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Chapter One

VALUES: "Spiritual Custody": Religious Freedom and Coercion in the Family

By Nomi Stolzenberg

In our fast-moving modern society, the traditional nuclear family is undone by divorce as often as not. One of divorce's most poignant consequences is the struggle that ensues over the children. A lesser-known, but often jarring, variant of the custody battle is the struggle over the children's religious upbringing. In which tradition should they be raised, if the parents are themselves of different religions, or if one parent is religious and the other is not? Or, in which version of the "same" religion, if parents subscribe to different denominations or personal understandings of the requirements of their faith (e.g., Orthodox versus Reform Judaism, Protestantism versus Catholicism? Baptists versus Methodists? High church versus low?)?

These situations make for contentious and protracted disputes,

played out with increasing frequency in our nation's courts. I propose to explore the phenomenon of "spiritual custody," as this concept is evocatively called in the language of American family law, both as a matter of law and political theory. What makes the subject particularly worthy of study is that it lays bare deep and often irreconcilable tensions at the heart of modern liberalism. On one hand, powerful forces of personal choice and autonomy prompt parents to join and exit marital unions at will – and prompt individuals, more generally, to choose their own life path. On the other, parents and society in general put a premium on inculcating moral and cultural values in children – and on fostering religious traditions in and through them. Spiritual custody law is a fascinating site of confrontation between these two impulses.

The tension reflected in the law of spiritual custody between the value of individual autonomy and the desire to preserve religious and cultural traditions is one that pervades the modern world. It has been expressed most vociferously in the battles waged by fundamentalist religious movements against secular and liberal values and political regimes. But fundamentalism is only the most militant, and hardly the most common expression of this tension. Many people who basically identify with modern secular, liberal culture, and hold no truck with religious extremism or violent militancy, nonetheless experience troubling conflicts between the claims of their heritage and the values of liberal, secular society to which they also subscribe.

These tensions are often represented as conflicts that occur between two discrete cultures, each of which is internally unified and singularly opposed to the other. Thus, we commonly understand religious groups that seek to establish their own schools to be involved in an enterprise of protecting "their own" values against the values of the larger society. Spiritual custody cases can likewise be seen as conflicts between religious subgroups and the wider culture. But spiritual custody cases revolve around value-conflicts *within* the family. All too often, discussions of the tension between liberal and religious values rest on the implicit assumption that "the family," figured as the chief vehicle of cultural transmission in society, is an organic

unity. Spiritual custody cases remind us of what we all too often lose sight of: that families are beset not only by outside forces but by conflicts internal to the family as well. The very identity of particular family's religious (or nonreligious) creed or culture is internally contested in a spiritual custody case. Recognizing the internally-contested nature of a family's religious/cultural identity creates difficult questions for a liberal polity dedicated to religious tolerance, freedom of belief, and family autonomy. Who has the right to prevail in these cases is uncertain. Indeed, it is unclear that there is any way to resolve these disputes without impinging on *somebody's* autonomy, and offending the basic principles of liberalism. Spiritual custody cases thus bring us into contact with the limits of liberalism, forcing us to reconsider the place of religion both within the family and within the society at large.

The Case of Zummo v. Zummo

In 1988, David and Pamela Zummo, the divorced parents of Adam, Rachel, and Daniel Zummo, appeared before a Pennsylvania family court, seeking resolution of what had become an intractable dispute. Pamela and David disagreed about the religious training of their children. Pamela asked the court to order David to bring the children to their synagogue to attend Sunday school during their weekend visitations with their father. She also asked the court to prohibit David from bringing the children to church with him. David was a "sporadic" Roman Catholic. Pamela was an "actively practicing" Jew. The family court, which heard and ultimately granted, both of Pamela's requests, observed that, "prior to their marriage, mother and father discussed their religious differences and agreed that any children would be raised in the Jewish faith." It further noted that "during the marriage, the Zummo family participated fully in the life of the Jewish faith and community," becoming members of the Norristown Jewish Community Center, attending services and joining a Jewish couples' group at their synagogue, and celebrating the Jewish Sabbath every Friday night until Pamela and David divorced.

Although he never converted, David did not share his religious

traditions with his children during the time he was married. A "lapsed" Catholic, he put the faith in which he was raised aside and supported his wife in her aim to give their children a Jewish upbringing. But after their divorce, things changed. David began attending Catholic mass occasionally and wanted to bring his children with him to church and to family functions and holiday celebrations – not regularly, but now and then. He also told Pamela that he did not want to have to take the children to Hebrew school during their weekend visits with him. Testifying in court that "he had no intent to interfere with his children's religious education as Jews or to convert them to Catholicism," David was conciliatory, stating: "I guess I am in agreement with my wife, as far as not creating an identity problem." (Strikingly, David still referred to Pamela as his "wife" after the divorce proceedings.) "It's just that – what my contention is," David falteringly explained to the court, "I don't want to be buried as far as my ability to relate my children and how I relate to my children is really – I mean, what I am is a product of my heritage and my religious training. I don't want to be barred from that." With a little more confidence, he stated his basic legal claim: "What's necessary for me is that I can have the freedom to expose them, maybe not on a regular basis, semi-regular basis, I don't know, but at least have that freedom, respecting her wishes as much as much as possible, and still have the ability to have some way of instilling what's good about my background." Struggling to reconcile this assertion of his religious rights and identity and parental authority with his sense of his "wife's" equal right to the same (and his own earlier commitments), David came to the heart of the matter: his desire as a parent to bond with his children and, more particularly, to bond his children *to* him. Based on his understanding of himself as a "product of my heritage and my religious training," David's desire was, in short, to project his own identity onto his children. Giving voice to the concerns of many "weekend fathers," fearful of estrangement from their children, David plaintively testified, "I am worried about what kind of input I have with my children, and every aspect, timewise," then concluded with a trifle more assertiveness, "I have a lot at stake here, too" (*Zummo* 1160).

What *do* parents have at stake in disputes like these? And how should courts resolve them? These are the basic questions raised by "spiritual custody" cases. Such lawsuits are interesting not only for their inherent human drama – the cases are poignant, often heartbreaking – but also because they bring us face to face with the limits of the constitutional principles that govern them.

