticket to integration into Israeli society. For that reason, as studies have documented, same-sex couples insist on converting their children, but they do so through the Reform authorities, which are more progressive in their acceptance of same-sex parenting.¹²¹ Under these circumstances, even when the child is registered Jewish, taking the Reform-authorities route means that he or she might not be able to get married in Israel, as marriage is controlled by the Orthodox Chief Rabbinate. This dynamic exemplifies how the exclusionary effect of the Israeli regime is sustained even when the excluded subject is actually crossing into full societal membership.

This brief survey of the challenges of cross-border surrogacy highlights the multiple dichotomies that accompany it from the excluded subject's perspective: Diaspora/homeland, isolation/collective, alienation/belonging. This dynamic reflects Manning Erin's observation that borders symbolize "the impossibility of integration and assimilation while holding captive the dream of territorial integrity, reminding us that, as strangers, we find ourselves in transition, incapable of delineating clearly the line between here and there, self and other."¹²² My view follows this same trajectory, as it explicates how, although the borders of the hetero-normative regime are being bypassed, and excluded subjects find their way back into society, ultimately, the exclusionary effects of the "old border" remain very much active.

C. The New Border

Cross-border surrogacy also begets a new border. This is the border

118. Lee Yaron & Netael Bandel, *Israel News Gay Fathers in Surrogacy Process Overseas Petition High Court to Help Them Return to Israel*, HAARETZ (Mar. 31, 2020), <https://www.haaretz.com/israel-news/premium-gay-fathers-overseas-petition-high-court-to-help-them-return-with-children-to-israel-1.8724664>.

119. In the case of surrogacy, most rabbinical authorities have decided that the woman who carries and delivers the child is the mother of the child according to religious law (*halakha*).

120. Sibylle Lustenberger, *JUDAISM IN MOTION: THE MAKING OF SAME-SEX PARENTHOOD IN ISRAEL* 165 (2020).

121. *Id.* at 170.

122. ERIN MANNING, *EPHEMERAL TERRITORIES: REPRESENTING NATION, HOME, AND IDENTITY IN CANADA* 73 (2003).

within the gay community itself, which differentiates between those who cross the territorial border and return assimilated into the collective fold, and those who do not, either because they cannot or do not wish to. Witness again the effect of creating a new border or *re-bordering*. Today, Israeli male couples are allowed to seek surrogacy in Canada and the United States (US), where the average cost of the whole procedure for one live birth, including agency fees and legal costs, is approximately US\$110,000–US\$150,000.¹²³ Clearly, this is a costly ticket for crossing the border into Israeli society.

Consequently, some are excluded not only in terms of their sexuality but also their social class. This disparate impact creates another version of discrimination, one that distinguishes between the financially-comfortable class of gay people, who are welcomed into the national ethos of procreation, and those from the “underclass” for whom this remains out of reach, rendering them unworthy of belonging in the eyes of the national ethos.

A careful reading of the ruling in *Arad–Pinkas*, however, reveals that this dynamic of re-bordering has given rise to a new dynamic—*de-bordering*—in which another border is relaxed in a completely different direction. The *outcome* of cross-border surrogacy (namely, its division between poor and wealthy men) was considered by the Israeli Supreme Court grounds to rule that the Israeli Surrogacy Law was unconstitutional and open up access to domestic surrogacy. In short, the disparate impact of cross-border surrogacy caused the Court to relax the border of this regime. This is further evidenced in the reasoning of Justice Hendel:

“I will admit that another consideration was before my eyes. Today, those who cannot perform surrogacy in Israel can perform it abroad. Surrogacy abroad is generally more expensive. This creates a gap between men with means who can perform these procedures and thus realize their desire to be parents, and men with fewer means who cannot do so. This gap does not exist in relation to women and is not desirable. Just as ‘the mind is uncomfortable with the state directing its citizens to fulfill their dreams and rights in other countries’ [citation omitted], so it is uncomfortable with the state allowing a situation in which the ability of unmarried men to become parents is greatly influenced by their economic means.”¹²⁴

The judicial reasoning underlying the Court’s decision in *Arad–Pinkas* exemplifies, first, how *re-bordering* the legal terrain of surrogacy (creating a new border dividing the gay community by *class*) planted the seeds of *de-bordering* it (relaxing the border codified by the Israeli Surrogacy Law);¹²⁵ and, second, how *opening* one border (the territorial) has the unintended

123. Almsai, *supra* note 93, at 8–9.

124. *Arad–Pinkas* Part III, *supra* note 75, at § 6, Justice Hendel.

