

# A legal field in action: the case of divorce arrangements in Israel

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## Abstract

*This paper suggests a theoretical and methodological framework that integrates Bourdieu's conception of the juridical field with Mnookin and Kornhauser's claim of the centrality of the action occurring in the shadow of the law. This framework is constructed based on a study of the Israeli legal field governing divorce that included the analysis of 360 divorce files and in-depth interviews with more than 40 divorcees and legal and therapeutic professionals. The study allows a rare exploration of a legal field in action, including the main positions within the field and the power relations between them, as well as the field's boundaries and game rules. The findings illustrate the importance of Bourdieu's fields theory if and when opened up to the informal dimensions of law and demonstrate the potential of the suggested framework to the sociological understanding of law in action.*

## Introduction

Two decades have passed since Pierre Bourdieu (1987) applied his notion of social fields to law. Since then, the theoretical and methodological implications of conceiving law as a social field have received scant attention (García Villegas 2006, p. 58). The few who relate to Bourdieu's notion of 'juridical field' either dismiss it as too static to be useful to the understanding of the complexity and dynamism of law (Valverde, 2006), or use it uncritically in their studies. Interestingly, these studies are mainly grand-scale investigations mapping the historical development of a whole national or transnational juridical field (for example, Dezalay and Garth, 1996; Tomlins 2004; Cohen 2007). This paper seeks to join those who find the theoretical conceptualisation of law as a social field useful, but to do so critically, while focusing on the present ongoing activities taking place in a particular doctrinal legal field. Through a thick description of a segment of the Israeli legal field governing divorce, I demonstrate the potential of Bourdieu's field theory for the sociological understanding of law in action, if the theory is expanded to include also the informal dimensions of law.

Bourdieu's application of his social fields conception to law was limited to a discussion of the latter's adversarial dimensions. His brief description of the judge as 'a third-person mediator' stands in stark contrast to his definition of the 'juridical field' as 'a social space organized around the conversion of direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy' (Bourdieu, 1987, p. 831). In line with this definition, he proceeded to focus on

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the struggle amongst judges, lawyers and law professors over the monopoly on determining the law. Yet growing empirical evidence that litigation is but a small fragment of the legal field (the term I will use hereinafter for *champ juridique*<sup>1</sup>) belies the centrality Bourdieu accorded to its adversarial aspects. In the sphere of divorce, for example, as indicated by my findings as well as those of others (Maccooby and Mnookin, 1992; Robinson, 1991; Stamps, Kunen and Rock-Faucheux, 1997; Bastard and Cardia-Voneche, 1995), the vast majority of cases culminate in a settlement agreement between the parties that is submitted to the court for approval, rather than being concluded by a judicial decision. Moreover, studies have shown that many litigants in divorce cases do not have legal counsel (Beck and Sales, 2000) and that appearing in court constitutes only a very small proportion of attorneys' work on divorce cases (Eekelaar, MacLean and Beinart, 2000; Sarat and Felstiner, 1995). This is not unique to divorce law. Mounting empirical data show that, in many civil matters, the majority of legal action occurs outside the courtroom (Relis, 2002; Lempert, 2001, fn 103). Even criminal law, presumably the most adversarial legal sphere, has become increasingly open to out-of-court negotiations in the form of plea bargains (Lempert, 2001, fn 103) and mediation (Umbreit, 1998).

The research on the substantial out-of-court legal activity highlights the compelling validity of Mnookin and Kornhauser's (1979) groundbreaking assertion about the centrality of out-of-court negotiations and the need for a theory explaining the relationship between formal law and what takes place in the shadow of the law. And indeed, since the publication of the Mnookin and Kornhauser article in 1979, several researchers have attempted to shed light on this relationship. In the area of divorce, Griffiths (1986) found, from his study of Dutch divorce lawyers, that it is actually the attorneys, not the divorcing parties, who bargain in the shadow of the law. In contrast, Erlanger, Chambliss and Melli (1987) concluded from their study of divorce proceedings related to economic issues in Wisconsin that both lawyers and parties negotiate in the law's shadow. However, they observed, this is a very vague shadow created by judges, who, in turn, reach their own decisions in the shadow of informal settlements and adopt the norms shaped in the course of private negotiations. Jacob (1992) took the argument of the ambiguity of the shadow of divorce law one step further. Based on interviews he conducted with divorced men and women in Illinois, he concluded that the shadow of the law has almost no presence in divorce negotiations and that most settlements are wrought primarily by the parties in the private sphere and formulated in emotional rather than legal terms. In light of his findings, Jacob labelled as 'unfortunate' Mnookin and Kornhauser's choice of divorce for their case study to demonstrate the importance of the relations between formal law and informal negotiations (p. 586).

In this article, I propose that Bourdieu's theory of social fields contains an analytical framework that can be developed beyond the important yet limited debate over who is acting under which shadow, to a broader, expanded application that captures the formal as well as informal dimensions of law. Using my case study of a segment of the Israeli legal field governing divorce, I consider the ramifications of Bourdieu's theory when synthesised with Mnookin and Kornhauser's insight on the significance of the action taking place in the shadow of the law. The integration of the two provides constructive theoretical and empirical parameters for our understanding of the legal field in action.

The first part of the article, intended for those who are not familiar with Bourdieu's thought, explicates his general theory of social fields and his specific conception of the legal field. The second

1 The French *juridique*, which Bourdieu used in the original 1986 version of his article to designate this field, can be translated as either *juridical* or *legal*. Though the words share the same meaning, 'of or related to law', in accordance with the main argument of this article, I prefer the latter to the former, 'juridical', which is the term used in the English translation of his article. The word *juridical* is associated mainly with 'judicial proceedings' whereas *legal* conveys a broader meaning, including that which is 'concerned with law', and thus is better suited for capturing legal interactions that take place outside judicial tribunals. See *Black's Law Dictionary* 8<sup>th</sup> ed., 2004; *The Oxford Encyclopedic English Dictionary* (ed. J.M. Hawkins and R. Allen), 1991; <http://www.answers.com/topic/legal> [all internet sites were last visited on 13 June 2008].

part presents an overview and outline of the study I conducted on the divorce proceedings of Jews in central Israel. This is followed, in the third part, by a presentation and analysis of the study's main findings. I begin with a discussion of the role of formal law as the 'written manual' of the legal field's structure and rules of the game. I then consider the findings relating to the main positions in the legal field – courts and judges, lawyers and clients, and therapeutic professionals – and discuss the professional competition over the mediation role in the field. I conclude the article with a defence of its title, arguing that my findings demonstrate that, despite the participation of non-legal agents (i.e. clients and therapeutic professionals) in the field's action, it nonetheless warrants the label 'a legal field'. Finally, I discuss also the implications of the case study for the general argument regarding the importance and potential of Bourdieu's field theory for the study of law as a social phenomenon.

## Law as a social field

One of Bourdieu's most significant innovations was his vision of society as composed of social fields, which he defined as networks of objective power relations amongst social positions. These hierarchical positions are ordered within the field in correspondence with the overall volume and relative weight of the economic, cultural and symbolic capital they presently or potentially accord to their occupants. The agents and institutions occupying these positions are in a constant struggle to capture the different kinds of capital the field offers, with the big capital holders usually striving to preserve the current distribution of capital in the field and the smaller capital holders trying to undermine it. These conflicts notwithstanding, the different social agents share fundamental interests, which generate objective co-operation amongst them. These common interests include preserving the field's boundaries and the monopoly wielded by the current agents over its prizes, which serve as motivation to exclude newcomers from the field. Moreover, all agents accept the rules of the game governing the field and recognise the value of the various types of capital it offers, if merely in their participation in the game. Thus, even those who challenge the field's orthodoxy propose only partial revolutions that do not threaten the basic axioms at the heart of the field's power game (Bourdieu, 1990; Bourdieu and Wacquant, 1992; Bourdieu, 2005[1984], pp. 113–19; Dezalay, 1986).

The ability of agents to enter the legal field and successfully compete for its prizes is contingent on their habitus. Bourdieu conceived of habitus as a 'system of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them' (Bourdieu, 1990, p. 53). This concept departed from the vision of the individual as a conscious agent acting solely by free will as well as from that of the human marionette activated purely by external social forces. While human beings act in accordance with their understandings, interests and wills, these are embedded with social structures, rules, norms and categories of meaning and perception which constitute the habitus we acquire through socialisation and that limits our imagination. We are generally unaware of the habitus that influence our thoughts and actions, just as we are not conscious of the specific social conditions and contexts in which it was produced (Bourdieu, 1990; Bourdieu and Wacquant, 1992, p. 121; Webb, Schira and Danaher, 2002, p. 39). Despite the ambiguity regarding the relation between habitus shaped by a position within a field that an agent enters as an adult and habitus acquired during early socialisation (Jenkins, 1992, p. 90), Bourdieu's writing does suggest that an agent has a greater chance of prevailing in a specific field when that field's logic facilitates the actualisation of his or her individual habitus: the product of the agent's group or class habitus and his or her accumulated historical experiences within different social fields (Bourdieu, 1990, pp. 59–62; Bourdieu and Wacquant, 1992, pp. 105, 135–36).

Bourdieu's (1987) application of his social fields theory to law succeeded in avoiding both the formalist and instrumentalist approaches. Under his conception, law is neither an autonomous

system, to be understood exclusively in reference to itself, nor a direct expression of external social power relations. Rather, law is a professional space that functions in close relations with other social fields but, like all other social fields, operates according to a particular logic that is the product of its specific internal power relations, which constitute its structure and govern the competitive struggles within it. This ‘internal logic of juridical functioning’ (p. 816) constantly limits the range of possible actions by agents and constrains juridical solutions. Only by perceiving law as a social field can we fully comprehend its social significance, since it is within this distinctive space that ‘juridical authority is produced and exercised’ (p. 816).

Bourdieu’s understanding of the agent acting within a structure overcomes the strict dichotomy between the structuralised and the phenomenological perceptions of law (see Luhmann, 2004, as an example of the former, and Ewick and Silbey, 1998, as an example of the latter). Indeed, construing law as a social field in Bourdieu’s terms enables an analysis of the legal universe as a structured system that does not abandon the notion of the agent as an active, interpretive, and sometimes challenging subject.

Under Bourdieu’s conceptualisation, judges, lawyers and law professors are the social agents in the legal field, engaged in the struggle over the right to determine the law. A structural animosity exists between legal scholars, who are dedicated to the purely theoretical constitution of legal doctrines, and judges, who are concerned with the application of the law to concrete cases. Notwithstanding this hostility, all agents accede to the legal field’s internal logic, under which the interpretation of legal texts is a means for reaching the practical objective of conflict resolution. They all also comply with the rules of the game in the field, which exclude any lay understanding of fairness and justice (including that of clients) by rationalising and professionalising the law. Hence, the legal field is organised as ‘a hierarchized body of professionals who employ a set of established procedures for the resolution of any conflicts between those whose profession is to resolve conflicts’ (p. 819).

According to Bourdieu, the agents occupying the legal field, as well as the public at large, conceive of the juridical process as a transformation of conflicts into rule-bound exchanges of rational arguments between professionals, in a progression towards the truth as embodied in the judicial ruling. With its universalising, neutralising and homologating (i.e. enabling the association of the same meaning by different speakers) effects, the legal language contributes significantly to this conception of the law. Bourdieu further propounded that, in order for a conflict to enter the legal field, it must be in need of a relatively ‘black or white’ determination and framed in terms of recognised legal categories and precedents. Accordingly, the power lawyers wield in the legal field can be in large part attributed to their monopoly over the ability to translate conflicts into legal language and assess a party’s chances of winning.