Freedom of religion and freedom of choice in matters of belief, more generally, are the fundamental principles of liberalism that govern the legal resolution of spiritual custody disputes, along with such other basic liberal principles as the right not to be controlled or harmed by others and the right not to be controlled or harmed by the state. Courts addressing spiritual custody claims have applied these principles, with more or less consistency, more or less intelligence, and more or less sensitivity, depending on the particular court and the particular judge. In some cases, religious biases appear to have skewed decisions. For example, some judges seem to evince a bias against parents who practice "extreme" unorthodox or non-mainstream faiths, such as Jehovah's Witnesses who include their children in their proselytizing efforts, or Christian Scientists who deny their children medical treatment. Other judges to seem to exhibit a more general bias against religion, in favor of the "modern," secular parent. Still more prefer generic "religiosity" over parents who profess and practice no religious faith. More often than not, however, judges seem to bend over backward to avoid these sorts of results, striving to attain a position of judicial "impartiality" and "neutrality" vis-à-vis different religious faiths and vis-à-vis the choice between religious and non-religious parents (Schneider). This, the legal community generally agrees, is required by the basic principles of freedom of religion and conscience, and the prohibition against state "establishments" or "entanglements" with religion, enshrined in the First Amendment (Schneider, Beschle, 416, Compton v. Gilmore).

But no matter how much they strain to eliminate bias from their judgments, no matter how conscientiously they apply the basic constitutional principles of liberty, equality, neutrality, and tolerance that govern our legal system, judges inevitably end up

violating these principles in spiritual custody cases. Even when they decline to intervene – when they effectively decide *not* to decide, in other words – they find that they have in effect sided with one of the parents against the other, despite themselves and their best intentions. For a decision not to adjudicate a spiritual custody dispute in effect supports the parent who opposes the action.

This is exactly what happened in the *Zummo v. Zummo* case, on appeal. David challenged the family court's decision ordering him to arrange for the children's attendance at Hebrew school during their weekend visits with him and prohibiting him from taking the children "to religious services contrary to the Jewish faith." Though the family court had made allowances for bringing the children to Catholic family events, including Christmas, Easter, weddings, and funerals, its basic decision had been to place the children in the spiritual as well as physical, custody of the mother. Adopting the arguments made by Pamela's lawyer, the family court judge had taken the view that exposure to both religions might "unfairly confuse and disorient" them, and that "it was in the children's best interests to preserve the stability of their religious beliefs." The court of appeals overturned the trial court's decision and rejected all of the arguments put forth on its behalf. Emphasizing "the constitutional prerequisite of 'benign neutrality' towards both parent's religious viewpoints," the appellate court forswore the authority to favor one of the parent's right to spiritual custody over the other. But in doing so, the court effectively sided with the father's contention that "children would benefit from a bi-cultural upbringing and should therefore be exposed to the religion of each parent" (*Zummo* 1141).

It is of course a characteristically liberal idea that we can avoid taking sides by simply exposing people to competing viewpoints, and declining to favor any particular one. But this liberal policy of non-exclusion through exposure is itself a particular contested position. To refuse to favor one parent's claim to spiritual custody over another is not so much to avoid adjudicating the conflict as it is to favor the liberal position in that conflict. Liberalism is itself one of the antagonistic points of view in the contest between

competing viewpoints about how children should be brought up – which is to say that, paradoxically, liberalism is antagonistic to itself.

The inherent contradictions of liberalism, and the impossibility of escaping them, are made painfully clear in spiritual custody cases like *Zummo v. Zummo*. *Zummo* is a particularly good case to drive the point home because the judicial opinion that it generated on appeal avoided the mistakes often made in spiritual custody adjudications, yet still failed to avoid contradicting the very liberal premises upon which it rests. Authored by Judge John Kelly, of the Pennsylvania Superior Court, the *Zummo v. Zummo* opinion is unusually sensitive to the various interests and needs at stake in the case, as well as to the various parties' different points of view. It is exceptionally thorough in its canvassing of the various theoretical and doctrinal frameworks that could be used to resolve spiritual custody controversies. And it offers an astute and at times profound analysis of the shortcomings of each of the available approaches. Judge Kelly's opinion is, in a word, wise, a term not often affixed to judicial opinions these days. Nonetheless, it was no more successful in resolving the dispute in a manner consistent with the liberal principles of religious tolerance, freedom, and neutrality than other court decisions.

The fact that Judge Kelly's failure cannot be dismissed as the result of intellectual or moral shortcomings on his part requires us to consider the possibility that the failure reflects limitations built into liberalism itself. Judge Kelly scrupulously avoided the various lapses of judgment that have marred judicial decisions handed down in other spiritual cases. Nonetheless, his opinion betrayed some of the basic constitutional principles of liberalism that guided him. It thus reveals the inherent contradictions of liberalism. At the same time, it raises again the question of what exactly is at stake in spiritual custody disputes. What did David gain, and what did Pamela lose? And what did the children stand to gain or lose?

The Problem of Religious Freedom and Control in a Liberal Society

In many cases where parents have religious differences, they manage to work them out, or at least live with them, without destroying each other and without resorting to the law. But in a growing number of cases, protracted religious disputes have led parents to petition judges to grant one of them more or less exclusive control over their children's religious upbringing, just as Pamela Zummo did. *Zummo v. Zummo* provides a lens through which we can better understand what parents are trying to gain out of winning such a right of control, as well as what is potentially lost – and what might (and should) lie beyond anyone's control. Indeed, *Zummo v. Zummo* confronts us with the limits of control, with the limits of both parental and legal control over "spiritual development." Before turning to the *Zummo* opinion, however, it may be helpful to elaborate the basic philosophical dilemma expressed in spiritual custody cases – the dilemma of freedom and control – in non-legal terms.

It is a truism about modern, liberal societies that they make religious affiliations voluntary – and therefore vulnerable. Religious and social critics of liberalism have long charged that faith is rendered vulnerable in liberal societies precisely as a result of its being made voluntary (Stolzenberg & Myers, 648, Bentwich, 147-72).

The threat posed by liberalism to religious faith is downplayed in the mainstream political culture through a variety of rhetorical devices, for example, by emphasizing the freedom *to* affiliate with a religion of one's choice. (Recall how Senator Joseph Lieberman won the crowds over during his run for vice-President with his statement that the First Amendment stands for freedom *of* religion, not *from* religion.) (Lieberman). The reality, of course, is that freedom of religion *entails* freedom from religion. Consequently, as the critics have long claimed, liberalism has always posed a threat to religious groups.