125. Part I (A).

consequence of *opening* another (the legal). One can observe, again, how the dynamic of borders is not performed as an outcome. Rather, it is a material condition under which both the law *and* the subject are operated: at any given time, a border may be materialized as a mechanism of exclusion, while at another time it may function as a subversive weapon, wielded by those left outside it, to replace the system with something more just and equitable.¹²⁶ Such a multidimensional dynamic reminds us of Michel Foucault's observation that we can never step outside power relations to reach a liberated place.¹²⁷ Paying attention to borders, their dynamic roles, and their transformative costs enriches that observation by revealing how the oppression–resistance interplay simultaneously occurs within and outside different arenas: national, international, and regional.

III. THE JUDICIAL PARENTAL ORDER

The dynamic of borders operating on different geopolitical scales is further exemplified by the third domain of the Israeli case that I wish to examine in this article: The Judicial Parental Order (JPO) and the struggle to ease the access requirements of this regulatory avenue.

A. New Family-Building Mechanism

The JPO was an unforeseen outcome of male couples' crossing of Israel's *territorial* borders. It was officially introduced in *Mamet*, a case litigated in 2014, as a solution for male couples seeking cross-border surrogacy.¹²⁸ The case involved a male couple who had married in the US and had become parents through a surrogacy arrangement conducted in Pennsylvania. Upon their return to Israel, the men applied to have both of them registered as parents in the State Population Registry, based on a US-issued birth certificate and a foreign judgment that recognized both parties as the child's parents.¹²⁹ The Ministry of the Interior rejected the couple's request and insisted on the adoption procedure, a cumbersome and invasive option, as a condition for registering the genetic father's partner as a legal parent.¹³⁰ The couple then filed a petition asking the Israeli Supreme Court to intervene. With the agreement of the Attorney General and the petitioners, the Court

126. Part I (D).

127. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 95 (1978).

128. HCJ 566/11 Doron Mamet Meged et al. v. The Ministry of the Interior et al. (Jan. 28, 2014), Nevo Legal Database (Isr.) [hereinafter, *Mamet*]. That avenue was dubbed a "judicial parental order" as the Court created it by analogy to the statutory parental order found in the Surrogacy Law and granted only in relation to internal surrogacy. This new category within Israeli family law is an illustrative example of the unintended consequences of the global surrogacy market on local regimes. See HACKER, *supra* note 6, at 140–143.

129. *Id.* at § 3, Chief Justice Naor's opinion. To formalize the status of the genetic parent, the person needs to undergo a DNA test to prove their genetic relationship to the newborn.

130. *Id.*

issued an order requiring the state to register the biological father's partner as the legal parent, highlighting the need to find a "way to ease the route [for male couples]," for whom the option of surrogacy abroad "is a major practical route, the only one at times, to become parents."¹³¹

The *Mamet* ruling paved a new way for parental determination, which is grounded in the *relationship* between the applicant and the biological parent and their *mutual intention* to raise the child.¹³² Notably, the Attorney General agreed to issue JPOs in cases of cross-border surrogacy only as a temporary solution, until an explicit law could be enacted.¹³³ To date, however, no such law has been passed, and the effects of the *Mamet* ruling continue to be extended far beyond the decision reached in that case.

In March 2015, the Family Court took the first significant step toward broadening the use of the JPO, when the female spouse of a woman who conceived their child through an anonymous sperm donation asked the state to recognize her (the former) as the legal parent through the JPO procedure.¹³⁴ Ever since, courts have routinely issued JPOs for couples undergoing cross-border surrogacy and for female couples conceiving through sperm donation. In doing so, they have further relaxed the border to the legal institution of parenthood.