The image of the law that emerges from Bourdieu’s description of the legal field corresponds with an adversarial conception of law. In emphasising the centrality of the struggle amongst legal professionals over the interpretation of formal legal texts, he depicted the field as organised around legal proceedings in which two attorneys represent disputing clients before a judge who decides in the matter in a clear-cut manner but while also engaging in a charged dialogue with the abstract legal conceptualisations of academics. As noted at the outset, attributing such a weighty status to litigious procedure is questionable in light of the empirical evidence that it constitutes only a small part of the legal action.

Indeed, Bourdieu asserted that a social field’s boundaries and positions, its agents’ habitus and its relations with other fields should be defined only following empirical investigation (Bourdieu and Wacquant, 1992, pp. 100, 104–105) – of the very sort he failed to conduct on the legal field. Bourdieu himself conceded on several occasions that he had devoted neither enough time nor effort to understanding law (García Villegas, 2006, p. 58). Consequently, his work on the legal field should be taken as a preliminary analysis influenced by his elementary acquaintance with the French legal

system – more of an insightful sketch than a full and developed theory of law. This does not, however, render his general theory of social fields and its specific application to law irrelevant (see also Madsen and Dezalay, 2002). In what follows, I will demonstrate how a deep and complex understanding of a specific legal field – in our case, that governing divorce – can be achieved through an empirical application of Bourdieu's concept of law as a social field, but without making a priori assumptions regarding the field's boundaries, positions, prizes or logic. This analysis will serve to highlight the potential of Bourdieu's theory for the study of law in action.

## The study

Most empirical studies on law in action focus on one or two types of agents in the legal field, including judges (see e.g. Stamps *et al.*, 1997), lawyers (see e.g. Eekelaar *et al.*, 2000), litigants (for a review of the literature, see Relis, 2002) and other professionals, such as the medical or therapeutic professions, who find themselves embroiled in legal proceedings (see e.g. Jenkins and Kroll Smith, 1996, for a collection of essays on sociologists in court). Only a very few studies have examined more than two types of agents. One rare example in the context of divorce is the Griffiths's (1986) study of Dutch divorce lawyers, which included interviews with divorced parents, judges, attorneys and other professionals and observations of attorney–client interactions. Two other such studies are the Erlanger *et al.* (1987) Wisconsin study, in which interviews were conducted with family court judges, lawyers and divorced parents, and a study conducted by Bastard and Cardia-Voneche (1995) investigating the relations amongst judges, lawyers, social workers and mediators in France in the context of divorce.

Following the lines of these studies, but with a more ambitious objective inspired by Bourdieu's concept of law as a social field, my study was designed to capture a legal field in action, focusing specifically on the legal field governing Jewish divorces in central Israel.<sup>2</sup> The main objective of the research was to learn about custody and visitation arrangements and the familial and professional norms and practices that shape them (for the findings on custody and visitation and on how parents and professionals perceive motherhood and fatherhood, see Hacker, 2005). This objective required a full understanding of the way in which the legal field governing divorce operates. Formulated in Bourdieu's analytical terms, I sought to determine the main positions in the field and the power relations amongst them, the central rules of the game and the rewards being competed for, the field's boundaries, and, finally, whether this space does, indeed, constitute a type of legal field. To address the challenge posed by Mnookin and Kornhauser's assertion and by empirical findings to Bourdieu's fundamental presumption of the predominantly adversarial nature of the legal field, I approached these issues with a meta-question: What does this specific legal field do? Thus, I did not conduct a classic Bourdieusian study (see e.g. Bourdieu's work on the academic field, Bourdieu, 1988, and the Dezalay and Garth 1996 study on the field of international commercial arbitration), but, rather, applied Bourdieu's theoretical parameters while critically examining his perception of the legal field.

The study comprised both a quantitative stage and a qualitative stage. The former consisted of a statistical analysis of data gathered from 360 randomly selected divorce case files from courts in the central region of Israel. This heterogeneous area includes Tel Aviv, Israel's second-largest and most cosmopolitan city, and many other towns, with a combined total population of approximately two million (out of the total Israeli population of seven million). The sample was restricted to cases that had been filed during 1997 and 1998 and concluded with an official divorce decree by the end of 1999 and in which the parties were Jewish Israeli couples with at least one minor offspring. The sample

2 The specific focus on Jewish divorce proceedings was due to the fact that, in Israel, there is no possibility of conducting civil marriage or divorce and Jews, Muslims and Christians maintain sectorial religious courts, each with varying characteristics. In addition, the Jewish population constitutes 78 percent of the general population in Israel; hence examining Jewish divorce is relevant to the majority of Israelis.

represented about one-sixth of the relevant research population. Data were collected on the terms of divorce, with a focus on custody and visitation arrangements, the divorcees' socioeconomic backgrounds and the professional agents who participated in formulating the post-divorce arrangements. The data were analysed using descriptive statistics,  $\chi^2$  for probability of association and Cramer's  $V$  for strength of association, OLS regression and logistic regression.

To gain a better understanding of the field, standardised open-ended interviews (Patton, 1990) were conducted with more than forty respondents during the years 2001–2002: sixteen recently divorced parents (eight women and eight men from different socioeconomic backgrounds) and twenty-seven professionals (judges, lawyers, mediators, social workers, psychologists and representatives of sociolegal advocacy organizations). The divorced parents were reached through public advertisements and using snowball technique; the professionals were selected according to relative experience and expertise in divorce cases, as extrapolated from the frequency of their appearance in the court records examined and from information given by key informants, with the majority having more than ten years of relevant experience.<sup>3</sup> In addition, observations were conducted at conferences for legal and therapeutic professionals related to divorce. All interviews and observations were transcribed and later analysed, together with the data extracted from the court files, using grounded theory methodology (Strauss and Corbin, 1998). Preliminary and conclusive findings were presented for feedback to divorcees and professionals familiar with the field (Altheide and Johnson, 1998).

## Findings and discussion

### Formal law

Formal law was rarely mentioned by interviewees as guiding their actions and perceptions. However, the legal field of divorce, and any other type of legal field, cannot be fully grasped without acknowledging the role of formal law. For formal law may be so crucial in shaping the field's structure and playing rules that it is in fact part of the 'durable dispositions' forming the agents' habitus, in no need of conscious deliberation (see also Hagan and Levi, 2005, p. 1503).

Under Israeli formal law, family matters, including divorce, are governed by a dual regime. There are separate religious courts for Jews, Muslims and Christians that operate parallel to and in conjunction with a civil family courts system, enjoying both overlapping and exclusive authorities. Whereas only the religious courts can grant a divorce decree, in other, related matters (such as alimony, property, custody and visitation), the religious and civil courts enjoy parallel authority and the matter is decided by the tribunal with which it is first filed (Shava, 2003). Of particular significance are the legal rules that determine that divorce cannot be conducted privately: Israeli law mandates that every divorce must enter the legal field. The divorce agreement must be approved by either a religious legal tribunal or a civil court for it to have legal effect or, alternatively, the relevant tribunal or court must decide on the terms of divorce when no agreement has been reached between the parties, and the formal act of divorce is then supervised by a religious tribunal.<sup>4</sup> The written law thereby positions religious and civil courts as essential and powerful institutions within the legal field of divorce and signals married couples' lack of autonomy from intervention by state

3 As mentioned above, Bourdieu accorded centrality to law professors in the legal field (influenced by his knowledge of the French legal field, in which they do play such a role (García Villegas, 2006, p. 69)). In contrast, the interviewees in my study did not mention them as occupying a significant position within the field, and I found no indications in the court files of academic influence. Thus, legal scholars were not included in the scope of the study. Indications of a scholastic role in the field could perhaps have been identified had the study examined appellate and Supreme Court files, in which settlements might be more rare and substantive arguments and rulings might include references to scholarly sources.

4 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953; Capacity and Guardianship Law, 5738-1978, §§ 24, 25; Financial Relationships between Spouses Law, 5733-1973.

organs in their separation. This signal is even further reinforced by the absence of no-fault divorce from Israeli law. Indeed, the subordination of each and every divorce to judicial supervision is a manifestation of the tight link between the legal field and the state, the latter conceived as a meta-field by Bourdieu due to its monopoly over legitimate symbolic power (Bourdieu and Wacquant, 1992, pp. 111–12), so often manifested in formal law (García Villegas, 2006).

An additional formal guideline set by Israeli law that affects the field's structure and logic is the prescription of 'the best interest of the child' as the only relevant criterion in custody disputes between divorcing parents.<sup>5</sup> In so providing, the law allows therapeutic professionals, perceived as experts in assessing and predicting that interest, to gain entry into the legal field. Indeed, as we shall see, therapeutic evaluation is an inevitable part of the legal process in all custody disputes. This raises the significant question, considered below, of whether this criterion in fact undermines the legal field's specific logic and subordinates it to the therapeutic habitus.

Formal law impacts not only the structure of the field, but also the professional habitus of its agents. The child's-best-interest criterion, in conjunction with the assumption that parental conflict is harmful to the child and the legal provision that parents should agree in all matters related to guardianship over their children,<sup>6</sup> partially explains the general consensus in the field that a settlement between the parties, as opposed to a judicial ruling, is the optimal solution in parental divorce. As we shall see, this perception is tied to the prevalent practice in the field of pressuring divorcees to reach an agreement. This pressure shapes the judges' role, is the source of lawyers' authority as the law's representatives outside the courtroom and is manifested in the institutionalised effort to introduce mediation into the legal field.

It is important to note that, despite the formal legal rhetoric regarding the centrality of the child's best interest and the legal field's support for this criterion, in most cases, the specific child's interest is apparently never assessed by any agent occupying one of the field's positions. In setting guardianship, custody and contact with the non-custodial parent as the issues to be determined,<sup>7</sup> the law in effect narrows the scope of the personal, familial and social aspects of the parent–child relationship after divorce to these three areas. Mather and Yngvesson (1980–1981) argued that such narrowing is an extremely prevalent process when disputes are transformed into legal concepts, and from my study, it emerged that this is even the case when the parties present the court with an agreement. Almost all the settlements filed in the court records examined included 'custody' and 'visitation' arrangements – the two leading terms shaped by the legal field governing divorce regarding parents–children relations. In Shifman's terms (1989, p. 232), the law assumes that the best interests of the *potential child* are served by a custody and visitation agreement between the parents, thereby allowing the legal field (except in the rare instances of bitter parental conflict over custody) to bypass a thorough discussion of the best interests of the *actual child* whose parents are divorcing. In effect, formal law promotes the confinement of every family's relations, regardless of its members' unique characteristics, to a uniform set of terms that facilitate bureaucratic management of the post-divorce relations. As will be shown, in so doing, the law bolsters lawyers' ability to direct their clients towards such standardisation in their out-of-court settlements and contributes to the exclusion of therapeutic mediation from the legal field governing divorce.

Moreover, formal law clearly impacts also the scope and content of interpretative struggles within the legal field, thus further shaping its structure as well as its agents' habitus. Unlike the case in Western countries, Israeli law still incorporates the 'tender year's presumption', with the Capacity and Guardianship Law instructing courts to rule according to the premise that 'children up to the age

5 Capacity and Guardianship Law, 5738-1978, §§ 24, 25.

6 Capacity and Guardianship Law, 5738-1978, § 18.

7 Capacity and Guardianship Law, 5738-1978, § 24.

of six shall be with their mother unless there are special reasons for directing otherwise'.<sup>8</sup> This doctrine is one of the underlying reasons for the unwavering domination of sole maternal custody in Israeli divorce, which was the outcome in over 90 percent of the cases examined in the study. But it is not only what the law states explicitly that bears weight, but also what it refrains from saying. The law does not detail visitation arrangements, thus leaving this a vague area to be regulated by the field. The enormous variety of visitation schemes found in the cases reviewed can be attributed in part to this lacuna. Despite the efforts of lawyers and the court to influence and standardise visitation schedules, ninety-nine different models of schedules were identified in the 309 files with sole maternal custody. Moreover, it emerged from the interviews that the law's favouring of maternal custody deters fathers from fighting for custody, and they instead channel their relative power into the negotiations and battle over visitation rights. Thus we see here yet another example of the interconnection between formal law and the negotiations that take place in its shadow.

