

MOTHERHOOD, FATHERHOOD AND LAW: CHILD CUSTODY AND VISITATION IN ISRAEL

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ABSTRACT

This article analyses the ways notions of fatherhood and motherhood are constructed, negotiated and articulated during divorce proceedings in Israel. The analysis is based on in-depth interviews with divorced parents, lawyers, judges and therapeutic professionals, and on a wide sample of divorce court files involving child custody arrangements. The main finding of the study is that while motherhood is ordinarily perceived as a taken-for-granted caring essence, fatherhood is a vague concept that has yet to acquire concrete meaning. Treating the law as an overwhelming arena of conceptual negotiations and practical applications, the study also finds that legal professionals have a significant role in shaping how both women and men grasp and act upon their parental rights and duties. By and large, I find that the impact of legal professionals to that effect, combined with a rather conservative family law system in the shadow of which the parties operate, impedes innovation and discourages men from assuming expansive parental roles after divorce. Hence this study provides a rich example of the contribution of law to the gendered social expectations and coercions determining women and men's ability to shape their parental roles and identities.

KEY WORDS

custody; divorce; fatherhood; Israel; motherhood; visitation

INTRODUCTION

IN *The Normal Chaos of Love* Beck and Beck-Gernsheim (1995) argue that because categories such as *marriage* and *family* are undergoing profound changes and are marked with radical instability, children rapidly become the last remaining object of unconditional love for both women and men

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(p. 37). Consequently, they argue, new types of committed fatherhood develop alongside the more traditional model of the 'caring mother' and both women and men cooperate, or compete, in managing primary caretaking of children. Hence the birth of 'new fathers', men who relate to their fatherhood as a central part of their identity and construct their priorities in a way that enables them to participate fully in the life of their children (see Coltrane, 1996; Lupton and Barclay, 1997; Burghes, Clarke and Cronin, 1997).

Alternatively, there are those who claim that nothing is significantly new and that the contemporary nuclear family is still highly gendered. Mothers still do the majority of childcare and housekeeping chores and create significant emotional bonds with their children, while fathers continue to be involved primarily in paid labour (Fineman, 1995). According to this view, the discourse of the 'new fathers' who adopt maternal behaviours and feelings only serves to mask the persisting division of labour between the sexes and ignores the fact that strong social forces still construct motherhood and fatherhood as two binary gendered categories (Lewis and O'Brien, 1987; Ambert, 1994).

In this article, I engage the above-mentioned conflicting views about the changing or unchanging roles of parents by looking at the process and outcome of child custody and visitation arrangements upon divorce in Israel. I posit that from a methodological standpoint, the process of divorce in general and of shaping child custody arrangements in particular, provides a unique opportunity to consider how people construct, understand and act upon their identities and roles as parents. Sclater (1999a) argues that 'divorce represents a process in which the old certainties are dismantled and the subject is confronted with the mammoth task of rebuilding the world and the self' (p. 175). In this process, the divorcees reappraise the past while trying to reorganize their lives in the present and move forward to the future stage of post-divorce family (Sclater, 1999b). From this perspective, the legal procedure of divorce can be seen as a 'moment' when family relations in general and parenthood in particular have to be reconsidered, renegotiated, and rearranged, thus bringing to the surface heretofore taken-for-granted gendered assumptions and expectations about parental roles and identities (Smart and Neal, 1999a: 118; Thompson and Amato, 1999). In addition, divorce procedures enable us to consider the role of law – in book and in action – in reproducing or altering gendered concepts of parenthood. Law is one of the primary social institutions that shape the normalizing expectations regarding parental roles (Sevenhuijsen, 1992). Moreover, above and beyond legal rules, divorce as a process that brings together various legal, psychological and social policy discursive regimes (Piper and Sclater, 1999) provides an opportunity to explore the impact of legal and therapeutic experts on shaping parents' understandings and expectations concerning their own parental roles and identities. Thus, another methodological benefit derived from analysing divorce proceedings is that it contextualizes the way decisions about children are being made, positioning the parents within a broader field of agents and institutions that take part in the process.¹

THE ISRAELI CASE: GENERAL BACKGROUND

In general, there seems to be a discrepancy between current changes of parental roles and familial stability in Israel and a legal reality in which little seems to have changed by way of a gendered division of labour after divorce. Not unlike other industrialized societies (Bakker, 1996), there has been a dramatic increase in the number of women participating in the paid labour market. In 1960, only 27.3 per cent of women as opposed to 78 per cent of men above the age of 15 were employed in wage labour. By 2002, the percentages had shifted to 48.4 per cent and 60.2 per cent, respectively, and 56.2 per cent of married mothers were employed at that time (Statistical Abstract of Israel (SAI), 2003: tables 12.1, 12.8). Yet the entry of women to the labour market has not been accompanied by a corresponding increase in men's participation in domestic tasks (International Social Survey Program (ISSP), 1994). This data notwithstanding, there are some indications that compared to previous generations, more men share housework and childcare with their spouses (Fogiel-Bijaoui, 1999). Reviewing the existing data on Israeli (Jewish) families, Fogiel-Bijaoui (1999) concludes that although Israeli society is still more familial and traditional than other western society, the paradigmatic nuclear family in which the husband is the sole breadwinner and the woman the sole caregiver has become the exception (also see Oren, 2001).

Divorce rates have also increased over the past 30 years. In 1975, the ratio of marriages to divorces was approximately 10:1. By 1995, the ratio approached 3:1 (SAI, 2003: Table 3.1). While only 6.1 per cent of couples that married in 1968–71 divorced within seven years, 11.2 per cent of couples married in 1992–3 did so (Yaffe, 2004). These rates are lower than those recorded in other western countries but they do indicate a significant change in family stability in Israel (Katz and Peres, 1996). The growing legitimacy of divorce has been accompanied by a growing legitimacy of divorce among parents of minor children. During the 1960s, 45 per cent of divorcees were parents of minor children, compared to 66 per cent in 1991 (Katz and Peres, 1996). In 2002, more than 11,500 Israeli children experienced the divorce of their parents (Children in Israel, 2003).

