# The Child's Worst Interests

## • • • *Socio-legal Taboos on Same-Sex Parenting and Their Impact on Children's Well-Being*

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**ABSTRACT:** This article questions the way in which the 'child's best interests' test is applied by Israeli courts in cases of children of same-sex parents. It argues that the reluctance to recognize same-sex parenting indicates that the child's best interests is a politicized concept, which looks at heterosexual ideology rather than at the child's specific circumstances. This ideology views the opposite-sex parental model as the ideal model and thus is wary of recognizing same-sex parenting because it also entails recognition of same-sex relationships. I identify this prejudice against same-sex relationships and parenting as the product of what I term cultural and legal 'heterophilia'. To the extent that the objections of judges and social workers to same-sex parenting (pursuant to this ideology) are based on fears of actual harm caused to the children because of their parents' sexual orientation, they are the product of homophobia.

**KEYWORDS:** adoption, child's best interests, custody, gender, parenting, same-sex marriage, sexuality, sexual orientation

The 'child's best interests' test is perhaps the most important legal test in parent-child law. It reflects the notion that raising children is not a merely private endeavor but something that society has a strong interest in. It is a highly ideological and politicized test, and the courts' treatment of children of same-sex parents demonstrates this clearly. The child's best interests principle is applied when something goes wrong (child neglect, abuse) or when an adult seeks to become a parent through legal intervention (adoption) or through the utilization of some form of assisted reproductive

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technologies. It is also applied in custody disputes between divorcing parents. Others, who do not need the help of either the medical or the legal system in order to become parents, are not subjected to any type of scrutiny pursuant to this test. The framework of a demand to obtain a 'license to parent' in advance from some intended parents but not others reflects a clear preference for certain family structures over others (Triger 2010: 413–415). The content of the child's best interests test is also ideological. While it can mean seeking what is the best interests of the individual child whose legal status is under consideration, in many cases this is an 'objective test', a legal term of art that means that we are looking not at the actual best interests of the specific child whose case is being adjudicated, but rather at the 'reasonable child' or at the best interests of a generic, imaginary child.

This article argues that although relatively advanced in its recognition of the rights of partners in same-sex unions, Israeli law is reluctant to recognize the unions themselves, reflecting a prevalent taboo on same-sex parenting. The law is thus hindering the promotion of the child's best interests at the expense of adherence to what the courts perceive as society's idea of a normative family. I call this approach 'heterophilia'.

Ideology and politics also taint the decisions of social services, which repeatedly rely on outdated empirical data that confirm their intuitions concerning gender roles and parental capabilities. The social services often fail to consider recent studies, which show that the child's best interests can be safeguarded by same-sex parents as well. This approach is a result of homophobia.

## The Child's Best Interests Test: A Brief Overview and Critique

Article 3(1) of the UN's Convention on the Rights of the Child of 1989 requires that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[1] The phrase 'best interests of the child' appears nine times throughout the Convention, and it applies to every decision concerning children (Morag 2010b: 39–40). The child's best interests is, by definition, a principle that derives its content and meaning from what the state believes would better serve the child's well-being. In some instances, this principle has little to do with the parents' notion of their own child's best interests. Nor does it take into account the child's own ideas about her or his own best interests.

The 2004 report of the Public Committee on Children and the Law, headed by Judge Saviona Rotlevi, reviewed and evaluated the basic

principles concerning the child and Israeli law and their implementation in legislation. The report specifically recommended that children be heard in certain procedures, for example, concerning their placement. However, these recommendations have not been fully adopted by the Israeli courts or the legislature (Morag 2009–2010: 86–89). In Israel, for example, it is mandatory to send children of certain ages to school, and home schooling is by and large prohibited, despite some parents' convictions concerning their children's education.