To understand the implications of this relaxation, it is worth clarifying how the JPO empowers same-sex couples to cross over into the legal institution of parenthood. Up until the *Mamet* case, courts had built on interpretations of the Adoption Law to recognize the parental status of a biological parent's partner. The shift from the Adoption Law to JPOs allows same-sex couples who already self-identified as parents to have this role recognized by the state in an abbreviated and relatively simple procedure. Practical implications are also apparent: Recognizing the parental status closer to the moment of the child's birth carries emotional and financial benefits.¹³⁵

Furthermore, the JPO, unlike the adoption order, does not require congruence between the child's and the non-biological parent's religion.¹³⁶ Therefore, the JPO enables courts to formalize the parental status of the non-biological parent, even if he or she is of a different religion to the child.¹³⁷ This result is subversive because the interfaith child-parent

131. *Id.* at § 41, Chief Justice Naor's opinion and § 1, Justice Danziger's opinion.

132. FAR 1118/14 Jane Doe v. Ministry of Welfare and Social Services, § 7–8, Justice Hendel (Apr. 1, 2015), Nevo Legal Database (Hebrew) (Isr.).

133. *Mamet*, *supra* note 128, at § 24, Chief Justice Naor's opinion.

134. FC 57740-12-13 Family Court (Ramat-Gan) Jane Doe v. Atty. Gen. (Mar. 1, 2015) (on file with author).

135. For further reading see Noy Naaman, *Timing Legal Parenthood*, 75 ARKANSAS L. REV. 59, 75-79 (2022).

136. As for the requirement for religious congruence in adoption, see § 5 Adoption of Children Law 5720-1960, 14 LSI 93 (1960).

137. This result has been advanced by a number of cases. *See, e.g.*, FAC 47781-12-19 District Court

relationship, in fact, undermines the conflation between Jewishness and Israeliness—a conflation enshrined in the ethno-national ideology on which the Israeli nation is based. In that sense, the JPO not only creates the possibility to easily cross the border into the legal institution of parenthood. It also, unwittingly, de-borders its own core norms by expanding the spectrum of what is considered a “legitimate” family within the Israeli collective.

In the absence of legislation, the JPO jurisprudence has been shaped, on the one hand, on a case-by-case basis by courts and, on the other, by directives promulgated by the Attorney General and the Ministry of Labor. Recent directives stipulated that a JPO be issued only when the applicant satisfies various criteria, each of which is operated as a *border* around the project of family-shaping.¹³⁸ However, the meaning of this operation is not limited to that of creating *impediments* by demarcating the institution or imposing state surveillance, for instance. These borders have also produced other meanings, such as *possibilities* for counter-discourse, reconstituting the discourses that render a person a *legal* parent.

It is important to note that, as a matter of law, the JPO does not pertain exclusively to same-sex couples. Unmarried different-sex couples, in which one of the parties has no biological ties to the child (for example, when it is born thanks to the assistance of an anonymous sperm donation) are ostensibly subject to the JPO,¹³⁹ as a condition for formalizing the parental status of the biological parent’s partner. In *practice*, however, unmarried heterosexual couples easily bypass this procedure, as the parental status of the birth parent’s partner is contingent on a written form provided soon after the birth, if not at the hospital, declaring that the partner is the biological parent.¹⁴⁰ Though the form requires both the birth mother and the putative father to attest that the male partner is the child’s genetic father, the form is not scrutinized and there are no practical means for inquiring into the use of sperm donation.¹⁴¹ Another scenario in which a JPO, *in practice*, is not necessarily only secured by same-sex couples involves heterosexual couples seeking cross-border surrogacy. In this case, to be recognized and registered as parents, they simply have to undergo a DNA test to prove their genetic relationship to the child.¹⁴²

(Tel Aviv) The Atty. Gen. v. M.L., § 21 (Jan. 4, 2021), Nevo Legal Database (Hebrew) (Isr.) [hereinafter, *M.L.*].

