

# “THE HEBREW LANGUAGE HAS NOT CREATED A TITLE FOR ME”: A LEGAL AND SOCIOLINGUISTIC ANALYSIS OF NEW-TYPE FAMILIES

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## ABSTRACT

As more and more families deviate from the typical “one father, one mother, and children” family form, societies will have varying reactions to the cultural and legal implications of these “new-type families.” Israel provides a fascinating case study in the experience of such families for two reasons. First, Israel has among the highest per capita populations of identified gay and lesbian individuals and families made up of homosexual principals. Second, and more importantly, the Israeli justice system affords ever-increasing bundles of rights to such families. It is thus possible to dissociate cultural and legal barriers to acceptance in a way not possible in most other countries.

In this article, we study several such families through personal interviews and come to the conclusion that although legal equality is a near reality, cultural equality is not. Interestingly, this is not the case due to a general cultural antipathy towards such families but instead because such families are left unidentified, without adequate terminology to reflect or categorize them, and therefore are seen as invisible nonentities in the greater Israeli society. This issue creates a gap between the “authenticity” with which new-type families live and the non-recognition with which they are met.

This article explores the nexus of language, social identity, and legal status for new-type families. By incorporating notions of the theory of recognition together with redistribution ideas, it seeks to promote the legal reform that would provide those families the recognition they deserve and demand.

## I. INTRODUCTION

In a wonderful Israeli children’s book, a young boy spends a sleepless night before celebrating his birthday in school. The tradition in his class is for each child to tell a story about his or her family to the class as part of the birthday celebration. Most of the children’s birthdays had come and gone, and each had told the story of a unique family: a single mother, divorced parents, an adopted child, two mothers, two fathers and a mother, and so on. The boy, who heard his teacher remark that she “had never had such a diverse class,” felt anxious about sharing his “standard story” of two parents, a brother, and a cat.<sup>1</sup> While the story is charming in the way it turns tradition upside-down, the truth is that new-type families—those

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1. YEHUDA ATLAS & YAEL MISHALI, KOL ECHAD VEHA-MISHPACHA SHELO [EVERYONE AND HIS FAMILY] (2000).

which differ from the standard nuclear family—differ from the norm and occupy an uncomfortable place in both Israeli culture and the legal system. In this article, we explore the difference between cultural acceptance and legal acceptance for “new-type families” and engage in a linguistic study to show that the inability to adequately describe these families hampers cultural acceptance.

Israel has the highest number of children of homosexual parents per capita in the world.<sup>2</sup> This may be attributed, in part, to the emphasis that Israeli society traditionally places on the family institution, regardless of form.<sup>3</sup> As a result of this large population, the topic of gay/lesbian parenting is now entering public discourse and generating heated debate. While a growing number of households in Israel offer an alternative to the typical concept of family, those involving homosexual parents are fundamentally different from the “traditional” family in part because of the inherent inability for both partners in a gay couple to become the genetic parents of a child. Since surrogacy is not available for same-sex couples in the Israeli legal system and adoption is legally problematic, family formation usually requires involving a third party. The process of becoming a parent in a steady, long-term relationship with a life partner does not allow for the same organic family relationship that heterosexual couples enjoy. Gay parents may give birth to children with their partners as a result of a joint decision, may adopt the children of their partner, may wish to adopt children together, or may involve a third party for the purpose of procreation. The identity of these new families, even as self-

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2. See David K. Flaks, *Gays, Lesbians, and the Meaning of Family: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 345 (1994) (giving statistics on the number of homosexual parents in the United States); GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 1 (2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf> (reporting results from a study on adoption and foster care by lesbian and gay parents which used census data and other government surveys to estimate the number of adopted and fostered children living with lesbian and gay parents in the United States and to provide a demographic portrait of these families); see also Moshe Ronen & Ronen Tal, *Lo Mitcaddim Lehazminchem [Don't Intend to Invite You]*, YEDIOT ACHARONOT [24 HOURS MAGAZINE], Feb. 2, 2007, at 3. The problem of estimation, and the resulting range of estimates for the number of gay and lesbian parents, is not unique to Israel. For example, in 1994 it was estimated that between 1.5 and 5 million lesbian mothers and between 1 and 3 million gay fathers lived in the United States. The total number of children with a lesbian or gay parent range from 6 million to 14 million. *Id.* See generally Irit Rosenblum & Nurit Peleg, *Report on Family's Situation in Israel 2007*, <http://www.newfamily.org.il/cat/16> (estimating that gay and lesbian couples account for more than 18,000 families and that they are raising between 2000 to 3000 children). Accurate figures are hard to obtain because not all parents use known organizations to adopt or facilitate procreation.

3. See Goel Pinto, *Ga'avat Hamishpacha [Family Pride]*, HAARETZ, Nov. 10, 2006, at Galeria 3 (describing a meeting of a group of homosexuals, in which they discussed whether their desire for a child is a genuine wish or whether it stems from cultural impositions).

described, is multi-faceted and affected by personal, societal, and legal factors. These families give rise to multiple legal questions regarding marriage, adoption, prenuptial agreements, and the ability to give such arrangements legal validity.

Israel is quite progressive in the legal protection given to homosexual individuals by providing a reasonable approximation of equality through legislation and judicial review. Nevertheless, the absence of a recognizable family status often leads to dissatisfaction among gays and lesbians in alternative family settings concerning rights, benefits, and the way they are treated by society and the state.<sup>4</sup> Their frustration reveals the gap between the reality of new-type families and a normative environment that often ignores their existence.<sup>5</sup> The particular frustrations felt among gay and lesbian families also imply a possible dissociation between advancing the rights of gay and lesbians, as individuals, and addressing new problems associated with the status and rights of alternative families.<sup>6</sup>

Consider the story of Jonathan Danielowitz, a homosexual flight attendant who worked for El Al, the national Israeli airline. Danielowitz asserted the right to receive a free ticket for his partner, in accordance with the company policy towards heterosexual employees. The Israeli Supreme Court granted him that right on the basis of the legal prohibition against discrimination among employees and the general right of equality.<sup>7</sup> This decision was no doubt a pivotal point in the Court's acknowledgment of gay rights. Nevertheless, ten years later, the atmosphere at a conference convened to celebrate the event was one of discontent, derived not necessarily from a sense of inequality or victimization, but from a desire for recognition.<sup>8</sup> Conference participants noted the ability of gays and lesbians to creatively establish new family forms, but at the same time

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4. See DICTIONARY OF NEW FAMILY, NEW FAMILY ORGANIZATION, available at <http://www.newfamily.org.il/rec/72> [in Hebrew] (defining "single parent" and recognizing the clearly defined status of single lesbian mothers as "single parents").

5. See Michal Tamir (Itzhaki), *Hazhut Leshivion Shel Homosexualim Velesbiot [Equality of Gays and Lesbians]*, 45 HAPRACLIT 94, 127 (2000) (pointing to the gap in Israel between the relatively progressive legal advances concerning homosexuals vis-à-vis their unsatisfactory social situation).

6. See John Bowe, *Gay Donor or Gay Dad?*, N.Y. TIMES, Nov. 19, 2006 (Magazine), at 66 (suggesting that this gap is not unique to Israel and quoting an expert who partly attributes this lag to the "natural inertia in the legislative process" to offend socially conservative voters); see also Ronen & Tal, *supra* note 2, at 2 (discussing the special challenges new-type families face, for example, the commonly expressed view that a child needs "a mom and a dad").

7. See HCJ 721/94 El-Al Israel Airlines Ltd v. Danielowitz [1994] IsrSC 48(5) 749 (finding discrimination on the basis of sexual orientation). See ISRAEL LAW REPORT 1992-1994, at 478-522 (Jonathan Davidson ed., 2002), for an English translation.

8. Dr. Tamir attended the conference held at the Faculty of Law, Tel-Aviv University, January 11, 2005.

raised questions such as “why can’t we get married and adopt children?” The common explanations regarding orthodox religious sensibilities,<sup>9</sup> the current compromise between the religious and secular sectors, and the need to avoid antagonism were deemed irrelevant to justify the state’s continued position of neutrality.

Israel provides a fascinating case study in the experience of such families not only because of the relatively high proportion of families made up of homosexual principals in its general population, but because the Israeli justice system’s ever-increasing bundle of rights to such families makes it possible to dissociate cultural and legal barriers to acceptance in a way not possible in most other countries. In this article, we study several such families through personal interviews. Using sociolinguistic tools, we focus on the linguistic expressions that gay and lesbian parents choose in portraying their family situations in an attempt to identify the personal, social, or legal gaps reflected in their descriptions.<sup>10</sup> This crucial query finds its impetus in widely-accepted arguments about the inextricable and multidirectional links between language and social identity.

We find that although legal equality is a near reality, cultural equality is not. Interestingly, this is the case not because of a cultural antipathy towards such families (though this might well exist in some cases), but rather because such families are left unidentified, without adequate terminology to reflect or categorize them. As a result, they are considered to be invisible nonentities in the greater Israeli society. Such a finding certainly has implications for efforts to integrate new-type families into the cultural mainstream throughout the world. Against this background, it strikes us that the well-known and well-developed jurisprudential notions of equality are insufficient for dealing with the changing notion of what constitutes a family. Clearly, new-type families are not “equal” to classic

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9. See HCJ 8988/06 (Jer) Meshi-Zahav v. Commander in Chief [2006] (discussing the need to reconcile the right to hold a gay parade in Jerusalem and the negative feelings such a parade invokes among orthodox Jews). The Court did not have to make a determination in this case, as the litigants reached a compromise. *Id.* See also Sheera Claire Frankel, *Religious Leaders Protest Gay Parade*, JERUSALEM POST, July 4, 2006, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&c id=1150885916950> (examining the hostile reactions to and condemnation of the gay community’s plan to hold the annual 2006 gay pride parade in Jerusalem); Neta Sela, *Gay Parade Leaves Jerusalem?*, YNET, July 7, 2006, <http://www.ynetnews.com/articles/0,7340,L-3272408,00.html> (stating that even a compromise to hold a small-scale event, which was approved by the police, came under attack in the High Court of Justice).

10. See Bowe, *supra* note 6, at 66 (suggesting that the word “spouse” as used to describe a partner in a heterosexual family has no equivalent in the context of same-sex partners in alternative families). This linguistic inadequacy symbolizes the multifaceted social gap we are seeking to explore in the current paper. This deficiency is amplified when referring to the partner of a gay biological father, or the biological father of a child who is raised by two lesbians. Is he “more than an uncle but less than a father?” *Id.*

families and therefore legal principles such as “equality” or even “substantive equality” fall short of capturing the multidimensional context in which the status and self-identity of Israeli alternative families should be viewed.

Using the results of our study, we analyze the complex situation of new-type families in Israel in terms of *recognition* and, in doing so, illuminate neglected aspects of the right to equality. The *theory of recognition* challenges the liberal idea that one can develop self-identity in isolation from others. It argues that the capacity to develop an interpretation of one’s needs and identity depends on processes of mutual recognition taking place at three levels: family, society, and state. Proponents of this theory pursue a *positive difference* approach in society and seek a world where assimilation to dominant cultural norms is no longer the price of equal respect. This concept is highly underdeveloped in Israel. While social politics and liberal ideas of autonomy and equality are well established, cultural politics is not as developed, and questions of recognition and authenticity<sup>11</sup> are rarely raised.

Part II of this article describes the constitutional background of the right to equality and the right to family in Israel. In addition, it provides a historical review of gay rights in Israel with special attention to recent legal developments and their implications for new-type families. This Part shows that while recent legal developments advance gay rights, they have yet to constitute recognition of new-type families. Part III introduces the theory of recognition and hypothesizes that, in the absence of a defined status or even terminology to describe new-type families in Israel, their problematic situation cannot be fully captured by the liberal notion of equality. Part IV explains our motivation for using a sociolinguistic prism to examine issues concerning the identity and status of alternative families. Part V details the methodology used in the study, including background information about participants, the questionnaire used for data collection, and categories of analysis. Part VI introduces our findings, which concentrate on the explicit and implicit thematic content expressed by the study participants, whose strongest concern stems from the absence of a clear, recognizable—and thus definable—status to describe their authentic position within the families they form. Based on the non-recognition our study identifies, Part VII suggests shifting from a neutral to positive difference approach, whereby parents in new-type families are viewed as

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11. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 30 (Amy Gutmann ed., 1994) (explaining authenticity: “[t]here is a certain way of being human that is *my* way. I am called upon to live my life in this way, and not in imitation of anyone else’s life. But this notion gives a new importance to being true to myself. If I am not, I miss the point of my life; I miss what being human is for *me*.”).

individuals who enrich society, rather than merely potential victims of discrimination. By incorporating notions of the theory of recognition together with redistribution ideas, Part VII seeks to promote the legal reform that would provide those families the recognition they deserve and demand. We then conclude in Part VIII that the power of gay families lies in their ability to reshape the political, emotional, and legal understanding of what family is. This reshaping is a prerequisite for building a sense of positive difference, and in turn, recognition from the state, which will further shape social attitudes. Thus, only legal recognition of the new-type families, by enabling marriage, adoption, and prenuptial agreements, can establish social esteem and achieve “solidarity.”

## II. BACKGROUND

Understanding the barriers to true equality for new-type families requires an appreciation of the legal regime under which substantive rights and remedies for violations of those rights are available. As the principals of many such families are homosexual, this Part reviews the legal development of gay and lesbian rights in Israel in both individual and family domains.

Israeli courts use a two-step process to address constitutional issues.<sup>12</sup> Courts first look for *coverage*—whether a specific infringement falls within the scope of the constitutional right in question. If it does, courts look to see if there is *protection*—namely whether, under the specific circumstances of the case, the infringement meets the constitutional demands for a remedy given the need to balance every right with conflicting rights and interests.<sup>13</sup>

Historically, in the absence of a written constitution, human rights developed through case law.<sup>14</sup> The Israeli Supreme Court has always interpreted statutes with the presumption that the Israeli Parliament (the Knesset) intends to uphold basic human rights.<sup>15</sup> Thus, an extensive body

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12. See, e.g., HCJ 6427/02 *The Movement for Quality Gov't in Isr. v. The Knesset* [2006] (Barak, C.J. opinion, ¶ 20) (explaining the levels of scrutiny the court uses in addressing the constitutionality of a legal norm); HCJ 7052/03 *Adalah – the Legal Ctr. for the Arab Minority Rights in Isr. v. The Minister of Interior* [2006] (Barak, C.J. opinion, ¶ 18) (explaining the process the court uses in addressing constitutional issues).

13. HCJ 7052/03 *Adalah - the Legal Ctr. for the Arab Minority Rights in Isr. v. The Minister of Interior* (Barak, C.J. opinion, ¶ 18) (examining the law at issue to determine whether the violation satisfies the requirements of the limitations clause which would make the violation lawful and create no remedy).

14. See Itzhak Zamir, *Administrative Law*, in *THE LAW OF ISRAEL: GENERAL SURVEYS* 51, 53-54 (Itzhak Zamir & Sylviane Colombo eds., 1996) (detailing how the constitutional law was developed through principles of administrative law).

15. See Allen Zysblat, *Protecting Fundamental Rights in Israel Without a Written Constitution*, in *PUBLIC LAW IN ISRAEL* 47, 49-50 (Itzhak Zamir & Allen Zysblat eds.,

of case law developed that balances basic rights with other rights and interests.<sup>16</sup> Human rights, no matter how important, are considered relative rather than absolute, marking a difference from American jurisprudence.<sup>17</sup> For instance, in the landmark decision establishing the right to equality as a basic right in Israel, the Supreme Court emphasized: “[i]ndeed, general goals [which every law is presumed to fulfill]—as the basic values they derived from—contradict each other. More than once, these general goals march in pairs of contradictions . . . . Once the Court faces them, it should assign them the appropriate weight and balance them in the clash point.”<sup>18</sup> As a result of this relativist approach, Israeli courts define basic rights broadly,<sup>19</sup> since doing so does not forestall the ability to later constrict the right when it comes into conflict with other rights and interests.<sup>20</sup>

There is no unitary constitutional document in Israel. However, Israeli law does contain components of a written constitution, known as “Basic Laws.” Most of the Basic Laws deal with institutional aspects of the Israeli legal system.<sup>21</sup> In 1992, the Knesset passed the two Basic Laws that constitute a partial Bill of Rights, the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty.<sup>22</sup> The new enactment was deemed “a constitutional revolution” by scholars.<sup>23</sup> The new Basic Laws each included a substantive limitation clause, which declared that protected

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1996) (asserting that the court presumes that the “Knesset was cognizant of basic individual rights when it shaped the legislative measure at issue”).

16. See David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?* in PUBLIC LAW IN ISRAEL 141, 143 (Itzhak Zamir & Allen Zysblat eds., 1996) [hereinafter Kretzmer, *New Basic Laws*] (explaining that the Supreme Court has filled the void created by the lack of a Bill of Rights).

17. Cf. *id.* at 150-51 (comparing the United States’ model to other countries).

18. HCJ 953/87 Poraz v. The Mayor of Tel-Aviv-Jaffa City, 42(2) IsrSC 309, 335 (1988).

19. See, e.g., Mordechai Kremnitzer, *Constitutionalization of Substantive Criminal Law: A Realistic View*, 33 ISR. L. REV. 720, 724-25 (1999) (discussing the implications of absolutes in the law).