This principle is of merely declaratory value for children and parents whose lives are not interfered with by the legal or social services systems. Such interference can be compulsory (e.g., when parental neglect or abuse is discovered, or during custody disputes), or voluntary (e.g., when adults wish to become parents through adoption). Pursuant to the child's best interests principle, adoption is made available only to those who submit their lives to thorough scrutiny by the state's social services and its legal system (Triger 2010: 413). Consequently, the child's best interests principle does not apply to all children, and therefore its name is somewhat misleading in the sense that, as a practical legal test, it is not universal. This suggests that it is a product of the heterosexual nuclear family ideology at least as much as it is a product of sincere concern for children's well-being (ibid.). In the context of adoption, for example, Israeli courts have understood the child's best interests to mean that the child is better off growing up in a 'normative' family, which is comprised of two parents (as opposed to single-parent families) and is also 'normative' in its lifestyle (Barkai and Mass 1998: 7). While the existing case law concerning adoption (excluding second-parent adoption) does not refer to same-sex parents, it is clear that, in the eyes of the courts, a 'normative' family is one that is headed by two opposite-sex parents.

Repeatedly citing the classic work *The Best Interests of the Child* (Goldstein et al. 1996), Israeli courts adjudicating adoption cases have looked for a "permanent and stable familial structure";[2] "warmth, affection, and individual care";[3] and "security, permanence, a sense of belonging and support"[4] (Barkai and Mass 1998: 21). Strikingly, children who are up for adoption and who are old enough and perceptive enough to voice their opinions usually do not get a chance to do so. Thus, they are denied the opportunity to contribute to the process of figuring out their own best interests (Mass 2010).

The child's best interests principle has revolutionized parent-children relationships in that it marks an important departure from the notion that children are their parents' property (Morag 2010b: 16–17). Nevertheless, I contend that despite the language found in case law, this principle is widely applied in a manner that does not look at specific children's needs

and interests, but at general policy considerations that are politically and ideologically charged.

For example, under Israeli law, it is presumed that for a Jewish child whose father's identity is unclear, it is best not to know who the biological father is, if there is a chance that the father is a man who had had an affair with the child's mother while she was married to another man. The reason is that this would render the child a *mamzer*, a Halakhic category that makes the people who belong to it ineligible for marriage with another Jew, unless that person is also a *mamzer*. In other words, with regard to genetic information, the Israeli law presumes that it is in the best interests of the Jewish child to be able to marry a halakhically recognized Jew rather than to know the identity of his or her biological father. Only under very extreme circumstances can this presumption be overcome (Pogoda 2007: 813–814; Zafran 2003: 315).

## Socio-legal Taboos on Same-Sex Parenting

Until about three decades ago, most lesbian or gay parents became parents within a heterosexual relationship. With the growing socio-legal recognition of lesbians, gays, bisexuals, and transgenders (LGBTs) as bearers of equal rights and increasing societal recognition of same-sex relationships, new ways of becoming parents were created: adoption as singles or as a couple; second-parent adoption (one partner adopting the birth child of the other partner); co-parenting (an agreement between a man, usually gay, and a woman, to have a biological child together not within a heterosexual relationship and usually without cohabitation); the use of sperm donation by a lesbian couple or of an egg donation and a surrogate by a gay couple (Walzer 2002: 63).

Within the context of the 'first generation' of gay parenting (namely, when a gay or a lesbian spouse divorced an opposite-sex spouse), the legitimacy of gay parenting was usually brought up during custody disputes, in which, typically, the straight spouse fought for exclusive custody, arguing that the gay or lesbian spouse was unfit because of her or his sexual orientation. In a more equitable decision, the European Court of Human Rights ruled in 1999 that the sexual orientation of a biological parent cannot serve as a negative factor in custody disputes between gay and heterosexual parents.[5]

The 'second generation' of gay parenting raised a different set of challenges relating not only to the parents' sexual orientation, but also to the legitimacy of same-sex relationships. There is a close connection between the socio-legal legitimacy of a relationship and the legitimacy of parenting

within that relationship. Basing their decisions on changing attitudes toward same-sex relationships, some American courts have been allowing second-parent adoptions for two decades now. The Vermont Supreme Court, for example, allowed a second-parent adoption by a lesbian partner, thereby recognizing that a child may have two mothers and that there is no need for the birth mother to lose any of her parental rights (as is the case with regular adoption, in which an adoptive parent replaces the birth parent of the same sex).[6] The Vermont Court ruled that "[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate their purposes."[7]

The Israeli courts that have been reluctant to recognize same-sex parenting have done so in part because of their reluctance to recognize same-sex relationships. Others, as we shall see, have used the child's best interests test and widespread beliefs and prejudice alongside scientific research in order to justify non-recognition of same-sex parenting.