Israeli law, however, has not undergone significant changes in respect to the norms governing families and parenthood. Sections 24 and 25 of the Capacity and Guardianship Law (1962) state that:

24. Where the parents of the minor live separately . . . they may agree between them as to which of them shall exercise the guardianship of the minor, wholly or in part, which shall have custody of the minor and what shall be the rights of the other parent with regard to having contact with him. Such an agreement shall be subject to the approval of the Court . . .

25. Where the parents have not reached an agreement as provided in Section 24 . . . the Court may determine the matters referred to in Section 24 as may appear to it to be in the best interests of the minor, provided that children up to the age of six shall be with their mother unless there are special reasons for directing otherwise.

As can be seen, the *tender years doctrine* which favours mothers as physical custodians still governs the Israeli legal landscape. Recently, the Tel Aviv District Court tried to minimize the implications of the tender years presumption by stating that this legal rule is just one consideration among many others to be taken into account when considering the child's best interest regarding custody.² This attempt was overruled by the Supreme Court that re-established the tender years presumption as the dominant rule governing custody disputes.³ Moreover, Israeli courts have reinforced the maternal preference stipulated by the law by ruling that separating siblings from each other and changing existing custody arrangements is undesirable.⁴ By that, courts have implicitly pronounced the mother to be the preferable custodian even when children are over six years of age (Shifman, 1989). In other countries, doctrines such as *the primary caretaker*, *the psychological parent*, *joint custody* and *parental responsibility* (Cochran, 1985; Weitzman, 1985; Fine and Fine, 1994; Mason, 1994; Fineman, 1995; Paradise, 1998; Smart and Neale, 1999b) reflect changing concerns over the role of fathers in post-divorce families (Boyd, 2003), while in Israel there seems to be little normative development in this direction. Some countries also introduced new rules that are designed to encourage detailed visitation schedules (Bahr et al., 1994; Bartlett, 2002), whereas Israeli law is by and large silent about this issue. While heated academic and public debates have accompanied such changes in other countries (see for example Goldstein, Freud and Solnit, 1973; Smart and Sevenhuijsen, 1989; Popenoe, 1998; Boyd, 2003), questions such as child custody and visitation arrangements hardly capture the public and academic eye in Israel. Thus in Israel there is an observable gap between social changes regarding parenthood and the legal stability regarding the rules governing parents–children relations in post-divorce families.

THE STUDY

Drawing on previous insights concerning the importance of looking not only at the level of formal law but also at what takes place in the shadow of the law when we want to understand the relationship between social and legal processes (Mnookin and Kornhauser, 1979), this study aims at a multi-layered analysis of the legal field in which custody and visitation rights and duties are being established. I will ask how custody and visitation rights are being shaped in the course of divorce proceedings, both in and out of court; who the social agents and social institutions that take part in the process are; and to what degree such agents and institutions control and shape outcomes. I will also ask: what is the content of extant custody and visitation arrangements? What can we learn from them about perceptions of parenthood and how these arrangements correspond with those held by agents in the legal field? Although I shall focus on the Israeli landscape, I believe that answers to these questions may be of interest and of relevance to other societies as well. This is so particularly in light of the fact that in Israel, like elsewhere,

most divorce cases are settled without a judicial ruling but still rely on the advice of legal and therapeutic experts acting in the shadow of the law (Stamps, Kunen and Rock-Faucheux, 1997; Relis, 2002).⁵ Moreover, even in countries where the law that governs parent-child relations upon divorce is formally gender neutral, sole maternal custody still remains the dominant model (Fine and Fine, 1994; Boyd, 2003; Smyth, 2004). This fact raises questions of the effect of gendered perceptions of parenthood within the legal field that require an analysis which goes beyond formal legal rules, as is done in this study.

The study reported here is based on statistically analysed data that has been derived from 360 randomly selected divorce files submitted to courts for resolution or for affirmation of an out-of-court settlement.⁶ The jurisdiction of these courts covers the central region of Israel, a heterogeneous area that includes Tel Aviv, Israel's largest and most cosmopolitan city.⁷ The sample was restricted to files that had been opened during 1997 and 1998, and closed with an official divorce decree by the end of 1999.⁸ The parties were all Jewish-Israeli couples with at least one child under the age of 18.⁹ The sample analysed in this study represents about 1/6 of the research population.¹⁰ In addition, standardized open-ended interviews (Patton, 1990) were held with more than 40 respondents between the years 2001–2: 16 recently divorced parents (eight women and eight men from different socioeconomic backgrounds), located through ads placed in public places and through snow-ball method, as well as 27 professionals (judges, lawyers, mediators, social workers, psychologists and representatives of organizations for socio-legal change). The professionals were selected according to their standing in the field, with the majority of them having more than ten years' of experience dealing with divorce. In addition, conferences held by legal and therapeutic professionals on divorce proceedings were observed. All interviews and conferences were transcribed and later analysed, together with the findings from the files analysis, according to grounded theory methodology (Strauss and Corbin, 1990). Preliminary findings were presented to readers familiar with the field for feedback (Altheide and Johnson, 1998).

THE REGIME OF TRUTH SURROUNDING MOTHERHOOD

The divorce files I examined show that women received exclusive custodianship in 90.8 per cent of the cases and conditional exclusive custodianship in another 2.5 per cent of the cases (the latter conditioned on such grounds as retaining Israeli residency). Men received exclusive custodianship in 3.9 per cent of the cases, joint custody was assigned in 1.4 per cent of the cases, and split custody – one or more children in custody with the father and one or more children custody with the mother – was assigned in the remaining 1.4 per cent of the cases.