20. Cf. *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (interpreting rights strictly, then creating specific exceptions to their definition—a legal paradigm that differs from Israel’s because the American Constitutional amendments define rights in an absolute manner).

21. See generally Michal Tamir, *Israel*, in 2 LEGAL SYSTEMS OF THE WORLD 755, 757 (Herbert M. Kritzer ed., 2002) (discussing the structure and history of the Israeli legal system).

22. See Basic Law: Human Dignity and Liberty, PUBLIC LAW IN ISRAEL, 154-56 (Itzhak Zamir & Allen Zysblat eds., 1996) (stating that the purpose of the Basic Laws is “to protect human dignity and liberty”).

23. See Ruth Gavison et al., *Round Table: Israeli Constitutionalism*, 6 YALE ISR. J. 25, 27 (2005) (describing the “constitutional revolution”); see also Ariel L. Bendor, *Is It a Duck?—On the Israeli Written Constitution*, 6 YALE ISR. J. 53 (2005) (explaining that the status of the Basic Laws rose to the top of the legal agenda only after the enactment of the two human rights Basic Laws about which Chief Justice Aharon Barak wrote extensively in his work titled “The Constitutional Revolution”).



rights can only be infringed, or trumped, by a statute that befits the values of the state of Israel, pursues a worthy goal, and does not exceed the scope necessary to meet that goal.<sup>24</sup> In sum, these laws are a demand of proportionality.<sup>25</sup> Given the central role basic rights have always played in judicial decisions, the new laws constituted a revolution not in the sense of defining protected rights, but rather in providing restrictions over legislation. This revolution had the effect of sanctioning the Supreme Court's willingness to review legislation inconsistent with the protected rights.<sup>26</sup> Thus, the new Basic Laws did not change the relative nature of human rights, but rather clarified their normative superiority. In addition, they strengthened the tendency to interpret legal norms in accordance with the spirit of the basic norms.<sup>27</sup>

### A. *The Right to Equality*

The purpose of this Section is to explore how the right to equality, particularly as it relates to homosexual Israelis, has evolved over the past few decades in Israel.

#### 1. *In General*

Basic Law: Human Dignity and Liberty does not explicitly guarantee a right to equality.<sup>28</sup> This omission is not accidental but is a result of efforts to overcome opposition from religiously motivated groups.<sup>29</sup> Section one of the Law does, however, state that “[f]undamental human rights in

24. See Asher Maoz, *Constitutional Law*, in *THE LAW OF ISRAEL: GENERAL SURVEYS* 6, 9-10 (Itzhak Zamir & Sylviane Colombo eds., 1995) (comparing the substantive limitation clause to the formal entrenched clause).

25. See Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, in *PUBLIC LAW IN ISRAEL* 327 (Itzhak Zamir & Allen Zysblat eds., 1996) [hereinafter Zamir, *Unreasonableness*].

26. See Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581, 590-91 (2001) (stretching the application of Basic Laws, or public laws, to corporations); David Kretzmer, *The Supreme Court and Parliamentary Supremacy*, in *PUBLIC LAW IN ISRAEL* 303, 306-08 (Itzhak Zamir & Allen Zysblat eds., 1996) [hereinafter Kretzmer, *Supreme Court*] (detailing how the Courts have expanded rights given Israel's lack of a Bill of Rights).

27. See Zysblat, *supra* note 15, at 49-50 (explaining the rights-based approach).

28. See *PUBLIC LAW IN ISRAEL*, *supra* note 22, at 154-56.

29. See Kretzmer, *New Basic Laws*, *supra* note 16, at 148-49 (reasoning that the jurisdiction in matters of marriage and divorce in Israel is granted to the religious courts, and that since the law applied by both the Jewish Rabbinical and Muslim courts may be regarded as discriminatory towards women, recognition of a constitutional right to equality may affect the operation of these laws); see also Judith Karp, *Chok Yesod Kvod Haadam Vecheruto – Biografia Shel Maavakei Koach [Basic Law: Human Dignity and Liberty—A Biography of Power Struggles]*, 1 MISHPAT U-MIMSHAL [LAW AND GOVERNMENT IN ISRAEL] 323, 345-61 (1993) (providing a comprehensive survey of the power struggles concerning the right to equality).

Israel . . . shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.”<sup>30</sup> This Declaration established Israel as a Jewish, democratic state that grants “complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.”<sup>31</sup> Thus, the Basic Law incorporates the notion of equality.

Furthermore, since the theory of human dignity can be used to derive other human rights,<sup>32</sup> some justices of the Israeli Supreme Court have taken the view that fundamental rights (such as equality) not expressly mentioned in the Basic Laws are nonetheless protected under the umbrella of human dignity as defined in the Basic Law.<sup>33</sup> As Justice Eliyahu Mazza put it: “with the enactment of Basic Law: Human Dignity and Liberty, the normative status of the principle of equality—already (recognized) as ‘the heart and soul of our constitutional regime’ . . . was raised and became a constitutional principle of normative supremacy.”<sup>34</sup> Other justices have been reluctant to acknowledge that the Basic Law changed the normative status of the right to equality.<sup>35</sup> Justice Dalia Dorner has expressed a view that the Basic Law only protects against infringements upon the right to equality that reach the standard of degradation.<sup>36</sup> Recently the Supreme Court has adopted an intermediate approach under which the label of “human dignity” covers all rights narrowly linked to human dignity.<sup>37</sup> According to this theory, discrimination on the basis of sexual orientation

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30. PUBLIC LAW IN ISRAEL, *supra* note 22, at 154-56.

31. THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (Isr. 1948), available at <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel>.

32. See Haim H. Cohn, *On the Meaning of Human Dignity*, 13 ISRAEL. Y.B. HUM. RTS. 226, 230 (1983).

33. See Kretzmer, *New Basic Laws*, *supra* note 16, at 149 (indicating that certain justices have held that fundamental rights should be expanded); see also Alon Harel, *Gay Rights in Israel—A New Era?*, 1 INT’L J. DISCRIMINATION & L. 261, 263 (1996) [hereinafter Harel, *Gay Rights*] (asserting that the vague nature of Basic Laws gives judges enormous power).

34. HCJ 4541/94 Miller v. The Minister of Def. IsrSC 49(4) 94 [1995]; see HCJ 5394/94 Hupert v. “Yad Vashem” [1994] IsrSC 48(3) 353, 363 (conveying the same idea via Justice Theodore Or).

35. See, e.g., HCJ 453/94 Israel Women’s Network v. Gov’t of Isr. [1994] IsrSC 48(5) 501 (Zamir, J., concurring) (agreeing that the principle of equality received powerful expression, but refraining from saying that it became a constitutional right with super-normative status). This reluctance stems from the possible consequence, not necessarily reflecting the intention of the Knesset, that a court can set aside a new law inconsistent with the principle of equality. *Id.*

36. See HJC 4541/41 Miller v. Minister of Def. [1995] IsrSC 49(4) 45.

37. See HCJ 6427/02 The Movement for Quality Gov’t in Isr. v. The Knesset [2006] (Barak, C.J.) (indicating that while the intermediary approach does not extend the Basic Law to cover every case of discrimination, it also does not limit the law to only the most egregious scenarios).

infringes upon the rights of self-fulfillment and liberty, is tied into the concept of dignity, and was even perceived by the Israeli legislature as humiliating.<sup>38</sup> Hence, it seems to be protected by the Basic Law.

The extent to which the right is protected is, as noted above in the distinction between *coverage* and *protection*,<sup>39</sup> a separate question that depends upon the balance that courts strike between the equality of gays and lesbians and other competing interests and rights. The Basic Law purports “to protect human dignity and liberty, in order to anchor . . . the values of the State of Israel as a Jewish and democratic state.”<sup>40</sup> The substantive limitation clause declares that protected rights can be infringed upon only “by a law fitting the values of the State of Israel.”<sup>41</sup> Since these values are defined as “Jewish and democratic,” the equality of gays and lesbians can also be qualified by employing an orthodox Jewish interpretation to the concept of Jewish values.<sup>42</sup>

## 2. *The Right to Equality of Individual Gays and Lesbians*

Under traditional Jewish law, sex between two men is considered unclean,<sup>43</sup> while sexual intimacy between two women is not explicitly addressed. The prohibition against male homosexuality is found in Leviticus 18:22, which commands “[d]o not lie with a male as one lies with a woman; it is an abhorrence,” and Leviticus 20:13, which dictates that “[i]f a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death—their bloodguilt is upon them.”<sup>44</sup> More recently, Zionist ideas have implicated gender and sexuality in addition to nationalism; the new post-Diaspora Zionist man has been characterized as hyper-masculine and distanced from the image of the feminized gay man.<sup>45</sup> Such religious and cultural attitudes are embodied in

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38. See Prevention of Sexual Harassment Law, 1998 S.H. 166 (defining “sexual harassment” as an, inter alia, “intimidating or humiliating reference directed towards a person concerning that person’s gender or sexuality, including that person’s sexual orientation”).

39. See *supra* notes 12-13 and accompanying text.

40. PUBLIC LAW IN ISRAEL, *supra* note 22, at 154.

41. *Id.* at 155.

42. See Harel, *Gay Rights*, *supra* note 33, at 263 (emphasizing the values of Israel as a Jewish state).

43. See Aaron Belkin & Melissa Levitt, *Homosexuality & the Israel Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 27 ARMED FORCES & SOC’Y 541, 556-57 (2001).

44. *Leviticus* 18:22, 20:13.

45. See Aeyal Gross, 21 ISR. STUD. F. 122, 122 (2006) (reviewing RAZ YOSEF, *BEYOND FLESH: QUEER MASCULINITIES AND NATIONALISM IN ISRAELI CINEMA* (2004), and DANNY KAPLAN, *BROTHERS AND OTHERS IN ARMS: THE MAKING OF LOVE AND WAR IN ISRAELI COMBAT UNITS* (2003)) (discussing the link between homosexuality and masculinity).

Israeli secular law, which, in the past, criminalized certain sexual practices.<sup>46</sup> Both the Criminal Code Ordinance enacted under the British Mandate and the Israeli Penal Code that replaced it prohibited sodomy<sup>47</sup> and both were interpreted as prohibiting both anal sex between two men and between a man and a woman.<sup>48</sup> Nevertheless, in 1972, the Attorney General of Israel reissued instructions not to enforce laws against consensual sexual acts of this type.<sup>49</sup> These directives were followed by police and prosecutors.<sup>50</sup> After several efforts to eliminate the section prohibiting homosexual intercourse were defeated by strong pressure from religious political parties, it was finally eliminated in 1988 as part of a major sex crimes reform bill.<sup>51</sup> This development was followed by many other changes in criminal and civil law, such that “observers who examine the legal changes in the status of gays and lesbians in Israel since 1988 are astonished at the pace of the change.”<sup>52</sup>

In 1992, section two of the Equal Employment Opportunities Act, which applies both to the public and private sectors, was amended to include sexual orientation to the list of illegitimate grounds for discrimination against employees and job seekers.<sup>53</sup> In the years that followed, other specific legal provisions were enacted or amended to incorporate the prohibition against discrimination on the basis of sexual orientation.<sup>54</sup>

46. See Yuval Yonay, *Hadin Bidvar Netiya Chad Minit – Bein Historia Vesochiologia* [*The Law Regarding Homosexuality—Between History and Sociology*], 4 MISHPAT U-MIMSHAL [LAW AND GOVERNMENT IN ISRAEL] 531, 532-50 (1998) (discussing the criminal prohibitions and the decriminalization process).

47. Criminal Code Ordinance, 1936 § 152(2) (Palestine Gazette, supp. No. 1, 285) (prohibiting “carnal knowledge of any person against the order of nature”); The Penal Law, 1977 § 35, S.H. 226.

48. See Alon Harel, *The Rise and Fall of the Israeli Gay Legal Revolution*, 31 COLUM. HUM. RTS. L. REV. 443, 449-53 (2000) [hereinafter Harel, *Rise and Fall*] (surveying the legal prohibitions and their interpretations).

49. Hanchayot Hayoetz Hamishpati Lamemshala (Guidelines of the Attorney General), 50.049 (1.1.1972) [1972].

50. See Shimon Shetreet, *Custom in Public Law*, 21 ISR. L. REV. 450, 486 (1986) (detailing a policy of non-enforcement regarding homosexual relations).

51. See Harel, *Gay Rights*, *supra* note 33, at 264 (reviewing the legal treatment of gays and lesbians in Israel).

52. Harel, *Rise and Fall*, *supra* note 48, at 443.

53. Equal Employment Opportunities Act (Amendment), 5752-1992, (Isr.) S.H. 1377.

54. See Prohibition on Defamation Act, (Amendment no. 5), 1997, S.H. 70 (prohibiting libel when it takes the form of humiliating a person because of her “gender or sexual orientation”); The Prevention of Sexual Harassment Law, 1998, §3(a)(5), S.H. 166; The Prohibition on Discrimination of Goods, Services and of the Entrance to Entertainment and Public Places Act, 2000, §3(a), S.H. 58 (prohibiting whoever is engaged in supplying public goods or services from discriminating against people on a number of grounds, including sexual orientation); The Procurement Contract Act (Amendment no. 16), 2003, S.H. 544 (adding a section which prohibits the public authority holding a tender, from discriminating against an offeror, inter alia, on the

In addition to the legal changes, there have also been important developments in the attitude of the Israeli Defense Forces (“IDF”) towards homosexuals.<sup>55</sup> Most Israelis enter the military in their late teens, their formative sexual years. The Israeli military has never officially banned homosexuals from serving in its ranks. Nevertheless, before the 1980s, a soldier’s admission of homosexuality would likely have been met with dismissal from the army. In 1983, the military adopted regulations that officially approved the inclusion of sexual minorities, but implemented some restrictions on their placement.<sup>56</sup> In an effort said to protect the IDF from being blackmailed, homosexual soldiers were prohibited from serving in security or encryption positions.<sup>57</sup> All known gay and lesbian soldiers were also subjected to additional psychological testing to ensure their fitness. In 1993, the regulations were changed and these particular restrictions were officially lifted.<sup>58</sup> Discrimination based only on sexual orientation was prohibited and official policy subjected homosexuals to no more scrutiny than all other candidates.<sup>59</sup> In 1993, amendments were drafted to the 1983 order abolishing any special criteria for homosexuals in the military.<sup>60</sup>

While Israeli law has moved in the direction of rights for homosexual Israelis, there are a number of ways one could read the developments. Alon Harel distinguishes between the concept of *detached toleration* toward homosexuals, the argument that legal reforms protecting gays and

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basis of sexual orientation); The Patient Rights Act (Amendment no. 2), 2004, S.H. 26 (forbidding healthcare providers and medical institutions from discriminating against patients on the basis of sexual orientation).

55. See Gross, *supra* note 45, at 124 (asserting that the army, and especially the combat service, is one of the central homosocial institutions in Israeli society and that such institutions rely on male bonding and often attempt to distance themselves from homosexuality, and so are overtly homophobic).

56. See Belkin & Levitt, *supra* note 43, at 543 (stating that the new regulations would not limit homosexuals in their service).

57. See ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT: AN ESSAY ON INTERNATIONAL HUMAN RIGHTS LAW* 280 (Martinus Nijhoff Publishers 1995). The idea underlying this effort is that a homosexual, who has access to sensitive security information, can easily be blackmailed by someone seeking this information, in return for not disclosing his sexual orientation or the identity of the people with whom he had been in a relationship. *Id.*

58. See Belkin & Levitt, *supra* note 43, at 542-43 (surveying the developments that have taken place in the military: allowing homosexuals to serve in the military, repealing security restrictions against sexual minorities, granting same-sex widower benefits rights).

59. See *id.* at 543 (detailing the treatment of homosexuals in the Israeli military). See generally DANNY KAPLAN, *BROTHERS AND OTHERS IN ARMS: THE MAKING OF LOVE AND WAR IN ISRAELI COMBAT UNITS* (2003) (considering research based on interviews with twenty-two homosexual soldiers who served in combat units in the Israeli Army).

60. See Belkin & Levitt, *supra* note 43, at 544 (detailing the IDF’s official recognition of homosexuals’ rights are to serve in the military the same as others).

lesbians should be supported irrespective of one's moral beliefs, and the idea of *acceptance*, the belief that reform should be supported on the ground that homosexuality is a valuable way of life, or at least incommensurable in its value compared to heterosexuality.<sup>61</sup> Consider this distinction in light of a 1997 Israeli Supreme Court case, in which the Court invalidated a decision by the Minister of Education to prevent the broadcasting of "Open (Exposed) Cards," a program that was devoted to sexual orientation of teenagers.<sup>62</sup> The Court's decision was brief, poorly reasoned, and based on grounds other than an equality doctrine.<sup>63</sup> Justice Kedmi refrained from expressing a positive approach towards gays and lesbians in two ways: first, he emphasized that he did not want to "take a stand regarding the 'phenomenon' of homosexuality,"<sup>64</sup> and second, he did not grant any positive rights, but merely noted that he found no justification for limiting homosexual rights.<sup>65</sup> Justice Kedmi found no reason to forbid the broadcasting of the program, since he contended that watching it was not damaging.<sup>66</sup> Alternative positive reasoning would have acknowledged the need to allow a minority group a platform for speaking and educating or the need to allocate resources, such as money and airtime, in an equal manner.<sup>67</sup> Harel argues that while Justice Kedmi's reasoning on its face suggests *detached toleration*, a toleration which is compatible with indifference, sympathy, or acceptance, the tone and vocabulary suggest *critical tolerance*, a tolerance that evaluates homosexuality critically.<sup>68</sup>

In a recently proposed constitution drafted by the Israel Democracy Institute, the equality section does not explicitly contain protection against

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61. See Harel, *Rise and Fall*, *supra* note 48, at 449 (describing how the advocates of toleration and advocates of acceptance came together to transform the Israeli legal system).