## Common Objections to Same-Sex Parenting

While families headed by LGBT parents are as diverse as those headed by heterosexual parents, they still suffer from "prejudice because of sexual orientation that turns judges, legislators, professionals, and the public against them, frequently resulting in negative outcomes such as loss of physical custody, restrictions on visitation, and prohibitions against adoption" (Patterson 1995: 5). There are four common objections to same-sex parenting. According to the first, a child needs both a father and a mother. The second objection is that same-sex families are less stable than opposite-sex families. According to the third objection, LGBTs are more prone to abuse their children sexually. The fourth objection is that children of LGBTs are more likely to become LGBTs themselves.

A fifth objection, which applies not only to LGBT parenting but also to parenting achieved through assisted procreation technologies (e.g., in vitro fertilization and surrogacy), is the commodification of children. According to this objection, parents of children born with the assistance of such technologies will not be as good parents as those of children conceived 'naturally' because the former will treat their children as products that were purchased. There is no evidence that this is the case, and there is actually some evidence that points in the opposite direction: parents who have struggled to become biological parents and have experienced the hardships and frustrations of assisted reproductive technologies tend to invest a lot in their children. They became parents after a conscious decision and not just because they could (or by accident), as is the case with

many heterosexual couples (Macintosh 2005: 19). Following are a few possible answers to the first four objections.

### *Children Are Better Off Growing Up in a Household in Which There Is One Mother and One Father*

Most research that concludes that children should have a mother and a father has compared children who grow with two functioning opposite-sex parents to children growing in a single-parent household (Strasser 2004: 629). Therefore, any conclusion based on this research—to the effect that two functioning opposite-sex parents are better for children than two functioning same-sex parents—is methodologically flawed (Ferrero et al. 2004: 42–46).

According to a growing body of scientific research, children of same-sex parents "are just as healthy and well-adjusted as other children" (Cooper and Cates 2006: 25), and restrictions on same-sex parenting may cause harm to the children (Hicks 2005: 153). The American Committee on Psychosocial Aspects of Child and Family Health has recently published a policy statement which concludes that parents' sexual orientation has nothing to do with their competence as parents (Perrin and Siegel 2013). Biblarz and Stacey (2010: 17) state: "Claims that children need both a mother and father presume that women and men parent differently in ways crucial to development but generally rely on studies that conflate gender with other family structure variables." They also find that, with the exception of breast feeding, there are no immutable gendered parental roles and that both parents can assume them (ibid.: 17–18). While there is a large body of research on lesbian co-parenting, the research on gay parenting is not as developed. However, Biblarz and Stacey anticipate similar results according to which there would be no significant differences in children's psychological adjustment between gay co-parenting and opposite-sex or lesbian parenting (ibid.). They also suggest that the absence of a mother encourages men to become more involved in raising their children and to assume more culturally encoded 'feminine' functions, which means that the overall investment in the children would not be different when there are two fathers as opposed to a mother and a father.

A recent essay by a psychoanalyst who is also a gay father provides a fascinating insight into gay men's parenting in the absence of a mother (Laur 2011). The highest degree of investment in children is in lesbian families, because women are culturally 'programmed' to sacrifice more when they become mothers. As a result, when a child has two mothers, she or he receives more attention than when there is a mother and a father (Biblarz and Stacey 2010: 17–18; Gartrell and Bos 2010).