But, what kind of threat? There has always been something mystifying about liberalism's adversarial relationship with religious groups and traditions. For one thing, it is undeniably

true that liberalism mandates religious tolerance and protects the right to participate in religious associations. Critics of liberal tolerance have argued that these core values produce a culture of individualism that, paradoxically, undermines religious groups and their traditions. Historical experience largely supports their claim that Enlightenment ideals of emancipation and individual rights undercut the traditional forms of communal autonomy and authority that historically undergirded religious groups, as well as their further claim that the values of diversity and freedom of conscience led many people to abandon traditional faith. Yet religious groups have simply not "withered away." On the contrary, Americans are routinely – and accurately – described as a highly religious people (Carter).

If the hallmark of liberal society is the individual's freedom to decide which religion to belong to, or whether to belong to any religion at all, the great tendency of individuals in American society has been to embrace religious affiliation. Although, as a logical matter, the freedom of religion implies the freedom not to practice any, as a sociological matter, the majority of Americans have exercised their right to religious freedom in conformity with Lieberman's slogan: "freedom *of* religion," not "freedom *from*." Like marriage (another area of social relations where liberals fought hard to establish the "freedom not to"), religion seems to be one of those social institutions most Americans can't get enough of. Given the choice, rather than avoid these institutions, Americans continue to enter both marriage and religion with undiminished hopes and expectations. Even when their marital or religious affiliations dissolve, their strong tendency is to attach themselves to yet another marital partner or religious tradition, rather than abandon marriage or religion altogether. (If, as has often been observed, Americans have a penchant for "serial monogamy," we might justly observe that they have a similar predilection for "serial faith.")

Notwithstanding how indulgent Americans are of romantic and religious changes of heart, the common practices of serial monogamy and serial faith both demonstrate an abiding cultural preference for affiliation over un-affiliation, for "freedom of"

over "freedom from." (Consider our attitudes toward our politicians: one who takes a new wife is eminently forgivable, one who adopts a new faith is positively exemplary; but the politician who espouses no spouse or creed is going to have a hard time getting elected.) Of course there are Americans who opt out of marriage and religion altogether – but surprisingly few given their supposedly optional character.

The American penchant for religious affiliation could be interpreted as showing that the critics' view that liberalism makes religion voluntary and therefore vulnerable is only half-true. Perhaps the truth is that religion has become a voluntary affair, but being voluntary has not made religion vulnerable to disaffection in the way that the critics predicted. This position has some intuitive plausibility. But are our religious affiliations really voluntary? This is supposedly what distinguishes a liberal from a traditional society, according to both liberalism's critics and its defenders (Stolzenberg & Myers, Richards, 105-21). But perhaps this common understanding is wrong. The critics of liberalism may have it wrong on both scores – maybe the truth is that religion in a liberal society like America is neither voluntary nor vulnerable, or at least not *as* voluntary or *as* vulnerable as the critics have argued. And perhaps the surprising durability of religion in America does not so much reflect American "preferences" or "choice" as it demonstrates the very same kind of social mechanisms that ensured the perpetuation of religious cultures in traditional, non-liberal societies.

Liberal political theory pictures competing religious and cultural belief-systems as constituting a sort of "marketplace of ideas," and it pictures people as consumers who get to make selections from this cultural-religious-philosophical marketplace much the same way we select material goods from the marketplace – without the rigid constraints on identity that prevailed in traditional societies. But examining what *leads* people to make the "choices" about religion that they do never reveals individuals, unconstrained by prior beliefs and cultural attachments, simply making a rational, detached choice about what to believe and where to belong. The "isolated selves" of liberal mythology, "cut

loose from all social ties" and freely choosing their beliefs and attachments from a menu of available options, are just that, a myth – at best, a useful theoretical construct; at worst, a distortion of reality (Walzer 9-10) We do not emerge from the chrysalis of childhood as the "unencumbered" individuals pictured in liberal political theory (Walzer 10, Sandel 538). Our childhood experiences shape and constrain us and, to a great extent, determine who we are. We bear the imprint of our earliest cultural experiences even when we struggle to shake them off.

All this we know. What we do not know is how to square this familiar knowledge of ourselves as creatures of the cultures into which we are born with the equally familiar picture of ourselves as autonomous individuals exercising freedom of choice.

The standard way of reconciling the contradiction is to invoke a certain conception of "the family." Liberal political theory typically conceives of the family as an "intermediate institution" (Dailey, 1836) that constitutes a social space that hovers in between self and society, individual and group. As such, the family is supposed to resolve the tension between the cultural conditioning that necessarily shapes us as we grow and the state of freedom and autonomy that supposedly awaits us when we are grown. Although the family is a private collection of individuals from the point of view of the state, from the standpoint of the individual, the family is a group that shapes and constrains the individuals within it. The family thus combines qualities of the individual and the group and, somehow, "mediates" between our qualities of individuality and groupness. In the same vein, the family is also thought to somehow "mediate" between the forces of acculturation and social conditioning to which we all are subject and the values of liberty and choice that we are supposed to possess. Thus, the family is pictured as carrying out different social functions that stand in tension with each other. On the one hand, liberal theory entrusts the family with the "communitarian" function of transmitting the traditions of a particular culture from one generation to the next. It likewise sees the family as serving the "cultural pluralist" function of ensuring the ongoing existence of diverse sub-cultures, rather than having a single homogenous

culture society-wide. On the other hand, the family is expected to fulfill the classically "liberal" function of ensuring that children develop the ability to exercise the "normal" faculties of reason and choice. Looking at these various social tasks entrusted to the family through the lens of the market metaphors which structure liberal thought, one might say that the family serves to foster both the supply and the demand functions of the "marketplace of ideas." On the supply side, families, by virtue of their communitarian and cultural pluralist functions, serve as the vehicles through which the different religious and ethnic sub-cultures that make up a pluralistic society are transmitted and delivered to the cultural marketplace. On the demand side, the family's liberal function is to produce the autonomous individuals, the informed consumers, who are capable of choosing from that marketplace. Through appropriate child-rearing, the idea is that families gradually nurture the capacity to think and make choice, allowing the autonomous individual to emerge. And thus the contradiction between our cultural dependence and our right to individual independence is magically resolved (Dailey 1826-1850).