138. PROFESSIONAL COMMITTEE TO REVIEW CRITERIA FOR THE ISSUANCE OF THE JUDICIAL PARENTAL ORDER (INTER-MINISTERIAL COMMITTEE) [<https://perma.cc/QRW6-Z7R3>].

139. If the couple marries, the husband is presumed to be the genetic father. See Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple—The Israeli View*, 9 GEO. J. GENDER & L. 115, 153-154 (2008).

140. *Id.*

141. *Id.*

142. See *supra* note 129. If one of the parties is not genetically related to the child, they will need to apply for a JPO, just as in the same-sex-couple scenario. It should be noted that there are no published

Hence, despite important counter-impulses, the issue of the JPO remains bordered by heteronormative expectations of family. The contradicted function of the border will be clarified throughout the discussion of two criteria, centered at the heart of recent litigation: The *relationship* between the applicant and the biological parent and their *intention* to raise the child together.

B. Challenging the New Family-Building Mechanism

1. Relationship as a Border

To satisfy the criterion of relationship, the couple needs to prove the sharing of a joint household, interdependence, and that they have been in a stable union (i.e., of a romantic nature) for at least 18 months prior to the moment of conception. Closer inspection of the litigation around the JPO reveals that, while the rationale underlying this criterion may be appropriate (ostensibly to ensure a mutual intention to bring a child into the world to raise together in a stable setting),¹⁴³ the means of implementation are reduced to techniques of state surveillance through which gays and lesbians are disciplined, in a bid to make them fit neatly into the traditional paradigms of family.¹⁴⁴

In *Jane Doe v. Attorney General*, one female same-sex couple accompanied their application for a JPO with a parenting agreement.¹⁴⁵ Despite fulfilling this formality, the Attorney General rejected the application because the couple had not provided other documentation

statistics on the parents of children born through cross-border surrogacy. However, in a different empirical study in which I collected and analyzed all the published cases discussing the JPO, almost *all* of them concern male or female couples. Indeed, in Israel, parental determination cases fall under the jurisdiction of the Family Courts, and, therefore, not all existing cases can be accessed because, by law, Family Court cases are not made public. Yet, since Israel is a common-law jurisdiction, the published law largely reflects the law in action, and thus these data provide us with a relatively reliable picture of whose parental status relies on the issuance of a JPO. Compare with Yael Hashiloni-Dolev & Zvi Triger, *The Invention of the Extended Family of Choice: The Rise and Fall (to Date) of Posthumous Grandparenthood in Israel*, 39 *NEW GENETICS AND SOC'Y* 250, 255 (2020). Moreover, considering that the same-sex-couple scenario ordinarily features a non-biological parent-child relation, the JPO mechanism is arguably still discriminatory even if it withholds recognition from the non-biological parent in both different-sex and same-sex couples, especially if the former can easily circumvent this mechanism, as explained earlier. See Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2333 (2017).

143. See *supra* note 138, at 26.

144. I should clarify that cohabitation and longevity are not lifestyle characteristics associated exclusively with the relationships of heterosexual couples. My point is that setting forth these requirements is problematic as, first, it upholds neoliberal discourses of the “good” family model—which homosexual kinship has long complicated; second, when these requirements refer to the regulatory avenue on which same-sex couples depend, these requirements become a device through which the state rebrands the gay identity into a model that replicates the heteronormative. Gays and lesbians should not have to conform to having stable relationships to be recognized as parents if that is not a lifestyle they wish for, and they should not have to *prove* they are in the stable relationships that they are in, as this requirement, by default, doubts the authenticity of their relationship.

145. FA 41543-04-19 Family Court (Petah-Tikva) *Jane Doe v. Atty. Gen.*, § 13.4 (Sep. 18, 2019) (on file with author).

showing evidence of a joint bank account and the rental or purchase of a joint asset attesting to the authenticity of their long-term relationship. Under the circumstances of *Doe*, this case found its way to the Family Court in 2019. The Court, in a brief decision, invalidated the state's position, holding that its insistence on such evidence was specious and lamenting that it unnecessarily invaded a family's privacy.¹⁴⁶ Indeed, given the existence of a clear declaration of intent affirmed by a judicial procedure prior to the conception, one can only wonder whether the insistence on a lengthier relationship in that case was simply a matter of securing the assurance of mutual responsibility for raising the child together—or a deliberate, even punitive, obstruction.