Indeed, many American organizations who seek to promote children's rights and interests have endorsed the view that LGBT parenting is as good as heterosexual parenting. Among those organizations are the Child Welfare League of America, the American Academy of Pediatrics, the North American Council on Adoptable Children, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and more (Cooper and Cates 2006: 15; Ferrero et al. 2004: 43–44).

In fact, path-breaking research in the field of evolutionary anthropology has shown that the more parents a child has, the better. Sarah Blaffer Hrdy (2009), an evolutionary anthropologist, has found that early hominids raised their children in what she describes as 'alloparenting', a method of upbringing in which multiple adults care for the collective's children and not only their own biological children. This type of parenting, according to Hrdy (ibid.: 146), is responsible for the evolutionary advantage of the hominids. She argues that the socio-legal taboo on same-sex parenting ignores the scientific knowledge on the evolutionary roots of the human race and is informed by anti-gay ideology. Hrdy contends that the sex of the parents does not matter; what *does* matter is the number of adults who function as parents (ibid.). If we must resort to arguments about what is 'natural', then the nuclear family is far from natural, considering child-rearing practices among the early hominids (see also Gilligan 2011: 51–55).[8]

### *Same-Sex Families Are Less Stable Than Opposite-Sex Families*

There is no research that has found a correlation between sexual orientation and the stability of the relationship. Heterosexual relationships have been extremely unstable, with a 50 percent divorce rate in the Unites States (Gilligan 2003: 167) and a 30–33 percent divorce rate in Israel (Halperin-Kaddari and Karo 2009: 42).

Moreover, to the extent that same-sex relationships are indeed less stable than heterosexual relationships, this could be related to the socio-legal taboo on same-sex relationships in general and on same-sex marriage in particular. According to this argument, marriage and the related legal, bureaucratic, social, and economic hardships associated with its dissolution might contribute to the stability of a relationship. But as long as the right to marry does not apply to same-sex couples, LGBTs will not be able to 'enjoy' the purported enhanced stability of this institution. To be sure, the dissolution of long-term non-marital relationships, gay or straight, is not necessarily easier, especially when there are children and communal property involved.

### *LGBT Parents Are More Likely to Abuse Their Children Sexually*

Homosexuality is a sexual orientation that concerns attraction between adults of the same sex. Pedophilia is a disorder that concerns adults who are attracted to children, either of their own sex or of the opposite sex. Pedophiles are usually not sexually attracted to adults. Moreover, most pedophiles are attracted to children of the opposite sex. Research has shown that there is absolutely no connection between homosexuality and pedophilia. This has also been recognized by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) published by the American Psychiatric Association (Ferrero et al. 2004: 109–110). Nevertheless, Pearson (2010: 56) found that in American courts, for example, "LG [lesbian and gay] parents must simultaneously convey that they are good parents and that they will not model homosexuality for their children."

According to a related prejudice, the exposure of children to same-sex relationships is immoral and wrong. LGBTs are often perceived as hypersexual, and the fear is that they will inappropriately expose their children to same-sex sexual activity. Many lesbian and gay parents who divorce a heterosexual spouse risk losing custody or incurring other sanctions pursuant to such a claim. For example, following an appeal by a grudge-holding divorced husband, the Rabbinical Court in Jerusalem ruled in 2000 that a lesbian custodian mother may not allow her partner to visit her while the children are at home, stating that "this behavior is immoral and harshly damages the souls and education of the children," and cited the child's best interests test to support this conclusion. The Israeli Supreme Court overruled this decision for lack of jurisdiction,[9] but there are other cases that have not reached the appellate level, and parents have lost custody because of their sexual orientation.

### *Children of LGBT Parents Are More Likely to Become LGBTs Themselves*

Longitudinal studies of children who have grown up in gay families show no difference in the children's likelihood to become straight or gay, compared to children of heterosexual parents (Golombok and Tasker 1996; Patterson 1995: 7; Stacey and Biblarz 2001). The only difference between such children is their relatively high acceptance of LGBTs and their openness to same-sex sexual experiences during adolescence, but this did not affect the 'final' sexual orientation of those children.