62. HCJ 273/97 The Soc'y for the Protection of Personal Rights v. Minister of Educ. [1997] IsrSC 51(5) 822.

63. See Alon Harel, *Batey Hamishpat Vehomosexualiyut—Cavod O Sovlanut? [The Courts and Homosexuality—Dignity or Tolerance?]*, 4 MISHPAT U-MIMSHAL [LAW AND GOVERNMENT IN ISRAEL] 785 (1998) [*hereinafter* Harel, *Dignity or Tolerance?*] (asserting that not only was the decision brief and non-dramatic, but that it lacked any legal references or legal analysis).

64. *The Soc'y for the Protection of Personal Rights*, HJC 273/97 at 825 (stating that "[i]ndeed—without taking a stand in this matter—there are those who think that this phenomenon is undesirable and even damaging. Yet, this does not justify ignoring the existence of this phenomenon . . .").

65. *Id.* at 826.

66. *Id.* at 827.

67. Tamir, *supra* note 5, at 113 (discussing the difference between positive and negative protection of human rights and claiming that the Open Card case involved negative protection, in that the court did not find a reason to prevent the right).

68. See Harel, *Rise and Fall*, *supra* note 48, at 466 (asserting that Justice Kedmi's persistent use of the term "the phenomenon" in reference to homosexuality demonstrates his discomfort with homosexuality).

discrimination on the basis of sexual orientation.<sup>69</sup> This can be understood as a compromise with the orthodox forces in Israeli society and as an attempt to keep the status quo, another example of detached recognition rather than acceptance.

### B. *The Right to Family*

#### 1. *In General*

The defining characteristic of family law in Israel is that, unlike in other democratic countries and notwithstanding the otherwise liberal, secular, Western Israeli legal system, it is governed by religious law.<sup>70</sup> Civil marriage does not exist in Israel.<sup>71</sup> Marriage is perceived as the contractual bond between “a man” and “a woman,” and is recognized in this way in the law.<sup>72</sup> This legal recognition entails a series of *in personam* and *in rem* rights and obligations.<sup>73</sup> Some consequences of this regime might be perceived as infringing upon the right to marriage expressed in international treaties.

The family is considered an integral component of Israeli society. Family Day in Israel is celebrated once a year, in February, in honor of the

69. ISRAEL DEMOCRACY INSTITUTE, CONSTITUTION BY CONSENSUS 117 (2001), [http://www.idi.org.il/sites/english/ResearchAndPrograms/ConstitutionalLaw/Documents/Hooka Excerpts.pdf](http://www.idi.org.il/sites/english/ResearchAndPrograms/ConstitutionalLaw/Documents/Hooka%20Excerpts.pdf) (containing a section, “Equality under Law and the Prohibition against Discrimination” in the current draft proposal of “Constitution by Consensus” that states the following: “All are equal before the law; Persons shall not be discriminated against on the basis of race, religion, nationality, gender, ethnicity, country of origin, disabilities or any other reason.”).

70. See Michal Tamir, *A Guide to Legal Research in Israel*, GLOBALEX, Aug. 2006, <http://www.nyulawglobal.org/globalex/israel.htm> (noting that Israel follows the Ottoman tradition, continued by the British Mandate, of according autonomy to the various communities on matters of “personal status”: personal, family, and inheritance law). There are religious courts for the four main religious denominations: Jewish, Moslem, Christian, and Druze. Each court tries cases on the basis of its respective religious law, applying the particular religious law to members of its own community who are citizens of Israel. For example, Rabbinical Courts have exclusive jurisdiction in matters connected with marriage and divorce of Jews, and concurrent jurisdiction in other matters of personal status. *Id.*

71. Carmel Shalev, *Chofesh Hahitkashrut Lenisuin Velechayim Meshutafim [Freedom of Cohabitation and Alternatives to Marriage]*, in MAAMAD HAISHA BACHEVRA UBAMISHPAT [WOMAN’S STATUS IN ISRAELI LAW AND SOCIETY] 459, 460 (Frances Raday et al. eds., 1995).

72. See, e.g., The Jurisprudence of the Rabbanic Tribunals Act (Marriage and Divorce) [1953] S.H. 134 (stating in Article 3 that if a divorce claim between Jews is issued to the rabbinic tribunal, by the woman or the man, the rabbinic tribunal has unique jurisdiction to deal with any matter associated with the claim, including alimony to the woman and child support).

73. See BENZION SCHERESCHEWSKY, DINEY MISHPACHA BEYISRAEL [FAMILY LAW IN ISRAEL] 88- 231 (4th ed. 1992) (describing the marital duties and rights under Jewish Law, and the role of marriage in secular law; these duties also affect family law, as marriage has implications for the sharing of assets and parental rights, for example).

“family” institution.<sup>74</sup> On this day, children typically invite their parents to participate in school activities in which the theme of “family” features prominently, including watching plays about family ties, listening to songs whose lyrics celebrate family relationships, and participating in parent-child team tournaments.

The right to family is an independent right in Israel. The current constitutional state of the right is nicely summarized in the recent *Adalah* case, in which an extended tribunal of the Supreme Court determined that the right to family is embodied in the concept of human dignity and is thus protected by Basic Law: Human Dignity and Liberty.<sup>75</sup> *Adalah* concerned a temporary order of the Israeli Citizenship Law that restricted the possibility of family unification of Palestinians and Arab-Israeli couples by denying the Palestinians’ spouses permits to stay in Israel. The law was approved by a slight majority of the Court.<sup>76</sup> The justices unanimously held that the right to family is part of human dignity but disagreed as to whether that right covers the duty of the state to allow people to exercise the right in Israel. Justice Salim Joubran, who wrote a distinct decision regarding the ultimate result, pointed out that shared and joint life is one of the most substantive aspects of the right to family.<sup>77</sup> Construing the right to family as an integral part of one’s potential self-fulfillment served as Justice Joubran’s general rationale for including it under the umbrella of human dignity. In his own words:

It seems that in our days, few are the choices by which one fulfills his free will, such as his choice of the person with whom he will share his life, with whom he will create his family, with whom he will raise his children. In choosing a spouse, in getting married, a person expresses his personality and fulfills one of the main aspects of his individual autonomy. In creating a family, one shapes the way he lives and builds his very own world. Thus, in protecting the right to family, the law protects the basic freedom of the citizen to live his life as an autonomous

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74. Rachel Talshir, *Family Day for ‘Normal’ Families*, HAARETZ, available at <http://www.haaretz.com/hasen/spages/952339.html> (describing the Family Day tradition as celebrated in Israeli kindergartens).

75. See HCJ 7052/03 *Adalah – the Legal Ctr. for the Arab Minority Rights in Isr. v. Minister of Interior* [2006] (denying a petition to declare the temporary order of the Citizenship Act unconstitutional and void, by majority opinion of Cheshin, Rivlin, Levy, Grunis, Naor and Adiel; Barak, Beinisch, Procaccia, Joubran and Hayut dissented).

76. See *id.* at 24-38 (Barak, C.J.) (observing that many aspects of family life derive from the broad principle of human dignity); *id.* at 46-47 (Cheshin, J.) (asserting that the rights to marriage and family, including the right of a minor to live with his/her parents are one of the foundations of society and are derived from the concept of human dignity).

77. *Id.* at 10 (Joubran, J.) (asserting that the right to co-habitation is not marginal, and that it is at the core of family rights).



person, who is free to make choices.<sup>78</sup>

Though the majority ultimately decided to uphold the temporary order, this case is significant for the unanimous decision regarding the right to family as part of human dignity, as reflected above in Justice Joubran's words.

## 2. *Gays' and Lesbians' Family Rights*

The right to create a new-type family has already been indirectly recognized in different decisions. For example, in 1993 the Supreme Court enabled a common-law wife to take the name of her life partner and that of their common children,<sup>79</sup> and in doing so the Court acknowledged that one's name is part of one's freedom of expression as well as one's ability to develop self-identity.<sup>80</sup> Implicitly, this decision acknowledged the right to create different types of families as an expression of autonomous will. In another decision, the Supreme Court recognized a single mother and her children as a family unit warranting equal treatment under law.<sup>81</sup> However, different laws define "family" differently depending on context, as Israeli law has yet to forge a more coherent definition.<sup>82</sup>

In 1994, two contradicting decisions were issued regarding the rights of Adir Shteiner, the male life partner of the late Colonel Doron Meizel, who attempted to claim the benefits normally granted to opposite-sex partners (married or common-law spouses).<sup>83</sup> While the appeal committee under the 1985 Permanent Service Act (Benefits) granted Shteiner the benefits, the appeal committee under the 1950 Fallen Soldier's Family Act

78. *Id.* at 7.

79. HCJ 693/91 Efrat v. The Supervisor of the Population Registry in the Ministry of Interior [1993] IsrSC47(1) 749.

80. *See id.* at 771 ("A person's name is part of her personality. It is her social "I." It is the key by which she paces in the social paths. It is not only an identification code. It is an expression of personality, feelings, duty, tradition, destination . . . . Indeed, recognition of ones' ability to change her name is a recognition of her self autonomy.").

81. *See* HCJ 2458/01 "New Family" v. The Comm. for Approving Surrogacy Agreements of Surrogate Motherhood, Ministry of Health [2002], IsrSC 57(1) 419 (refusing to grant a remedy, since the Court was considering the new arrangement of surrogate motherhood, which should have been considered by the legislature).

82. Yuval Merin, *Hazchut Lechayey Mishpacha Velenisuin (Ezrachiyim) – Mishpat Benleumi Vemekomi [The Right to Family Life and to (Civil) Marriage – Domestic and International Law]*, in ZCHUYOT KALKALIYOT, CHEVRATIOT VETARBUTIT BEYISRAEL [ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ISRAEL] 663 (Yoram Rabin & Yuval Shani eds., 2004).

83. *See* Fallen Soldier's Family Act (Recompenses and Rehabilitation), 1950, S.H. 162; Permanent Service Act (Benefits), 1985, S.H. 141 (defining "partner" in both laws as "whoever was his wife at the time of his death, including whoever was his common-law wife living with him at that time, or whoever was her husband at the time of her death, including whoever was her common-law husband and lived with her at that time").

(Recompenses and Rehabilitation) denied his claim.<sup>84</sup> Finally, after several negotiations and lawsuits, Shteiner was recognized as a beneficiary under both laws and was granted the right to be invited to official memorial services.<sup>85</sup> Notwithstanding the substantial legal reforms sexual minorities achieved in the context of military service in the IDF, Belkin and Levitt have observed that informal changes are occurring at a slower pace.<sup>86</sup>

A focal point regarding gay rights in Israel was the decision of the Supreme Court in the *Danielowitz* case, mentioned previously. After several appeals in lower courts, the Israeli Supreme Court found Israeli national airline El Al's practice of granting free tickets to employees' opposite-sex partners, but refusing to extend the same benefit to employees' same-sex partners, to be illegal under the Equal Employment Opportunities Act.<sup>87</sup> Vice President Barak, the second highest Justice on the Israeli Supreme Court, wrote the majority decision in which he emphasized the importance of equality as a fundamental right in Israeli law, entrenched in a number of normative structures.<sup>88</sup> However, despite the constitutional pathos and the classification of discrimination against homosexuals as a "grouping discrimination" like race, nationality, or religion, Justice Barak based his decision on a provision of the Equal Employment Opportunities Act that states that sexual orientation shall not be relevant in employment, unless required by the nature of the job.<sup>89</sup> The rhetoric of Justice Barak's decision is that of toleration and not of acceptance, as evidenced by his emphasis that nothing in his decision implies that homosexuality is morally on a par with heterosexuality.<sup>90</sup> Justice Barak went on to compare the partnerships of opposite-sex and same-sex couples and concluded that even if differences exist between them, they are not relevant to the issue at stake in *Danielowitz*.<sup>91</sup> This case provides another example of Israel's progressive record when it comes to

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84. See Tamir, *supra* note 5, at 107.

85. See Harel, *Rise and Fall*, *supra* note 48, at 444 (recounting the details of Shteiner's recognition under both the Permanent Service Act (Benefits) and the Fallen Soldier's Family (Pensions and Rehabilitation Act)).

86. See Belkin & Levitt, *supra* note 43, at 550 (discussing the reactions of heterosexual servicemen to homosexuality).

87. H CJ 721/94 El Al Israel Airlines Ltd. v. Danielowitz [1994], IsrSC 48(5) 749, IsrLR 478 (remedying the violation by conferring the same benefit to same-sex cohabitants). See ISRAEL LAW REPORT 1992-1994, at 478-522 (Jonathan Davidson ed., 2002), for an English translation.

88. *El Al Israel Airlines Ltd.*, HJC 721/94 at 486-91 (explaining that the principle of equality is part of justice and is anchored in the Declaration of Independence, in the Israeli Common Law, and in many specific laws).

89. See *id.* at 491-94.

90. See *id.* at 464.

91. See *id.* at 491; Tamir, *supra* note 5, at 107-08 (describing the reasoning of Justice Barak's decision).

doling out formal, legal rights, but highlights certain undercurrents in Israeli society wherein individuals cannot fully fathom the existence of same-sex couples in larger society.

It is not clear whether Justice Barak's decision would have been different in the absence of specific legal provisions that prohibit anti-homosexual discrimination.<sup>92</sup> That is, it is unclear whether the principle of equality in itself would have sufficed to justify the outcome in *Danielowitz*.<sup>93</sup> Commentators have claimed that the ambiguity was "sufficiently open-textured to allow conflicting results concerning the recognition of same-sex couples in the Israeli Legal system."<sup>94</sup>

The concurring and dissenting justices, however, were clearer on their views of whether the principle of equality justified the Court's decision. Justice Dalia Dorner agreed with the result reached by Justice Barak but at the same time emphasized that, in addition to having roots in the Equal Opportunities Act, the right to partner benefits also derived from the general principle of equality.<sup>95</sup> Her decision conveyed compassionate empathy towards homosexuals and unambiguous acceptance of homosexuality.<sup>96</sup> At the other extreme, Justice Jacob Kedmi dissented,

92. Tamir, *supra* note 5, at 107 (explaining that since Justice Barak implemented the legal ban on sexual orientation discrimination, it is not clear if he would have reached the same conclusion if there had not been an explicit legal norm addressing the matter).

93. See Harel, *Gay Rights*, *supra* note 33, at 266. It is important to note that Justice Barak's opinion is no longer ambiguous, based on a later decision that dealt with employment discrimination on grounds of age. In that case, Justice Barak cited Justice Dorner's words in *Danielowitz*, holding that the Equal Employment Opportunities Act demonstrates the preexisting equality principle, rather than establishing a new principle. See Diun Nosaf ("D.N.") [rehearing] 4191/97 Rekanat v. The Nat'l Labor Court [2000] 54(5) IsrSC 330, 369.

94. Aeyal M. Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-recognition of Same-Sex Couples in Israeli Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 391, 396 (Robert Wintemute & Mads Andenæs eds., 2001) [hereinafter Gross, *Challenges*].

95. *El Al Israel Airlines Ltd.*, HCJ 721/94 at 514 (discussing the importance of equality on the basis of race, religion, nationality, language, ethnic group, age and sexual orientation).

96. See Harel, *Dignity or Tolerance?*, *supra* note 63, at 462-63 (explaining that Justice Dorner's empathy towards homosexuals is expressed through her sentimental description of the persistent persecutions of homosexuals). In a previous article, Harel criticized Justice Dorner for ruling that the rights of gays and lesbians should be acknowledged only because of the more tolerant societal attitudes toward them. He argues that this position necessarily means that the more discriminated against the minority group is, the less likely it is to be protected by the principle of equality. Harel also pointed out that there are conceptual difficulties in the theory: Justice Dorner's main analysis relies on the growing tolerance towards gays and lesbians, but what if such a growing tolerance is accompanied by the belief that employers should be free to run their businesses as they wish and to distribute benefits in accordance to the criteria they choose? There are no criteria in Justice Dorner's decision to determine which of the prevailing societal attitudes are more relevant. See Harel, *Gay Rights*, *supra* note 33, at 266-67; see also Gross, *Challenges*, *supra* note 94, at 397 (arguing that from the perspective of gay rights, it is risky to make the legal recognition of gay couples

asserting that the term “spouse” as used in the employment agreements simply does not include same-sex partners.<sup>97</sup> He concluded that a homosexual couple does not fall within the conceptual understanding of the word “couple,” and so the denial of the ticket did not constitute discrimination.<sup>98</sup> Behind Justice Kedmi’s etymological inquiry into the meaning of “couple” lies a fundamental belief that only a potentially reproductive unit is entitled to recognition. Nevertheless, as Harel argues, “it is the desire and pleasure rather than capacity for procreation which seem critical to contemporary understanding of the basic unit constituting society.”<sup>99</sup> As for the distinction between tolerance and acceptance, Justice Kedmi adopted, in Harel’s terms, “critical toleration.”<sup>100</sup> Aeyal Gross identified another feature of the dissenting opinion: “that of ‘imitation’ in the context of characterizing the behavior of two people of the same-sex who ‘imitate’ the behavior of a [heterosexual] couple.”<sup>101</sup> In his view, “Kedmi’s heterosexual couple should be understood in this light: it presents itself, the ‘authentic,’ as the pure source.”<sup>102</sup>

More recent decisions have furthered the legal recognition of new-type family rights. In 1997, a family court in Haifa issued a protective order to a lesbian woman under the Prevention of Violence in the Family Act.<sup>103</sup> The order restrained the woman’s partner from entering the apartment in which the protected woman lived. The decision rested on the interpretation of the word “spouse” in the Act as applying to same-sex partners and established, for the first time, that domestic problems in same-sex families could be addressed in family court.<sup>104</sup>

In a less progressive decision than it appears at first glance, the Supreme Court ordered the Minister of the Interior to register the adoption of a child by his mother’s lesbian life-partner.<sup>105</sup> The applicants were two cohabiting

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contingent on the social acceptance of homosexuality).