The problem remains, however, that these functions stand in tension with each other. Besides invoking magical terms like "intermediate," and "mediate," liberal political thought never really explains how the tensions are resolved. If a family succeeds in transmitting a particular faith or cultural identity, then it follows that individuals raised in that family are, to say the least, predisposed to "choose" that faith/identity from the menu of available cultural and religious options. This is indeed a rather understated way of making the point. (Other commentators speak of "value-inculcation" or – the scare word – "indoctrination.") But whatever terms are used to describe the concern, the point is the operation of powerful forces of socialization or acculturation, which call into question how much of a choice we really have in determining our religious or cultural identity as adults.

The standard way of "solving" the problem of predisposition or indoctrination is to say that families are (or should be) sufficiently open and supportive of the development of the normal

capacity of reason that children grow up to be able to make choices for themselves. In other words, the upbringing provided by a family must be sufficiently, though minimally, liberal. A sufficiently liberal upbringing means simply that children are not completely insulated from exposure to alternative ways of life, nor completely "indoctrinated," i.e., deprived of the ability to think for themselves. With the emphasis here on "completely," liberal theorists of children's education generally agree that these requirements are not inconsistent with allowing parents broad latitude in controlling the upbringing of their children and limiting their religious and cultural horizons. So long as the normal faculties of reasoning and independent judgment are allowed to develop, and so long as an "adequate" range of choices is presented to children once they are grown, liberal political theory generally holds that letting parents place limits on their children's cultural horizons is not only permissible but necessary to social development (Gutmann 43-47, Macedo 237-38).

This conception of the family providing a liberal education or upbringing depends on several questionable assumptions. The "communitarian" function is granted wide berth on the theory that allowing the family to inculcate the values of a particular religion or culture in children does not preclude (and in fact may be a prerequisite to) the emergence of the child's faculties of independent reason and choice. But the compatibility of the liberal and communitarian functions – the possibility of a choice-promoting education existing alongside a family's inculcation of particular values; the possibility of individual independence coexisting with cultural dependency within a single individual – is merely asserted, never explained. Rather than demystifying the way the "mediating" function of the family works, this line of argument simply repeats the familiar mystifications. How the control that our parents exercise over the shape of our identity ever ends – how it is, for example, that someone raised in an Amish family, or in a Hasidic family, ends up leaving the community in which she was raised – are questions that never really get answered in most treatments of the family by liberal political theorists. It is left more or less a mystery how the cultural

forces that exercise such a powerful effect over the formation of our identities when we are young cease to constrain us when we become adults – or how, if they do continue to shape our identities, our choices and judgments can really be said to be "free."

If the family's communitarian function of cultural transmission creates one set of problems, its liberal function of cultivating reason and choice creates more. Cultural conditioning, according to the liberal theory of the family, does not prevent the emergence of the autonomous adult, capable of choosing for herself from the marketplace of ideas — so long as certain, fairly minimal, conditions are met. So long, that is, as the family refrains from total indoctrination, and so long as it does not completely shut out awareness of alternative ways of life, the family is understood to produce individuals who are as capable of rejecting their upbringing as embracing it, depending solely on their own personal inclinations. In other words, a liberal upbringing is supposed to permit (though not require) people to transcend, or escape, their family's religious heritage and upbringing. But, as the *Zummo* case suggests, even a liberal approach to upbringing tends to reproduce itself. (Just as Jewish families tend to produce Jews, and Catholic families tend to produce Catholics, liberal families tend to produce liberals.) Of course, we are only speaking of tendencies, not strict determinism. (People raised in liberal families sometimes rebel against their parents' liberalism, just as sometimes people raised in Jewish families sometimes reject their parents' faith.) But the fact that people sometimes reject, and almost always modify, their parents' faith does not contradict the formative impact of our upbringings on our identity. Thus, the problem of cultural predisposition or "indoctrination" – the problem of reconciling parental control over upbringing with the value of freedom of choice – remains.

Perhaps the gravest challenge to the usual way of attempting to reconcile parental authority and cultural conditioning with free choice stems from yet another weakness in the liberal model of the family: an unspoken assumption that "the family" is internally homogeneous and bears a single identity. The assumption of the culturally homogenous, unitary family clearly underlies the usual

communitarian and cultural-pluralist constructions of the family as a vehicle of cultural transmission. In all of these accounts, the family is routinely construed as a unitary entity, as if religious and cultural differences within a family do not occur. Liberal theory may voice an occasional hesitation over parental control tending to suppress the emergence of differences between parents and children, but the point, then, is that such differences *are suppressed*. Differences between parents are usually not even mentioned. The tacit assumption is that parents share a common religious (or secular) identity, which they jointly inculcate in their children.

Obviously, this assumption of parental unity is highly unrealistic. Parents often differ in their religious beliefs and practices, some finding their way to compromise, others collapsing into conflict. But if the family harbors religious conflicts, then our understanding of the tension between freedom of choice and parental control has to be significantly revised. The problem can no longer be seen simply in terms of one party (the parents) impinging on the freedom of choice of another (the child). Nor can the solution depend on an understanding of the family – or even of the individual – as embodying a single, homogeneous culture or identity. Instead, we need to develop a picture of how multiple parties vie for parental authority and the right to exercise control over the "spiritual development" of their children – and over each other.

Spiritual custody cases shine a spotlight on the complex dynamics of compulsion versus freedom in the family. It is tempting to view these cases – still few but growing in number – as anomalous, as if they only represented "dysfunctional" families, and there were other, "functional" families that still answered to the old assumptions of religious unity and satisfactorily resolved the tension between our dependency on cultural conditioning and the value of individual autonomy and freedom of choice. But just as medicine and psychology have historically used the study of pathology as a window into physical and mental health, so too the study of spiritual custody cases reveals dynamics common to all families in a world governed by the principles of religious

liberty, family autonomy, and freedom of choice.

Spiritual custody suits exhibit the family *in extremis*: conflicted, in pain, bound by fierce attachments, and pulled apart by competing loyalties – in other words, the typical family in an exaggerated form. Far from being anomalous, spiritual custody cases throw into relief the struggles for control and personal freedom that occur between parents, and between parents and children, in families both "broken" and "intact," interfaith and intra-faith, religious and secular, traditional and modern. Most of these spiritual custody disputes simply never make it to court. Why some families' religious disputes erupt into legal proceedings, while most never do, is best explained by examining the legal doctrines that govern such disputes.