These findings are consistent with our everyday experiences and common sense. After all, the vast majority of LGBTs in the world are children of heterosexual parents. If the parents' sexual orientation had any effect on their children's orientation, LGBTs should have been extinct by now.

## Between Homophobia and Heterophilia: Analysis of the Objections to Same-Sex Parenting

As demonstrated by the four common objections discussed above, the topic of same-sex parenting is saturated with prejudices, preconceptions, and presumptions that are not always grounded in solid research (Brinig 2003: 147). This is not surprising, given that the general use of science in family courts, including in Israel, is often problematic (Meisels 2010: 561). In some cases, Judeo-Christian-inspired religious objections to homosexuality, dressed up in scientific language, inform those objections. This is the case, for example, with regard to the Vatican's 2003 Congregation for the Doctrine of Faith, which invokes concerns for children's "full human development"[10] should they be raised by LGBT parents (see also Wintemute 2005: 220–221). The result is, as this article argues, an ideological understanding of the child's best interests test rather than the pursuit of the actual child's best interests.

It is easy to dismiss the objections to same-sex parenting as homophobic. But I believe that in order to be able to dispel them compellingly, we need to look at law's hidden prejudice—law's heterophilia (Triger 2013: 351–353). Psychoanalyst David Schwartz (1993) has argued that in addition to homophobia—a well-explored prejudice that is rooted in devaluation (Fone 2000: 5–7)—there is another form of prejudice against LGBTs that is rooted in 'philia', namely, in the idealization of heterosexuality. Schwartz (1993: 647) describes heterophilia as an "unarticulated belief in a particular sexual ideology," rather than an objection to an alternative sexual ideology. The absence of phobia makes the detection of this prejudice more difficult and therefore harder to combat. Claiming to be devoid of phobia, heterophiles "immunize their ideological commitments against articulation and scrutiny" (ibid.).

The line between homophobia and heterophilia is not always clear. To be sure, some heterophilic actions can be regarded as unconsciously homophobic. However, generally speaking, laws that privilege predominantly heterosexual institutions, such as marriage, are usually heterophilic in nature, while laws that restrict LGBTs, discriminate against them, or punish them for being gay are homophobic. Laws can be of a mixed nature: heterophilic in some respects and homophobic in others. For example, laws that privilege married couples are heterophilic as long as LGBTs cannot get married and as long as those privileges are not extended to all couples, married and unmarried. In jurisdictions in which marriage is exclusively heterosexual, marriage law not only is heterophilic but also has homophobic qualities, as many scholars have rightly observed (Halley 2001: 97; Warner 1999: 96). Laws that exclude LGBTs from the institution

of marriage altogether, such as the American Defense of Marriage Act (DOMA),[11] are outright homophobic (Koppelman 1997).

I would like to suggest that the first and second objections discussed above are heterophilic, while the third and fourth objections are homophobic. I would also like to suggest that the child's best interests test is a mix of homophobic and heterophilic prejudices. Therefore, it is not enough to be aware of the former; one has to take into account also the latter in order to focus effectively on children's well-being, rather than unconsciously promote a patriarchal ideology.

## Same-Sex Parenting in Israeli Law: Homophobia or Heterophilia?

Since this article discusses the connections between children's rights and the socio-legal legitimacy of same-sex relationships, it can be informative to look at the right to become a parent through the lens of the distinction that I have drawn between homophobia and heterophilia. After a short survey of the history of the right to become a parent and its patriarchal roots, I analyze Israeli courts' approaches to same-sex parenting and argue that heterophilia, which is much more difficult to detect, plays an important role in inhibiting full recognition of this form of parenting, no less than homophobia.