Applying a border-studies reading, one might indeed suspect that the way this mechanism is implemented is intended to operate as “border patrolling”—that is, to preserve the division between “good” and “bad” gay and lesbian subjects, between those who adopt a lifestyle that adheres to the heteronormative perception of family, and those who do not. Under this reading, in the eyes of the state, patrolling these borders is a justified practice in a homonormative era, in which gays and lesbians are integrated into the fold of society and their dominant institutions, such as Family, while they affirm the heteronormative logic embedded in such institutions.¹⁴⁷

In addition to the homophobic discourse informing this border patrolling, discursive effects are also apparent. The requirement to prove the truth of the intended parents' status through personal documents attesting to a long-term relationship and cohabitation—when this requirement refers mostly to same-sex couples—conveys a crippling message that these family units are, by their very nature, suspicious and therefore call for special scrutiny. While some take this message as a label of inferiority and resist it (as did the couple in the *Doe* case), other gays and lesbians internalize whatever is expected from them in order to cross the border into the legal institution by adopting the required proxy characteristics of a heteronormative marriage-like lifestyle: Cohabitation, stability, and longevity. In that sense, the JPO not only operates as a traditional demarcation of inclusion–exclusion. It is also deployed as an installation of self-governance, whereby gay and lesbian subjects re-constitute themselves into a form that, ultimately, enables them to become *legal* parents. Should they resist this molding, they risk never becoming parents.

Yet, it was that very patrolling dynamic that eventually invoked the

146. *Id.* at § 12.

147. Such a dynamic of border-patrolling exemplifies Zvi Triger's valuable observation of the status of same-sex units more generally. *See* Triger, *supra* note 19. Yet, the border lens employed in this article offers a more reparative reading of current oppressive structures (compare with SEDGWICK, *supra* note 64), assessing the counter-dynamic invoked by the border and its ameliorative possibilities, as discussed below.

emergence of counter-discourse. As this litigation continues,¹⁴⁸ it becomes clear that this counter-discourse has not only relaxed the border, allowing more subjects to enter the legal institution. It also uncovers the ways by which the state (here, the Attorney General) renders some notions of family inconceivable or natural—such as the taken-for-granted correlation between conjugality and parenthood—and how such notions are deployed as a gateway to the legal institution of parenthood. The potential to denaturalize these notions is not limited to the particular outcomes but, rather, extends to propagating a constant state of de-bordering around the legal institution of parenthood. Such a relational process creates the conditions under which ameliorative possibilities may emerge in the future, propelled by a reappraisal of the taken-for-granted underpinnings of this institution.

2. *Intention as a Border*

Another threshold criterion that has been at the center of litigation is the couple's intention to conceive and raise the child together. A couple needs to show that they signed a pre-conception parenting agreement.¹⁴⁹ One could question this particular insistence on the period prior to the conception. Why should the intention to become a parent be legally relevant only if it is expressed before the moment of conception? Why is this particular period of time (pre-conception) preferable to another point in time (post-conception)? True, when we think about conception through ARTs, the express intent of the intended parents, pre-fertilization, seems, in the eyes of many legal experts, to be a fundamental criterion for determining parental status.¹⁵⁰ However, focusing on a pre-conception timeframe,