The Law of Spiritual Custody

Spiritual custody cases are a relatively new legal phenomenon. The first publicly recorded litigation of a spiritual claim appears to have occurred in 1867 (*Cole v. Cole*). Litigation over spiritual custody remained quite rare until the 1950's. Today, there are hundreds, perhaps thousands, of recorded spiritual custody cases.

The dramatic rise in the number of spiritual custody cases is generally attributed to the confluence of several fundamental changes in family-related social and legal practices. Perhaps the most common explanation refers to the increase in the number of interfaith marriages. The assumption underlying this explanation is that people who marry from different religious backgrounds are more likely to fall into disputes over the religious upbringing of their children. Even when parents enter marriage having reached some kind of agreement, as when a spouse converts, or one simply agrees to defer to the other's religious preferences, the chance of such an agreement breaking down haunts the intermarriage scenario, as borne out in cases like *Zummo v. Zummo*.

Divorce is another factor commonly cited as a cause of the rise in spiritual custody cases. All spiritual custody claims are made in the context of the custody proceedings that follow divorce (or its functional equivalent, the separation of unmarried partners).

This is so because courts are generally barred from adjudicating disputes between parents who are married to each other under the legal doctrine of "family privacy." This doctrine denies courts the authority to intervene in family disputes, save for extreme situations when children are clearly at risk of being seriously harmed by their parents (as in cases of child endangerment or abuse and neglect). But it only applies when parents are married to each other; once a legal separation or divorce occurs, courts not only may but must intervene in parental disputes (Gregory 165-67).

With around 50% of marriages now ending in divorce, it stands to reason that there would be a rise in litigation over family affairs, including disputes over spiritual custody. Yet another factor cited as a cause of the rise in the number of spiritual custody claims is the change in the legal standard used to adjudicate child custody. Until the early nineteenth century, when divorce was still rare, the law gave fathers exclusive custody of their children as a general rule under the doctrine of *patria potestas*. This was of a piece with the prevailing view of the father as the head of the family, exercising rightful authority not just over his children but also over his wife (Black and Cantor 4-10).

So long as fathers held exclusive authority over their children as a matter of law, legal disputes between parents over their children's upbringing simply could not occur. Perhaps surprisingly, this bar on judicial intervention in family disputes held fast even after the doctrine of *patria potestas* was abandoned. In the early 19th century, courts began to reject the traditional paternal preference, embracing in its stead a legal preference in favor of placing children in the custody of their mothers, codified in the doctrine of the "tender years presumption." But though this shift from a paternal to a maternal preference seemed to represent a rejection of the old patriarchal custody regime, it perpetuated the basic patriarchal assumption that the family is a unit presided over by a single custodial authority or head of household. Just as the traditional doctrine of paternal authority had denied mothers the right to challenge fathers' decisions about their children's upbringing, the maternal preference, which

awarded child custody to the mother, effectively precluded fathers from interfering with most of the decisions that custodial mothers made. The mother, in effect, became the father, for all practical purposes. That is, she became the head of the household and the sole custodian, in most cases, both physical and "spiritual."

By effectively eliminating one of the parents from the legal picture, and denying, first her, then him, the opportunity to claim a legal right to "spiritual custody," both the paternal preference and the subsequently favored maternal preference served to create the illusion – and, to a significant extent, the reality – of a family united under the authority of a single custodian (Fineman 733-34). All this changed with feminism and the advent of new standards that purported to give mothers and fathers equal rights. The presumption in favor of awarding custody to the mother was displaced by a new child custody doctrine that rejected both paternal and maternal preferences in favor of case-by-case inquiries into what would serve the best interests of a particular child.

In theory, either parent is eligible to receive custody under this version of the best interests standard. In practice, however, mothers continued to receive custody of their children in much the same rate as under the tender years presumption when the best-interests regime was first adopted, both because fathers rarely sought custody, and because courts continued to believe that it was in children's best interest to be raised by their mothers. To this day, mothers are much more likely to become the sole custodians of their children than fathers are in cases of divorce. But there has been a significant move in the direction of shared custody between fathers and mothers resulting from the confluence of the feminist movement's call for gender-neutrality in the area of child custody and an emerging father's rights movement, asserting the rights of fathers to custody, control and participation in their children's upbringing. Together these two movements have given rise to a preference for joint custody, and other forms of shared parenting. Though fathers actually seeking custody remain a minority, a clear trend has nonetheless emerged favoring joint custody as a norm (Kandel 145-148).

Thus, the path has been cleared for parents, each now endowed with legally-recognized rights of authority over their children, to enter into spiritual custody disputes. Unlike the earlier regimes of child custody law, which effectively suppressed such disputes by lodging parental authority in a single "head," the combination of the best interests of the child standard and the legal preference for joint custody has opened the door for parents to disagree and to bring their disagreements into the courtroom.

It is not at all surprising that commentators should have identified intermarriage, feminism, divorce, and the various new legal doctrines, such as the best interests of the child standard and the joint custody preference, as "causes" of spiritual custody disputes. But this is just to say that in the past the law actively suppressed the emergence of spiritual custody disputes. What feminism and the new child custody standards have served to do is not so much *cause* spiritual custody disputes as *remove* the legal obstacles that prevented these disputes from being expressed and adjudicated in the public forum of law.

Disagreements between parents in private were never so rare as the public record of litigated disputes would suggest, even before the advent of feminism, gender-neutral custody standards, and the widespread occurrence of divorce. Nor were such disputes limited to cases of interfaith marriages. The notion that women and men had different approaches to the religious training of their children was a commonplace Victorian thought, and what the Victorians had in mind was surely not a man and a woman coming from different religious traditions. Rather, they subscribed to a general belief that women were more scrupulous in their moral and religious observance, and more effective at inculcating values in children of tender years. (It was of course precisely this idea that gave rise to the tender years presumption). The Victorians did not need the stimulus of feminism, intermarriage, or divorce to perceive the possibility of conflicts occurring between mothers and fathers over their children's spiritual development, which strongly suggests that the root causes of spiritual custody disputes lie deeper than the supposed dysfunctions of contemporary life.