97. *El Al Israel Airlines Ltd.*, HJC 721/94 at 499 (arguing that marriage is what grants legal and social recognition and protection to a couple, not cohabitation).

98. *See id.* at 512 (referring to a same-sex couple as a “pair,” which is not deserving of the same level of protection).

99. Harel, *Gay Rights*, *supra* note 33, at 269.

100. Harel, *Dignity or Tolerance?*, *supra* note 63, at 462.

101. Gross, *Challenges*, *supra* note 94, at 398.

102. *Id.* at 399.

103. Family File (Hi) 32520/97, *Roe v. Doe* [1997].

104. *But see* Family File (Ramat-Gan) 1630/08 *Roe v. Doe* (2008) (holding that the Prevention of Violence in the Family Act did not apply to same-sex couples, demonstrating the unclear legal situation deriving from the *Danielowitz* decision); Family File (TA) 14480/98 *Roe v. Doe* (contending that the Tel-Aviv Family Court had no jurisdiction to hear a case of a gay couple, since there was no indication that the category “reputed as a spouse” included same-sex partners).

105. H CJ 1779/99, *Roe v. Minister of Interior* [1999] IsrSC 54(2) 368.

lesbians who had lived in California and subsequently moved to Israel. One gave birth to a child by means of sperm donation and the other adopted the child through an order issued by a court in California. The majority opinion found in favor of the couple based on the fact that a registration officer is not authorized to check the validity of registration, a technical decision that has no bearing on the ability of same-sex couples to adopt children. However, the minority judge was reluctant to accept the registration, questioning its validity on the grounds that Israeli law prohibits adoption by same-sex couples.<sup>106</sup>

In November 2004, the Nazareth district court allowed an elderly gay man to inherit an apartment registered under the name of his late cohabiting life-partner.<sup>107</sup> When the man sought an inheritance order declaring him to be his partner's legal successor, his appeal was denied by the family court even though he and the deceased had shared their lives for forty years. The majority decision of the district court, however, asserted that while the marriage section of the Inheritance Act is not applicable in this situation, there is no reason not to apply the cohabiting section, which is broad enough to include any kind of non-married couple.<sup>108</sup>

The past years have seen three important decisions by Israeli courts concerning family agreements, adoption, and registration of same-sex marriage. The first was a high-profile family court case, which approved an agreement between two homosexuals regarding the relationship between the two men, the twins of one, and the mother of the twins.<sup>109</sup> In a broad and well-reasoned decision, the Court concluded that the Family Court Act<sup>110</sup> must be interpreted in accordance with the spirit of the Basic Law. According to Israeli law, family agreements are valid only when the court gives a decision of validity. As such, same-sex couples' right to equality includes an ability to have such agreements approved in court, just as heterosexual couples can.

The second decision was made by the majority of an extended tribunal of

106. *Id.* at 381.

107. CA (Nz) 3245/03 Anonymous v. The Custodian Gen. [2004].

108. *Id.* at section 19 (Nisim Maman, J.) (“[T]here is no reason today not to recognize the inheritance rights of same-sex couples as a required step in the current legal situation.”).

109. *See* CA (TA) 6960/03 Roe v. Israel [2004] (basing the decision to give legal validation to the parties' agreement, to a large extent, on arguments elaborated in Tamir, *supra* note 5). For example, the court agreed with the argument that the Basic Law should not be used to discriminate against a group (Tamir at 116), that the court should use a substantive rather than a formal approach to equality (Tamir at 123), and that fulfillment of one's homosexual identity is part of human dignity (Tamir at 96-97, 101).

110. Family Court Act, 5755-1995, (Isr.) S.H. 393.

the Israeli Supreme Court with respect to two cohabiting lesbians.<sup>111</sup> The women, Tal and Avital, had three children together using donated sperm. They entered an agreement detailing their joint ownership of shared property and their specific plans for childcare. Fearing the contract inadequate to guarantee the children's interests, each wanted to adopt the children of the other.<sup>112</sup> The Supreme Court remanded the case to the family court with instructions to determine whether approving that request served the children's best interests. In February 2006, the family court to which the case was remanded approved the adoption.<sup>113</sup> A dissenting opinion by Justice Eliyahu Mazza argued that since the Adoption Act does not refer to the possibility of adoption by same-sex couples, it cannot be interpreted to cover such adoptions.<sup>114</sup>

The third decision was again made by the majority of an extended tribunal of the Supreme Court sitting as the High Court of Justice.<sup>115</sup> The appellants, five homosexual couples married in Canada, appealed the refusal of the Ministry of Interior to change their registration status from "single" to "married." The majority based its decision to allow the registration on precedent<sup>116</sup> which stated that registration of marital status carries only statistical importance and is unrelated to the validity of the marriage.<sup>117</sup> This approach ignores the complicated questions regarding the legal status of gay couples legally married in other jurisdictions, and the issues of social and ethical recognition that their marriages raise, leaving

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111. CA 10280/01 Jarus-Hakak v. The Att'y Gen. [2005] IsrSC 59(5) 64.

112. See ALBA CONTE, 1 SEXUAL ORIENTATION AND LEGAL RIGHTS § 16.8 (Wiley Law Publications, 1998) (demonstrating the inadequacy of contractual relationships in providing the continuity and stability necessary for parenthood).

113. Adoption (TA) 48/97 Jarus-Hakak v. Att'y General [2006].

114. *Jarus-Hakak*, CA 10280/01 (Mazza, C.J. opinion, ¶ 21) ("[M]y opinion is that the words 'special circumstances' . . . can not be interpreted as recognizing . . . the legal status of same sex couples . . . . [T]his interpretation is undesired . . . . [T]he social attitude regarding same sex couples is still controversial.").

115. H CJ 3045/05 The Ass'n for Civil Rights in Isr. v. Chief Registrar of Population, Ministry of Interior [2006] IsrSC.

116. H CJ 143/62 Foonk-Shlezingler v. Minister of the Interior [1963] IsrSC 17(1), 25.

117. Cf. *Lewis v. Harris*, 908 A.2d 196, 196 (N.J. 2006) (separating out the benefits and responsibilities of marriage from the name and status of marriage). In *Lewis v. Harris*, "same-sex couples brought action against state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses, alleging [that] local officials' refusal to issue marriage licenses to plaintiff same-sex couples violated their state constitutional rights to privacy, due process, and equal protection." *Id.* The Supreme Court of New Jersey held that same-sex marriage is not a fundamental right entitled to protection under the liberty guarantee of the New Jersey Constitution, however, committed same-sex couples must be afforded the same rights and benefits enjoyed by married opposite-sex couples. *Id.* at 207, 211. Hence, the New Jersey legislature was required to either amend the marriage statutes or enact a statutory structure affording same-sex couples the same rights and benefits enjoyed by married opposite-sex couples. *Id.* at 221.

those issues to the Knesset.<sup>118</sup> The dissenting view rejected the registration, arguing that the mere act of registering gay couples as “married” could be perceived as officially legitimating and condoning the possibility of a gay family unit, an option recognized in only a few places worldwide. Following this decision, a Knesset member initiated a bill to change the Registration Act in a way that prohibits the registration of same-sex marriages as long as there is no Israeli law approving those marriages.<sup>119</sup> A new committee of the Israeli Bar established to protect gay rights objects to the bill and argues that its purpose is to discriminate against a minority group.<sup>120</sup> Finally, in another recent and important administrative decision, the Ministry of Construction and Housing entitled same-sex families to receive aid for accommodations and mortgages.<sup>121</sup>

While recent decisions advance the legal rights of homosexual couples to create families, these decisions stop short of *recognition* of new-type families. The family court decision regarding the approval of the family agreement between the gay fathers and the children’s mother, for example, does not provide precedent for approval of prenuptial agreements between unitary couples (in contrast to a “family agreement”).<sup>122</sup> Prenuptial agreements are the major vehicle in Israel for couples to arrange their proprietary rights over their financial assets, and their validity requires approval of the court.<sup>123</sup> On this point—whether same-sex couples can also submit their prenuptial agreements for judicial approval—there are contradictory decisions in the various family courts.<sup>124</sup> With respect to

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118. Cf. Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291, 296 (2007) (claiming that a piecemeal approach was “necessary, inevitable, and useful” for furthering the recognition of same-sex couples in New Jersey, “even though it also set up the possibility of a detour away from legalizing marriage for same-sex couples”).

119. See A Bill to Amend the Registration Act (Registration of Marital Status), 2006, <http://www.knesset.gov.il/privatelaw/data/17/1762.rtf> (aiming to introduce same-sex marriage through a social-political process, under the belief that legislation recognizing gay marriage would be perceived as revolutionary and harmful to large segments of the population).

120. *Halishka Mitnagedet Lehaatzaat Hachok Lesor Rishum Nusuim Shel Homosexualim Velesbiot* [The Bar Objects to the Bill Forbidding the Registration of Same-Sex Marriage], ORECH HADIN [THE LAWYER] (Feb. 2007).

121. See Shachar Illan, *Zugut Chad-Miniyim Yekablu Siyua Bemashkantaot* [Same-Sex Couples Would Receive Mortgage Aid], HAARETZ, Mar. 13, 2007, <http://news.walla.co.il/?w=/1076121> (detailing the decision, which is not public).

122. See CA (TA) 6960/03 Roe v. Israel [2004].

123. The Proprietary Relationships between Couples Act (1973), S.H. 267 § 2 (“A prenuptial agreement requires approval of family court or the religious court, which has the jurisdiction on marriage and divorce issues of the couple. The same approval is needed for an amendment of the agreement.”).

124. See, e.g., Family Court 47720/06 (TA) [2006] (affirming a contract between two co-habiting lesbians, including an agreement to mutual parenting as a prenuptial agreement, but emphasizing the concept of equality as the basis of the decision, not any

adoption, the Supreme Court emphasized that its decision concerning mutual adoption stems from the pursuit of the best interest of the specific children involved and not from a general recognition of the legal capacity of same-sex couples to adopt children. Moreover, the decision bears no normative or moral judgment regarding the status of unitary couples.<sup>125</sup> This distinction between co-parent adoption (one partner is biologically related to the child) and stranger adoption (neither partner is relation) is not unique to Israel.<sup>126</sup> However, in Israel, it reflects the Court's awareness of the reservations that a considerable part of the Israeli public feels towards same-sex families.<sup>127</sup> Even the decision concerning the registration of same-sex marriage is less groundbreaking than it may appear because it grants registration based on marriage certificates, regardless of whether the marriage is recognized in Israel, and so falls short of legally validating homosexual marriages. Once again, one can detect a pattern of formalistic legal advancement for same-couples and their families, but advancement that lacks corresponding social recognition or understanding.

### III. THE THEORY OF RECOGNITION AND NEW-TYPE FAMILY ACCEPTANCE

While impressive, recent advancements in Israeli law regarding the rights of homosexuals do not follow any particular logic, nor do they show uniformity.<sup>128</sup> Israel still lacks a mechanism by which same-sex couples and the families they create can garner official recognition of their relationships. Instead, the gap between legally sanctioned and recognized family life and the family life created and experienced by so many Israelis grows ever wider.<sup>129</sup> While in reality diverse family units exist, the legal system still defines family as the nuclear unit founded upon heterosexual marriage. The absence of a clear definition of "family" and the implicit exclusion of alternative families from the meanings covered by the term

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elucidation of what constitutes a marriage).

125. CA 10280/01 Jarus-Hakak v. The Att'y Gen. [2005] IsrSC 59(5) 64 § 26 (Barak, J.); *id.* at 26 §17 (Cheshin, J.) (explaining the limitations of their decisions).

126. See William E. Adams, Jr., *Whose Family is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 621 (1996) (discussing the distinction several American courts draw between co-parent and stranger-parent adoption, which precludes gays in some states from adopting).

127. See, e.g., Shahar Ilan, *Shas MK Blames Gays for Recent Earthquakes in the Region*, HAARETZ, Feb. 20, 2008 (reporting on Shlomo Benizri, a member of the Knesset, who blamed earthquakes on sodomy and other "perversions like adoptions by lesbian couples").

128. Gross, *Challenges*, *supra* note 94, at 392 (asserting that to the extent that legal recognition of same-sex couples does exist in Israel, it has evolved in a peculiar way).

129. See Shalev, *supra* note 71, at 502 (asserting that the greater the gap between the ideology of the law and the reality of life, the more life overrides the written law).



“family” hurts individuals who live in such alternative families.<sup>130</sup> In short, new-type families are not recognized by Israeli society.

### A. *The Theory of Recognition*

Theorists of recognition challenge the liberal idea that an individual or a group is able to develop its self-understanding in isolation from others. They argue that the capacity to develop an interpretation of one’s own needs and identity stems from, and depends upon, recognition by others. Conversely, misrecognition or non-recognition can yield real damage to individuals when society reflects back to them a distorted image of themselves.

Thus, the liberal ideal of *autonomy* is challenged by the Romantic notion of *authenticity*.<sup>131</sup> For example, Charles Taylor again explained authenticity this way in *The Malaise of Modernity*:

This is the powerful moral idea that has come down to us. It accords crucial moral importance to a kind of contact with myself, with my own inner nature, which it sees as in danger of being lost, partly through the pressures towards outward conformity, but also because in taking an instrumental stance to myself, I may have lost the capacity to listen to this inner voice. [Authenticity] then greatly increases the importance of this self-contact by introducing the principle of originality: each of our voices has something of its own to say. Not only should I fit my life to the demands of external conformity; I can’t even find the model to live by outside myself. I can find it only within.<sup>132</sup>

Taylor’s theories have been summarized as postulating that authenticity is legitimate self-understanding, distinct from autonomy, and unaccompanied by the politics of equal dignity.<sup>133</sup> His thesis suggests that while the struggle for legal equality was central in the history of liberal societies, it was, to a large extent, replaced by groups’ claims for recognition of their cultural differences.<sup>134</sup>

Theorists have identified two opposing camps in progressive politics: redistribution and recognition.<sup>135</sup> Proponents of *redistribution* draw on a

130. See Merin, *supra* note 82, at 723.

131. See Ruth Abby, *Charles Taylor’s Politics of Recognition: A Reply to Jonathan Seglow*, 47 POL. STUD. 710, 710-11 (1999) (describing the conflict between these modern western approaches).

132. CHARLES TAYLOR, *THE MALAISE OF MODERNITY: THE MASSEY LECTURE SERIES 29* (House of Anansi Press 1992). See Taylor, *supra* note 11, at 30, which further expounds on the notion of authenticity.

133. Jonathan Seglow, *Universals and Particulars: The Case of Liberal Cultural Nationalism*, 46, POL. STUD. 963, 973 (1998) (arguing against the notion of cultural authenticity).

134. Taylor, *supra* note 11, at 37-44.

135. See NANCY FRASER & AXEL HONNETH, *REDISTRIBUTION OR RECOGNITION* 1-6

long tradition of egalitarian, labor, and socialist organizing and seek a more just allocation of goods. Proponents of *recognition* draw a new version of a “difference-friendly” society and seek a world in which assimilation to majority or dominant cultural norms is no longer the price for equal respect. Accordingly, the latter group seeks recognition of the distinctive perspectives of ethnic, racial, and sexual minorities, as well as recognition of gender differences.<sup>136</sup>

For the purpose of our analysis, Axel Honneth’s theory concerning *The Struggle for Recognition*<sup>137</sup> serves as a starting point. In his view, one’s sense of self is necessarily established through interaction with others, in a process of mutual recognition. Such processes take place at three levels: family, society, and state. The structure of relations of recognition is described in Table 1.

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(Joel Golb, James Ingram & Christiane Wilke trans., 2003).

136. See Nancy Fraser, *Recognition Without Ethics*, 18(2-3) THEORY, CULTURE & SOCIETY SOC. 21, 21 (2001); see also Neere Chandhoke, *The Logic of Recognition*, Seminar Web Edition: Multiculturalism, (Dec. 1999), <http://www.india-seminar.com/1999/484/484%20chandhoke.htm>. Chandhoke uses the urgent condition of the Dalit, an ‘invisible’ social class in India, to parse out the two discrete, but not mutually exclusive, moral conflicts inherent in the notions of redistribution and recognition:

One form of conflict takes the shape of struggles over material resources, political gains, and against deprivation. We can deal with this by the redistribution of material and political resources. The other kind of moral conflict that has come to dominate the body politic is the struggle for recognition. Extension of respect becomes absolutely essential, for when perverse and demeaning stereotypes come to govern the way a particular community is perceived – as ‘invisible’, ‘inferior’, ‘polluting’, or as ‘threatening’ – we have a potentially incendiary situation on our hands.