Formal law hence provides us with preliminary guidelines for understanding the legal field's structure and logic. Unlike the sometimes elusive and hard-to-detect structures and logic of other social fields, formal law is the 'written manual'<sup>9</sup> of the legal field, determining the central positions and their relative power and the perceptions and bargaining behaviours of the agents occupying those positions. Obviously, like any text, this manual is only partial and open to different interpretations. This feature of formal law, which, as Bourdieu reminded us, cannot be understood as an oppressive structure that leaves no space for the individual action, returns us to the interpretive and active agents and their subjective interaction within the field. In the next section, I present and discuss the study findings that fill in the spaces left by formal law. I begin with an analysis of the role and relative power of the field's main positions: courts and judges, lawyers and their clients, and therapeutic professionals. I conclude with a discussion of the competition between lawyers and therapists over the monopoly on mediation.

### The judiciary

This section in effect challenges Bourdieu's adversarial depiction of the role of judges and elaborates on the part they play in directing litigants towards supervised agreements. In addition, I critique Bourdieu's disregard for the courts as institutional agents in the legal field and apply his general field theory to argue that court fees, forms and support staff, along with judges' habitus, all impact the judicial procedure and its outcomes.

As mentioned, the dual legal system that governs divorce in Israel is composed of civil family courts and religious tribunals. The Jewish religious tribunals, known as the rabbinical courts, are part of a legal system that was formed in Palestine before the establishment of the State of Israel. Rabbinical court judges are required to be ordained orthodox rabbis (most are from the ultra-orthodox stream) and, consequently, are always male. In contrast, the family court system is a relatively new innovation, established in 1995–1997 in an attempt to centralise all civil family matters under one roof and to create 'caring courts', offering up-to-date in-court therapeutic services. Family court judges must be specialists in family law matters and have at their disposal a wide array of therapeutic professionals to assist them in their determinations. For instance, whereas the regional rabbinical court focused on by the study was, at the time, assisted by only one social worker in the court's Advisory Unit, the Assistance Unit of the family court in the same region employed twelve full-time social workers as well as a psychologist and psychiatrist part-time.<sup>10</sup> Both the family

8 Capacity and Guardianship Law, 5738-1978, § 25.

9 I thank Menachem Mautner for suggesting this term.

10 In 2006, the Justice Ministry drafted a bill to establish 'Assistance Units' within all the religious tribunals, including the rabbinical courts. This bill has not yet been passed by the parliament. See <http://www.justice.gov.il/NR/rdonlyres/1087C4E8-D6E4-4965-99A6-64D222Bo5921/o/HOKBATEIDATIIM YEHIDOTSIFYUA.pdf> [Hebrew].



courts and rabbinical courts are subject to the Jewish religious law governing divorce, unless a specific civil law provision has set an overriding norm; however, in some matters of procedure and evidence law, the rabbinical courts follow religious rules and the family courts apply civil regulations (Rosen-Zvi, 1990, pp. 69–92). The decisions of the courts in both systems are subject to constitutional review by the Israeli High Court of Justice. This unique dual structure offers a rare and enlightening opportunity to conduct a comparative study of the role of judges and courts in divorce proceedings.

To begin with, there are a number of similarities in the performance of judges in the two court systems. In both the family court and the rabbinical court, a judicial ruling determining the terms of divorce is the exception. The data revealed that only 2.2 percent of the cases were actually decided by the judge on matters of custody or visitation. It should be noted that this may be lower than the overall proportion of judicially determined cases, if all such cases are factored in, due to the bias deriving from the restriction of the sample to cases concluded within three years of filing. However, other evidence, including the rarity of custody and visitation claims and low rate of appeal in these matters reported by district court judges interviewed, seems to point to the non-litigious character of this field, at least with respect to non-financial issues. This conclusion correlates with findings from studies conducted in other countries, mentioned in the Introduction, which have shown that, in family law matters, as well as in other areas of law, most cases are concluded without the need for a judicial ruling.

In light of the scarcity of judicial determinations in divorce and other civil cases, some scholars have concluded that, in contrast to their substantial role in the past, civil judges have served, since the mid-twentieth century, merely as a rubber stamp for agreements filed for court approval (Friedman and Percival, 1976). My study findings, however, contradict this conclusion and instead indicate that judges continue to be important agents in the field of divorce, albeit not necessarily in the capacity of handing down formal rulings. Interview responses revealed that both family court and rabbinical court judges actively direct litigants towards reaching agreements, employing three different tactics. First, the judge may issue an order against recording the courtroom proceedings, aimed at enabling the parties and their lawyers to speak freely and ‘off the record’. This practice is based on the assumption that eliminating the fear that statements made in the course of negotiations will be later used against the speaker increases the likelihood of the parties’ arriving at a mutually acceptable agreement. A second method used by judges to encourage settlements is to postpone hearings. As one family court judge recounted, this ‘lets the parties stew’ [F4].<sup>11</sup> The intentional delays cause distress to the parties and eat away at their means for the costs of the court procedure, thus encouraging them to end the dispute without the formal intervention of a judge. A third method used by judges to promote agreement is to suggest possible settlement options. One lawyer vividly described the power of judges to push parties into agreement:

‘There are judges who won’t leave the couple alone [*laughs*] and almost force them to reach an agreement. It’s much easier for a judge to convince the parties to reach an agreement than it is for a mediator. The judge, he sits there, high up. Sometimes you agree because you feel uncomfortable standing before the judge. You often feel scared: if you don’t agree now he’ll pass down such and such a decision ...’ [F9]

It is clearly understandable that the force of a judge’s suggestions stems from her position as final arbiter or, in Bourdieu’s terms, the final determiner of the law. However, the role played by judges that emerges from my study deviates significantly from that depicted by Bourdieu, who completely

11 Except in cases where the interviewee held a unique position within the field and gave permission to reveal his or her name, the names of the interviewees have been withheld to protect their privacy. Under the anonymous coding, [F] stands for ‘female’ and [M] for ‘male’.

ignored the phenomenon of legal negotiations and settlements in his analysis of the legal field. The study findings are consistent with Mark Galanter's argument that 'courts not only resolve disputes, they prevent them, mobilize them, displace them, and transform them' (1983, p. 34). Indeed, it seems that at least family court and rabbinical court judges who work at the trial court level – the lowest and widest rung of the hierarchical legal field – do not insist on performing the decision-maker role, and instead prefer to leave the concrete decisions to the parties themselves.

One of the consequences of judicial reluctance to end parental divorce proceedings with a court ruling is that judges do not take full advantage of the opportunity to constitute the law by infusing substantial and clear content into vague legal terms such as 'the best interest of the child'. This seemingly contradicts Bourdieu's claim that judges are in ongoing competition with all other agents in the legal field over the power to determine the law. If such was, in fact, the case, we would expect to find strategic attempts by judges to exacerbate divorce conflicts and frequently hand down legally binding decisions.

In fact, several explanations can be offered for judges' anti-adversarial tendencies, including heavy case-loads awaiting speedy resolution, consensus amongst all the field's agents that parental marriages are best terminated by consent as parental conflict is harmful to children, or the emotional burden for judges entailed in hearing the testimonies of family members. However, the position of family court and rabbinical court judges in the Israeli legal field of divorce becomes fully apparent in light of the crucial findings on the direct and indirect pressure judges bring to bear on divorcing parents to reach an agreement, which contradict, and thus collapse, the conventional dichotomy set between rulings and agreements. As described, judges are often active in bringing divorcing parents to an understanding, by facilitating off-the-record negotiations inside the courtroom, postponing hearings or hinting at the contents of a potential ruling should an agreement not materialise. Combined, the judges' presence and performances contribute to a hybrid legal outcome: an arrangement that is neither a reflection of the parties' free will nor a product of a formal judicial decision. It is, rather, an agreement shaped under the judicial gaze.

Such an understanding of the legal outcome in many divorce cases allows us to expand on Bourdieu's perception of the prize contended for in the legal field, namely, winning the battle over how legal texts – laws and precedents – are interpreted. As evident from the study findings, this conception captures only the adversarial end of the continuum of legally endorsed outcomes, which includes judicially approved out-of-court agreements as well as all other agreements formulated under relatively active judicial intervention. Thus, the legal field offers a greater prize than the power to determine the law in its narrow formal sense and should be understood as including also the power to approve and influence legally binding 'agreements'. Indeed, in the context of divorce, the position of judges as final arbiters, even though manifested only in a small proportion of the cases brought before them, in conjunction with the need for court approval for a divorce agreement to be legally binding, often allows judges to forego the struggle over the interpretation of formal legal texts, without fear of weakening their position in the field and their influence over the outcomes of the legal procedure.

The important similarities between rabbinical and family court judges that emerged from the study notwithstanding, it is the differences between the courts in the two systems that illustrate the complexity of the courts' role in the legal field. Both lawyers and family court judges harshly criticise the rabbinical court system, claiming that it is a patriarchal regime that is detrimental to women, that its judges lack therapeutic knowledge and therefore their decisions cause harm to children of divorcing parents, and that, at the very least, it is inefficient, with files often lost in the system. From the interviews it was apparent that lawyers and family court judges alike perceive their own habitus, of modern and educated professionals, to be substantially dissimilar and superior to the habitus of rabbinical court judges, who, in the majority of cases, lack a university legal education and are entrenched in an orthodox and traditional way of life. The shortcomings of the rabbinical courts as

well as their judges, argue lawyers and family court judges, led to the emptying of their corridors following the establishment of the family court system in 1996.

My study found, however, that even after the institution of the family courts, almost half of the examined cases had nonetheless been submitted exclusively to the rabbinical court. What can explain the continued appeal of the rabbinical courts, in contradistinction to the impression held by family court judges and lawyers? The answer relates to the fact that the two types of divorce proceedings operating in the field are divided and characterised by economic class.<sup>12</sup> The study found that the one set of proceedings, in the rabbinical court, tends to feature relatively poor parties, who do not hire lawyers and usually file for divorce without any advance settled agreement. They are often presented with a standard, one-page divorce agreement at the rabbinical court, which they usually sign automatically, filling in only their names, addresses, number of children and amount of child support to be paid. The second type of divorce proceedings, in the family courts, is characterised by parties from the middle and upper classes. These litigants hire at least one lawyer and usually conclude the process with a detailed settlement agreement.

The statistical analysis of the study's findings revealed that the probability of a relatively poor party filing with a rabbinical court, as opposed to with the family court, is thirty-seven times greater than the same probability for a relatively wealthy party, after controlling for representation (see Appendix A). Why do poorer people file with the rabbinical court whereas more privileged parties turn to the family court? My findings offer several explanations related to different aspects of the procedures in the two types of tribunals.<sup>13</sup> One factor is the lower court expenses entailed by the proceedings in the rabbinical courts. For example, there is no charge for filing an alimony suit with the rabbinical court, whereas the family court charges a fee of \$50. Another factor relates to the legal forms submitted to the courts. The rabbinical court provides the public with simple, standardised forms with which the layperson can initiate a legal procedure without the assistance of a lawyer. For instance, the brief, one-page long 'Mutual Petition for Divorce' form requires only that parties fill in their names and addresses and the names and ages of their children, with four lines provided for the parties to explain their reasons for the petition. Several of the rabbinical court forms in the files examined contained only a few handwritten words with spelling and grammar errors. While conducting my study at the rabbinical court, I witnessed several encounters in which an officer of the court assisted a party in filling out such forms. In contrast, none of the legal documents from the files studied in the family court was handwritten and all were formulated in legalese. Indeed, while at the family court, I learned that law students, stationed there to assist unrepresented parties as part of clinical work, advise them, in cases of divorce proceedings, to delay the legal procedure until they hire a lawyer. These various findings highlight the shortcomings of Bourdieu's neglect of courts as institutions and his focus on judges as the sole relevant agents in the context of the judiciary. Judges are in fact only one component of the court. The institution comprises also forms, fees, officers of the court and other support staff, all of which influence the court's accessibility to the public and the nature of the legal proceedings that are conducted between its walls.