To seek the causes of spiritual custody disputes is to return to

the question of what is at stake in spiritual custody disputes. What motivates them? Or, to put it more precisely, what motivates the parents who ask for spiritual custody, and what motivates the parents who resist them? The factors adduced in conventional explanations, divorce, intermarriage, and the advent of legal standards granting mothers and fathers equal rights, merely created an opening for parents to stage legal disputes over their children's upbringing. What rushes in to fill that opening is something infinitely more complex than the conventional explanations suggest. Those complexities are nowhere better illustrated, and analyzed, than in the appellate court opinion handed down in the case of *Zummo v. Zummo*. It is to that case that we now return.

Zummo v. Zummo Redux

Zummo v. Zummo framed its analysis in terms of the competing interests that parents have in religious freedom and parental control. But rather than presenting a simple contest between one parent with an interest in religious freedom and one parent with an interest in parental control, the *Zummo* opinion offered a complex picture of mixed motives on the part of each parent.

A less subtle analysis might have portrayed Pamela as the parent desirous of establishing religious control and David as the champion of religious freedom. This would be a fairly standard liberal take on the case. Liberalism, after all, depends on such dichotomies as freedom versus control, choice versus compulsion, and neutrality versus indoctrination. Exposing people to a range of diverse ideas, without making value-judgments about which is better, is thought to be a very different thing from inculcating people with the values of a particular belief-system, the ostensible difference being that only the former leaves people to free "make up their own minds."

Pamela asked the court for the authority to inculcate her religious beliefs in her children; David asked for the freedom to expose the children to "what's good about my background," while "respecting [Pamela's] wishes as much as possible." Pamela argued that exposure to the conflicting religious traditions of

Catholicism and Judaism would cause the children suffering and harm – emotional suffering, in the form of stress and confusion, and the further harm consisting of the destabilization of their established beliefs. David contended that "the children would benefit from a bi-cultural upbringing and should therefore be exposed to the religion of each parent" (*Zummo* 1142). These differences are readily translated into the standard dichotomies of liberal thought, with Pamela being seen as the upholder of the traditional values of value-inculcation, parental control, and authority, and David standing on the opposite side of the dichotomy, defending the liberal values of neutral exposure, diversity, and freedom of choice.

But to frame the contest between David and Pamela in this way would be to miss the point that the tension between the desire for control (over one's children, one's former spouse, and one's self) and the desire for freedom is a struggle that takes place within the breast of each parent, as well as between the two. Notwithstanding the real differences between what Pamela and David wanted for their children (and for themselves), the opinion in *Zummo v. Zummo* revealed that both parents had an equal interest safeguarding their religious freedom *and* in establishing their parental control and authority. What made the case hard was not that one parent wanted these rights and the other did not. The problem, as Judge Kelly notes, was rather that, as a matter of law, "both parents have rights to inculcate religious beliefs in their children," now that we have abandoned the old "gender stereotypes" that used to endow one parent with the exclusive authority of the head of the household (*Zummo* 1135, 1157).

In a spiritual custody dispute, both parents seek control and authority, even when one parent is seeking the authority to instill the values of a secular, liberal, multi-cultural upbringing. This recognition undermines the core idea of liberalism that control and freedom are separable and dichotomous. Judge Kelly drew this recognition out of a careful analysis of the various proposed ways of resolving spiritual custody cases.

Lawyers, judges, and legal commentators have so far come up with three basic ways of handling spiritual custody disputes:

One is a general posture of non-intervention in spiritual custody disputes, favored by many judges. This approach is based on the belief that judges cannot adjudicate spiritual custody disputes without offending the constitutional principles of freedom of religion and the separation of church and state.

The second leading approach, also adopted in many spiritual custody cases, allows judges a broad license to decide if restricting the behavior of one of the parents, and conferring the exclusive rights of spiritual custody on the other, would be in a child's best interests. This approach involves the application of the best-interests standard that has generally governed child custody proceedings since the demise of the traditional presumptions in favor of fathers and mothers, respectively. It basically involves making an open-ended inquiry into the impact of each of the parent's religious practices (or non-religious) on the child or children involved, with an eye towards protecting them from parental practices that will cause them "harm." The defining characteristic of this approach – indeed, the only thing that distinguishes it from the general principle against judicial intervention – is that it accepts a broad definition of harm. Courts following this approach seek to protect children from potential, as opposed to actual, harms, including psychological "harms," such as stress and confusion, which are commonly alleged to result from exposing children to conflicting religious traditions. Such an expansive conception of harm provides an ever-ready justification for intervening in spiritual custody disputes.

The non-interventionist approach, by contrast, resists defining harm to children in such expansive terms. It is not that the non-interventionist approach eschews the best-interests standard, which courts today unanimously agree should govern all child custody proceedings. It is rather that it relies on a different understanding of what the best interest of a child *is*. Advocates of the non-interventionist approach agree that judges should intervene in cases where a child is threatened with serious harm – for example, in cases when a parent's religious convictions require him to withhold medical treatment, or prompt her to teach the child that the other parent is condemned to eternal damnation

and must be shunned. The difference between this approach and the more discretionary application of the best-interests standard lies in the narrower conception of harms justifying judicial intervention. For practical purposes, this makes all the difference in the world. More precisely, it marks the difference between a general rule of non-intervention in spiritual disputes (subject only to a narrow exception for cases where children are seriously endangered), and the opposite legal regime, a general rule of subjecting spiritual custody disputes to judicial adjudication (with spiritual custody awards granted routinely as a matter of judicial discretion).

Yet a third approach has been proposed for resolving spiritual custody disputes, which seeks to navigate between the constitutional concerns that militate against judicial intervention and the concern over children's welfare that underlies the more expansive best-interests approach. The proponents of this approach have mostly been scholars (courts have resisted it), though a number of lawyers, including Pamela Zummo's lawyer, have argued for its adoption on behalf of clients seeking to establish spiritual custody. This third approach encourages parents to enter into agreements, or contracts, stipulating the religious upbringing of their children, and calls upon courts to enforce these private agreements when and if one of the parents reneges on his or her earlier commitments.

After surveying all three of these leading legal theories, the non-interventionist principle, the discretionary best-interests approach, and the contractualist approach, Judge Kelly adopted the first, observing that "judges and state officials are deemed ill-equipped to second-guess parents, and are precluded from intervening" in parental disputes, save for emergency situations where the behavior of one of the parents is actually endangering the child, as in cases of child abuse and neglect. Judge Kelly rested this conclusion partly on general principles of constitutional law that seemed to be vindicated by the non-interventionist approach, and partly on the absence of better alternatives, given the weaknesses he perceived in the other two approaches.