The general conclusion that I derive from analysing the files and from the interviews I conducted is that in the vast majority of cases the question of

custody is actually a non-issue in the sense that all parties assume that the mother would be the custodian. Fathers claimed custody in only seven out of the 360 files I studied. Only 22 out of 158 substantial judicial hearings addressed custody, while alimony and property were the dominant disputed issues. The interviews also revealed that the lack of custody disputes cannot be attributed solely to the 'maternal preference' which is set in the formal law. Although both divorcees and professionals were aware of the law's preference for mothers as custodial parents, they did not perceive this as an arbitrary rule imposed from above. Rather, most interviewees regard the *tender years presumption* which is implicit in the law as appropriate and, moreover, as corresponding to widespread social norms. One Family Court judge (female), thus explained:

Custody itself is not contested because models of maternal custody continue to exist and be widely accepted. This isn't something I invented; this is what people come with. It isn't even a matter of agreement; it is something ingrained in the public mind. (Interview conducted on 17 April 2001)

Indeed, most divorcees and professionals hold a very coherent and consistent perspective: motherhood is inherently different from and superior to fatherhood when it comes to childcare. Two arguments may be singled out as the primary explanations for this distinctly gendered perspective. Some interviewees argue that there is an innate biological factor that grants mothers superior capabilities in caring for their children. Many refer to notions such as 'maternal instincts' and 'maternal feelings' that women presumably possess. The assertions of one male lawyer illustrate this point:

Mothers are generally good mothers. I always say that it's always better for children to be with their mother than with their father. She is more attached to them, she brought them into the world; they're the fruit of her womb. It's hard for me to believe that any father would be willing to do what a mother does. This is what I believe . . . their sensitivity is greater . . . what can you do? She was apparently born with such a biological instinct. Nothing can be done against nature. It's possible to contest many things in life, but you can't fight nature. (Interview conducted on 23 March 2001)

Other interviewees state that the mother's superior advantage in caring for her children is due to socialization, not nature. This position is well articulated by the manager of a Family Court's Assistance Unit (female social worker):

I do not believe that a woman is born with instincts different from a man, but she is born with all the history of women caring for children. That is to say, history destines her for this role, she sees her mother and she sees the toys given to girls; they become part of her. (Interview conducted on 8 January 2002)

All the interviewees who think that mothers have an advantage over fathers due to socialization also tend to see all mothers as a homogeneous category. According to this view, the attributed qualities are so deeply embedded in

social life that they have become like second nature to women. In this sense, the difference between those who argue that these qualities are inborn and those who argue that they are socially acquired is not very significant. All in all, the perceptions of motherhood recorded in this study are more explicit and sharp than those reported by other Israeli studies examining perceptions of men and women's roles in the family through closed questionnaires (ISSP, 1994; Tzameret, 2000). It seems to me that this difference reflects one between answering normative questions in the abstract and asking people to explain their decisions in concrete situations, whether as divorcing parents or as assisting experts. It seems that in the former case people tend to be more egalitarian and at least more careful about gendered distinctions than in situations when they must deploy deeply rooted perceptions in the course of making substantial decisions.

The hegemony of the 'maternal custody' model in the legal field, combined with the widespread popular conception of motherhood as a distinct quality of women thus constitutes a 'regime of truth' (Foucault, 1980: 131). This regime of truth corresponds with the modern maternal image that has evolved in the West since the eighteenth century, often termed 'the good mother myth'. According to this myth, women are generally 'good mothers' who, in the absence of pathology, care for their children with boundless devotion and unconditional love (Badinter, 1981; Braverman, 1989; Gillis, 1996). The findings of this study are another demonstration for the ongoing existence and vitality of the good mother myth (Braverman, 1989; Winstanley, 2001). This myth seems to hold regardless of the ascendance of individualistic and egalitarian normative approaches to gender in the western world and in Israel over the last 50 years (Beck and Beck-Gernsheim, 1995; Raday, 1995). Moreover, we now have ample evidence, grounded in research, showing that maternal roles and identities were and are constructed (Braverman, 1989; Ambert, 1994), and that the dramatic rise in women's employment has not resulted in any damage to the cognitive or social achievements of children (Braverman, 1989; Bianchi et al., 2000). It seems that while in other countries normative cultural ideas of gender neutrality and parental equality overcome the good mother myth and mask the ongoing gendered parental practices and portray mothers and fathers as performing the same parental roles (Boyd, 2003), in Israel the maternal myth prevails over egalitarian notions and masks the changes and variety in maternal practices by portraying all mothers as a homogeneous group superior to all fathers in caring for children. In both cases, cultural perceptions reduce the complex material realities of gendered parental practices.

It is important to note that the interviewees are aware of the changes in the meaning of motherhood and the changing conditions for upholding it. Many argue that contemporary mothers are different from their own mothers because of their participation in the labour market, their career-driven orientations and their general stake in matters other than caring for children. Moreover, some interviewees discuss the emotional and economical difficulties faced by custodian mothers and some tell stories about custodian

mothers who harm their children by jeopardizing their relationship with the father. However, the awareness that the housewife model has become an exception to the rule and that being a mother, especially a sole custodian mother, can be a difficult and imperfect experience, does not undermine the mythical conception of motherhood. The ability of this myth to absorb these realistic or critical insights is another demonstration of its strength.