*Id.*

137. AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (Joel Anderson trans., 1995).

*Table 1: Honneth's Structure of Relations of Recognition*<sup>138</sup>

<u>Mode of Recognition</u>	<i>Emotional Support</i>	<i>Cognitive Respect</i>	<i>Social Esteem</i>
DIMENSION OF PERSONALITY	needs and emotions	moral responsibility	traits and abilities
FORMS OF RECOGNITION	primary relationships (love, friendship)	legal relationships (rights)	community of value (solidarity)
DEVELOPMENTAL POTENTIAL	–	generalization, de-formalization	individualization, equalization
PRACTICAL TO SELF-RELATION	basic self-confidence	self-respect	self-esteem
FORM OF DISRESPECT	abuse and rape	denial of rights, exclusion	denigration, insult
THREATENED COMPONENT OF PERSONALITY	physical integrity	social integrity	honor, dignity

*Love and emotional support* constitute the basis of recognition in the family. Through reciprocal loving care, family members know themselves to be united and interdependent. Recognition must possess the characteristic of effective approval and encouragement, since certain needs and emotions can only be validated by being directly satisfied or reciprocated. This relationship of recognition is thus also necessarily tied to the physical existence of concrete others who hold each other in high esteem.<sup>139</sup> Moreover, the development of a person's sense of independence critically relies on an understanding that the love he or she shares with his or her family will continue even when that person is no longer under the immediate care of his or her parents; without such confidence, one cannot recognize his or her independence.<sup>140</sup> Thus, recognition is characterized by a dual process in which the other is released and, at the same time, emotionally tied to the loving subject. The affirmation of independence is supported and guided by care.<sup>141</sup>

138. *Id.* at 129.

139. *See id.* at 95-96; *see also* Axel Honneth, *Recognition or Redistribution? Changing Perspectives on the Moral Order of Society*, 18 THEORY, CULTURE & SOC'Y 43, 48-49 (2001) (emphasizing that physical and emotional needs can only be validated through recognition).

140. HONNETH, *supra* note 137, at 107.

141. *See* Catherine Audard & Stephen Grosz, *Recognition*, THE BRITISH PSYCHOANALYTICAL SOCIETY, 2000 <http://www.psychanalysis.org.uk/recognition2>.

In the social dimension, the mode of recognition is *cognitive respect* provided by *legal rights*. Legal relations differ significantly from love. However, both are spheres of interaction, which should be understood as patterns of socialization. In law, only once we have taken the perspective of the “generalized other,” which teaches us to recognize other members of the community as bearers of rights, can we also understand ourselves to be legal persons, in the sense that we can be reasonably confident that certain of our claims will be met.<sup>142</sup>

In addition to affectionate care and legal recognition, individuals need a form of *social esteem*, which allows them to relate positively to their concrete traits and abilities.<sup>143</sup> In modern societies, social relations of symmetrical esteem between individualized and autonomous subjects serve as a prerequisite for *solidarity*. According to Honneth,

[i]n this sense, to esteem one another symmetrically means to view one another in light of values that allow the abilities and traits of the other to appear significant for shared praxis. Relationships of this sort can be said to be cases of “solidarity,” because they inspire not just passive tolerance but felt concern for what is individual and particular about the other person.<sup>144</sup>

“These three patterns of recognition: love, legal order and solidarity, appear to provide the formal conditions for interaction, within which human beings can be sure of their ‘dignity’ and ‘integrity.’”<sup>145</sup>

This epistemological conception of the moral order of society has been criticized as not satisfying reasonable demands for material redistribution.<sup>146</sup> When judged alone, claims for recognition risk failing to “fully capture . . . the meaning of equality.”<sup>147</sup> In this context, Nancy Fraser suggests a comprehensive framework in which the conception of justice is expanded so as “to encompass distribution and recognition as two

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htm (last visited July 3, 2009) (discussing Hegel and Winnicott’s views of the processes involved in mother-infant mutual recognition and tracing the need for recognition from infancy to adult life).

142. HONNETH, *supra* note 137, at 108; *see also* Honneth, *supra* note 139, at 49-50 (arguing that a form of disrespect occurs when persons are not granted rights and responsibilities equal to that of a “full legal person within their own community”).

143. *See* Honneth, *supra* note 139, at 49-50 (emphasizing that self-esteem comes from “solidaristic acceptance” as well as society’s perception of one’s “abilities and way of life”).

144. HONNETH, *supra* note 137, at 129.

145. Honneth, *supra* note 139, at 50.

146. *Id.* at 52 (discussing the criticism surrounding Honneth’s theory).

147. *See* Gila Stopler, *Contextualizing Multiculturalism: A Three Dimensional Examination of Multicultural Claims*, 1 L. & ETHICS HUM. RTS. 309, 310 (2007) (noting the impact of multicultural theory and claims of recognition by minorities on the need for equality on all levels, including economic equality).

mutually irreducible dimensions.”<sup>148</sup> Furthermore, she contends that the “identity model” of recognition is problematic, since “it emphasizes psychic structure over social institutions and social interaction.”<sup>149</sup> Hence, her proposal is to treat recognition as a question of *social status*. According to this model, “what requires recognition is not group-specific identity but rather the status of group members as full partners in social interaction.”<sup>150</sup> Moreover, other scholars have emphasized that when examining matters through the prism of recognition, “multicultural claims should be analyzed in the political, social, and economic context in which they are made and should not be detached from or given precedence over other dimensions of justice.”<sup>151</sup>

### *B. Recognition of New-Type Families in Israel*

Israel has clearly made a move from a formal concept of equality towards a substantive one, which, in Justice Mishael Cheshin’s words, is: “nothing but one of the derivatives of justice and fairness.”<sup>152</sup> Formal equality finds its expression in Aristotle’s classical position that equals are to be treated equally and unequals unequally.<sup>153</sup> This “formula leaves it to the proponents of both equality and inequality to prove empirically whether the persons among whom justice is to be done have characteristics . . . entitling them to similar or different treatment.”<sup>154</sup> When dealing with groups that have been historically and structurally discriminated against, this position is problematic because such evaluation is influenced to a large extent by the very same stereotypes that the equalization purports to abolish.<sup>155</sup> Therefore, the modern concept of human equality—*substantive equality*—is socio-dynamic rather than static. “Socio-dynamic equality designates the need for an ongoing process of social introspection as regards existing inequality in the treatment of members of society.”<sup>156</sup>

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148. Fraser, *supra* note 136, at 38. *But see* Honneth, *supra* note 139, at 54 (concluding that the term “just distribution” is derived from “the degree of social esteem enjoyed by social groups” in line with a normative order).

149. Fraser, *supra* note 136, at 24.

150. *Id.*

151. Stopler, *supra* note 147, at 310-11.

152. HCJ 7111/95 The Union of Local Auths. in Isr. v. The Knesset IsrSC 50(3) 485 (1996).

153. *See* ARISTOTLE, *Nicomachean Ethics*, in *THE COMPLETE WORKS OF ARISTOTLE* 1729, 2035 (Jonathan Barnes ed., Princeton University Press 1984) (providing examples of artistic and athletic ability to argue that individuals who are different should be treated differently by society).

154. *See* Julius Stone, *Equal Protection and the Search for Justice*, 22 ARIZ. L. REV. 1, 4 (1980) (arguing against the presumption that until similarities or differences are proven, all persons are entitled to equal treatment).

155. *See* Tamir, *supra* note 5, at 123.

156. *See* Frances Raday, *Socio-Dynamic Equality: The Contribution of the*

The modern concept of substantive equality can help individual gays and lesbians in their pursuit of equality, as shown in the historical overview of advancement above. But is this concept sufficient for providing recognition for new types of families? Such families are by no means equivalent to classic families, and even identifying the lines along which they should be compared is challenging. In addition, the issue here is not of historical discrimination, but rather of a more complicated case of a new type social unit formed by members of a historically marginalized group. Liberal concepts of equality, as our research shows, may not be sufficient in this case.<sup>157</sup>

Israel's attitude as a state and the attitude of some members of its society toward gays, lesbians, and alternative families can be titled the *neutral difference approach*, which perceives sexual orientation as something that should not be used as a basis for discrimination.<sup>158</sup> This approach is still a far cry from *positive difference*, whereby gays and lesbians, along with the families that they form, are regarded as upstanding members of society who diversify and enrich their communities.<sup>159</sup>

Harel argues, in light of the legal developments that have taken place in Israel since the *Danielowitz* case, that the gay legal revolution was facilitated by the political support for equal treatment of gays and lesbians which did not presuppose sympathy toward homosexual practices.<sup>160</sup> Thus Harel concludes that it was not a process of liberalization that was primarily responsible for the legal change, but rather that the change occurred despite the continuing conservative nature of Israeli society:

The preconditions that facilitated the success of the gay legal revolution are the ones that also limited its social significance. The legal measures protecting gays and lesbians were possible because providing political support for them did not presuppose any deep transformation of the conservative nature of the Israeli society, or the norms governing its social mores.<sup>161</sup>

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*Adversarial Process*, in CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES 141, 142 (Shlomo Slonim ed., 1990).

157. Cf. Gross, *Challenges*, *supra* note 94, at 414 (citing Michel Foucault, who saw the battle for gay rights as "an episode that cannot be the final stage," and spoke of the need for "establishing homosexual lifestyles as cultural forms").

158. See EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 2 (1990) (detailing how this view is reflected in many early legal developments protecting gay and lesbian rights in the United States such as the decriminalization of private, same-sex activities).

159. See DONALD G. CASSWELL, *LESBIAN, GAY MEN AND CANADIAN LAW* 10 (1996).

160. Harel, *Rise and Fall*, *supra* note 48, at 446 (arguing that activists and politicians purposefully made the equality arguments ambiguous in order to avoid a debate about the social acceptance of homosexuality).

161. *Id.*

How parents experience the gap between their family's authenticity and their social/legal non-recognition can be found in their own descriptions of their family status. For example, a recent seminar on gay and lesbian parents featured Eido Burnshtein, a thirty-four year old gay man whose partner fathered a child with a heterosexual woman. Eido and his partner were present at the delivery of the child. The child currently shares his time equally between his mother's and father's households, which makes Eido, as the biological father's cohabiting partner, a significant figure in raising the child. Eido stated: "The Hebrew language has not created a title for me and I live at peace with it. I am present for the child just as his father is . . . ." <sup>162</sup>

Eido is an unusual man. Not all those similarly situated are "at peace" with their unclear social status. Yael and Dana are cohabiting lesbians who were married in a private ceremony and are together raising a sixteen month old baby boy, born to one of them. On Family Day 2007 in Israel, they said "[w]e are literally a family but the state does not recognize us even as a couple. Lior is the son of both of us, but the state views only his biological mother as having duties and rights towards him." <sup>163</sup>

In sum, while liberal ideas of autonomy and equality are well-established in Israel, concepts of recognition are highly underdeveloped. The discourse of cultural politics—unlike that of social politics—is limited and questions of recognition and authenticity are rarely raised. Given this, we believe it crucial to confront recognition of new-type families.

We thus suggest, as our findings below also reveal, that lack of status pervades Israeli culture, which manifests itself as: 1) an absence of social acknowledgment, or gap between the authenticity in which new-type families live, and the non-recognition with which they are met, and 2) a conspicuous absence in the Hebrew language itself. <sup>164</sup>

#### IV. SOCIOLINGUISTIC PERSPECTIVE

Names are important. The way in which a person or concept is named by society often provides a view into what society thinks about what it has named. Our motivation for using a sociolinguistic prism to examine issues

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162. Tzachi Cohen, *Horim ze Lo Tamid Aba Veima (Parents Are Not Always Mommy and Daddy)*, ZMANIM MODERNIEM (Modern Times), Aug. 3, 2005, at 1.

163. LA-ISHAH [TO A WOMAN], Feb. 18, 2007.

164. Cf. Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 386 (1999) ("Gay lives and same-sex marriage are now something said. The Saying takes place in private and in public. Public efforts to deny same-sex marriages are thus Unsayings that strive to cancel, erase and shut off private and public realities encoded in language. An Unsayings of such magnitude and public nature has systemic consequences that transcend particular harm to an identity.").

concerning identity and status of alternative families rests on the well-established claim that language and social identity are tightly linked.<sup>165</sup> Language use and change have been associated with particular societal norms, practices, conventions, customs, perceptions, attitudes, and expectations. That is, language is a sociocultural phenomenon, interacting with broad identity categories such as ethnicity, age, and gender. In fact, language is one of the most salient representations of private and public identity, and, as a result, a natural vehicle for establishing a sense of belonging.<sup>166</sup> Identity relations are also observed across more locally defined cultural positions (e.g., popularity at the workplace), and these relations emerge in the course of discursive interaction.<sup>167</sup>

Specifically, identity is a sociocultural accomplishment, constructed primarily through linguistic practices and indexed across a variety of linguistic systems. It is a confluence of relational dimensions expressed between one's self and other, such as *adequation* ("sufficient" social similarity) versus *distinction* (social differentiation); *authentication* (the genuineness of identity) versus *denaturalization* (falsehood of identity); and *authorization* (institutionalized or ideological power) versus *illegitimation* (the dismissal of identities in institutionalized contexts). That is, identity simultaneously emerges on inter-subjective and interactional bases. Identity derives from co-constructed intentions, perceptions and representations as well as more general ideological processes articulated in discourse.

This view of identity links neatly with the aim of the present study to shed light on the self-identity of alternative families in Israel by examining their *discourse* regarding their family situation, since "even the most predictable and non-innovative identities . . . are only constituted as socially real through discourse . . ." <sup>168</sup> To date, research on language use among gays and lesbians has typically focused on the link between language and issues of gender, sexual identity, or desire<sup>169</sup> with very little

165. See PETER TRUDGILL, *SOCIOLINGUISTICS: AN INTRODUCTION* 13-34 (1974) (discussing the interconnectivity of language and society, including the function of linguistic behavior in "establishing relationships" and "conveying information about the speaker").

166. See DAVID CRYSTAL, *THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE* 17-48 (Cambridge University Press 1987) (discussing how language and identity are linked and how this link is manifested in different social groups).

167. See Mary Bucholtz & Kira Hall, *Identity and Interaction: A Sociocultural Linguistic Approach* 7 *DISCOURSE STUD.* 585, 585 (2005) (examining linguistic interactions in order to develop a framework for an analysis of identity).

168. *Id.* at 591.

169. See Mary Bucholtz & Kira Hall, *Theorizing Identity in Language and Sexuality Research*, 33 *LANGUAGE SOC'Y* 469, 469 (2004) (emphasizing the intersubjective nature of sexuality and identity, specifically focusing on a "desire-centered view of sexuality" in research on identity).



attention to notions such as family or parenting. Israel provides an ideal environment for such a study because, as we discussed above, Israeli law approaches formal equality, but may or may not approach substantive equality.

While limited, there has been some sociolinguistic study of gay and lesbian use of terms to define family and parenting, primarily found in the works of Celia Kitzinger and Victoria Clarke, who analyzed discussions on gay/lesbian parenting in English-speaking cultures.<sup>170</sup> In the following sections, we summarize Kitzinger and Clarke's work and provide a brief overview of the background against which the sociolinguistic study of gay/lesbian language has emerged.

### A. Language and Gender

Much of the early work examining the relationship between language and gender has focused on differences between men's and women's speech. Such differences, termed *linguistic sex differentiation* or *sociolinguistic gender patterns*, are often attributed to the distinct social roles of men and women in society.<sup>171</sup> Informed by feminist theory, many language and gender studies focused on issues of social equality,<sup>172</sup> identifying patterns of sexism in language structure, meaning, and use.<sup>173</sup> Such studies typically associated *women's language* with powerlessness, insecurity, dependency, and subservience, which have been interpreted

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170. See, e.g., Victoria Clarke et al., "Kids are Just Cruel Anyway": Lesbian and Gay Parents Talk about Homophobic Bullying, 43 BRIT. J. OF SOC. PSYCHOL. 531, 531 (2004) (evaluating the psychological and social effects of homophobic bullying on children from gay and lesbian households); Victoria Clarke, "We're All Very Liberal in Our Views": Students' Views: Students Talk about Lesbian and Gay Parenting, 6 LESBIAN & GAY PSYCHOL. REV. 2, 2 (2005) [hereinafter Clarke, *We're All Very Liberal*] (analyzing a student focus group to identify levels of tolerance regarding gay and lesbian parenting); Victoria Clarke & Celia Kitzinger, *Lesbian and Gay Parents on Talk Shows: Resistance or Collusion in Heterosexism?*, 1 QUALITATIVE RES. PSYCHOL. 195, 195 (2004) [hereinafter Clarke & Kitzinger, *Talk Shows*] (illustrating that heterosexist framing of debates on talk shows forces gay and lesbian guests to make apologetic or defensive arguments); Victoria Clarke & Celia Kitzinger, "We're not Living on Planet Lesbian": Constructions of Male Role Models in Debates about Lesbian Families, 8 SEXUALITIES 137, 137 (2005) [hereinafter, Clarke & Kitzinger, *Planet Lesbian*] (analyzing the response of gay and lesbian parents to the claim that children, especially boys, suffer from being raised in lesbian households due to a lack of male role models).