An additional striking difference between the rabbinical and family courts relates to the role of lawyers within each tribunal. The statistical analysis I conducted revealed that the probability that

12 The economic class of the studied divorcees was determined according to a model developed specifically for the study that incorporated occupation, number of homes, cars and other owned property, place of residence, and amount of child support paid before and after the children would reach eighteen years of age.

13 A reasonable assumption that could not be verified, as the divorce files did not include information on parties' degree of religiosity, is that the lower classes tend to be relatively more religious, which might further explain the appeal of the religious tribunals for this group.

an unrepresented party will approach the rabbinical court is thirty times greater than for someone with representation, after controlling for economic class (see Appendix A). One explanation for the greater involvement of lawyers in the family court is the higher status they enjoy in this tribunal when compared to the rabbinical court. Rabbinical court judges are guided by religious rules requiring the parties themselves to be heard prior to the claims of their lawyers.<sup>14</sup> Indeed, this insistence fuels the claims made against the rabbinical courts by other legal professionals. Both family court judges and lawyers claim that in many cases the atmosphere in the rabbinical court resembles that of a market-place, with people shouting to the point of negating any possibility for conducting a rational hearing. In contrast, in many cases heard by family courts, the parties are not heard at all, with lawyers alone communicating with the judge. The rabbinical court judges interviewed defended their way of running their courtrooms by stating that only by hearing the parties themselves can they learn the true nature of the family, unconcealed by the legal jargon and tactics employed by lawyers. It is hardly surprising, then, that lawyers tend to refer their clients to the family court rather than to a tribunal that marginalises their role.

Thus, we find here an explanation for the inconsistency between the claim made by lawyers and family court judges that the rabbinical courts have been abandoned in favour of the family courts and the evidence arising from the study's data showing that almost half of all divorce petitions are filed with the former: lawyers are simply oblivious to the population that does continue to resort to the rabbinical courts. The divergences between the two types of courts manifested in different norms, practices, fees and forms make the rabbinical court more accessible to the underprivileged and unrepresented, i.e. the public not served by lawyers. Indeed, the data on the two very different divorce procedures within the legal field reinforce Bourdieu's claim of the significance of class habitus to agents' ability to enter and compete in a specific field. Whereas the poor have ready access to the rabbinical court and can easily participate in the legal game that takes place inside its walls, their alleged irrational and unprofessional habitus and their economic inability to hide behind a lawyer's habitus limit their ability to participate in legal procedures within the family court.

It is important to note that these differences between the two court systems result in considerably diverging legal outcomes. Although sole maternal physical custody is dominant in both family court and rabbinical court files, there are statistically significant deviances between the legal custody, visitation and child support arrangements found in each tribunal's files. Arrangements in the family court files examined in the study were more detailed than those filed with the rabbinical court with respect to continuous paternal involvement in decisions concerning the children and the visitation schedule, as well as providing for higher child support (see Appendices B, C and D). The simple, uniform divorce agreement form used by parties in the rabbinical courts contributes to the relative lack of detailed legal custody and visitation arrangements. The form makes no reference to paternal legal custody, stating only that, with advance co-ordination, 'the husband-father is entitled to see his children at any time outside the mother's home'. With no lawyers to negotiate the nature of the father's post-divorce involvement in his children's lives and lacking the human capital to investigate other options, the unrepresented and underprivileged parties resorting to the rabbinical court conclude their divorce proceedings completely uninformed of paternal legal custody and visitation rights. The study interviews exposed the contribution of judges to these differences in outcome. Rabbinical court judges believe that in cases with no hope for spousal reconciliation, the most pressing task is to issue a divorce decree, even if at the price of allowing vague agreements. From their religious point of view, a situation in which a married couple does not live as such might have dangerous consequences, such as relations with others while married. Family court judges, on

<sup>14</sup> Rabbinical Courts Hearing Regulations, 1993, § 60.

the other hand, believe that the divorce procedure must take as long as needed for the construction of a divorce agreement, including a visitation schedule, that will be clear and detailed, to enhance stability and predictability in the life of the post-divorce family. The diverging worldviews of the judges in the two court systems may also be a factor in the lower level of child support set in the rabbinical court agreements examined, as compared to their counterparts in the family court files, even after controlling for economic class (see Appendix D). This finding supports the assertions of certain interview respondents that rabbinical court judges are ignorant of children's needs in modern society and set child support according to the standards of the traditional and relatively poor ultra-orthodox community they belong to.

To conclude, this analysis of the position of courts within a legal field uniquely comprising two very different judiciaries illustrates that courts have not lost their power and judges are not mere rubber stamps. Although most divorce cases end in agreements rather than judicial rulings, in many cases these agreements are not entirely the product of the parties' free will, but rather, their contents are significantly influenced by the presiding judge. Family court and rabbinical court judges employ both direct and indirect tactics to promote agreement between the divorcing spouses. Moreover, their habitus, in conjunction with in-court factors such as forms and fees, impact the relative accessibility and appeal of their courts for different populations, the status accorded lawyers within the different systems and the outcomes of the legal proceedings.

### Lawyers and their clients

In this section, I continue to contest Bourdieu's adversarial image of the legal field by showing that lawyers successfully try to channel much of the legal action out of the courtroom, into the shadow of the law where their power has its greatest effect. Furthermore, I will argue that, although lawyers are more powerful than their clients, as Bourdieu rightly claimed, the latter should not be excluded from the analysis of the legal field.

Although legal representation in divorce is not mandatory in Israel, the data gathered from the court files revealed that, in the majority of cases, at least one party is assisted by a lawyer. In 55 percent of the case files, there was clear indication of a lawyer's involvement either inside or outside the courtroom; in an additional 25 percent of the cases, there was indirect evidence of a lawyer's involvement in the professional legal formulation of the divorce agreement. These findings correspond with those of Maccoby and Mnookin (1992) but are lower than what emerged from other American studies (for references and discussion, see Beck and Sales, 2000). Both the case files and interviews indicated that the majority of family lawyers are from the private sector and only a small proportion of divorcees are represented by state lawyers or by legal counsel provided by NGOs. While the names of 225 different lawyers were extracted from the 360 files, some appeared more than once. The interviewees stated, moreover, that although some general practitioners do practise family law, most lawyers engaging in this area of law are specialists and some have acquired notable reputations and a relatively high ranking in the divorce legal field.

Two prevalent images of divorce lawyers emerged from the study: the *mediator* and the *fighter*. The *mediator* lawyer represents both parties and assists them in reaching an understanding in a non-conflictual manner. This practice is allowed under the Israel Bar Association code of ethics, to which all Israeli lawyers are subject. While the code prohibits lawyers from representing simultaneously two parties with conflicting interests, it does allow them to assist conflicting parties in shaping an agreement.<sup>15</sup> The comment of one of the lawyers interviewed is very illuminating regarding the norms and strategic behaviour of mediating lawyers:

15 Rules of Chamber of Advocates (Professional Ethics), 5746-1986, § 14.

‘According to the legal school I belong to, you need to do everything in order not to reach litigation and to separate with an agreement. And, by the way, this is reflected in the fees I charge, which I set in advance, in order to motivate people to reach an agreement. Because I truly think that it is in the best interests of the couple . . . anyway this procedure is very, very, very hard and painful, and tiring, and frustrating, so if there is a way to shorten it – it is better. Moreover, my experience shows that at the end of the day, even if you litigate for four years in court, you end up with the same outcome you could have reached three and a half years earlier.’ [F9]

By contrast, the *fighter* lawyer represents only one party and encourages his client to fight for her rights and interests. One of the lawyers interviewed in the study is well-known in the field as one such fighter, and his comments support this reputation:

‘It is I who always decides everything. [. . .] My client does not decide a thing. This is how it should be. He should consult me, I should not consult him. [. . .] Most of my cases reach the court. Yes, I believe that to reach good agreements you should first fight in court. I always assume that the other lawyer is not as good as I am. [. . .] I am said to be the best lawyer. And it is true.’ [M7]

Most interviewees criticised such combative lawyers as motivated by greed, a claim based on the practice of charging higher fees for litigation than for negotiation and assistance in formulating an agreement. Indeed, the interviewed fighter lawyer cited above proudly recounted how a client had been forced to mortgage her apartment in order to pay his fees.

At first glance, it would appear that the litigious lawyers occupy a more powerful position in the legal field than the mediators, in both the economic and professional dimensions: they are paid more by clients and are considered more professional since they specialise in litigation, which is the struggle over the determination of the law in Bourdieusian terms. However, Ingleby’s (1992) findings regarding the economic axis and my findings and those of others on the professional axis suggest that mediator lawyers compensate themselves on both levels. Ingleby (1992, pp. 157–58) claimed that concluding divorce cases with a settlement better serves lawyers’ economic interests, as opposed to litigation, as it enables them to take on a bigger case-load as well as increasing the probability of their fees being paid and clients recommending their (inexpensive) services. On the professional level, the determination of who is a ‘good lawyer’ seems to be significantly influenced by the prevailing view that marriage is best ended in a settlement agreement, not litigation. The interviewees in my study subscribing to the anti-adversarial norm, indicated that they believe a good, professional lawyer to be an attorney who helps her clients reach an agreement rather than push them into long, conflictual and costly legal battles (see similar findings in Eekelaar *et al.*, 2000; Erlanger *et al.*, 1987; Griffiths, 1986; Ingleby, 1992).

Although the majority of studies have shown that most family lawyers can be classified as mediators (see e.g. Griffiths, 1986; Sarat and Felstiner 1995), others have indicated that the two groups are roughly equal in size (Murch, 1977; Kressel, Hochberg and Meth, 1983). The interviews with lawyers for my study were too limited in number to offer any conclusive insight on this issue in the Israeli context; however, the minimal amount of custody and visitation actions found in the court files examined is evidence of the absence of confrontational litigious strategies, at least with respect to these issues. Nonetheless, this does not necessarily entail the conclusion that lawyers play a minor role in divorce cases. On the contrary, regardless of whether a lawyer is of the fighter or mediator type, or something in between, he or she plays a crucial role in shaping the final terms of divorce.

In the interviews, it emerged that most of the respondents who forewent legal counsel did so because of limited resources, not because they believed it to be unnecessary. Moreover, most of the represented interviewed divorcees in fact believed that they could not have undertaken the legal

procedure on their own. As one divorced woman explained when asked why she and her former husband had turned to a lawyer:

'I do not know how you do all the legal work. I do not know. What, I just go to the court and say hello? It's a profession, like going to the doctor when you are sick. [...] The profession has its own language. You do not know legal language when you need it. Look, there are things here [*looking through the agreement*] that I did not even read through, that I guess if I had not turned to a lawyer I would not have known. And that is simply why I did so. He also did everything. He paid the court fees, he set the date for the hearing, things that never in my life did I think I would do.' [F31]

Such an understanding of the imperative role of legal language correlates with Bourdieu's claim regarding the position of lawyers and clients in the legal field. As he stated, lawyers create a need for their services by securing a monopoly over the translation of ordinary language into legal language. In entering the legal field, the layperson abandons other mechanisms for solving her problems, submits her matters to the control of the legal professionals and is reduced to the status of a client (Bourdieu, 1987, p. 834). One possible explanation for this willingness to hand over one's affairs to lawyers, which can be divined from the interviewees in my study, is the layperson's ignorance and lack of self-confidence (see also Relis, 2002). One therapeutic mediator went so far as to compare the condition of divorcing spouses to shell-shock, arguing that the parties turn to lawyers because they are in crisis and 'in a crisis you need someone to take you by the hand' [F42].