148. That installation of maintaining and controlling the borders is reflected each time the state encounters a “threat” to this logic. In these encounters, the Attorney General has denied applications or conditions them on more state surveillance in the form of the invasive and humiliating procedure of a social-worker review, which seeks to verify the authenticity of the relationship. *See* FA 41332-07-21 Family Court (Tel Aviv) Doe v. Atty. Gen. (October 19, 2021) (on file with author). In this case, the Attorney General, for example, was willing to issue a JPO for a female couple living in separate houses (which, by itself, reflects a shift from his original position), but only if the couple agreed to undergo a social-worker review. The judge rejected the state's position, holding that there is no evidence that living in separate houses can be dangerous for a child. In another case, FA 10925-11-17 Family Court (Tel Aviv) Doe v. Atty. Gen. (April 29, 2018), Nevo Legal Database (Hebrew) (Isr.), the Attorney General was unwilling to issue a JPO for a couple who maintained separate properties during their relationship. That installation of maintaining and controlling the borders is reflected each time the state encounters a “threat” to this logic. In these encounters, the Attorney General has denied applications or conditions them on more state surveillance in the form of the invasive and humiliating procedure of a social-worker review, which seeks to verify the authenticity of the relationship. *See* FA 41332-07-21 Family Court (Tel Aviv) Doe v. Atty. Gen. (October 19, 2021) (on file with author).

149. For the recent directives on the issuance of JPOs, see Ministry of Justice, Oct. 20, 2021, <https://www.gov.il/he/departments/legalInfo/parenting-order-outline> (Hebrew).

150. *See* John Lawrence Hill, *What Does It Mean to Be a “Parent”?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 414 (1991); Yehezkel Margalit, *Legal Parenthood: Law and Justice, Towards Determining Legal Parentage by Agreement in Israel*, 42 HEBREW U. L. REV. 835, 873 (2012) (Hebrew).

especially as a *threshold* requirement, arguably reflects a narrow understanding of the construction of the intention to become a parent. As Carlos Ball articulated, in relation to same-sex couples undergoing ARTs, “[w]hether that intent existed, and whether it was demonstrated through particular understandings and conduct, would seem to be more important than its precise timing”¹⁵¹ Ball’s observation is persuasive in the context of ARTs, especially in the context of couples, as the choice to become a parent (on the part of the biological intended-parent’s partner) cannot be *always* pinned to a particular point in time. That choice, as Ayelet Blecher-Prigat highlights, “does not emerge as a momentary event, but rather is a process that evolves and develops over time.”¹⁵² As one can observe here, while the rationale underlying this criterion may be appropriate (to ensure a commitment to raise the child), the means of realizing it—the insistence on a pre-conception agreement—policies those whose choice deviates from the normative script on conceiving a child via ARTs.

This criterion was recently brought before the court in Tel Aviv, in *Attorney General v. John Doe*, a case concerning the parental status of a biological parent’s ex-partner, in relation to a male couple and a child conceived through cross-border surrogacy (hereinafter, *John Doe*). In this case, the genetic parent’s partner did not initially intend to become a parent (and, thus, he did not sign a pre-conception agreement). However, as his partner went ahead regardless and the surrogacy process unfolded, his intention to become a parent flourished, as evidenced by the active role he took throughout the process. Regrettably, however, the couple broke up after the child was born. The genetic parent, supported by the Attorney General, denied the parental status of his former partner and objected to his application for the JPO.

In this complex scenario, where much was at stake, the Court rejected the Attorney General’s position, stating that the insistence on the pre-conception agreement “paints a romantic picture” in which the legal institution of parenthood is open only to those “who embroidered the dream of parenthood with them [the biological parent] from the beginning.”¹⁵³ This understanding, as the court emphasized, is unrealistic, as intent “cannot always be pinned down to a decisive moment.”¹⁵⁴ By de-naturalizing the romantic discourse informing the Attorney General’s position—on which the state grounds its patrolling—the Court, again, de-bordered access to legal parenthood. Not only has such a dynamic enabled more subjects to

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

152. Ayelet Blecher-Prigat *Conceiving Parents*, 41 HARV. J. L. & GENDER 119, 151 (2018).

153. FAC 65030-12-18 Family Court (Tel Aviv) *Atty. Gen. v. John Doe* § 16 Justice Shohat’s opinion (May 4, 2020), Nevo Legal Database (Isr.).