171. See RALPH FASOLD, SOCIOLINGUISTICS OF LANGUAGE 89-118 (Wiley-Blackwell, 7th ed. 1990) (discussing basic notions in the study of the relationship between sex and language); TRUDGILL, *supra* note 165, at 84-102 (discussing the differences between male and female speech).

172. See ANNE PAUWELS, WOMEN CHANGING LANGUAGE 16-80 (Addison Wesley Longman 1998) (identifying trends in international language planning and highlighting women's efforts to change biased representations of sexes in language).

173. See Deborah Cameron, *Introduction to Part II*, in THE FEMINIST CRITIQUE OF LANGUAGE: A READER 83, 83-90 (Deborah Cameron ed., Routledge 1998) (reviewing studies on sexism in language).

from a variety of perspectives. For example, Dale Spender claims that sexism in language stems from men's patriarchal power, used to determine semantic meaning in language, and, as a result, perpetuate women's social inferiority.<sup>174</sup> Others attribute sexist practices to contextual factors, governed by the view that men are generic human beings and women are gender-defined, or that only the male gender is recognized by language and culture.<sup>175</sup>

Language defined in terms of gender differentiation has been termed *gender-appropriate* language.<sup>176</sup> This notion is based, in part, on the popular belief that heterosexuality is a natural default whereby opposites with complementary social roles attract. This belief is anchored in *compulsory heterosexuality*, a political institution whose primary goal is to preserve the gender hierarchy existing between men and women, whereby women are subordinate to men.<sup>177</sup> Such a view deems language use by individuals whose identities are non-heterosexual as *gender inappropriate*. However, direct linguistic indexing of gender is rarely observed.<sup>178</sup> Language practices do not presuppose the identity of a speaker-writer as male, female or other, but rather interact with a constellation of factors such as personality, social stance, and social activity, with particular pragmatic functions.<sup>179</sup>

### B. Language and Homosexuality

Over the years, the study of language used by individuals with

174. See DALE SPENDER, *MAN MADE LANGUAGE 1* (Routledge 1980) (asserting that male societal power has allowed men to "construct the myth of male superiority and have it accepted"). See generally Robin Lakoff, *Language and Women's Place*, 2 *LANGUAGE SOC'Y* 45 (1973) (arguing that female identity is lost in language).

175. See generally Maria Black & Rosalind Coward, *Linguistic, Social and Sexual Relations: A Review of Dale Spender's Man Made Language*, in *THE FEMINIST CRITIQUE OF LANGUAGE: A READER* 100 (Deborah Cameron ed., Routledge 1998) (analyzing the notion of 'man made language' and the distinction between discourse required to develop feminist theory and the system of language); Luce Irigaray, *Linguistic Sexes and Genders*, in *THE FEMINIST CRITIQUE OF LANGUAGE: A READER* 119 (Alison Martin, trans., Deborah Cameron ed., Routledge 1998) (exploring further the ways in which gendered language affects society).

176. See DEBORAH CAMERON & DON KULICK, *LANGUAGE AND SEXUALITY* 50-51 (Cambridge University Press 2003) (presuming that gender-appropriate speech is equivalent to heterosexual speech while gender-inappropriate speech is equivalent to non-heterosexual speech).

177. *Id.* at 44.

178. See Elinor Ochs, *Indexing Gender*, in *RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON* 335, 340 (Alessandro Duarte & Charles Goodwin eds., 1992) (examining the cultural significance of the categorization of men and women in language). Indexing refers to a direct mapping of linguistic form with social meaning, which Ochs argues does not capture the relation between language and gender. *Id.*

179. CAMERON & KULICK, *supra* note 176, at 59 (discussing the construction of the heterosexual identity).

homosexual and lesbian identities has evolved.<sup>180</sup> Early studies perceived homosexuality as an aberration identifiable through the use of homo-specific code containing a special inventory of lexical items—a “lavender” lexicon<sup>181</sup>—and a tendency to show grammatical gender inversion. Such studies were grounded in the heteronormative idea that gay men are womanly and thus are attracted to men, and that lesbian women are manly and therefore desire women. Interestingly, no linguistic characteristics were associated with lesbian women, since lesbianism was regarded as “a phase, a pose, a strategy to become thespian, or an expression of petulant, confused dissatisfaction with men.”<sup>182</sup>

Many homosexuals and lesbians tried to reject the peculiar linguistic patterns associated with gay language on sociopolitical grounds, since such patterns at times thwarted their attempt to gain mainstream acceptance. In the 1980s, gayness and lesbianism were increasingly treated as a phenomenon involving oppressed minorities where “gayspeak” was thought of as stemming from clearly defined social identities. The main endeavor in this line of research was to find commonalities that cut across varieties of gay/lesbian identities, on the assumption that there exist gay and lesbian communities with distinct linguistic practices. These include, in addition to a unique lexicon and use of gender inversion, certain patterns of voice quality,<sup>183</sup> also known as “the voice,” and “feminine” collaborative discourse patterns.<sup>184</sup> Studies identifying these patterns have come under attack, since it is difficult to identify language patterns that are gay-exclusive, even if statistically such patterns are more prevalent among gay individuals.<sup>185</sup>

Moreover, in the 1990s, diversity among non-heterosexuals started occupying an increasingly important role in the political agenda of gay/lesbian activists. As a result, sociolinguistic inquiry broadened to

180. *See id.* at 74-106 (discussing the history of the debate surrounding whether gay men and lesbians have a distinctive language).

181. *See id.* at 78 (analyzing homosexuals’ “‘secret language’ of identity”); JOAN SWANN, A DICTIONARY OF SOCIOLINGUISTICS (Edinburgh University Press 2004) (characterizing “gay language” as lavender, a color associated with the gay and lesbian community for many years).

182. CAMERON & KULICK, *supra* note 176, at 86.

183. *See* Arnold Zwicky, *Two Lavender Issues for Linguists*, in QUEERLY PHRASED: LANGUAGE, GENDER, AND SEXUALITY 21, 22-23, 26 (Anna Livia & Kira Hall eds., 1997) (elaborating on the lexical items used to refer to homosexuality).

184. *See* JAMES W. CHESEBRO, DOES A GENERAL THEORY OF HOMOSEXUALITY/GAY/QUEER COMMUNICATION EXIST?, 28-29 (Apr. 6, 2002), available at [jwchesebro.iweb.bsu.edu/Research/Homosexuality.doc](http://jwchesebro.iweb.bsu.edu/Research/Homosexuality.doc) (noting the existence of verbal and non-verbal symbols in the gay and lesbian community).

185. *See* CAMERON & KULICK, *supra* note 176, at 59, 81-82 (detailing an early study of male, homosexual speech in which the subjects often used the feminine pronouns and titles, “she,” “her,” “miss,” “mother” and “girl” when referring to males).

include examinations of language use among drag queens, bisexuals, transvestites, and others. The resultant body of work is known as *queer linguistics*.<sup>186</sup> Many studies within this framework consider sexual identities as discourse accomplishments, in which a variety of linguistic resources are combined to create a certain social positioning. In the present study, we are concerned with the sociocultural positioning of the spectrum of individuals involved in alternative parenting, including gays and lesbians and their children, as well as single heterosexual women who decided to mother a child with a gay man, so providing an additional perspective to the way households with gay fathers operate. We are particularly interested in examining the language used by such individuals when describing their family constellations to others in order to shed light on the newly evolving identity of alternative families.

### C. Language and Gay/Lesbian Parenting

The connection between language and alternative parenting is clearly an understudied topic. The few studies that do exist have focused on English-speaking cultures, examining talk about controversial issues, such as the right of gays and lesbians to parent children<sup>187</sup> and the need or lack thereof for a male role model in lesbian households,<sup>188</sup> children growing up in same-sex families as victims of homophobic bullying,<sup>189</sup> and general debates supporting or opposing gay/lesbian parents.<sup>190</sup> For example, Clarke and Kitzinger analyzed conversations on British and American talk shows hosting gay/lesbian parents and suggested that such parents typically adjust their linguistic choices to fit heterosexual framing and adopt an apologetic tone when discussing their family situations.<sup>191</sup> Such framing is accomplished through host questions that call into question gays' and lesbians' right to create families or by the host's oppositional positioning of

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186. See generally, QUEERLY PHRASED: LANGUAGE, GENDER, AND SEXUALITY 3 (Anna Livia & Kira Hall eds., Oxford University Press 1997) (containing a compilation of essays on the topic).

187. See, e.g., Victoria Clarke, *What About the Children? Arguments Against Lesbian and Gay Parenting*, 24 WOMEN'S STUD. INT'L F. 555, 555-70 (2001) [hereinafter Clarke, *What About the Children?*] (discussing various arguments against gay parenting).

188. See Clarke & Kitzinger, *Planet Lesbian*, *supra* note 170, at 137-39 (exploring the necessity of male role models).

189. See Victoria Clarke et al., *supra* note 170, at 532-33 (identifying children's challenges with bullying when they are victims because of their different family dynamic).

190. See Clarke, *We're all Very Liberal*, *supra* note 170, at 2 (discussing general views of gay/lesbian parenting).

191. Clarke & Kitzinger, *Talk Shows*, *supra* note 170, at 212 (describing this as a tactic used by participants to minimize the 'disability' of homosexuality that impairs the ability of lesbians and gay men to integrate into heteronormative structures).

herself as a representative of heterosexual viewers against a homosexual guest. In such a context, an open-minded host is one that allows the “controversial” parent to defend him/herself.

Clarke and Kitzinger identified six thematic categories that arise in discourse sympathetic to gay/lesbian parents, which reflect an overall tendency for “normalization,” such as an attempt to incorporate gay/lesbian families into mainstream practices.<sup>192</sup> They contend that these categories, both based on the semantic content and the ideological function of gay parents’ statements, inform our understanding as to the sociocultural meanings of gayness and lesbianism.

The first category is “I’m not a lesbian/gay parent.”<sup>193</sup> In placing themselves in this category, gay/lesbian parents reject the juxtaposition of the terms gay/lesbian and parent, on the assumption that parenting is the same socially, whether gay/lesbian or straight. Second is the category “we’re just the family next door.”<sup>194</sup> In this instance, gay/lesbian parents amplify their ordinariness by describing their daily routine as resembling just what is observed in an average heterosexual household. Third comes “love makes a family,”<sup>195</sup> where love in a home with same-sex parents is acceptable as a last resort: a loving gay/lesbian relationship is positioned as preferable to a loveless and dysfunctional heterosexual family. Fourth is “God made Adam and Steve,”<sup>196</sup> which aims at fitting gays and lesbians into a religious (Christian) ideology. Next is the category “children as ‘proof,’”<sup>197</sup> where heterosexuality or conventional gender identities of children growing up in gay/lesbian families provide evidence to refute the supposed detrimental effects of being raised by same-sex parents on the child’s healthy psychosexual development, such as giving rise to a next generation of gays/lesbians. Last is the category of “the benefits of growing up in a lesbian/gay family.”<sup>198</sup> This category stresses the fact that children raised in gay/lesbian families are always planned; consequently, they always experience love and the feeling of being wanted. It also emphasizes that the non-normative identities of such parents exposes their children to diversity, tolerance, and pluralism very early in life.

The semantics in the discourse of gay/lesbian parents point to “bland and apolitical language, avoiding any discussion of overtly political concepts

192. *See id.* at 202 (noting different themes used by talk shows to normalize lesbian and gay parenting, serving to fit these families into the larger vision of society).

193. *Id.* at 202-03.

194. *Id.* at 203-05.

195. *Id.* at 205-06.

196. *Id.* at 206-07.

197. *Id.* at 207-10.

198. *Id.* at 210-11.

such as power and oppression, and of feminist and lesbian/gay values. They are also careful not to claim that their parenting is “different from, or better than, conventional parenting.”<sup>199</sup> Clarke and Kitzinger interpret such linguistic practices as implicit consent to heterosexism, which, they argue, is promoted by the various talk shows where gay and lesbian parents are not really afforded an opportunity to speak of their experience as parents but rather are expected to explain how they aspire to fit into mainstream, heterosexual structures such as marriage or the nuclear family. The different categories are summarized in Table 2.

*Table 2: Clarke and Kitzinger’s Thematic Categories in Talk Shows Discussing Gay/Lesbian Parenting*<sup>200</sup>

<i>Category</i>	<i>Meaning/Purpose</i>
“I’m not a lesbian/gay parent”	Rejection of the notion ‘gay/lesbian parenting’
“We’re just the family next door”	Resemblance to ordinary households
“Love makes a family”	Last resort love
“God made Adam and Steve”	Consistency with Christianity
“Children as ‘proof’”	Children may end up gay/lesbian
“The benefits of growing up in a lesbian/gay family”	Children are planned, loved, and exposed to diversity & pluralism

The configuration of new-type families is not “equal” to that of traditional families, and legal principles, such as “equality” or even “substantive equality,” are insufficient for handling the complexities in the emerging identity of alternative families. We focus, therefore, on the variety of linguistic devices parents in alternative families employ to describe their families in an attempt to identify personal, social, and legal gaps they expose. The question we address is how the legal system should address these gaps. Why such a discussion is necessary has been stated by Mae Kuykendall, who examined language used to describe gay marriage in the United States:

The explosion of gay speech, answered with a legal Unsayings in the marriage context, requires the overt use of linguistic manipulation and forms of artifice that inflict gratuitous harm on individual gay people and that harness public policy to attack the self-confidence of the citizenry at large in their project of collective definition through common making of

199. *Id.* at 211.

200. *Id.* at 202-211.

meaning in daily speech. Marital codes that seek to freeze public meanings about intimate associations are at odds with the experimentation and robustness, indeed the orneriness, of American speech.<sup>201</sup>

Our objective is thus to examine the self-identity of gay and lesbian individuals in the context of their nontraditional family constellations and explore how their identity formation and articulation intersect with language, legal regime, and Israel's current sociocultural climate.

## V. METHODOLOGY

The study carried out here is qualitative and is based on data collected from twelve participants, who were each interviewed concerning their specific family set-up. A description of the participants, method of data elicitation and transcription, and the categories of linguistic analysis performed, are provided below.

### *A. Participants*

Data were collected from twelve parents living in alternative families. Our study consisted of a wide variety of new-type families. One couple (each partner interviewed separately) consisted of cohabiting lesbian women, raising twin girls, who at the time of the interview were eight-and-a-half years old. Two separate female participants were heterosexual women who each decided to mother a child with gay men cohabiting with their partners. Another was the gay partner of a biological father (who was himself a subject) to a six-month-old baby boy; the baby's mother is a lesbian woman cohabiting with her life partner who has a child of her own, fathered by a different gay man living with his own life partner. Another was a gay man who fathered twin girls with a heterosexual woman; the mother was also an interviewee. A full list of our subjects can be found in Table 3.

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201. Kuykendall, *supra* note 164, at 391.

Table 3: Subjects

<i>Participant</i>	<i>Family Status</i>	<i>Children + Age (at time of interview)</i>
R1	Non-biological lesbian mother	Twin girls (8.5 years)
E	Biological lesbian mother	Twin girls (8.5 years)
S1	Biological heterosexual single mother (with gay father)	Boy (8.5 years)
S2	Biological heterosexual single mother (with gay father)	Two girls (2 and 5 years)
J	Gay partner of a biological gay father	Boy (6 months)
O	Biological gay father (with lesbian mother)	Boy (6 months)
K	Biological lesbian mother	Girl (3 years); partner pregnant
A	Biological gay father	Twin girls (2 years)
R2	Biological heterosexual mother (with gay father)	Twin girls (3.5 years)
G	Biological gay father (with heterosexual mother)	Boy (1.5 years)
S3	Biological gay father (with heterosexual mother)	Girl (3.5 years)
P	A lesbian woman married to another woman	Intends to have children

Subject recruitment for the study was difficult. Potential participants were told they would be interviewed for a study of alternative families, and that they would be kept anonymous. Some declined to take part in such a study out of fear of exposure and a desire to protect their children. Such reluctance is, perhaps, an additional indication of the difficulties that parents leading a non-standard family-life experience. Due to the difficulty of getting subjects, we decided to carry out a qualitative rather than a quantitative study that provides an in-depth analysis of the speech of individuals willing to discuss their unique family situations openly.

Each subject participated in an approximately hour-long, semi-structured



interview,<sup>202</sup> based on a questionnaire we designed in advance and adjusted to fit each interviewee's specific experience. The interviewees were given the option to focus on a period of their choice, such as pregnancy, birth, after birth, or parenthood, in their response to each question. The questionnaire consisted of fifteen main questions designed to elicit responses concerning different aspects in the formation of self-identity of alternative families. These included four broad categories of questions which we title *general*, *pre-family-forming*, *family-internal*, and *family-external* questions. Table 4 lists the questions included in each of the categories.

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202. See New-Type Family Interviews (on file with authors). As promised to protect the confidentiality of the interviewees, the dates of the interviews and their locations have been withheld. The interviews were audio taped and transcribed. The transcripts were not transformed into phonemic or phonetic transcription, since the authors' primary focus in this study is on the thematic content expressed. Thus, information specific to the spoken modality, such as pausing or other prosodic features, was ignored. Four of the interviewees refused to be recorded, and therefore minutes of their interviews were taken by the interviewer. All subsequent footnotes quoting speech from the interviews should be understood as deriving from the transcriptions and/or minutes on file with the authors of this article. The content of such footnotes has been verified by the *Journal of Gender, Social Policy & the Law*.