### *The Historical Roots of the Right to Become a Parent and of Parental Rights: A Brief Account*

The right to become a parent has been treated as a 'natural' right, one that stems from one's humanity as an important vehicle to self-fulfillment and as an expression of human dignity. It has been recognized by the Israeli Supreme Court as a fundamental right.[12]

Since antiquity, and until roughly the mid-twentieth century, in many cultures the license to marry included a license to procreate and become a parent. Children born out of wedlock were to be killed, abandoned, or sold to slavery. Later on, when killing infants became illegal, mainly due to the rising influence of the church, unwanted children were placed in orphanages (Kertzer 1993: 8–15). These laws, traditions, and policies were part of a patriarchal marriage ideology: concerns about paternal kinship and the idea that the wife and children are the father's property played a central role within this belief (Wegner 1988: 41–69).

Liberalism has substituted these property relations with the notion of privacy and thus has reformulated the right to be a parent as one that stems

from a person's right to privacy (Shifman 2005: 665). Under the privacy reasoning, the right to be a parent has become a sub-category of the right to privacy in the same way that the husband's rule within the family, allowing him to practice corporal punishment in order to 'discipline' his wife and children, is part of his right to privacy: "By Marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything" (Blackstone 1765: 442–445). Hence, the right to privacy is, as feminist scholars have pointed out since the 1960s, only a modern reformulation of the patriarchal right to property, because it protects only the husband's/father's right to privacy.

### *Who May and Who May Not Become a Parent?*

Unlike romantic love, which became an important reason for marriage only in the nineteenth century (Merin 2002: 26–27), procreation has been its main goal since its very first days. Even in the most divorce-hostile culture, infertile marriage was a just (and necessary) cause for its dissolution. Childless couples were, and in many communities still are, considered illegitimate.

The nuclear family in which the children are genetically related to both parents is considered the 'natural' and the morally acceptable structure, despite the fact that it is a relatively new socio-legal construct (Bernstein 2002: 1047; Butler 2002: 14; Triger 2012: 364–369). The cultural and legal bond between procreation (*de jure* fertility) and child birth (*de facto* fertility) and the heterosexual couple's legitimacy is saturated with presumptions of what is good for children and what is not. But the truth is that most considerations designed to promote the child's best interests in fact look at what is the perceived communal good according to patriarchal ideology, and not at individual children's interests.

Thus, the ability to procreate legitimates the relationship: only the existence of such ability—either *de jure* or *de facto*—can lead to legal recognition of the couple since only such couples can meet the goal of procreation in the patriarchal imagination. The fact that *de jure* fertility is sufficient in order for the couple to be eligible for a marriage license and thus for legal recognition shows us that heterosexuality is a key concept within the legal definition of the legally recognized couple, because in the patriarchal/heterosexual imagination, procreation is an option available only to different-sex couples.

Israeli culture is saturated with concerns around (mainly Jewish) kinship and procreation. Lesley Hazleton (1977: 63–90) dubbed this phenomenon "the cult of fertility," and Susan Martha Kahn (2000: 1–4), who studied

the use of assisted procreation methods in Israel (and Israeli pro-natalism in general), observed that the use of these methods, which is generously funded by the Israeli public health care system, is among the highest in the world (Karakoe-Eyal, forthcoming). As a result, in contemporary Israel, the refusal to succumb to the fertility cult is stigmatized as mental illness (Liebermensch 2005: 19) or as a manifestation of damaged femininity/masculinity.

During antiquity, infertility was considered a punishment for sin, usually sexual promiscuity (Greer 1985: 75–76). In our psychologized and psychologizing culture, sin is transformed into mental illness, and infertility is often regarded as the result of a psychogenic phenomenon rather than an organic problem. Whether infertility is the result of immorality or insanity, it is regarded as a curse (ibid.: 77, 84).

A same-sex couple fits perfectly within the framework of infertility as a punishment for sin or as the inevitable consequence of mental illness. According to this view, the 'infertility' of the homosexual couple is indeed a well-deserved 'curse'. Those who argue that two men or two women are biologically infertile because they are incapable of inception, pregnancy, and birth based on their own genetic material allude to the curse of infertility. Based on biological fact, this argument gains the aura of scientific objectivity.