154. *Id.*

enter into the institution, but it has also restructured the terms on which this institution is subscribed. The potential of this counter-discourse also lies in *obiter dictum*, stating that, in a hypothetical scenario in which the intended biological parent meets his partner immediately after the conception, and he joins him or her on the journey toward parenthood, the partner should be entitled to a JPO.¹⁵⁵ This reasoning, in fact, continued the dynamic of de-bordering the criterion of romantic relationship invoked by the *Jane Doe* ruling,¹⁵⁶ calling us to continue to fathom how to accommodate the law to evolved configurations of families that may not yet exist but will come into view in the foreseeable future.

Such a dynamic, where *bordering* on the part of the state meets *de-bordering* on the part of the excluded groups, characterizes how the JPO has been developed. It reveals how each element of that regulation as a border can be understood not only as a marker of exclusion–inclusion but also as a site in which the collective efforts of different configurations of couples emerge, all of whom negotiate their own becoming as parents, and more broadly, the becoming of the legal institution they strive to enter. Their constant interaction with the border allows them to re-craft the terms of what it means to become a parent, and, in turn, to challenge the role of law in shaping this ever-evolving becoming.

IV. CONCLUSION

While surrogacy in Israel, as in other places, is a statistically minor phenomenon compared to the overall number of childbirths,¹⁵⁷ it is one of the most fascinating terrains in which manifestations of the family-building mechanism are most intensely evidenced. In the context of Israel, that terrain also provides an opportunity to better understand the rights-politics of the LGBTQ community. The three domains of the Israeli story are distinct from one another, but all illustrate how these manifestations can be understood as different borders—be they territorial, legal, or social—in a perpetual state of *becoming*: in their crossing, opening, or closing, their destruction and reconstruction.

The account I provide here can, of course, be told through the traditional narrative of rights and legal recognition, but the “border” lens opens a new panorama of understandings by directing our analytical attention toward issues of governmentality, and how these issues take effect within, and outside, different arenas and discourses. They are especially evident in the context of family-building mechanisms: reifying the legal institution of Family requires borders, and borders require the exclusion of those who

155. *Id.* Justice Shilo’s opinion.

156. *Jane Doe*, *supra* note 145.

157. Zafran & Hacker, *supra* note 1, at 1142.

wish to enter into this institution but fail to adhere to its norms. This oppressive role of borders, as my analysis demonstrates, becomes even more crucial when the state *allows* the inclusion of what have previously been deemed excluded groups (same-sex couples) and that dynamic of opening the borders is accompanied by self-governmentality among those who wish to enter the legal institution. More importantly, the border prism reveals the potential of the border to be weaponized by those who are “left outside” to negotiate, transgress, or undo the hegemonic institution itself. By focusing on this aspect of the story, the present analysis challenges the orthodox meaning of borders in the legal scholarship and highlights their potential to invoke a new relational process—the outcomes of which, paradoxically, do not involve solely the interests of the particular excluded groups that initiated the original effort to undermine the border but also those of individuals already inside the institution under consideration or other excluded groups. Such an understanding of borders could urge us, scholars and policymakers alike, to cross the border of our imagination—of what ostensibly seems to be solely a site of oppression—to see what has been articulated by José Esteban Muñoz as “a horizon of possibility” and ameliorative opportunities, of what is not *yet* but could be one day.¹⁵⁸

This analysis has focused on a *relatively* uncontested form of parenthood, namely dual-fatherhood in relation to surrogacy. Future analysis of bordering legal parenthood should address this ongoing theme with regard to other excluded modalities and groups that are only *now* seeking access to the legal institution of parenthood, such as trans parents or platonic co-parenting of same-sex couples, which is forcing states to address unique situations that were much less “overground” in the past. Further analysis of bordering should also be incorporated into the current scholarly discussion around cross-border reproductive transactions and the many conflicts these transactions provoke with regard to other parties involved, such as surrogates or gamete donors. Doing so could add an important critical layer not only to the well-developed legal field of parenthood but also to the fascinating intersection between law and border studies, as another methodological tool in the arsenal of the critical analysis of the law.

158. JOSÉ ESTEBAN MUÑOZ, *CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY* 97 (2009).