In their extensive study, Sarat and Felstiner (1995) found that lawyers contribute to their clients' insecurity and passivity when they tell them that people undergoing divorce are in an emotionally vulnerable state that undermines their ability to make rational decisions. Another dimension in this expert-layperson definition of the situation is that, as a setting, the lawyer's office helps to convince clients to leave their matters in the attorney's hands. Though the offices of the lawyers interviewed for my study were generally less extravagant than commercial law offices, family lawyers' offices are nonetheless a site of distinction between the lawyer and her clients, enhancing the control of the former over the latter. To begin with, when clients enter law offices, they almost always have to first go through a secretary, who screens their access to the lawyer. Then clients enter their lawyer's office, whose walls are usually lined with professional books and decorated with degrees and certificates; the lawyer sits in a large executive chair behind a large desk covered with files and papers, which separates him or her from clients, who are seated on regular chairs. In Goffman's (1959) terms, these features, combined with the attire of a dark suit and tie usually worn by Israeli attorneys,<sup>16</sup> serve as tools in impression management.

Moreover, Sarat and Felstiner (1995) found that lawyers enhance their status in the eyes of their clients by portraying judges as incompetent and presenting negotiations as a superior option to litigation. My study had similar findings, showing that lawyers tend to push their clients towards an agreement by emphasising the unpredictability and loss of control inherent to judicial determinations. For example, as if echoing Jerome Frank, one lawyer explained:

'Family courts and rabbinical courts ... you know how you enter; you do not know how you leave. [...] There is no stability in the court hearing. At this time, you cannot responsibly tell your client to pay \$300 in child support. You cannot even offer a range. Moreover, it is better that you decide your fate than let someone else do it. Take your fate into your own hands. Whether it is a family court judge or a rabbinical court judge, you are very dependent on them ... on their moods, how they woke up in the morning, if they quarreled with their spouse yesterday or not. Have they been to the supermarket lately? Do they know how much diapers cost?' [F11]

16 Under the Rules of Chamber of Advocates (Court Uniform), 5752-1991, when appearing in court, male lawyers must wear white shirt, black or dark blue suits and a black tie, and female lawyers must wear white shirt and a black suit or dress. When appearing in High or District Courts, all lawyers must also wear a black cloak.

Another lawyer interviewed described courts as ‘capricious’, stating:

‘Everybody I know, people who are close to me, if they reach a point in which they consider divorce, I say, end in agreement, any agreement is better than court decisions and court battles. [...] When you reach an agreement you control things. In court you have no control over what is going to happen.’ [F9]

Clearly, loss of control once the case reaches the judicial ruling stage is a predicament not only for the parties but also for their lawyers. In contrast to the descriptions of the power and control lawyers enjoy in shaping agreements, an experience of profound helplessness was conveyed by lawyers in reference to judicial rulings. Lawyers gave their lengthiest and most emotional responses in describing cases in which, despite their professional efforts, a wrongful and harmful custody ruling was issued. In Bourdieu’s terms, lawyers seem to be deeply aware of their relatively weak position in the competition with judges over the right to determine the law inside the courtroom; consequently, they steer their clients towards the sphere where their position allows them greater control over the legal outcome – the sphere of out-of-court negotiations.

Indeed, although some divorcees reported monitoring their lawyer’s actions, independently initiating evidence-gathering and negotiating agreements, it appears that, regardless, lawyers make a significant contribution to divorce negotiations in general. Illustrative of this is the experience recounted by a divorced mother of one [F13]. She recalled how the lawyer she and her ex-husband had hired had sent them off to do ‘homework’ and return to her with a draft divorce agreement. The two parents then sat in a coffee shop and listed the clauses they understood should be included in such an agreement. When they returned to their lawyer, she told them that the court would never grant the mother the agreed-upon monthly child support of \$550, leading the parents to reduce the amount to \$400. The lawyer further explained that, contrary to the parents’ understanding, the visitation arrangement they had drafted is the father’s right rather than obligation. Another example illuminating the influence of lawyers in negotiations involved two parents who wanted to share physical custody of their two daughters [F22 and M19]. Their lawyer informed them that joint custody does not exist in Israel. The father mistook this to mean that joint custody is illegal in Israel, and both parents abandoned this option. Indeed, interviewees repeatedly recalled the ways lawyers communicate to clients the formal legal situation or, even more often, the ‘common’ divorce arrangements they should accept. These two accounts of attorney involvement, similar to others described by study interviewees, demonstrate that lawyers are less engaged in a professional struggle over the determination of the law, as depicted by Bourdieu, and more occupied with normalising their clients’ expectations. This normalisation process is conducted by referring to the shadow of the law and, to an even greater extent, to the customary and normative agreements prevalent in the field. One of the most frequent questions asked by clients is ‘What is the accepted arrangement?’; by answering this question, lawyers both convey to their clients the kind of arrangements judges are likely to approve and participate in the very creation of these arrangements. Again, this is a struggle over the determination of the law, but a less apparent and far broader one than those battles waged in the framework of adversarial court procedures.

In Galanter’s (1974) terms, lawyers’ normalising power derives from the fact that they are repeat players in the field, as opposed to their one-shotter clients. Indeed, this characterisation of most layperson parties most likely explains why Bourdieu did not perceive clients of the legal field as constituting a position within the field. Indeed, it can be argued that no professional field includes positions of laypeople visiting the field as clients or consumers. Clients’ impermanent presence in the field and lack of shared habitus inhibit the evolution of a ‘position of clients’ in professional fields. However, my study exposed a number of indications that the legal field cannot be fully understood if clients are excluded from the analysis. Various findings pointed to the importance of conceptualising their place and role within the legal field: the fact that some parties do not turn to



lawyers (25 percent in my study); the fact that courts and lawyers decide on their strategies in accordance with the parties' economic and social capital; and the fact that, in some instances, lay parties do successfully challenge the professionals within the field and the field's doxies (as in the cases of couples that managed to agree on joint physical custody despite obstacles set by the legal and therapeutic professionals; see Hacker, 2005). The place and role of clients might not be a 'position' in the classic Bourdieusian sense, but they must be studied and analysed if we seek to truly grasp the legal field in action.<sup>17</sup>

This conception of clients' important influence on legal action notwithstanding, my study supports the stance attributing greater power to lawyers (see e.g. Erlanger *et al.*, 1987; Griffiths, 1986; Sarat and Felstiner, 1995), as compared to the parties (Cavanagh and Rhode, 1976; Cain, 1979; Jacob, 1992), in shaping agreements. Regression analysis revealed that not only are lawyers more influential than the economic class of parties in determining legal custody and visitation terms, they also wield greater influence than the courts (see Appendices E and F). As we saw, however, this power is most prominent and pronounced in cases that do not reach the stage of judicial determination. In contrast, when a consensual agreement cannot be forged and the parties resort to judicial ruling, not only does the power of judges emerge, as discussed earlier, but also the power of therapeutic professionals increases, as discussed next.

### Therapeutic professionals

Bourdieu's analysis of the legal field also omitted any mention of the presence of non-legal professionals in the legal field. In many areas of law, including family law, non-legal professionals participate in the action in the legal field, and understanding their place within the field is crucial. This section presents and discusses the reciprocal relations between these professionals and judges, who mutually enhance each other's power as producers of legal-therapeutic truth.

From the study, it emerged that therapeutic professionals are involved in the legal field in a variety of ways in the context of divorce. All interviewed divorcees reported that at least one therapeutic professional had been involved in their divorce process. This included a psychologist helping the spouses reach a decision on whether to divorce or their child cope with their decision to divorce, and a social worker, either court-appointed or to whom the family had turned of its own initiative, to arrange for state financial assistance, family evaluation or mediation. It should be noted that intensive involvement of therapeutic professionals such as consultants, evaluators and mediators in divorce proceedings is not unique to Israel (Bowermaster, 2002).

The design of my study allowed for the investigation of the therapeutic professional's role in divorce proceedings, especially in cases of conflict over custody or visitation. In these situations, social workers and psychologists wield particular power. As one interviewed lawyer admitted, it is extremely rare for either family court or rabbinical court judges to rule in a child-related dispute without first consulting a therapeutic professional:

A: The court will never rule on custody matters without getting a social worker's evaluation.

Q: And from your experience, does the court tend to adopt the [social workers] recommendations?

A: In over 95 percent of the cases, yes, because it has nothing else to go on . . . Sometimes the social worker also recommends a psycho-diagnostic examination. This means that the social worker was unsure of her diagnosis and that she wants a more thorough review of the case. [M7]

17 An interesting question relevant to the divorce legal field is the place and role of the children of the divorcing couples in the field. As I have shown elsewhere (Hacker, 2006), despite their crucial interest in the outcome of the legal procedures, they are excluded from its boundaries by both parents and professionals alike.

The responses of other interviewees corroborated the claim that judges tend to follow the therapeutic recommendations. Such recommendations are influential even in conflicts that end in an agreement between the divorcing parents, rather than a judicial ruling. For example, in a case in which the mother was fighting the father's demand for joint physical custody of their five-year-old son [M16], the bitter conflict was ended by a psycho-diagnostic evaluation that recommended joint custody, which led to the formulation of an agreement that included that arrangement. Indeed, in all of the twenty files studied in which a social worker gave a physical custody recommendation, the eventual arrangement, whether ordered by the court or included in a settlement agreement, incorporated the recommendation. In half of the twenty-two files that included a social worker's recommendation regarding visitation, the arrangement was identical to what had been recommended, and in another four cases there was only minimal deviation. Similar findings to this effect have been reported for Israel (Gofna-Pinto, 1996; Frishtick and Adad, 2001), as well as with regard to other countries (Levy, 1986; Kunin, Ebbesen and Konecni, 1992). In addition, the data from my study indicated that there would be even greater court reliance on psychologists' professional opinions were they less costly (the cost of a standard psychological family evaluation can amount to \$3,000, which is borne in full by the parents), and on social workers' opinions were they more available (their heavy case-loads often prevent them from timely submission of their opinions to the court).

A foremost explanation for judges' readiness to request and adopt therapeutic recommendations is the predominance of the 'best interest of the child' criterion, discussed earlier. Custody and visitation decisions are not perceived by agents in the field as expressions of values and a balancing of contradicting interests, but rather as reflecting arrangements that benefit the child. The shared assumption of legal professionals, therapeutic professionals and divorcing parents alike is that such a decision calls for therapeutic, not legal, expertise. This perspective was expressed by the Head of the Family Court Assistance Unit, a social worker by profession:

'We study family structure, we study systems, we study child development and pathology, and psychopathology; look at a social work degree syllabus and at a law degree syllabus, and tell me what in the courses provides a lawyer with any elementary understanding of child development or of what happens emotionally to a child in a family. Nothing. [...] What tools does a judge have? His tools are the law, right? Now there is nothing in the law that says what is in the child's best interest. The child's best interest mandates that he have two caring parents. But when parents are not wonderful, when they fight and are blind to the child's best interest, what tools does the judge have to make a decision? We are his tools. He asks us to identify what is in the child's best interest, and then he asks other social workers to offer some recommendations. If he could decide what to do alone, he would not have turned to us. So he has a whole cadre of social workers and of parental evaluation institutions that tell him what to do.' [F23]

This widespread conception in the legal field that therapeutic knowledge is indispensable to the resolution of custody and visitation disputes is one manifestation of the therapeutic discourse's ascendancy in the twentieth century (Freeman, 1984). This phenomenon is reflected in the popular notion that therapeutic professions can provide the answers to the most difficult personal questions and can devise solutions to the most complex social problems (Herman, 1995, p. 1). This has led to radical proposals in different countries such as 'the special judge' model, under which a psychologist judge joins the legal judge in hearing custody cases, and the 'behavioural panel' model, under which custody disputes are decided by a panel of predominantly therapeutic professionals, aided by family lawyers (Jeffreys, 1986; Van Krieken, 2004). Whereas these models were not adopted anywhere, the 'caring court' model has replaced the regular court in family matters in Israel, as well as in several other countries. This caring court includes an in-house therapeutic unit (like the Israeli Family Court Assistance Unit), which operates according to special procedures such as therapeutic evaluations and mediation that replace or at least weaken the dominance of adversarial procedures (Freeman, 1984;

Eldar, 1998). Since the 1980s, however, as part of a wider crisis of confidence in the professions and their alleged 'extraordinary knowledge' (Schön, 1983), questions have been raised in the scholarly literature regarding the therapeutic disciplines' reliability and therapists' capacity to foresee a child's best interest following parental divorce. There have been three main prongs to this criticism: the limitations of therapeutic knowledge, information-gathering failures and the influence of the professional's values on her or his therapeutic assessment.