Interestingly, while single-parent families are increasingly recognized by the law as legitimate forms of families,[13] although they are under severe attack by the right, 'single-sex' families remain much more controversial. One of the main reasons for this is the limitation of the 'like' approach—meaning the attempt to show that same-sex couples are just like heterosexual couples—as Aeyal Gross (2001: 413) writes. The 'like' approach, which is clearly used by many LGBT organizations in their same-sex marriage campaign, is flawed because it fails to consider seriously the families that already exist that are modeled differently and whose members' functions within the family structure cannot be translated into the patriarchal language of mother-father-children. I believe that the 'like' approach is a clear product of heterophilia.

### *Same-Sex Parenting in Israeli Courts: The Various Approaches*

Parenthood is a fateful project. It involves the lives of the helpless. In adjudicating cases relating to children's placement and other issues, Israeli courts tend to rely heavily on psychological studies and expert testimony to assist them in reaching a ruling that would best serve the child's best interests.

This reliance has proven to be problematic for various reasons. First, the leap from psychological assessment to legal ruling is not always justified. It often seems as if the courts prefer to outsource the legal decision-making process (which undeniably involves serious dilemmas and fateful choices)

to other professionals. Second, in many cases, judges cloak their own convictions and common-sense notions concerning children's best interests with what they view as science, using vague wording, such as "important psychological studies have shown," without citing specific studies that support their stance (Meisels 2010: 561). Third, judges who do refer to specific psychological studies rather than perceived psychological 'truths' are often not up to date with the most current studies and sometimes fail to identify methodological flaws in the studies that they use, or even mistakenly take American legal studies for psychological ones (ibid.). These occasional failures, which the Israeli Supreme Court is not free from, highlight both the problematic reliance on science by judges, who are usually laypeople in psychology, and the vulnerability of parents and children to ideologically driven decisions based on judges' own subjective values, which, masked as science, are much more difficult to challenge. Moreover, once these mistakes enter the case law, they become precedents with a life of their own. Lawyers and judges can then cite the case law without referring to the underlying science itself; therefore, there is little to no chance of critically examining the actual studies or their use by the courts (ibid.: 562).

In 2000, the Israeli Supreme Court ruled that a foreign second-parent adoption decree may be registered in Israel.[14] In the Yaros-Hakak case (January 2005), the Court ruled that a lesbian partner may adopt the children of her partner.[15] However, Chief Justice Barak, writing for the Court, stressed that this ruling is singular and specific to the case decided, that this decision does not recognize a general right of LGBTs to adopt, and that it also does not recognize the legal status of same-sex couples. He repeatedly noted that the decision is based on the "personal data" and "unique circumstances"[16] of the couple (Zafran 2008: 135). In splitting parenthood from relationship, Barak was probably attempting to sidestep the minefield of same-sex relationship endorsement. This approach can be viewed as the product of heterophilia. Interestingly, a year later Barak ruled in the *Ben-Ari* case that the Israeli Ministry of Internal Affairs must register same-sex marriages legally performed abroad.[17]

Following the *Yaros-Hakak* decision, the attorney general decreed in 2008 that second-parent adoption should be allowed under Israeli Adoption Law, provided that it is consistent with the child's best interests.[18] In that same decree, the attorney general also instructed the Service for Children of the Ministry of Labor and Social Affairs to allow gay and lesbian couples to adopt children under the same conditions that single parents may adopt. This means that gay and lesbian couples may adopt only older children or children with special needs. Healthy newborns are reserved for married heterosexual couples only. It would not be entirely accurate to classify this policy as homophobic, since it is no less than revolutionary

in establishing adoption for LGBTs, but it is definitely heterophilic in the sense that it reflects the idealization of the heterosexual couple.