Rules and actors within the field of law do not simply reflect existing social perceptions of custody and motherhood, but also enhance them. In addition to the *tender years presumption* applied in contested cases, the professionals within the field prevent and block substantial negotiations between parents regarding custody and tend to construct maternal custody as the only viable option. One lawyer (male) describes a common practice in the field that transforms custody into a non-issue:

The truth is that lawyers, and me among them, often dissuade fathers who want to fight over their children. We tell them up front: 'Listen, your chances are few if your wife is normal . . . as long as she neither burns the children with cigarettes nor get them addicted to heroin. So, there's a good probability that the children will remain in her custody, and the very fight over custody will cause the children even greater damage'. (Interview conducted on 23 April 2001)

When asked about the reason for granting such a piece of advice, this lawyer asserted that most lawyers are deeply aware of a 'sexist bias' (his term) among judges, social workers and psychologists. This bias consists of sending a strong message that mothers should be preferred as custodians, that women who abrogate this right and duty are deemed deviant, and that men have no chance of winning custody unless there is a proven 'deviance' in the mother. One divorced father describes this message clearly:

I did not think there was anything I could do about it and that asking for paternal custody stood any chance. My understanding was that, for judges to keep children from their mother in favour of the father, the mother had to be a whore, a drug addict, a non-Jew and I don't know what. So I did not think I had a chance. (Interview conducted on 21 November 2001)

Even fathers who are not represented by lawyers learn about the legal system's preference for mothers as custodian parents. Most of these fathers turn to the Rabbinical Court (see Note 6) without a pre-prepared divorce agreement. There, they are provided with a standard agreement that states, among other things, that 'the children will remain in the custody of the mother'. All that the parents have to do is to sign this form and present it for court approval for the divorce agreement to come into effect.

It could be argued that this model holds only as long as we are dealing with cases in which both parents opt for maternal custody or, alternatively, in cases in which the mother and the father struggle over exclusive custody at the expense of the other.¹¹ However, my findings reveal that the legal environment tends to produce similar outcomes also when it comes to joint physical custody, agreed upon and sometimes even sought after by the

parents themselves.¹² Such matters are subjected to a wide consensus among lawyers and other involved experts that joint custody harms children, notwithstanding many studies that claim otherwise (see Bauserman, 2002). Most judges, lawyers, social workers and psychologists silence joint custody as an option not only by not introducing it to the parents but also by placing obstacles in the way of parents who wish to pursue this option. The case of Gil and Joys, parents of two daughters who considered joint custody, demonstrates this point.

Joys told me that the lawyer she and Gil turned to told them that 'joint custody is out of the question' (Interview conducted on 4 December 2001). Gil was very surprised when I told him that there was nothing in the law prohibiting joint custody. He told me that the way their lawyer had framed it made him think that 'this is some kind of reality that I have no chance to change. That it is the law' (Interview conducted on 21 November 2001). Indeed parents who insist on joint custody are often required by the courts to be evaluated for their 'parental capabilities' by social workers and are sometimes scrutinized by psychologists. This practice of the court, or at least the common notion among lawyers that this is indeed the practice of the court and the advice they render to their clients thereof, thus becomes a further 'threat' that deters parents from pursuing this path. All in all then, it seems that strong and influential dynamics with the legal field, in and out of court, operate in ways that mark women as the appropriate custodian and that sustain and enhance the gendered dichotomy between motherhood and fatherhood.

Still, I do not claim that maternal custody is sustained only due to the force of law and the influence of legal and therapeutic professionals and that a multitude of men seek but fail to obtain custody. Rather, I would argue that the legal field is not conducive to facilitating changes in deeply rooted perceptions and that it rather tends to reinforce them. Indeed many interviewees claim that most men are interested neither in exclusive custody nor in a joint one. The word 'convenient' crops up in the majority of the responses I received from men when I ask them whether they considered custody. Being a non-custodian parent is convenient because it leaves one free to pursue leisure activities as well as to continue to invest time and energy in paid work. Duby, a father of two girls, reported feeling 'free as a bird':

I have quite a bit of freedom to choose and, in effect, save for one day a week when I take the children in the morning . . . it leaves me lots of free time. What can you do, men have a lot of benefits. It's true that I bring them back by 8:30 pm on Monday but after that I'm free as a bird. This lets you do what you want; this situation entails lots of advantages. (Interview conducted on 13 September 2001)

Another example is provided by Hannan, a successful lawyer who recently separated from the mother of his baby boy. He claims that non-custodian fathers 'are either fully or partially aware of how convenient this situation is for them' and that he is not capable of adequately caring for his child:

First of all, there's the frustration. I assume that I would be very frustrated, let's say, if I should decide to give up my job and only care for my child. I assume that this is also true for women, but I would be frustrated and angry at a situation where I would have to concede, to compromise so much regarding my talents, capabilities and the rest. (Interview conducted on 4 September 2001)

There is an ongoing scholarly debate on whether men simply do not want custody or want it but are blocked by the law and general social norms (Weitzman, 1985; Maccoby and Mnookin, 1992; Arendell, 1995; Nielsen, 1999). In fact, it is hard to determine the exact contribution of factors such as career, leisure, determination, and resources to the observed reluctance of men to seek exclusive or even joint custody. In this study I find that cause and effect are interchangeable and mutually constitutive of each other. On the one hand, mythical conceptions of motherhood and routine practices which affirm maternal custody as a 'natural' option discourage men from pursuing it. At the very least, the legal field routinely relieves men from the need to seriously consider their willingness and ability to become custodians. On the other hand, the absence of efforts and struggles by men who pursue custody further reinforces the legitimacy of extant practices and beliefs. The end result is that in Israel this hegemonic regime of truth transforms the question of fatherly parenthood mainly to issues concerning visitation rights. I will deal with this aspect of post-divorce parenthood in the next section.