Table 4: Example Survey Questions

<i>Category</i>	<i>Questions</i>
General	<ul style="list-style-type: none"> <li>◦ How would you define your family status?</li> <li>◦ If you had to describe the gap between the real vs. the desired state of affairs, how would you characterize it?</li> <li>◦ What were your considerations in choosing where to live?</li> <li>◦ Are you getting any professional counseling? If so, for what purpose?</li> </ul>
Pre-family-forming	<ul style="list-style-type: none"> <li>◦ What was your motivation for creating a family?</li> <li>◦ Have you done anything to establish your couplehood legally?</li> <li>◦ What were your considerations in choosing the specific means for having the child (e.g., sperm donation, gay/heterosexual partner, etc.)?</li> <li>◦ Did the decision to have a child precede or follow your coming out of the closet?</li> <li>◦ Did you feel that you belonged to a specific community before having a child?</li> <li>◦ Do you feel that in forming a family you have performed some sort of feminist act?</li> </ul>
Family-internal	<ul style="list-style-type: none"> <li>◦ What kinds of specific difficulties do you experience within the family?</li> <li>◦ Do you see your family unit as lacking or whole?</li> <li>◦ What is the division of labor and roles within your family?</li> <li>◦ Is being the biological parent of your child significant in any way?</li> <li>◦ How would you describe your relationship with your child? Has your being a special kind of family affected your relationship?</li> </ul>
Family-external	<ul style="list-style-type: none"> <li>◦ What kinds of social difficulties have you come across (e.g., with caregivers, teachers, extended family)? Have you faced any particular types of responses or different terminology?</li> <li>◦ Have you encountered any kind of institutional difficulties (e.g., with Social Security, social benefits, healthcare systems, schools)?</li> <li>◦ Are there special financial problems that are particular to your family situation?</li> </ul>

### B. Categories of Linguistic Analysis

Our sociolinguistic analysis of the dataset is thematic in nature. The analysis relies on direct and indirect linguistic indices used for sociocultural positioning in discourse.<sup>203</sup> *Direct indices* consist of explicit mention of social category labels, including noun phrases such as “stay-at-home mom,” and possible qualifiers, such as adverbial phrases, adjectival phrases, and clausal complementation, for example, “the marriage thing is not an important thing for me personally.” Additional indices include the juxtaposition of labels with other social categories, e.g., the mention of “alternative family” and “same-sex parents” in a single discourse turn.<sup>204</sup> *Indirect indices* refer to implicit pragmatic processes that require inferential work on the part of discourse participants, such as presupposition and implicature.<sup>205</sup> Presupposition is the common, unchallenged, non-controversial ground shared by the speakers in a given discourse context—for example, the idea that gay/lesbian parenting is fraught with difficulties associated with the sexual identities of the parents. This presupposition framed the interview so as to allow for open discussion of the complexities that arise in the different family situations discussed.

Implicature concerns meanings that speakers express beyond the literal meaning of the words they use. For example, the term “partner in parenting”<sup>206</sup> was used by a gay father to describe the particular relationship between him and the heterosexual woman with whom he fathered his twin daughters. This terminology implies a contractual nature to the relationship that is not generally apparent in discussions of heteronormative parenting, emphasizing the father’s active involvement in the upbringing of the children.

A related indirect linguistic index is evaluation as a reflection of *discourse stance*. John DuBois describes such evaluation as a tripartite discursive process of object evaluation, self positioning, and alignment with other(s), in which stances feed on one another in interaction by

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203. See Bucholtz & Hall, *supra* note 167, at 585 (outlining sociolinguistic indices and approaches).

204. See Harvey Sacks et al., *A Simplest Systematics for the Organization of Turn-Taking for Conversation*, in *STUDIES IN THE ORGANIZATION OF CONVERSATIONAL INTERACTION* 7, 27-28 (Jim Schenkein ed., Academic Press 1978) (identifying a “turn” as a basic conversational unit used by a discourse participant in order to perform a social action in a given discourse context, e.g., asking a question).

205. See GILLIAN BROWN & GEORGE YULE, *DISCOURSE ANALYSIS* 28-33 (Cambridge University Press 1983) (presenting examples and information on presupposition and implicature).

206. All Hebrew terms in the dataset are translated into their English equivalents for ease of exposition.

diverging or converging, and so create newly evolved stances.<sup>207</sup> A relevant example is the answer one of the lesbian mothers gave in response to the question, "How would you define your family status?" She said, "As far as I'm concerned, it's possible to say married plus two." She evaluated the term "family status" appearing in the question, and then considered the interviewers' identity—heterosexual married mothers—and aligned her answer with what "family status" typically means in heterosexual terms by choosing the word "married." She then diverged from this concept, explaining what "marriage" means for her: "The concept that is used . . . I'll explain what is the nature of the relationship or the essence of the relationship." This is where the text reflects whether the speaker perceives herself as adhering to mainstream, conventional norms or pursuing an "alternative" path.

In order to determine the thematic content of the interviews, a template was created for each interview, divided into the four broad categories mentioned above: *general*, *pre-family-forming*, *family-internal*, and *family-external*. The answers to the questions in each category were examined in terms of their direct and indirect indices. We tracked the vocabulary items, presuppositions, and implicatures they contained, as well as the discourse stance they reflected.

For ease of exposition, the present discussion focuses on a subset of the indices analyzed: vocabulary items and implicatures. These were chosen since they represent both overt and covert meanings that parents in alternative families express when portraying their family situation. We noted the explicit terminology parents selected for labeling family-related notions, and analyzed the implicit ideas, beliefs, concepts, and emotions underlying their statements. Such an analysis provides a window into the reality of new-type families, as perceived by parents living in such settings.

## VI. FINDINGS

Individuals who wish to create a family outside the mainstream context of marriage have no straightforward option for conceiving children; as a result, the emotional, mental, and financial resources spent in the process of family formation are immense. Parents used terms like "complicated," "non-normative," "problematic in our society," and "no options," in describing a range of painful experiences: being forced to contact bodies such as "Alternative Parenting" or "New Family" in order to find a potential candidate for joint parenting;<sup>208</sup> having to interview and

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207. See John W. DuBois, *The Stance Triangle*, in *STANCETAKING IN DISCOURSE: SUBJECTIVITY, EVALUATION, INTERACTION*, 139 (Robert Englebretson ed., 2007) (describing the use of stances in conversations).

208. See *generally* Alternative Parenting Israel, <http://www.alp.org.il/index.htm> (last

sometimes even date prospective partners in order to get to know them better; being rejected by a potential partner; or undergoing a host of traumatic medical procedures for the purpose of insemination.<sup>209</sup> Interviewees aspire(d) to form families and articulated that desire using language like “fantasy,” “to have an heir,” or “not be to be old and childless.” The last worry appears to be as basic among gay potential parents as it is among heterosexuals. A biological lesbian mother phrased it succinctly: “Having kids is not a demonstration or a form of opposition; we simply want to have a family.”<sup>210</sup>

Individuals’ strong drive to become a parent against all odds makes sense in the context of Israeli society, which cherishes the family institution and perceives it as one of its most defining trademarks.<sup>211</sup> It follows then, that in such a society, members who create families are highly valued. This fact is reflected in the sense of urgency expressed in some of the interviews. Terms such as “biological clock” and a desire “not to miss the train” were used to describe the interviewees’ motivations for creating a family, suggesting that a non-parent is perceived as someone who is not fully fulfilled. In fact, some of the gay fathers in the sample defined family forming as an opportunity to be perceived as “normal,” “stable,” “upgraded,”<sup>212</sup> and “doing something with your life,” implying that having a family in Israel is the conventional, expected, and publicly valued course of personal development. Two of the gay interviewees told us explicitly that after coming out of the closet to their mothers, who were at first devastated by the news, they were then asked to promise them not to give up having children.

When asked to define their family status, parents used a variety of terms to label their particular family constellations, including “alternative family,” “two mothers,” “same-sex parents,” “groups,” “partners,” “family unit,” “situation,” and “weird situation.” This host of descriptions reflects

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visited July 25, 2009); New Family, <http://www.newfamily.org.il/text/english> (last visited July 25, 2009) (highlighting organizations whose mission is to help individuals form families who otherwise do not wish, or are unable, to get married).

209. One of the biological lesbian mothers was even unable to recall any of the details of her insemination. See *New-Type Family Interviews*, *supra* note 202.

210. One biological gay father explained that becoming a parent is a possibility to mature and develop, an option not readily available for gay men, who are often deemed non-suitable “parent material.” Another non-biological gay father was told by a member of his extended family that he would not become a parent since he is gay. See *New-Type Family Interviews*, *supra* note 202.

211. AMIA LIEBLICH, *SEDER NASHIM [WOMEN’S ORDER]* (2003) (discussing the notion of family in Israel through interviews with Israeli women, who live in different family settings, e.g., single mothers, widows, and lesbians, among others).

212. The word in Hebrew is “meshudrag,” the translation of which is “upgraded.” It is used in the sense of being “evolved”—a gay parent is more evolved than a gay man with no children.

a linguistic deficiency in describing the exact familial relations in new-type families: the term "family" is simply inadequate to the task of accurately describing these creative clans.

These findings tie in with the unique family-internal difficulties new-type parents described in their interviews. The most salient obstacle seems to be related to defining the scope of the family unit, which is not pre-determined or straightforward in new-type families as it is in traditional ones, as a basis for determining the range of responsibilities each parental figure has towards the child. In the interviews with the lesbian mothers, terminology such as "stay-at-home mom," "work full-time," and "the role of the breadwinner" suggests that much like in heterosexual families, earning power may determine how much time a parent spends with the children, with income inversely proportional to amount of time spent with children. Other interviewees painted a more complex picture of a household in which it is not at all clear who may be considered immediate family: the biological parents, all parent figures, or some combination. References to "inner circle of me and the children," "outer-circle—their father," and "beloved uncle" imply that parents in alternative families may perceive their position as undefined and impermanent, an implicature which goes hand-in-hand with the already noted absence of appropriate terminology to describe their formal family status.

The problem of inadequate vocabulary also surfaced in the interviewees' descriptions of their contact with various official bodies, such as tax authorities, social security, and governmental offices. They identified relatively few practical problems and focused instead on how such institutions provide no options for new-type parents in choosing a label that captures both their formal and psychological status. A biological gay father complained that he has "no category" in official forms, that he is forced to "add a rubric," suggesting that formally, their family status is not recognized by the state as viable. Interviewees often referred to the absence of an explicit label to capture their marital status and described how they are compelled to characterize themselves as "single" in formal contexts. One lesbian interviewee was actually married in a semi-religious ceremony conducted by a female rabbi and including the exchange of wedding bands. She perceives herself as being married and calls her partner "my wife." Another biological lesbian mother said that she introduces herself as being "unlawfully wedded" in order to capture the difficulty she has expressing the authentic reality of her family relations. Her words indicate her desire to inhabit a clear, recognizable status beyond the context of her immediate family.<sup>213</sup> The same interviewee stated that

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213. She stated: "I [would] love this status to say that I'm married . . . These [formalities] are the tools the public has to notice there are two [of us]." Her statement

although she is legally defined by the government as a single mother, a status that entitles her to certain social security benefits, she refuses, “on principle,” to receive any financial support for which she is eligible.<sup>214</sup> She demanded that the government provide what she termed “a social, external truth” that would capture her family status, suggesting that the current situation, even if financially favorable to her, fundamentally fails to satisfy her desire to be legally recognized as a married lesbian mother. In order to get around this gap, most of the interviewees noted that they had changed their family name to include that of their partner in parenting, mainly for the children’s sake.<sup>215</sup> Name changes are a drastic measure that parents in alternative families are willing to take, though such a step may contradict in some way their mental or emotional state, or even parts of their identity. Moreover, it does not guarantee recognition of their family as a “family unit.”

The heterosexual women in our study, all of whom had children with gay fathers, seemed less concerned with formal status. Their lack of anxiety may result from their clearly defined legal status as “single mothers,”<sup>216</sup> which is how two of the three defined their family status. The third mother referred to herself as “single” but noted that psychologically she feels as if she has “a better family than most people.” She is clearly focused on the positive family dynamic of which she feels fortunate to be a part.

Indeed, all of our interviewees described good, solid, strong, loving, emotional ties with their children, who were often referred to as being “beloved,” “attached,” and “lucky.” However, in describing their relations with other family members, they exhibited far more variation. For example, the heterosexual mothers and gay fathers who co-parented often described their relationship by using phrases such as “good friends,” “very good relations,” “special dynamic,” and “friendship,” all of which imply deep and positive emotional investment. At the same time, some of the descriptions contained terms such as “annoying,” “disagreement,” “lack of trust,” “trap,” “takeover,” and “permission,” reflecting the difficulties such family relations often raise with respect to logistics of sharing the child’s

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implies that marriage carries a certain formal status that reflects cultural affirmation and that the pursuit for this cultural affirmation should be available to all humans, including lesbians. See New-Type Family Interviews, *supra* note 202.

214. “I am married!” she declared, and continued, “This is what upsets me. You know what pisses me off? THIS!” See New-Type Family Interviews, *supra* note 202.

215. One heterosexual mother, whose daughters bear their gay father’s last name, claimed that she felt it would help deal with deviations, although she is psychologically not connected to the change. A similar statement was made by a non-biological lesbian mother who felt mixed about changing her name but thought it was important for the kids. See New-Type Family Interviews, *supra* note 202.

216. See The Single-Parent Families Act, 1992, S.H. 142 (defining a single parent as an Israeli citizen who is not married, is without anyone known as her common-law spouse, and whose child is in her custody).

time. Nonetheless, many interviewees mentioned the extreme measures that new-type parents sometimes take in order to resolve conflict situations, either by receiving help from friends and extended family members, or by seeking professional help, including legal mediation or psychological counseling, with the child's best interest in mind.<sup>217</sup>

The amount of love, care, and concern new-type parents show toward their children is also reflected in the interviewees' descriptions of contracts drafted for specifying exactly how their children would be raised. The descriptions were long and detailed, including information regarding visitation, sleeping arrangements, healthcare, finances, schooling, extra-curricular activities, or, as one mother put it, "everything."<sup>218</sup> These contracts demonstrate the careful planning, thorough evaluation, and extensive consideration of the child's wellbeing, perhaps to a greater extent than is usually found in heterosexual families. Many of the parents, however, mentioned difficulties in adhering to the contracts, reflected in their use of expressions such as "flexibility" and "degrees of freedom" in interpreting clauses of the contract sometimes necessary after the child's birth, since "a child is not an object" or "a robot."<sup>219</sup> Nonetheless, even interviewees who described difficult breaches of contract, which resulted in a loss of trust between parents, stated that the parties eventually reached agreement together via discussion, mediation, legal intervention, or psychological counseling.

An alternative family comes with what one of the interviewees termed "additional colors," a difference that requires parents to explain to their children their life choices, especially as they grow older. Parents expressed a need to prepare their children for possible social reactions denying the very existence of new-type families. One of the lesbian interviewees

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217. One of the heterosexual mothers, whose relationship with her gay co-parent was rocky at first, strongly recommended the use of professional counseling to ensure that the child's basic needs are met. She was unable to manage without such help, even though she and her partner in parenting are both employed as mental health professionals. She emphasized the significance of resolving conflicts by comparing an unborn child to a *fruit*, who must be remembered and whose needs must be considered, so implying that a child is a product of love even when born into an alternative setting and that parental commitment in such a setting is taken seriously even before the child is conceived. See *New-Type Family Interviews*, *supra* note 202.

218. Another heterosexual mother mentioned that since both she and the gay father with whom she had her daughters are secular Jews, they decided to include a clause in the contract stating that if one of them decides to become an orthodox Jew, the other parent would gain custody of the children. See *New-Type Family Interviews*, *supra* note 202.

219. Much of the adaptation concerned sleeping arrangements of very young babies, whose mothers were not able to part with them and let them spend the night over at their fathers', as contracted. The mothers were described as "distracted," "anxious," and "throw[ing] a fit," in order to capture the way they reacted to the idea of leaving their babies with their gay fathers overnight. See *New-Type Family Interviews*, *supra* note 202.



reported that she witnessed one of her daughters being told by a nanny in the playground, “no, it’s not possible to have a family with two mothers.” Situations of this type were described by parents as a “source of conflict” for the child and a “tension in day-to-day life;” the parents described their situations as “not the majority” or “a special kind of family,” and all of these terms imply that the children may have to grapple with the fact that society’s perceptions of their families may be at odds with their inner sense of family. Some of the interviewees perceived familial discussions with their children as opportunities to instill important social values, such as “diversity” and “acceptance of others,” and to help their children develop a “broad world view.” This attitude suggests that parents in new-type families are well-equipped to handle issues of diversity, since they inherently experience and are forced to cope with them early on.<sup>220</sup> Moreover, they assert that when a child is born into a special kind of family, in which he experiences love, care, and security, the fact that the setting is nontraditional does not affect his happiness, or ability to grow up into a self-confident, mature person.<sup>221</sup>

Interviewees clearly expressed their sincere concern for the possible ramifications their life choices might have on their children, using phrases such as “dilemma,” “courage,” “to cope,” “problem for the child,” and “burden.” These suggest that, in a society where new-type families are not always well received, the decision to have a child requires full commitment on the parents’ part as well as immense internal and social resources to handle the child’s potential stigmatization. Several of the interviewees noted that commitment may have affected their choice of where to live—many chose Tel Aviv—in seeking a “liberal,” “tolerant,” “pluralistic” environment, in which they would feel comfortable raising their children and where their children would be less likely to encounter social rejection.