The first line of argument is that there is no solid scientific foundation to the therapeutic profession's claim to being able to determine the child's best interest after divorce (Freeman, 1984; Bowermaster, 2002). Almagor (1999), of the Haifa University Psychology Department, has asserted, for example, that the current working tools at psychologists' disposal are insufficient for identifying the preferable custodial parent, especially when neither parent shows the extreme features characterising parental dysfunction. Furthermore, it is difficult to assess a family on the basis of the parents' behaviour during the crisis of divorce and in the shadow of a legal procedure, for the stressful conditions may sabotage the accuracy of the diagnosis. Moreover, the validity and reliability of the prevailing psycho-diagnostic methods are now being questioned, something that is particularly acute in Israel due to the inadequate adaptation of American tests to its social context. Indeed, contrary to the faith in psychological knowledge articulated by most of the interviewees in the study and the evident professional confidence amongst social workers interviewed, psychologists who participated in the study were sceptical about their professional capacity to perform the task entrusted to them by other agents in the divorce legal field. For example, in a seminar for family lawyers held by the Israel Bar Association, a prominent clinical psychologist stated, 'All that a clinical psychologist knows is not enough for parental evaluation'.<sup>18</sup> Similarly, a psychologist who runs a clinic for parental evaluation that submits opinions to the court [M27], as well as a group of psychologists who work with families and the court and to whom I presented my findings,<sup>19</sup> all concurred that there are cases in which psycho-diagnostic tests are unable to predict the child's best custodial option. Finally, these limitations are possibly further augmented by the debate within the discipline over parent-child relationships. Indeed, psychological theories and findings regarding parent-child relations after divorce vary extensively (for reviews, see Amato and Keith, 1991; Hetherington, Bridges and Insabella, 1998), with the result that therapeutic knowledge can justify a whole range of widely diverging and at times conflicting stances on the preferable legal rule for custody.<sup>20</sup>

In addition to questioning the essence of therapeutic knowledge, many also claim the information-gathering process in the therapeutic professions to be defective (Bowermaster, 2002) and others point to the impact of personal values on a therapeutic professional's evaluations and recommendations (Fineman, 1988; Cohen and Segal-Engelchin, 2000). These two other prongs of criticism are supported by the findings of studies conducted in Israel and elsewhere (Levy, 1986; Sagi and Dvir, 1993; Cohen and Segal-Engelchin, 2000; Cohen and Shnit, 2001). In my study, for example, a problematic information-gathering procedure emerged from the interview with the psychologist running the parental evaluation clinic [M27]. He explained that all tests and observations performed for the evaluation reports are conducted at the clinic and all the tasks the parents

18 Iris Raiches, Winter Seminar in Family Law, Israel Bar Association, Tel Aviv Region, Dead Sea, 3 January, 2003.

19 A group discussion with psychologists working in a Municipal Unit for the Child, Youth and Family Care in the central region of Israel, 17 September, 2002.

20 See, for example, Klaff (1982), who supports the tender-years doctrine based on psychological theories and findings on the damage caused to children if separated from their mother, and Bender (1994), who refers to studies that show better child adjustment if contact is maintained with both parents, to support his argument in favour of joint custody.

and their children are asked to do are indoor activities, such as drawing or assembling a jigsaw puzzle. My comment that these tasks might be biased in favour of mothers (Nielsen, 1999, p. 148) came as an eye-opener for him:

'It is true that we do not take a father and son to the playground to play ball. You know what: now after our conversation it is a thought because, truly, sometimes we see the lack of skill, the embarrassment, the thing that a father is not used to. We have enough playgrounds around to do outdoor interaction. Definitely possible.' [M27]

One possible epistemological outcome of the above three points of criticism and supporting findings might be a radical demystification of therapeutic expertise and loss of faith in therapeutic professionals' ability to produce any valuable knowledge. Schön (1983) offered a less radical epistemological alternative, which he called 'reflective practice'. This perspective appreciates experts' knowledge as of value, but at the same time understands it to be embedded with social context, human values and interests, and limited in situations of uncertainty, instability, uniqueness and conflict. While it is unlikely that any professional field, including the legal field, will adopt the radical demystification stance, which entails destruction of its own *raison d'être*, it is interesting that only the psychologists interviewed engaged in reflective practice, whereas the social workers and legal professionals were almost unanimous in their confidence in the therapeutic ability to produce the truth regarding children's best interests in divorce.

It would be reasonable to assume that custody disputes, with their adversarial nature, would lead to the infiltration of criticism of therapeutic ways of knowing into the legal field. However, this has not been the case. An interesting observation on this matter was made by a lawyer familiar with both the legal field governing divorce and the legal field governing criminal proceedings:

'I have discovered that there is a very clear distinction. Custody cases give substantial weight to the expert and in criminal cases a psychiatrist is but one other opinion.' [M12]

Indeed, the study revealed different means by which the legal field governing divorce, unlike its criminal counterpart, promotes acceptance of the reliability of therapeutic knowledge and successfully silences potential challenges. Formal law encourages judges deliberating custody disputes to rely on therapeutic professionals as producers of truth. Unlike criminal procedures involving therapeutic evaluations, where the parties turn to different experts for opinions on their behalf, the Family Courts Law stipulates that when the court appoints an expert, the parties can submit expert opinions only with the court's permission.<sup>21</sup> In practice, only in very rare cases does the court grant both parties permission to submit separate reports and, in the vast majority of cases, only the court-appointed expert, perceived to be objective, submits an opinion. The fact that a judge will generally find herself weighing contradictory recommendations when the parties are allowed to submit separate therapeutic opinions has not been recognised by agents in the field as proof that there is no single therapeutic truth, but, rather, is regarded as an obstacle to be overcome by appointing a single and allegedly neutral expert.

In addition to this formal legal preference for one expert opinion in family matters, there is a tendency on the part of lawyers and judges to refrain from questioning the opinion of the court-appointed expert. One lawyer interviewed criticised judges for not interrogating experts on their testimony [M10]; and as if in response, a family court judge speaking at the Israel Bar Association seminar for family lawyers pointed a finger at lawyers for not challenging expert opinions and testimony. The judge also noted that rarely do lawyers contest an expert's appointment by inquiring

21 Family Court Law, 5755-1995, § 8(c).

into his or her field of expertise, professional experience or previous opinions, even though this would reveal a great deal about the content of the forthcoming opinion.<sup>22</sup>

The interviewed psychologist who runs a clinic for parental evaluation and who testifies as an expert witness in family and criminal proceedings offered an interesting insight into what transpires during expert testimony in the framework of the two different procedures. Whereas testifying in a criminal procedure can be 'terribly hard' and 'a bummer', he recounted, he gets 'lots of protection from the judge' in divorce procedures, which prevents lawyers 'from bothering you with irrelevant matters' and 'abusing you' [M27]. Indeed, at the above-mentioned seminar, one lawyer confirmed that, in family matters, lawyers feel pressured by judges not to interrogate court-appointed therapeutic professionals; moreover, she stated, they also refrain from doing so partially in fear of alienating the expert in the event that he is asked to submit another opinion during the course of the same proceedings. With such negligible cross-examination of therapeutic professionals and questioning of their opinions, it should come as no surprise that very few in the field are aware of the arguments and findings that can shake the validity and reliability of therapeutic knowledge and opinions.

A possible explanation for the prevailing policy in the legal field governing divorce of silencing any criticism of therapeutic knowledge is the emotional difficulty entailed for judges deciding custody cases and their desire to transfer responsibility for this sensitive matter to others (Levy, 1986). Similarly, this policy may be a product of judges' desire to pass the burden of hearing witnesses testify, such as family members or teachers, to therapeutic professionals, a time-consuming (Bowermaster, 2002) as well as emotionally draining task. Yet these reasonable explanations notwithstanding, my study findings support a more Bourdieusian explanation, which points to an exchange of capital between the two professions. Indeed, interviews and discussions with psychologists revealed that they are aware of their contribution to the construction of therapeutic opinions as truth, mainly through the consistently clear-cut opinions they produce even in cases where their professional judgment warrants ambivalence. One of the psychologists from the group to whom I presented my findings told me of the 'demand from below for the truth, from parents, social workers, courts'. This demand creates a dilemma, she added: 'Should we add to the confusion of the parents or act as though we really do hold the truth?' Other psychologists in the group remarked that they are aware of the limitations of psychological knowledge but feel they must supply 'answers' to families who want 'someone to tell them what's right' and thereby help end the destructive family conflict. The psychologist director of the parental evaluation clinic conceded that 'we too rarely admit that we are ignorant. Much too rarely.' He went on to explain that in cases in which the diagnosis does not produce a clear-cut opinion, the report submitted to the court represents 'a compromise', in the framework of which the therapeutic team nevertheless tries to offer a solution. When I asked why, in such cases, the team refrains from telling the court that no clear conclusion emerged, he revealed the economic context in which private therapeutic experts operate:

'I think there is some kind of a latent deal here between the different authorities. They say, okay, if you think you are capable of reaching a conclusion, we will work with you. If you throw the ball again and again back to the court, we will look for someone else. You want to make a living, and this creates a lot of pressure. Yet no one tells you so up front.' [M27]

Thus, both the desire to help families end the conflict and their interest in earning a living and being indispensable to judges push therapeutic professionals into submitting more conclusive opinions than would be produced were they totally to adhere to professional judgment and ethics.

22 Judge Osnat Laufer, Winter Seminar in Family Law, Israel Bar Association, Tel Aviv Region, Dead Sea, 3 January, 2003.

In his critique of judicial reliance on therapeutic professionals, Michael Freeman (1984, p. 13) coined the term 'the professional mystique'. My findings demonstrate that this 'mystique' is created by the very factors that give therapeutic opinions central, if not solely determinative, weight in custody disputes: the prevailing belief in therapeutic knowledge; the formal legal constraints that prescribe a preference for the submission of only one expert opinion; the reluctance of judges and lawyers to cross-examine therapeutic professionals; and the moral and economic pressure brought to bear on these professionals. And as we saw, this 'professional mystique' is far more potent in the legal field governing divorce than in that governing criminal procedure, suggesting that different sets of internal logic and power relations exist within different legal subfields. Yet this notwithstanding, the action in the divorce legal field reveals that even in this sphere, the therapeutic ascendancy is only partial and achieved at a substantial price. As described by the psychologists who participated in my study, their work is shaped by the adversarial legal logic that demands 'black and white' opinions, and this sometimes is at odds with the therapeutic logic, which acknowledges the complexities and dynamic nature of families. Here we find a compelling illustration of Bourdieu's claim of the social fields' power to subordinate agents within their boundaries to their logic.