The case that Judge Kelly makes against the best-interests

and contractualist theories is indeed compelling. Unfortunately, the case he makes against them applies equally well to the approach he leaves standing, the position disfavoring judicial intervention. In the end, Judge Kelly was forced to intervene and make a decision, even though his decision was only not to decide. But that, as I suggested above, is as value-laden and as meddlesome a decision as any other, paradoxical as that may be. For the decision not to intervene allowed David to carry out the "bi-cultural upbringing" that he favored against Pamela's wishes.

How alert Judge Kelly was to this paradox of non-intervention is uncertain. That he was generally alert to the paradoxes of liberalism vis-à-vis religious disputes is evident from his treatment of the other two leading theories of how to resolve spiritual custody disputes.

Perhaps the most innovative aspect of Judge Kelly's opinion lies in his treatment of the contractualist theory. A number of commentators and a few judges have argued that the best way to deal with religious differences over children's upbringing is through the mechanism of private contract (Freeman 89-91, Strauber 1008-10). As a policy matter, contractualists suggest that spouses should discuss their differences and hammer out agreements about the religious identity and upbringing of their children. Ideally, such agreements would take the form of a written contract that could readily be consulted in the event of a disagreement. But some agreements might be more informal: an oral agreement or even an implicit understanding between parents concerning their children's religious identity. According to contractualist logic, such agreements are best entered into before the children are born, or even before the couple marry. But they might also be formed at a later point in time. Either way, the theory is that it is better for parents to settle their differences themselves than to descend into bitter conflict and have a court impose a decision on them.

In addition to preventing courts from inappropriately intervening in religious controversies and infringing on parental autonomy, a private agreement is supposed to have the salutary effect of getting parents to resolve their differences in advance,

before real conflicts arise, so that either they never arise, or, if they do, it is clear how to resolve them. The appeal of contracting as a strategy for avoiding or managing religious conflicts has led many rabbis, ministers, and priests to institute the contemporary practice of pre-marital counseling, focused in good part on getting the partners to think about these issues and work out more or less formalized pre-nuptial agreements regarding the children's upbringing. (Such pre-marital services also supposedly serve the gate-keeping function of encouraging people whose religious differences seem unbridgeable to reconsider their plans). Formal statements of one party's commitment to raise the children in particular faith are also a typical part of the religious conversion process in some religions.

Proponents of the contractualist approach argue that courts hearing spiritual custody cases should look for evidence of such commitments or contracts and enforce them when they are to be found. They strenuously oppose the idea that spiritual custody contracts should not be enforced when a parent has had a change of heart. This is precisely what contracts are for, they argue: not only to ensure that the people to whom we make commitments get what they bargained for, but also to allow us to bind ourselves. In other words, when one makes a spiritual custody contract, it is a commitment not just to one's partner, but to oneself. It is binding the present self against the possible future self – the person one might evolve into in the future – who might subvert one's present wishes. If one couldn't bind oneself, couldn't promise now to refuse to indulge potential changes of heart in the future, then how, the contractualist asks, could one make commitments at all?

The contractualist argument says: if a person chooses to bind herself, as an expression of her own free will, why not let her? Isn't such a course consistent with the fundamental liberal value of freedom of choice? We accept this logic all the time in common contracting situations with commercial actors. Why not apply the same logic here? What is different about contracts for the exchange of spiritual custody rights, as opposed to material goods?

Two obvious differences come to mind, though whether those differences argue in favor of or against the enforcement of spiritual

custody contracts remains to be seen. One key difference is that the subject of a spiritual custody dispute is not a material commodity but is rather a matter of religious identity and faith. The other key difference, of course, is that besides the two parties who enter into an agreement (the two parents), there's a third party directly affected by the agreement, though not a party to it: the child.

As one court put it, punning on the contract law doctrine of third-party beneficiaries, the child is a "third party maleficiary" to the contract (*Hackett* 482). This formulation reminds us that the most vulnerable people in spiritual custody conflicts are the children. The question, though, is what harms them. Are children harmed by the breakdown of spiritual custody agreements and the refusal of courts to abide by them, leaving them at the mercy of warring parents and caught in the middle of antagonistic cultures? Or are they actually more subject to harm when spiritual custody contracts are enforced? Proponents of the contractualist approach appeal to the liberal values of freedom of choice and freedom of contract. But they clinch their argument with the notion that conflicting approaches to religious upbringing cause children harm. The whole point of spiritual custody agreements is that they are supposed to spare children the sufferings thought to result from being subjected to contrary child-rearing approaches. From this point of view, children are the intended beneficiaries of spiritual custody contracts, not their "maleficiaries." They only stand to become "maleficiaries" in the case when courts refuse to enforce them.

This idea resonates with widely held contemporary views about children's psychological needs and interests. Conventional wisdom dictates that stability and consistency serve children's best interests, and, conversely, that change and conflict produce emotional stress and psychological harm. More specifically, exposing children to conflicting religious views and different styles of upbringing is widely believed (as Pamela Zummo argued) to cause them stress and confusion. In short, pain and suffering result from having more than one "spiritual custodian" with conflicting practices and beliefs. By this account, parents should

be encouraged to form spiritual custody contracts, and they should be required by law to carry them out, precisely because such contracts protect the interests of children. In other words, spiritual custody contracts are to be enforced for the sake of the children.

The case for spiritual custody contracts thus depends on the principle of promoting the best interests of the children. It depends, however, on a particular view about what the best interests of the children are. The understanding of children on which the contractualist argument rests equates their interests with stability and consistency, and, conversely, holds that children are harmed by instability, inconsistency, and conflict in their upbringing. At first glance, this may seem utterly unexceptionable, the statement of an uncontroversial truth rather than a particular, contestable point of view. Indeed, popularized by contemporary psychology, this view has largely succeeded in reshaping the practice of child custody law; it would be hard to find dissenters. But in the context of spiritual custody disputes, it functions in essence as an updated version of the old principle of family unity, decked out in the modern therapeutic language. After all, instability, inconsistency, and conflict can only be avoided by ensuring that there is only one spiritual authority – either a head of the household or the mythical, magically-unified, family. A consistent, stable approach to a child's upbringing can be achieved, and conflict avoided, only if there is in fact a unified parental team, as when both parents make and remain committed to an agreement about how to raise their children; or, in the event of a breakdown in the agreement, if one of the parents alone is granted exclusive rights of spiritual authority.