The social problems to which the new-type parents we interviewed alluded were quite subtle. They had little experience with blunt, negative social reactions to their family settings and did not portray a sense of hostility, lack of acceptance, or alienation. In fact, a non-biological lesbian mother stated that her status as a parent has never been questioned by anyone from healthcare providers, teachers, her children’s friends’ parents, or her partner’s extended family, and that she felt “very fortunate” not

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220. See Clarke & Kitzinger, *Talk Shows*, *supra* note 170, at 210-11 (discussing alternative families as a benefit when teaching diversity).

221. See James C. Black, *Same-Sex Parents & Their Children’s Development*, in *SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA* 95 (Donald J. Cantor et al., eds., Wesleyan University Press 2006) (describing positive effects of same-sex parenting); BILL ESKRIDGE & DARREN SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 197-202 (2006) (reviewing the benefits of same-sex partnerships to family life, as evidenced in Scandinavian countries).

having faced that “hurdle.” Her words acknowledge that the world outside the alternative family often does call into question the parental status of the non-biological parent, and that attitude, or the fear of encountering it, may be felt within many circles.

Parents did describe what they saw as inauthentic expressions of social acceptance. For example, a non-biological lesbian mother spoke of being treated as “society’s token flag” on school celebrations of Family Day, implying that acceptance of her family setting by the school is designed to portray the institution as liberal, rather than to truly expand the social boundaries of the community it serves. Instead, she would have liked to be regarded as a regular family “throughout the year.”<sup>222</sup>

In general, when parents were asked to describe the gap between the existing and ideal state of affairs, all expressed a basic desire for a simpler reality in an accepting environment. They used expressions such as “huge burden,” “radar is always on,” and “ad nauseam explanations,” to describe current situations, suggesting that parents in new-type families feel subject to constant public scrutiny. They described a wish to experience a different public perception of their family life in a society that “banishes stigma,” “dissolves prejudices,” and which considers their families “completely regular,” “more normative,” or even “takes them for granted” as parents. They expressed a desire for a society in which “diversity” is valued and “appreciation” towards alternative families is expressed, in contrast to what they experience and observe in day-to-day life.<sup>223</sup> Some interviewees could not envision such a social transformation, saying, “it’ll never happen,” while others were more optimistic and expressed more “faith” in the “gradual, incremental process” of acceptance. A biological lesbian mother compared the classic family to a rigid mold, suggesting that society is simply not yet equipped to deal with families that do not fit that mold. “The framework no longer exists, it’s not suitable anymore. The puzzle is different now, it has more pieces.” These sentiments suggest that parents in new-type families are seeking recognition.

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222. Similar implicit references to tokenism were found in other interviews as well, where phrases such as “anecdote,” “a turn on,” “such a nice idea that I told my husband, as long as it does not concern [our] own son,” and “the town’s lesbian family,” were used to portray people’s reaction to an alternative family. See *New-Type Family Interviews*, *supra* note 202.

223. A biological gay father told of how proud he felt receiving a gift from an old uncle of his in honor of his baby’s birth with a card stating “I commend you for your wisdom and foresight,” implying that the creativity with which the child was brought into this world was a source of joy and even admiration. One of the gay biological fathers mentioned that he has a problem with the *prima facie* assumption of being a straight father. Thus, when going with his daughter to the park, it is important for him to position himself as a non-heterosexual married father, in order to reject society’s assumptions. He feels asserting his identity and family role is necessary for the sake of gay men who are not fully accepted by their families and friends. See *New-Type Family Interviews*, *supra* note 202.

## VII. DISCUSSION OF FINDINGS IN TERMS OF RECOGNITION

New-type families do not suffer historical, economic, and political marginalization in Israel. However, their desire for recognition should be considered in the social context within which they are made and the particular political circumstances in Israel. Nancy Fraser's emphasis on status illuminates an important dimension of the experience of the alternative family. Since Israeli institutions do not officially recognize new-type families, those who create them are not regarded or treated as *peers*, worthy of participating fully in social life. Thus, the conditions of *reciprocal recognition* and *status equality*<sup>224</sup> are not fulfilled.

Our findings clearly indicate that new-type families consider themselves to be real families. Children in alternative families receive unconditional love and care from their biological parents, their parents' life partners, and their extended or chosen family members. The emotional resources invested in these children are exceptional, with parent figures showing active involvement in their children's life in ways not typically observed in classic families.<sup>225</sup> Moreover, the decision to have a child in new-type families is always a conscious one, with an eye to the consequences the family composition may have on the unborn child and careful attention to protecting that child. Highly detailed contracts are common. Such contracts have often been compared to the kind drafted for couples divorcing, giving rise to the claim that parents in alternative family settings do not have their children's best interest in mind since they are intentionally placing them in a divorce-like reality. However, this comparison misses some fundamental differences between divorced couples and new-type families. Divorce is a new, changed situation imposed, often traumatically, on a family. A new-type family is a given setting into which a child is born, which remains stable and supporting, as long as the agreement is observed. This adherence has been found to be extremely challenging in some cases, resulting in head-on conflicts between the parents, who, nonetheless, made the utmost efforts to arrive at a resolution through mediation or psychological counseling. The parties' objective is to build a strong family structure for the child, rather than to dissolve a relationship that no longer works, as is the case with divorce. Thus, in the face of even the harshest problems, there is great willingness on each side to overcome so that the child continues to benefit from supportive, cooperative parent figures. In addition, parents in new-type families might feel that in the absence of legal background and clearly

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224. Fraser, *supra* note 136, at 24 (arguing that the institutionalization in marital law of heterosexist cultural norms denies parity of participation to gays and lesbians).

225. For example, some interviews revealed that both parents take the time to attend parent-teacher conferences at the school together.

defined roles of their principals, it is necessary to define contractual activities more formally.

The extent to which new-type parents feel confident as parents has been linked to their self-acceptance and sense of wholeness as people. Parents with a strong sense of self describe their family setting as a natural habitat for developing values of pluralism and mutual respect. Perhaps since creating a new-type family entails "coming out of the closet," most interviewees identified as self-confident and self-assured. It is interesting to note that one of the heterosexual mothers claimed that she too "came out of the closet" when she shared with others her decision to remain unmarried and create a family with a gay male partner.

At a societal level, the findings suggest that parents in new-type families neither experience social rejection nor suffer alienation, which is perhaps attributable to the fact that most participants live in Tel Aviv, one of the most liberal and progressive cities in Israel. Most had trouble recalling negative reactions from others regarding their family setting, suggesting that social aversion has not proved a problem for them.

However, the absence of formal status and the non-recognition to which it gives rise have emerged as critical problems. All of the interviewees alluded to a gap between their formal status to the outside world and their status in their own minds, a gap that interferes with the development of cognitive self-respect. A person evaluates herself in relation to society, examines the rights assigned to her compared to others, and thus develops a sense of social recognition. In Israel, however, members of new-type families face many unclear legal situations. For example, although it is important for same-sex couples to create a cohabiting agreement,<sup>226</sup> there are legal limitations on their ability to sign a binding prenuptial agreement.<sup>227</sup> Some of the interviewees also mentioned their fear that the signed contract is not enforceable, since they do not know whether a family

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226. See THE NEW FAMILY ORGANIZATION, THE NEW FAMILY GUARD 19-22 (2007) (showing that while signing an official co-habiting arrangement is always recommended for non-married couples, it is even more important for same-sex couples who need to make special efforts to convince the various institutions that their relationship is in good faith).

227. See Family Court Act, 5755 1995, (Isr.) S.H. 393; The Proprietary Relationships Between Couples Act (1973), S.H. 267 ("the 'Prenuptial Act'"). Parents in alternative family settings can have a "family agreement" as permitted under the Family Court Act. However, for the sake of arranging financial and other related issues between couples, agreements based on the Prenuptial Act are the more popular instrument used frequently by heterosexual couples. Agreements according to the Family Court Act on the other hand are a side route. Though the practical implications of either agreement are the same, the ability to arrange a prenuptial has symbolic value. Moreover, the presumption underlying Prenuptial Act agreements is of shared proprietorship. Thus, if the statute is applicable to same-sex couples, it might lead to far-reaching consequences where such couples without an arrangement are presumed to share their property the same as married or unmarried heterosexual couples.

court can approve an arrangement for parenting a child.<sup>228</sup> Thus, in the absence of a clearly definable legal status, such parents cannot enjoy the same rights other parents enjoy, and they subsequently suffer non-recognition at the social level.<sup>229</sup>

This cry for recognition fits within the broader context of Israeli reality, in which members of new-type families feel unrecognized or unacknowledged. For example, when the Family Court decided to allow two lesbian mothers to adopt each other's children, the two women responded: "Finally, the state officially recognized us as a family."<sup>230</sup> Arel, their teenage son, added: "Avital is my mother as much as Tal. We are family, and the decision will not change our daily life. But with respect to the state, it makes a big difference. This recognition is needed for all the ministries. Until today, we were not considered a family by the state."<sup>231</sup> Arel clearly perceives both women as his parents, as demonstrated in the tree diagram he used to portray his family structure.<sup>232</sup> However, he was forced to label Avital as his "father," for lack of an appropriate term.<sup>233</sup>

Members of new-type families aspire to experience their family life authentically. They are not interested in false affection, pity, sympathy, or other forms of insincere social acceptance. They simply wish to exercise their basic human right to become parents. In Israel, a family's authenticity derives from its resemblance to the traditional opposite-sex-based family. Recognition emphasizes the need to respect people's different choices as authentic. Russell Lord, one of the appellants in the Supreme Court case that approved the registration of five gay couples married in Canada as "married" by the Israeli Ministry of Interior,<sup>234</sup> commented:

228. Since such agreements involve an unborn child, the validity of the arrangements concerning her is questionable. Courts decide according to the best interest of the specific child and not according to an agreement drafted prior to her birth. In addition, socially speaking, there is little to no awareness of the significance of approving such agreements (albeit their legal complexity).

229. Cf. Laura Masnerus, *Child Born to Lesbian Couple Will Have 2 Mothers Listed*, N.Y. TIMES, Nov. 16, 2006, at N.Y. Region, available at [http://www.nytimes.com/2006/11/16/nyregion/16mother.html?\\_r=3&oref=slogin](http://www.nytimes.com/2006/11/16/nyregion/16mother.html?_r=3&oref=slogin) (presenting an example of a legal development that approved the listing of two lesbians as the parents on the birth certificate of their newborn in a decision by the Family Court in Burlington County, New Jersey, which will grant both mothers full parental rights and further the cause of recognition for gay and lesbian parents).

230. Adoption (TA) 48/97 Jarus-Hakak v. Att'y Gen. [2006] IsrDC .

231. See Tal Rozner, *Historia: Zug Halesbiot Eimetz Rishmit et Yaldeihen (History: Lesbian Couple Officially Adopted their Children)*, YNET, Feb. 12, 2006, <http://www.ynet.co.il/articles/0,7340,L-3214763,00.html>.

232. See Genealogy, <http://freepages.genealogy.rootsweb.ancestry.com/~pnlowe/loewenheim/g0000084.html>, (last visited July 25, 2009) (illustrating Arel Jarus-Hakak's genealogy).

233. *Id.* (displaying that Arel has a hyphenated surname, combining both of his mothers' ancestries).

234. HCJ 3045/05 The Ass'n. for Civil Rights in Isr. v. Chief Registrar of

All that we asked for is simply social recognition of us as a couple, equal in all respects to any other couple. We wanted to subjugate our shared responsibility to life like any other married couple and also enjoy the benefits that such couples enjoy. We wanted the common and normative track of every married couple, including the advantages and benefits involved. Therefore, the normal and expected track for us as a couple was to choose to get married. Canada granted us the option to fulfill our marriage and Israel granted us recognition in that marriage. For that we thank the state.<sup>235</sup>

Aeyal Gross argued that this decision to approve the registration<sup>236</sup> is a part of an attempt to “normalize” gays and lesbians into the socially desirable pattern, namely, “marriage,” which is perceived in Israeli society as the ultimate form of self-fulfillment.<sup>237</sup> However, the appellants view marriage and legal registration as the realization of their personal choice, rather than an obligation; they feel that they are no longer restricted in choosing their way of life, whether or not they opt to model their own relationships after traditional ones.

Parents in new-type families need societal symbols, such as clearly definable parent labels, acknowledging their family units’ legitimacy. In other words, what gay parents want is the opportunity to be viewed as valuable and valued members of society who contribute equally to Israel’s social fabric. They wish to free themselves of the paradox Israeli society imposes on them, simultaneously compelling them to become parents and failing to view alternative family configurations as legitimate families.<sup>238</sup>

Establishing a sense of belonging requires a supportive community, networking, a sense of security, and a feeling of connectedness. Such security is often the result of a strong sense of a shared sameness, something of which gays and lesbians are often deprived when they are marginalized as members of gay communities. Most of the interviewees in the sample stated that they do not feel they belong to a specific gay/lesbian community. The very fact of becoming a parent shifts adults’ focus to their

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Population, Ministry of Interior [2006] IsrSC.

235. Natasha, *Kol Kala Vekol Kala, Kol Chatan Vekol Chatan (Voice of Bride and Bride, Voice of Groom and Groom)*, HAZMAN HAVAROD (PINK TIME), Dec. 2006, at 14.

236. *The Ass’n. for Civil Rights in Isr.*, HCJ 3045/05.

237. See Aeyal Gross, *Does a Homosexual Have to Get Married Now Too?*, YNET OPINIONS, July 5, 2007, <http://www.ynet.co.il/articles/0,7340,L-3330933,00.html>.

238. See LEE WALZER, *BETWEEN SODOM AND EDEN: A GAY JOURNEY THROUGH TODAY’S CHANGING ISRAEL*, 179 (Columbia University Press 2000) (noting that gays and lesbians are not exempt from the pressure to marry and have children in Israel, which stems partially from Judaism’s emphasis on the family and partially from what is perceived as almost a national duty to procreate in light of the Arab-Israeli conflict). Overall, extreme pressure is also placed on individuals in Israel to be married in a religious ceremony—which is still the main, legally recognized form of marriage—and to have children shortly after, in the spirit of the Jewish Halacha.

children's wellbeing, a change fostered not when parents feel isolated on the basis of distinctive traits, but rather when they feel accepted as an integral part of society. This suggests that, at the state level, the conditions for social esteem are not met, and as a result gay and lesbian parents do not enjoy solidarity.

### VIII. CONCLUSION

Unfortunately, the reality of new-type families in Israel, apparent even to the seven-year-old character in the children's book described earlier,<sup>239</sup> has yet to penetrate Israel as manifested in its social and legal regimes. In Israeli reality, gay and lesbian individuals form new families despite the difficulties involved, and they provide their children with love and emotional support as in any other family. Yet, at the societal level, they experience passive tolerance at best or considerable objection at worst, as the state continues to close its eyes to the revolution in family formation that has taken place in recent years.<sup>240</sup> The state must take a stand and promote contested conceptions of the good. Liberal tolerance is not enough.<sup>241</sup> Only legal recognition of the new-type families, by enabling marriage, adoption, and prenuptial agreements, can establish social esteem and achieve "solidarity." The power of gay families lies in their ability to reshape the political, emotional, and legal understanding of what family is. The prerequisite for building a sense of positive difference is recognition from the state, which will further shape social attitudes.

The aim of this paper is by no means to reject the liberal notions of individualism and autonomy. Like Fraser, we perceive recognition as a matter of justice. Justice requires that "everyone has an equal right to pursue social esteem under fair conditions of equal opportunity."<sup>242</sup> Personal traits, temperament, and individual attributes influence the way individuals and families establish their identities, and hence affect the way we treat one another. However, since we postulate that the main struggle of new-type families revolves around recognition rather than equality, we

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239. See ATLAS & MISHALI, *supra* note 1 and accompanying text.

240. Cf. Ruth Eglash, *Study: 40,000 Children Have No Paternal Ties*, JERUSALEM POST, Nov. 16, 2006, <http://www.jpost.com/servlet/Satellite?cid=1162378407955&pagename=JPost%2FJPArticle%2FPrinter> (reporting on the growing number of children being born in Israel who do not know the identity of their fathers).

241. Cf. Chai R. Feldblum, *The Limitation of Liberal Neutrality Arguments, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS—A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW*, 55, 74 (Robert Wintemute & Mads Andenæs eds., 2001) ("[G]overnmental recognition of same-sex marriage will be difficult to achieve based solely on principles of toleration and fairness. In all likelihood, such recognition will require an explicit acknowledgment of a clash of moral principles, and a persuasive argument as to why gay relationships are as morally positive for individuals and for society as are heterosexual relationships.").

242. Fraser, *supra* note 136, at 28.

assert that liberal neutrality falls short of capturing the complexity of the situation and fails to provide a sufficient answer.

Understanding the connection between recognition and dignity is essential to fulfilling fundamental rights. If new-type families are not recognized as families, they cannot enjoy the right to family or to equal protection of the law. One non-biological gay father expressed his desire “to belong to the child-raising community,” indicating his deep commitment to parenting despite his status as an outsider. Recognition promotes a world in which he *already is*, rather than just *wants to be* part of the “parent community.”