The success of the legal field in subordinating the work of therapeutic professionals to its logic, on the one hand, and the existence of a regime of truth (Foucault, 1980, p. 131) under which therapeutic professionals are the sole bearers of truth regarding children's best interests, on the other hand, highlight the weaknesses of a polar conception of the power relations between the legal and therapeutic discourses within the legal field. King (1991) argued that the legal discourse has enslaved the therapeutic discourse and forces therapeutic professionals, constructed as 'experts', to adapt to judicial reasoning and needs. The dominance of the legal discourse is manifested, according to King, in the production of therapeutic opinions characterised by a decisiveness that would never materialise were the professionals to adhere to the therapeutic discourse. In response, James (1992) maintained that the courts' need for therapeutic opinions, therapeutic professionals' autonomy vis-à-vis the contents of their opinions and the adoption of these opinions by judges, all attest to the fact that it is the legal discourse that is subordinated to the therapeutic discourse and not the other way around.

My study, for its part, uncovered empirical data that point to complex relations between the two discourses and seems to negate accepting any unidirectional conception of those relations. The study findings indicate that relations of a 'give-and-take' nature prevail, even if unconsciously or unintentionally, between the judicial bench and therapeutic professionals. Judges grant symbolic and economic capital (i.e. recognition and income) to therapeutic professionals in return for unambiguous opinions, even if those opinions are not fully consistent with the experts' professional judgment and ethics. These opinions, in turn, facilitate judicial rulings in custody disputes and imbue these rulings with scientific legitimacy, thereby increasing the judicial position's symbolic capital (see also Raitt and Zeedyk, 2000, p. 27). It is therefore futile to argue which discourse is subordinated to which. A more productive endeavour would be an attempt to expose the web of interdependencies linking legal and therapeutic professional positions within the legal field.

Finally, there is also a competitive dimension to the relationship between legal and therapeutic professionals within the legal field. This is revealed in the analysis of the introduction of mediation into the field governing divorce.

### **Mediation**

In Israel, as elsewhere, the perception that mediation is highly suited to divorce disputes has gained widespread acceptance in recent years. Mediation – a procedure in which a neutral third party assists two parties in conflict arrive at mutual consent – is regarded as especially appropriate for parental marriage dissolution, due to the parties' particular need to clarify feelings in order to reach an understanding, as well as to establish a new kind of relationship that will enable them to maintain

relations with their children (Deutch, 1998; Zaidel, 2001). Advocates of mediation claim that it empowers parents by helping them create new communication channels and allowing them to shape an agreement autonomously (Zaidel, 1988); in addition, some assert, the procedure saves family and state resources (Pearson and Thoennes, 1988) and leads to a quick resolution of disputes (Jeffreys, 1986). Alternative views, which have yet to penetrate the dominant discourse, criticise divorce mediation for being detrimental to women (Grillo, 1991), for failing to conserve resources or improve parental communication (Walker, 1991) and for the lack of neutrality on the part of mediators alongside their ability to substantially effect outcomes (Fineman, 1988; Walker, 1991; Dingwall, 1988; Beck and Sales, 2000).

Many countries have established state mediation services for divorcing couples, and in some jurisdictions mediation is a mandatory precondition for petitioning the court (Irving and Benjamin, 1995; James, 1995). These state measures have been accompanied by a professionalisation process, which has included the creation of mediation training institutions, professional mediation journals and a professional code of ethics (Irving and Benjamin, 1995). Though mediation is not a compulsory procedure for divorcing couples in Israel, serious attempts have been made in recent years to integrate the practice into the divorce field. In-house Family Court Mediation Units have been established, while judges are also provided with lists of private mediators qualified to mediate family disputes. Under Ministry of Justice regulations, only lawyers and therapeutic professionals who have participated in a special family mediation course may be registered on these lists.<sup>23</sup> Thus, not surprisingly, many family mediation training institutions have sprung up across the country, where lawyers, psychologists, social workers and educational advisors qualify to become family mediators.

Unfortunately, there is no accurate up-to-date data on the current extent of divorce mediation in Israeli divorce procedures. However, data from recent years show that mediation has not become common practice in divorce. Only in eleven of the 360 cases examined in my study, for example, was there any mention of mediator involvement in formulating the agreement. Moreover, no mediation mechanism has been instituted in the rabbinical court system, the result being that parties resorting to its courts are unaware of this option. In the framework of family court proceedings, judges have encountered significant difficulties when referring parties to mediation. For example, in 2001, 71 percent of the cases sent to private out-of-court mediation and 40 percent of those directed to the Family Court Mediation Unit returned to court without agreement.<sup>24</sup>

The reasons mentioned by interviewees for the relatively poor integration of mediation into divorce proceedings can be classified into three categories: factors related to the emerging profession of mediation, to the divorcees themselves and to their lawyers. With regard to the profession itself, the claim is that mediation suffers from a rather unprestigious reputation due to a dearth of good mediators, the entry of charlatans into the profession, the potential for one party to exploit the process and use it against the other, and the lack of any clear rules on confidentiality and fees. With regard to the divorcees, some interviewees argued that not enough people are informed of the option in due time and, in any event, few are interested in mediation. As one therapeutic mediator explained:

The absurdity about divorce is that people who separate need to talk. Hatred, revenge, love, love-hate relationships, attachment. [...] So, in such an intense period, to ask people to come and talk about the children is very, very difficult for them.' [F21]

23 Court Regulations (List of Mediators), 5756-1996, § 3A.

24 Data presented by Judge Yitzhak Shenhav, Vice-President of the Ramat Gan Family Court, in the seminar 'Mediation in the Family' held by the Mediation Institute of the Israel Bar Association, February 2002.

These precise problems could be the impetus behind the recent government draft bill, following in the footsteps of several other countries (Dunnigan, 2003, fn 3), to implement mandatory mediation in Israeli family and religious courts,<sup>25</sup> which would be unnecessary were people to seek it of their own initiative. Indeed, studies show that, given the choice, most divorcing couples would not turn to mediation (Beck and Sales, 2000, pp. 994–95; Emery and Wyer, 1987).

A third category of factors suggested in interviews for the unpopularity of mediation focused on the divorce lawyers. One judge argued that lawyers raise their clients' expectations regarding the outcome of the legal procedure and pressure them to be unyielding in the mediation process, which obviously sabotages the mediation. He added that lawyers' preference for litigation is motivated by the high fees they can then charge [M3]. In fact, my study confirmed that lawyers do, indeed, play an important role in preventing the proliferation of mediation, but for far more significant reasons than those mentioned by the judge. Indeed, it arose that the crucial obstacle preventing the development of mediation as a separate and powerful professional position within the divorce legal field is the competition between the legal and therapeutic professionals over its control. Each profession attempts to establish itself as best qualified to conduct mediation. In the first issue of its mediation journal, the Israel Bar Association declared that 'it is impossible to hold a mediation process without a lawyer as mediator' and stressed that the Bar's Mediation Institute refers people exclusively to mediation conducted by lawyers.<sup>26</sup> This expresses what seems to be a flagrant lack of confidence in therapeutic professionals, in complete contrast to the trust legal professionals place in them in the context of custody and visitation evaluation. Yet at the same time, therapeutic professionals exhibit a similar distrust of lawyers as mediators. One interviewed therapeutic mediator who has taught lawyers, amongst others, in mediation training courses noted:

'I am worried about the kind of training typically undergone at present by those who are not therapists. This training is very superficial. I am less worried about family therapists since they already have a basis for understanding the family and children's needs, couplehood and parenting. But this wave of lawyers who think that they already know everything is another matter. There are lawyers who have never practiced family law and think that having a law degree is sufficient to enable them to be mediators. They take a course, are given barely 20–30 hours of training, and then start to practice mediation. I'm very afraid that this does poor service to the families.' [F17]

Apparently, lawyers and therapists disagree not only on which of the professions deserves a monopoly over the mediation market, but also on the very essence of mediation. Several interviewed lawyers asserted that they regularly conduct mediation in their offices, in the framework of their work as representatives of one or both parties. For example, one such lawyer stated:

'They invented a term called mediation. But my first family case was a mediation case. I sat with the husband separately, with the wife separately, I sat with both of them together, I brought them to an agreement; I actually mediated between them. And I have continued to do so over the years in every case possible.' [M8]

One of Israel's mediation pioneers and a social worker by training, who was interviewed for the study, disputed such claims made by lawyers, that they were conducting mediation long before the term was coined: 'They did not. They arranged agreements and helped people reach agreements. But

25 See [http://www.justice.gov.il/NR/rdonlyres/51D2B374-F75A-46B9-98D7-D7B4FC97D819/0/sichsocey\\_mishpacha.pdf](http://www.justice.gov.il/NR/rdonlyres/51D2B374-F75A-46B9-98D7-D7B4FC97D819/0/sichsocey_mishpacha.pdf) [Hebrew].

26 See [http://www.israelbar.org.il/article\\_inner.asp?pgId=3131& catId=179](http://www.israelbar.org.il/article_inner.asp?pgId=3131& catId=179) [Hebrew].



they did not mediate' [F42]. Another leading mediator, a lawyer by training, has echoed this stance, contrasting what transpires in a lawyer's office with what happens in mediation as follows:

'When a conflict arises, there are two options: One, the fastest and most efficient option is to reach a solution. I'm sorry, but mediation is not the fastest and most efficient option – but settlement is. In settlement there is no emotional involvement, no revolution, but it is part of the competitive negotiation lawyers are trained for. This is what we do all the time. The question is maximizing the party's benefits. [...] Mediation is a revolution in thought, not just in outcome. The agreement is not the peak of the process but only a part of the process that continues during implementation of an agreement. You should create relationships between the parties based on communication while taking change into account.'<sup>27</sup>

By including in the definition of mediation, negotiations between lawyers and their assistance in shaping settlements, lawyers in fact reject the need to refer clients to a neutral mediator and, in particular, to a therapeutic mediator. This is how the legal profession preserves its standing as conflict manager in divorce and minimises the significance of other professionals as mediators (see also Bogoch and Halperin-Kaddari, 2007).

Largely due to the characteristics of divorce mediation, even when conducted by a therapist, lawyers appear to be relatively successful in downplaying the differences between the kind of negotiations in which they are involved and mediation conducted by therapeutic professionals. Interviews with therapeutic mediators revealed that, in most cases, mediation involves only a small number of sessions, which focus on reaching an agreement between the two sides. Their explanation for the relative prevalence of speedy evaluative mediation and infrequency of broad and facilitative mediations (Riskin, 2003) returns to the fact that people do not choose mediation to begin with. Divorcing couples want to reach an understanding quickly so that they can go their separate ways. This is not unique to Israel. Therapeutic mediation in other countries, especially if a state service, also tends to be brief and focused (Pearson and Thoennes, 1988, p. 432). Thus, the communication difficulties between separating spouses and the desire to end the divorce process quickly combine to structure divorce mediation as a process resembling the negotiations regularly conducted by divorce lawyers.

Despite – or perhaps due to – this resemblance, the scholarly literature is fraught with the tension between the two professions over how mediation should be conducted. Therapeutic mediators are accused of being ignorant of the legal and economic aspects of divorce while legal mediators are accused of obtuseness in respect to all its emotional aspects (Emery and Wyer, 1987). Nolan-Haley (2002) has argued that the interest of lawyers in preserving the monopoly the law has granted them and in excluding other non-legal professions from the legal field prevents the profession of mediation from developing. Fineman (1988), by contrast, has attacked therapeutic professionals for the political change they have generated by transforming divorce from a legal event that concludes conjugal relations into an emotional event that re-establishes the family, a transformation that gives therapists priority as divorce mediators.