FATHERHOOD AS A PRIVILEGED AMBIGUITY

Unlike the hegemony of the exclusive maternal custody model, the divorce files I studied reveal a rich variety of arrangements when it comes to visitation schedules (i.e. times for fathers to spend with their children). Some schedules specify the number of weekly meetings between father and child, whether these include sleepovers, whether time is shared between parents during weekdays, weekends and holidays, and whose responsibility it is to pick up children from school. Some schedules, however, are notably vague and general. All in all, I found 99 different types of visitation arrangements in my overall sample of 309 visitation schedules. This enormous variation ranged from undetermined schedules (e.g. visitation 'when the father is in town') to meagre schedules (e.g. meetings every Saturday for a few hours), to broader and more complex schedules (e.g. twice a week when the child is not with his father over the weekend, every third weekend and a week during summer vacation), to very intensive schedules (e.g. three times a week including sleeping over, every other weekend, and half of holidays and school vacations).

This remarkable variety of visitation schedules is an indication of the lack of legal rules and normative expectations regarding the relations between fathers and children. Indeed, the interviews reveal a correlation between the lack of dominant visitation models and the lack of common and precise

perceptions of fatherhood. On the one hand, all interviewees (with one exception) agree that relations between fathers and children are important. For instance, one female lawyer who works for a parliamentary committee on children's rights stated that 'children need two parents, want two parents, it is right for them to have two parents' (Interview conducted on 22 November 2001). A male lawyer argued that 'the importance of the father in a young child's life, in all recent studies, reaches similar levels to that of the mother' (Interview conducted on 3 September 2001). Another female lawyer said that her children 'would be torn apart without their father' (Interview conducted on 29 March 2001). Even divorced mothers, including those who made bitter comments about their ex-husbands as spouses and fathers, agree that a father's involvement in the life of his children is important. On the other hand, these and other interviewees do not specify in what ways the presence of fathers is meaningful. Rabbinical Court Judges tend to mention the role of fathers as educators. Two divorcees, a male and a female, mentioned fathers as sex and gender role models while two other divorced fathers mentioned their role as providers. But these few references do not compound into any widely shared theme regarding fatherhood. Unlike motherhood, which the interviewees clearly defined as a caring, loving, devoted essence, fatherhood remains amorphous, with no distinctive qualities related to caring for children. This is especially interesting because the interviewees were asked the same number of questions regarding motherhood and fatherhood; nevertheless, they responded with lengthy answers mainly to the latter. In effect, the interviewees' references to fatherhood were more than double in length compared to those devoted to characterizing motherhood. It seems to me that this verbosity is an indicator of the difficulty people face when having to define fatherhood in substantive terms. While interviewees used known and common 'truths' about motherhood, they struggled to explain what fatherhood meant to them.

The difficulty of the interviewees to clearly articulate their perceptions of fatherhood correlates with the arguments of those who comment on the ambiguity of fatherhood in the present era. The social consensus regarding fathers' roles within the family was eroded during the second half of the twentieth century. Decreasing rates of men's participation in the labour force and increasing rates of women's employment weakened fathers' role as sole breadwinners (Marsiglio, 1995; Amato, 1998). At the same time, ideologies of gender equality and children's rights weakened the father's role as a patriarch (Mintz, 1998). The collapse of traditional concepts of fatherhood has not been filled by new agreed upon norms. Fathers today are exposed to contradicting images of maleness and fatherhood, ranging from the ideal rational, competitive worker who is expected to invest all his time and energy in the job market to the 'new father' who is expected to spend time at home and create meaningful emotional relations with his children. In fact, there are no binding social scripts that guide and shape fathers' behaviour, neither during marriage nor after divorce (Selzer, 1991; Selzer and Brandreth, 1994; Marsiglio, 1995).

Again, it is important to realize that the legal field not only reflects social perceptions of parenthood but takes active part in their construction. Classifying the 99 visitation schedules into four generic categories clarifies this argument. The classification is based on what some interviewees describe as the 'customary visitation schedule': twice a week during weekday afternoons and every other weekend from Friday noon until Saturday evening. This schedule accumulates to up to six daytime meetings and one overnight sleep during a two-week period (this schedule also includes half of the yearly holidays and vacations, a parameter that needed to be excluded to enable a limited numbers of categories).

As can be seen from Table 1, only 27.2 per cent of the cases fall into what is thought to be the 'customary visitation schedule', that is, six days and one overnight over a two-week period; 16.5 per cent of the schedules are more limited and 22.6 per cent are broader. The most common category (33.7 per cent) covers arrangements stating that the father can see his children 'at any time', usually requiring coordination with the mother (90.2 per cent). It is interesting to note that the visitation schedules found in this study are more detailed and broad than those found in studies conducted in other countries (Bahr et al., 1994; Melli, Brown and Cancian, 1997; Lamb, 1999). In what follows, I focus on the 'any time' category as well as on the fourth category of broad visitation arrangements, alongside the legal meaning of visitation in general, in order to demonstrate the contribution of the legal field to the construction of fatherhood as a vague and voluntary role.

At face value, it seems as if the arrangement stipulating that the father will see his children at any time enables the most intense contact between fathers and children. It seems that this arrangement does not limit the father's access to his children (a mother's unreasonable lack of cooperation can be overcome in court), and that it allows the father to see his children every day and night of the week. However, a statistical analysis of the parents' socio-economic characteristics, institutional and professional connections and affiliations, as well as an analysis of the correlation between this arrangement and the legal custody model under which they operate, suggests that this category is less

TABLE 1

Distribution of Paternal Visitation Schedules in Maternal Sole Custody Cases*

| <i>Category</i> | <i>Percentage of Cases</i> |
|---|----------------------------|
| At any time (no detailed schedule) | 33.7 |
| Less than six days and one overnight stay | 16.5 |
| Six days and one overnight stay | 27.2 |
| More than six days and one overnight stay | 22.6 |

*Schedule duration: Two weeks

N = 309

Source: Family Court and Rabbinical Court Divorce Files, Tel Aviv Region.