In a rare and probably non-representative decision, a family court approved the adoption of Yossi Even-Kama by his gay *de facto* adoptive parents, Uzi Even and Amit Kama. Yossi was not biologically related to either of the partners, who had been raising him since adolescence after he had been kicked out of his home by his birth father. At the time of the adoption, Yossi was no longer a minor and was not living with his adoptive parents.[19]

While there seems to be progress toward recognition of same-sex couples and parenting, some family court judges ignore these rulings. For example, in 2010, a family court judge, Philip Marcus, refused to allow gay parents of newborn babies through a surrogacy process abroad to enter Israel. In one of the hearings, Marcus was cited saying, "If it turns out that one of the [purported fathers] sitting here is a pedophile or serial killer, these are things that the state must examine" (Zarchin 2010). He is not the first family court judge to ignore the Supreme Court's *Yaros-Hakak* and *Ben-Ari* decisions.[20]

## Conclusion

I have questioned the way in which the child's best interests test is applied by Israeli courts in cases of children of same-sex parents. I suggest that the reluctance to recognize same-sex parenting may serve as an additional example of the notion that the child's best interests is a politicized concept. In the context of same-sex parenting, I have argued that this test seeks to reinforce heterosexual ideology (and, as a result, the heterosexual couple) rather than to promote a specific child's well-being. This ideology views the opposite-sex parental model as the ideal parental model and, as a result, is wary of sanctioning same-sex parenting because that would entail recognition of same-sex relationships.

I have identified this prejudice against same-sex relationships and parenting in the current socio-legal climate as the product of cultural and legal heterophilia. While the Israeli legal system has been steering away from the blatant homophobia that has governed family law in the past, it still views the heterosexual nuclear family as the ideal family and therefore takes it into consideration (whether consciously or not) in a manner that overrides children's actual needs and best interests. To be sure, to the extent that objections of judges and social workers to same-sex parenting (pursuant to this ideology) are based on fears of actual harm caused to the children because of their parents' sexual orientation, they are the product of homophobia. Whatever the source of the prejudice is, however, it does not work in the child's best interests, but rather in the child's worst interests.

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**NOTES**

1. See http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.
2. CA 320/84 *Jane Doe v. Attorney General*, PD 38(4) 242 (1984).
3. CA 488/77 *Jane Doe v. Attorney General*, PD 32(3) 422 (1978).
4. CA 451/88 *Plonim v. Attorney General*, PD 44(1) 330 (1990).
5. *Salgueiro da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. 309 (1999).
6. *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).
7. Ibid., 1275. See below for details about a recent US Supreme Court ruling on this matter.
8. Hrdy's (2009) model is very different from what was attempted in the kibbutzim. Her studies of early hominids find an organic structure that is not based around the nuclear family and does not attribute significance to gender and biological relations for the purpose of parenting. The kibbutz model viewed the nuclear heterosexual family as a central social construct that needs to be deconstructed, but without challenging gender roles or the centrality of the nuclear family. Hrdy's research shows that the nuclear family is a relatively late development in human history.
9. HCJ 293/00 *Jane Doe v. The Higher Rabbinical Court in Jerusalem*, PD 55(3) 318 (2001).
10. http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.
11. On 26 June 2013, in *United States v. Windsor*, the US Supreme Court declared Section 3 of DOMA to be unconstitutional under the Due Process Clause of the Fifth Amendment. See http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.
12. See Justice Mishael Cheshin's opinion in HCJ 2458/01 *New Family v. The Committee for the Approval of Agreements to Carry Fetuses*, 54(4) PD 419 (2002), 447.
13. See the Single Parent Family Law of 1992.
14. HCJ 1779/99 *Brenner Kadish v. Interior Minister*, PD 58(2) 368 (2000).
15. CA 10280/01 *Yaros-Hakak v. Attorney General*, PD 59(5) 64 (2005).

16. CA 10280/01 *Yaros-Hakak v. Attorney General*, PD 59(5) 64 (2005), paragraph 22.
17. HCJ 3045/05 *Ben-Ari v. Attorney General*, PD 61(3) 537 (2006).
18. See http://www.justice.gov.il/MOJHeb/News/2008/imuz.html.
19. Adoption 34/07 *Yosef Even-Kama v. Attorney General* (unpublished).
20. See, for example, FC 16310/08 *Ploni v. Almoni* (2008) (unpublished).

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