As a relatively new element in Israel's divorce field, it is premature to evaluate the ramifications of the mediation procedure in this context. Still, it is already evident that the current struggle between lawyers and therapists over mediation in the Israeli legal field governing divorce is much more than a competition over the economic capital that is attached to it. Rather, it is a struggle over the legal field's boundaries, its positions and prizes. If divorce is about clarifying feelings and empowering the parties by helping them to establish new lines of communication and to shape an agreement autonomously, as therapeutic mediators claim, then what has the law got to do with

27 Orna Doitch lecture given at a panel on mediation held during the Israel Bar Association Annual Conference, Eilat, 2001.

it? Either divorce should shift to the therapeutic field or the divorce legal field should transform itself. Clearly, this conception of divorce does not correlate with Bourdieu's perception of the legal field as organised around legal professionals who struggle over the interpretation of legal texts. Moreover, divorce thus conceived is a far cry even from the out-of-court negotiations managed by lawyers and their understanding of their professional role and identity. In contrast to brief, narrow and focused mediation, which is similar enough to lawyers' everyday experiences for them to claim they are mediators and incorporate the new agenda into the field, broad, enabling and emotional mediation is a heterodoxy that places in complete jeopardy the legal field's rules of the game.

In this context, the difference in perspective between lawyers and judges is noteworthy. Judges seem not only to be unthreatened by mediation, but also represent a major force in injecting the practice into the legal field of divorce. One possible explanation is that their position is not vulnerable to mediation since all divorce cases, even those settled by therapeutic mediation, eventually undergo judicial review. Another possible explanation relates to the fact that judges simultaneously belong to the judicial field and constitute a state organ. Unlike private lawyers, who are not directly guided by the state's logic, judges are part of the political and bureaucratic meta-field. If the state has an interest in mediation, be it the facilitation of cheap and efficient management of divorce, isomorphic imitation of mediation policies in other states or whatever other motivation, judges are likely to identify with that interest. And finally, a third possible explanation for judges' compliance with the new mediation discourse is the relative current weakness of therapeutic mediation within the field. If therapeutic mediation were to gain momentum and undermine the notion that divorce should be governed by the legal field or, alternatively, mandate a change in the legal field's logic itself, family court and rabbinical court judges could conceivably join forces with lawyers in their struggle to preserve the field's orthodoxy and to exclude therapeutic mediation from divorce procedures.

## Conclusion

The uniqueness of the study described and analysed in this article rests in its endeavour to holistically capture the action taking place within a particular legal field, namely that governing divorce of Jews in the central region of Israel. Figure 1, which presents the hierarchal positions within this legal field, sets the different positions according to their ability to influence legally binding outcomes in custody and visitation disputes.

The horizontal axis represents the number of arrangements each position is exposed to; the vertical axis represents the relative power of each position to influence the contents of the arrangements. Some positions grant the agents occupying them (such as lawyers) tremendous influence in many cases. Other positions, such as that of the Rabbinical Court Advisory Unit, offer minimal influence in only a very few cases. Additional positions, such as that of psychologists, wield enormous influence in the few cases they are exposed to. Alternatively, children constitute an example of an agent-type that is a component in every parental divorce case but remains in the periphery of the field with no independent capital or strategic ability to influence the legal outcome (Hacker, 2006). Although every case of parental divorce involves children, every child, like every mother and father, is exposed usually to only one divorce case, granting them only a 'visitor's position' (which is marked in Figure 1 differently).

I return now to the title of the article to conclude and assert that, despite the involvement of parents and therapeutic professionals in divorce procedures, the social space governing divorce is, indeed, a legal field. This has been forcefully supported by the main empirical conclusions drawn from my investigation. For the study findings have shown that, in the vast majority of cases, divorce procedures are not subject to the gaze of therapeutic professionals, but rather only to that of the law and its practitioners, i.e. judges and lawyers. The process of shaping a so-called understanding is

|                  | Many arrangements  | Few arrangements  |
|------------------|--|---|
| Strong influence | <p>Lawyers</p> <p><i>Mothers (on custody)</i><br/><i>Fathers (on visitation)</i></p>                                 | <p>Supreme Court<br/>Great Rabbinical Court</p> <p>District Court<br/>Psychologists</p> <p>Social workers</p> <p>Family Court<br/>Assistance Unit</p> |
| Weak influence   | <p>Rabbinical Court</p> <p><i>Mothers (on visitation)</i><br/><i>Fathers (on custody)</i></p> <p><i>Children</i></p> | <p>Family Court</p> <p>Therapeutic mediators</p> <p>Rabbinical Court<br/>Advisory Unit</p>  |

**Figure 1**  
Relative power of positions to influence legally approved outcomes

influenced by the power of formal law and its carriers to conceptualise the question of how family relations are reinstitutionalised after divorce as a question of the child’s best interests and their ability to classify this question into narrow legal categories of custody and visitation. In all cases in which there is no significant parental conflict over custody, the therapeutic discourse on family uniqueness, family members’ emotional needs and family dynamics over time is non-existent and fails to infiltrate the texts produced in the field. In such cases, judges, civil or religious, and the place they allot to lawyers, the forms provided by the different courts and the fees charged all shape the process and its outcomes. While underprivileged and unrepresented parties turn to the rabbinical court system due to its relative accessibility for them, the represented and more economically stable parties turn to the family courts. In many cases, the former must make do with a standard divorce agreement supplied by the rabbinical court, which makes no mention of legal custody or visitation schedules, while the latter end up with a much more detailed agreement, shaped by lawyers, who inform them of the different options and ‘accepted norms’.

In cases of custody dispute, the legal discourse apparently relinquishes its power in favour of the therapeutic approach. Therapeutic professionals are entrusted by other agents to assess the arrangement that will best serve the child’s interests. Both the transferal of evidence-gathering from the courts to the therapeutic arena and the almost automatic adoption of therapists’ recommendations are manifestations of legal professionals’ evasion of their responsibility in decisions related to custody. However, a thorough analysis of the power relations within the field reveals that the power of therapeutic professionals is subordinated to the legal logic that dominates the field. The power of judges as the final arbiters, the protection accorded by the law and judges to therapists in

return for unambiguous opinions that sometimes contradict the therapeutic habitus, as well as the lukewarm reception of therapeutic mediation into the field, all reflect a field structure and power relations that guarantee dominance to those agents who have acquired the legal habitus.

These illuminating empirical insights are, of course, only a case study, restricted to a specific place, time and legal doctrine, yet also aimed at shedding light on a broader theoretical and methodological argument. The complexity revealed by the examination of all elements influencing divorce arrangements in the particular context of the study serves to demonstrate the importance and productivity of Bourdieu's theory of social fields for understanding and investigating law in action. It is by treating law as a social field and studying its relevant positions and their power relations, as well as its internal logic, that we can fully comprehend law as a social phenomenon. At the same time, this study of the legal field governing divorce in Israel also points to the limitations of Bourdieu's focus on the adversarial dimensions of the legal field. The study demonstrates that it is imperative to analyse also the action taking place in the shadow of the law in order to understand the field's boundaries, logic and struggles. Restricting the inquiry to the competition over the interpretation of legal texts and the determination of formal law removes the majority of this field's action from the parameters of the empirical investigation and leaves us with a very partial understanding of the legal field.

Thus this article sought to demonstrate the theoretical and empirical potential embedded in Bourdieu's concept of the juridical field if expanded to capture both formal and informal law. I believe that the questions that remain unanswered further highlight this potential. On the empirical level, these questions relate to, amongst other things, divorce procedures in Israel's geographical periphery and in religious tribunals governing Muslims and Christians. Other issues pertain to the differences between the Israeli divorce legal field and the same field in other countries, and what differentiates the legal field governing divorce from fields governing other branches of the law. Empirical inquiry into these questions will enhance the possibility of developing a richer theory of law in action, one that will cope with issues of power, culture, dynamics and generalisation. Particularly exciting is the matter of whether it is at all possible to apply *the* legal field as a general concept with explanatory potential for studies of law in action or whether power, cultural and professional differences are sufficiently potent to force us to settle for *a* legal field or *legal subfields*, limited to specific times, places and legal branches. Such an investigation would contribute to the conceptualisation of the legal universe as either a patchwork of unique legal fields with very little in common or a unified, albeit internally varied, whole.

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## Appendices

### Appendix A: Logistic regression of probability of filing with rabbinical court (as opposed to family court) by status and legal representation

| Exp(B) | B              | Variable          |
|--------|----------------|-------------------|
| 30.542 | 3.419* (.332)  | No representation |
| 37.297 | 3.619* (0.609) | Low status        |
| 10.497 | 2.351* (0.545) | Medium status     |
| 0.19   | -3.971         | (Constant)        |

-2 Log likelihood = 271.07;  $\chi^2 = 227.10$

$p \leq 0.05^*$

$n = 360$

SOURCE: divorce files

### Appendix B:<sup>28</sup> Relation between tribunal and legal custody

|                  | Silence or maternal legal custody | Guardianship mentioned or partial paternal legal custody | Joint legal custody | N 100% |
|------------------|-----------------------------------|--|---------------------|--------|
| Family court     | 35.8%                             | 39.4%  | 24.8%               | 165    |
| Rabbinical court | 73.6%                             | 21.6%  | 4.8%                | 125    |

Cramer's V = 0.391;  $\chi^2 = 44.29$ ;  $p \leq 0.001$

SOURCE: divorce files

<sup>28</sup> Under Israeli law, both parents continue to be the child's guardians after divorce unless agreed otherwise. Though this rule makes it unnecessary to state the ongoing legal custody of the father in the divorce agreement, in many cases the parties do include a specific clause on this matter, declaring, in various variations, that the father will continue to be involved in important decisions related to his children.



**Appendix C: Relation between tribunal and visitation (duration = two weeks)**

|                  | Any time | Less than 6 days and<br>1 night | 6 days and<br>1 night | More than 6 days<br>and 1 night | N 100% |
|------------------|----------|---------------------------------|-----------------------|---------------------------------|--------|
| Family court     | 18.5%    | 16.1%                           | 35.1%                 | 30.4%                           | 168    |
| Rabbinical court | 51.8%    | 17%                             | 17.7%                 | 13.5%                           | 141    |

Cramer's V = 0.375;  $\chi^2 = 43.5$ ;  $p \leq 0.001$ 

SOURCE: divorce files

**Appendix D: Relation between tribunal and child support (per one child re-evaluated to 1 January, 2001)<sup>29</sup>**

|                  | Mean (\$) | N   | Std. deviation |
|------------------|-----------|-----|----------------|
| Family court     | 360       | 183 | 891.28         |
| Rabbinical court | 221.5     | 160 | 704.22         |

SOURCE: divorce files

**Appendix E: Linear regression of influence of kind of tribunal, status and lawyer involvement on legal custody**

| Variable           | Unstandardised coefficients B |
|--------------------|-------------------------------|
| (Constant)         | 2.111* (0.216)                |
| Kind of tribunal   | -0.315* (0.097)               |
| Status             | 0.045 (0.067)                 |
| Lawyer involvement | -0.550* (0.121)               |

 $F = 25$ ;  $R^2 = 0.213$  $p \leq 0.05^*$  $n = 290$ 

SOURCE: divorce files

**Appendix F: Linear regression of influence of kind of tribunal, status and lawyer involvement on visitation**

| Variable           | Unstandardised coefficients B |
|--------------------|-------------------------------|
| (Constant)         | 3.017* (0.335)                |
| Kind of tribunal   | -0.390* (0.146)               |
| Status             | 0.07 (0.106)                  |
| Lawyer involvement | -0.957* (0.181)               |

 $F = 27.69$ ;  $R^2 = 0.214$  $p \leq 0.05^*$  $n = 309$ 

SOURCE: divorce files

<sup>29</sup> Child support sums in cases from the rabbinical court were significantly lower compared to those in cases handled by the family court, even when the parents' economic class was controlled for ( $t = 4.497$ ;  $p \leq 0.001$ ).