a reflection of egalitarian construction of parental roles and more a result of very vague conceptualization and uncommitted application of the divorced father's role. Most of the parents who adopted this arrangement were relatively poor. Other Israeli studies found a correlation between low economic standing and traditional gendered perceptions and arrangements between spouses (Marcus and Doron, 1988; Oren, 2001). This correlation strengthens the claim that this visitation arrangement does not reflect egalitarian concepts of parenthood. The finding that these parents, unlike parents who included detailed visitation schedules in their agreement, did not mention the father's ongoing involvement in the major decisions related to his children's lives is another indication that the statement that the father will see his children 'at any time' does not reflect an intense paternal role. Moreover, in most of the cases in which the visitation arrangement included this statement, the parents were not assisted by a lawyer and turned to the Rabbinical Court and not to the secular civil Family Court. In roughly a third of such cases, the parents simply signed a standard separation agreement that had been made available to them by the Rabbinical Court. This standard one-page agreement stipulates that 'the father is entitled to see his children at any time outside the woman's house subject to prior coordination'. While the involvement of lawyers and the preparation of lengthy and detailed agreements (however standard they may be) appears to enhance some type of serious deliberation concerning paternal rights and duties, the lack of professional advice and the availability of a standard simple agreement seems to further decapacitate the ability of already unresourceful parents to reflect upon and commit to more detailed schedules (on the role and substantial influence of lawyers in divorce proceedings, see also Griffiths (1986) and Sarat and Felstiner (1995)). To sum, it is important to re-emphasize that the arrangement that stipulates that the father will see his children at any time with no detailed schedule represents a third of the overall population of cases I studied.¹³ At least if we accept the finding that there is a positive correlation between detailed visitation schedules and actual time the non-custodian parent spends with his children (Melli, Brown and Cancian, 1997), the situation I describe both highlights the adverse potential consequences of vague and undetermined visitation arrangements and exposes the contribution of the legal system to this state of affairs.

The fourth category of visitation schedules in Table 1 covers more than six daytime meetings and one overnight stay over the course of two weeks. Many of these agreements include sleepovers during the week and not only during weekends. In general, such visitation schedules are a relatively new phenomenon in Israel and may signify a growing interest among divorced fathers to be deeply involved in their children's lives. As we shall see, attitudes and practices within the legal field have an impact on the ability of parties to reach such agreements.

The interviews revealed disagreements regarding the frequency as well as the desirability of visitation schedules that include overnight stays on weekdays. These disagreements appeared to be related to conflicting attitudes toward the father's place in his children's lives. Some of the lawyers

interviewed claimed that visitations that include weeknight sleepovers are neither common nor they should be. Analysis of their arguments against this practice reveals a lack of trust in the father's ability to meet his children's needs, attributed to factors such as job demands and social activities. Other legal and therapeutic professionals claim that such visitation agreements are part of a beneficial ascending trend. District Judge Haim Porat (now retired), one of Israel's leading figures in the area of family law, described by many interviewees as the most influential judge in the field, had been active in encouraging visitation schedules that include weeknight sleepovers:

In more and more hearings the father wants to have the child over for the night in the middle of the week. And there are many studies that encourage such arrangement. I developed a model that involve every other weekend with the father, one visit without a sleepover and one that included a sleepover. This inspired a very high proportion of sleepovers at the father's home . . . and this result complies with theories on the importance of the father for the child . . . [a sleepover] includes dinner, bathing, putting the child to sleep, waking up in the morning, behaviours that are meaningful. It's called *parental hours*. Meeting from 4 until 6 is nothing; it amounts to going to the mall to buy ice cream. (Interview conducted on 27 December 2001)

Some interviewees also reported that a weeknight sleepover profoundly affected the substance of the relations between fathers and their children. Fathers who see their children for only a couple of hours on school days report that they try to make these meetings as pleasant as possible. They mention taking their children to the movies, to restaurants, malls and the beach. When children misbehave, these fathers avoid confrontation. They likewise leave most educational and discipline issues to the mother. These fathers, in short, perform as 'Disneyland Dads', a term which is used in studies which find that non-custodian fathers tend to include in their interactions with their children more fun activities than educational and day-to-day interactions (Lamb, 1999; Stewart, 1999). Consider Benny's report on his ex-wife's complaints regarding the differences in their parental roles in caring for their little daughter:

It's also easy. You see the child twice a week, every other Friday and Saturday; it's great! How did she [his former wife] say it at the beginning?: 'You're the icing on the cake. While I have to worry about taking her to kindergarten and bringing her home, and then taking her to the dentist, you come and take her to the beach and the movies, and wander around, and go to restaurants . . . and have a good time'. (Interview conducted on 15 July 2002)

The experiences of fathers whose children sleep over during weekdays are different. These fathers mention a variety of activities they perform with their children, such as assistance with homework, talks about the child's social life, preparation of meals and driving to school. As found in other studies (Lamb and Kelly, 2001; Parkinson and Smyth, 2003), such activities enhance the self perception of fathers as having a significant role in their children's lives. Yoav,

the father of a five-year-old boy, initiated a legal struggle when his ex-wife objected to a weeknight sleepover:

You see, I perceive my war as a war over the child, not as a war about taking him more often to an amusement park; to the contrary, a war to achieve as much normalcy as possible. So I can get up and hug him when he wakes up at night. That's what's most important when I think of what I missed when he was not with me. (Interview conducted on 5 September 2001)

Ori, whose two children sleep at his home once a week, reiterates a similar theme:

I wanted as much contact with the children as possible. It's worked well so far. I had a customer who divorced twice and he advised me that sleeping over with the father is rare and that I should insist on it. It is important that they also sleep at my place during the week; it changes the experience from a father who visits to something more significant. (Interview conducted on 13 September 2001)

These accounts also indicate that such visitation schedules are not routinely accepted. One female lawyer argued that she sees more fathers who 'insist on broader visitations that include overnights on weekdays'. She also framed her stories in terms of the 'demand' men make and their need to 'fight over it' (Interview conducted on 29 March 2001). Indeed, some fathers are discouraged from seeking broad visitation schedules by the professionals who are involved in the divorce procedure. One lawyer (male) explained that the reason is that such schedules run contrary to what is 'customary':

There are customs. Pointing at them is what lawyers contribute to this issue. You tell your client: 'Look, it's customary for the father to get the kids twice in the middle of the week and every other weekend', so normal people, that is people with no obsessions, just accept it. And then there is the father who says: 'No, I want them to be with me for overnights in the middle of the week too'. (Interview conducted on 23 April 2001)

This lawyer, as well as others, thus seems to advise men clients to follow a supposedly normative 'acceptable schedule' and those who insist on more might be labelled as obsessed.

To some extent, visitation schedules that include one or more weeknight sleepover, in addition to bi-weekly weekend stays, shared vacation time, and weekday afternoon interactions, are in fact an implicit joint custody arrangement. Melli, Brown and Cancian (1997) suggest that when legal custody is shared and visitation is ample 'the difference between sole custody and shared physical custody may only be a matter of degree' (p. 781). However, this argument should be qualified. While custody is defined in law as the custodial parent's obligation, visitation is defined as the non-custodial parent's right (Saadya, 1992). This difference is conspicuous in the wording of divorce arrangements. The language regarding custody is decisive, stating that the children *will* be in the custody of the mother whereas the language

regarding visitation is less stringent, usually stating that the father *may* or is *entitled* to visit his children at the times set in the agreement. This language is tailored to the fact that failure to fulfil custodial obligations, including the obligation to allow visitation between children and the non-custodial parent, can lead to criminal punishment, whereas no legal stipulations or penalties exist regarding the non-custodial parent's failure to carry out the visitation schedule set in the divorce proceedings.

The frustration experienced in enforcing visitation schedules is evident in the interviews conducted with sole custodian mothers. The situation is at least potentially different when custody duties are at stake. Dina, who shares custody over her three boys with her ex-spouse, has managed to resist his attempts 'to keep employing me after the divorce' (Interview conducted on 8 July 2001). She refuses to look after the children when he wants to travel abroad or go out at night. Unlike non-custodial fathers – even those who employ broad visitation schedules – who may force the mother to accept total responsibility for the children by not showing up for visits, the father of Dina's children will not be able to escape his responsibilities as a custodian parent if faced with legal proceedings.

In sum, the variety of visitation schedules that were identified in this study does not necessarily indicate a growing ability to deploy more egalitarian parental responsibilities. More than anything else, the visitation variety is an indication of the lack of agreement among professional actors about the paternal role. As we have seen, lawyers and courts have a significant role in shaping visitation schedules. Specifically, most lawyers and judges do not seem to assume an active role in encouraging fathers to take a more significant role in their children's lives, in fact often discouraging them from doing so. The legal environment, in general, is not conducive to change: the term 'visitation', in itself, marks the father as a visitor in his children's lives and as a bearer of rights rather than duties; many parents lack access to anything beyond a standard courthouse form that lacks a detailed visitation schedule; and many parents are only exposed to a normative assumption, backed by lawyers, about a 'customary schedule' that does not include sleeping during weekdays. All of these factors contribute to legal and cultural reproduction more than to legal and cultural change. The contribution of the legal field to the construction of fatherhood as an undefined voluntary role in the sense of active, daily, routine parental activities (see Smart and Neale, 1999b; Dowd, 2000) is in sharp contradiction to its treatment of motherhood as a taken-for-granted obligatory essence.

CONCLUSION

Feminist scholars such as Fineman (1995), Boyd (2003) and Polikoff (1982), analysing laws and court decisions dealing with custody in the United States and Canada, argue that motherhood as a symbol has collapsed and been replaced by the gender-neutral concept of parenthood. Consequently,

mothers are losing custody against their will with dire psychological and financial implications. Notwithstanding the importance of these arguments, this study suggests that in Israel the 'good mother myth' is still very much alive. In the vast majority of cases, divorced mothers are expected to assume full daily responsibility for their children and to perform according to hegemonic social norms. Fathers, on the other hand, are not exposed to any clear and shared social scripts regarding fatherhood and are not guided by any binding norms in respect to their caring role as divorced parents.

One possible explanation of the different conclusions drawn by the American and Canadian feminist scholars and by the author of this study is the focus on judicial rulings of the former and the focus on out-of-court activities of the latter. As this study strived to show, it is important to look beyond formal legal rules and judicial decisions when assessing the role of law in reproducing or changing concepts such as motherhood, fatherhood and parenthood and the practical implications derived from the meanings assigned to such concepts. As mentioned earlier, the vast majority of divorce cases are settled out of court and negotiations are only conducted in the shadow of the law. In these cases, mothers continue to gain custody even in countries where gender-neutral custody legal terms are in use. These facts and the findings of this study lead to the assumption that the maternal myth might still exist in other societies and legal fields and point to the limitation of the ability of legal reforms to impose equality on families in a social reality in which parental roles are still highly gendered. The American study of Wietzman (1985) as well as the British study of Smart and Neal (1999b) support this assumption. In both studies, although the law used gender-neutral terms regarding custody, divorced parents and legal professionals involved in divorce procedures still held gendered concepts of motherhood and fatherhood according to which mothers are better caregivers than fathers. These findings suggest that the difference between Israeli society and other western societies is the attempt of the latter to use the law as a mechanism for 'social engineering' (Smart and Neal, 1997) and not popular perceptions of parenthood. Indeed, the Israeli legal environment as a whole, implemented by daily professional routines in handling divorce, tends to reproduce and further reinforce a gendered division of labour rather than use divorce as an opportunity to send an egalitarian message to family members. In contrast to attempts made by other legal systems to enhance paternal involvement, the Israeli legal field reinforces the gendered perceptions of parenthood by turning the question of maternal custody into a non-issue, by constructing fatherhood as an undefined voluntary role, and by discouraging fathers who want to take a significant role in their children's lives. However, as mentioned earlier, in Israel joint legal custody was the norm long before it became a debated issue abroad and the visitation schedules found in the Israeli field are more detailed and broad than in other countries. These differences might be at least part of the explanation for the relatively quiet fathers' movement in Israel and the lack of a political struggle over custody law. However, recent attempts of an Israeli NGO to present a

legislative proposal for the abolishment of the *tender years presumption*¹⁴ and other recent similar attempts¹⁵ might add Israel to the list of legal systems with gender-neutral law governing custody. The findings of this study and the legal history of custody reforms in other countries (Smart and Neale, 1999; Boyd, 2003) suggest that this might be an outcome of global isomorphism carried out by fathers' groups and other professional advocates of socio-legal changes, rather than a reflection of broad and deep practical and conceptual changes within Israeli families and society as a whole.

Whether formal law governing divorce tries to impose parental equality or reinforces parental gender boundaries, looking at what is going on in the shadow of the law in divorce procedures complicates Beck and Beck-Gernsheim's (1995) argument regarding the kaleidoscope of parental possibilities available to women and men in the present era. As the Israeli case demonstrates, social perceptions regarding parenthood before and after divorce, as well as legal practices governing parent-child relations upon divorce, construct motherhood and fatherhood as two different essences that entail different parental roles for mothers and fathers. Indeed, the day in which women and men will be able to shape their parental biographies free from gendered social expectations and coercions is still far on the horizon.

NOTES

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1. For a thorough analysis of the different legal, therapeutic and political discourses within the Israeli field governing divorce procedures that cannot be elaborated here due to the focus and scope of this article see Hacker (2003).
2. C. A. (T. A.) 1125/99, *Roe v Doe* (2000), 32(9) P. M. 31.
3. C. A. 4575/00, *Doe v Roe* (2001), 55(2) P. D. 321.
4. For example, C. A. 783/81, *Roe v Doe* (2001), 39(2) P. D. 1.
5. In this study, only in 2.2 per cent of cases the custody or visitation arrangements were decided by a judge. In all other cases, at some stage of the proceeding, an agreement was handed to the court for approval.
6. Family matters in Israel are governed by two independent legal institutions, the civil Family Courts and the religious courts (each religious sect maintains its own court). In the case of Jews, which is the population investigated in this study, the reference is to the Rabbinical Courts. In these courts, the judges must be Orthodox Rabbis, which means that they are all men and usually hold traditional religious views. In addition, many aspects of the legal procedures are governed by Jewish religious law that treats men differently from women, usually to the disadvantage of the latter (Shohatman, 1995). Both Family and Rabbinical Courts must rule in custody and visitation matters according to the Capacity and Guardianship Law mentioned earlier. However, many in the legal field claim that the Rabbinical Courts encourage more paternal involvement than Family Courts due to religious norms (Frishtick and Adad, 2001; Hacker,

- 2003). Eventually, all files reach a Rabbinical Court since this is the only tribunal authorized to grant a divorce decree (Baker, 1968: 207–8).
7. This region was selected for three reasons: it is a socio-economic heterogeneous region; almost half of the divorces in Israel take place in this region (see SAI, 2003: Table 3.2); and it was the first one in which Family Courts were established. Further research should be conducted to examine the relevancy of the findings reported here to other areas of the country.
 8. Three-hundred and sixty divorce files of parents were randomly selected from the Rabbinical Court archive. In those cases in which a procedure took place also at the Family Court (53 per cent), the relevant file was located at the archive of the Family Court to complement relevant data.
 9. The reasons this study focuses on Jews are that Muslims and Christians have their own religious courts, as mentioned earlier, and that the Jewish population is the largest in Israel (78 per cent). A comparative research is important but goes beyond the scope of this particular study.
 10. During the study period, about 9,000 divorce files were opened in Tel Aviv's Rabbinical Court (see www.rbc.gov.il). According to a pilot study conducted by the author prior to the study reported here, the ratio between all files and those following the criteria relevant to the study was roughly 1:4. Therefore, 360 files consists of 1/6 of the research population.
 11. In fact, similar to findings in other countries (Bahr et al., 1994; Laing, 1999) Israeli studies demonstrate that in contested cases that reach judicial ruling, maternal custody is less prevalent than in divorce agreements (Gofna-Pinto, 1996; Frishtick and Adad, 2001). A reasonable explanation, at least to the Israeli findings, is that the resistance to custody options other than maternal custody in the legal field is so strong that cases that reach judicial ruling are more likely to be cases in which the mother lacks adequate parental capabilities.
 12. According to Israeli law, both parents continue to be the child's guardians after divorce, unless otherwise agreed or ruled. In practice, the question of joint legal custody is hardly ever raised.
 13. The rate of undetailed visitation agreements is even higher in some other countries (see Bahr et al., 1994; Melli, Brown and Cancian, 1997; Lamb, 1999).
 14. See www.horut-shava.org.il.
 15. In June 1997 a governmental committee was appointed to look into child-related laws. During its work, a Report was submitted by one of the committee members, arguing for the abolishment of the *tender years* doctrine in favour of the child's best interest criteria. Eventually, the committee decided not to recommend on the question of custody law. These days, however, this committee member is trying to promote his agenda through the Tel Aviv Bar Association.

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