The arguments that Pamela made in *Zummo v. Zummo* show clearly how the contractualist argument in favor of enforcing spiritual custody agreements depends on this underlying view of children's needs. Not only did she argue that exposure to David's Catholic practices would cause the children painful stress and confusion, but she also simultaneously asserted the existence of a spiritual custody agreement. Although no formal written ante-nuptial contract had been executed, it was undisputed that "the Zummo's had orally agreed prior to their marriage that any

children to their marriage would be raised as Jews" (*Zummo* 1142). The trial court relied on David's oral agreement as grounds for awarding spiritual custody to Pamela (and stripping David of his rights). The judge maintained that he was not making a choice about the faith in which the children should be raised, but merely enforcing the parties' own agreement. In theory, this avoided the constitutional problem of having the court take sides in a religious controversy or infringe on the rights of parental autonomy, the idea being that the court was not taking a substantive position on the merits of the contending parents' faiths, but was merely giving effect to the substantive position that the parents themselves had long ago mutually reached.

But the court was taking a substantive position on the merits of competing theories about what children's best interests are. Using the contract argument enabled the trial court to side with the view that being exposed to more than one religion is psychologically painful and (what is not quite the same thing) actually harmful to children. It enabled the court (until it was reversed on appeal) to protect the children from the harms it perceived to flow from a "bi-cultural upbringing" without appearing to take a stand against the contrary view, put forth by David, that a bi-cultural upbringing was actually of positive benefit to the children. Instead, the court could fall back on the position that it was merely enforcing a contract, implementing the arrangement that the parents had mutually agreed upon – conveniently ignoring the fact that the argument for applying contract logic to spiritual custody disputes rests heavily on the view that a bi-cultural upbringing, with its attendant features of instability, inconsistency, and conflict, is not in the best psychological interests of children.

But in fact this is a disputable – and indeed disputed – view of children's needs and interests, although in today's climate, it may seem almost inconceivable that anyone could argue the contrary position. How could it possibly be that conflict, inconsistency, and instability are ever in a child's best interests? It is one thing to contend, as David Zummo did, that a "bi-cultural" upbringing is a positive good, but quite another to argue that

conflict, inconsistency, and instability are of benefit to children. But once we get past the level of slogans, it seems undeniable that a bi-cultural upbringing in situations like the Zummos' necessarily entails some degree of conflict, inconsistency, and instability for the children. If we want to understand what children actually experience in situations like this, we have to get past comforting cultural bromides like "bi-culturalism" and dig out the constituent elements that a bi-cultural upbringing actually consists of: beliefs and practices that are sometimes antithetical to each other, as in the case of Judaism and Catholicism; belief-systems which pose a real threat of destabilizing or undermining each other; family cultures hostile towards each other; and divided loyalties to parents with different, sometimes contradictory expectations. Surely, Pamela wasn't wrong in sensing that allowing David to do what he wanted posed a real risk of undermining the children's attachment to Judaism and weakening their sense of Jewish identity. Under these circumstances, is it possible to doubt the conventional psychological wisdom that holds that children are better off being raised in one religious (or secular) culture?

It would take an act of sheer audacity, if not perversity, to argue against the view that instability and conflict are contrary to the best interests of children. Yet that is exactly what Judge Kelly did in the *Zummo* case, and his argument, once stated, seems anything but perverse. Indeed, once fully absorbed, it seems less audacious than commonsensical, albeit a version of common sense that contemporary popular culture has largely lost sight of. Kelly's point is simply this: "stress is not always harmful, nor is it always to be avoided and protected against." Acknowledging that "for children of divorce in general, and children of intermarriage and divorce especially, exposure to parents' conflicting values, lifestyles, and religious beliefs may indeed cause doubts and stress," Judge Kelly went on to say that "the key is not whether the child experiences stress, but whether the stress is unproductively severe." Short of that, claims of emotional harm are not sufficient to justify court intervention in parental religious disputes, and the principle of non-intervention must therefore be adopted.

Judge Kelly actually resisted the conventional psychological wisdom about the virtues of a consistent upbringing on several grounds. First, he observed that there is a "problem of causation" – that is, it is always hard to tell, when a child is distressed, if the suffering is actually caused by the religious upbringing dispute rather than by something else. It might well be that the child is suffering simply because "the parents have divorced or because of other factors unrelated to the religious upbringing issue." In a similar vein, Judge Kelly noted that claims about the psychological distress caused by exposure to more than one religious tradition are generally just conjectures, notwithstanding the psychological "experts" commonly brought in to testify in support of such claims. Following the lead of other courts, Judge Kelly rejected "speculation by parents and by experts" as being simply too speculative a basis on which to intervene in parental disputes in the name of protecting children from harm (*Zummo* 1155, 1156).

Both of these arguments go to the question of whether conflicting approaches to religion within a family really cause children harm. Judge Kelly cited the work of several scholars who have concluded that "exposing a child to more than one religion in the various households to which [the child] is attached does not, by itself, cause [the child] emotional stress or identity confusion" (Petsonk & Remsen 298; Mayer 42-45; Frideres, Goldstein & Gilbert 288-75; Schneidner 131; Heller 141-56; Rosenberg, Meehan & Payne 132-43; Cowan & Cowan 127-65, 255-62; Gruzen 62-63; Doyle 83-84).

But Judge Kelly's most powerful argument accepted the possibility that exposing impressionable children to multiple traditions can cause psychological stress and confusion. What he refused to do was make an elision between such psychological pain and harm. Again, "stress is not always harmful" (*Zummo* 1156). In fact, stress may best be regarded as an un-eliminable, essential, and even positive component of emotional and psychological development. "The process of a child's maturation requires that they view and evaluate their parents in the bright light of reality," Judge Kelly opined. "Children who learn their parents' weaknesses and strengths," he went on, "may be better

able to shape life-long relationships with them." Therefore, he concluded, "courts ought not impose restrictions which unnecessarily shield children from the true nature of their parents unless it can be shown that some detrimental impact will flow from the specific behavior of the parent" – leading again to his favored position of non-intervention (*Zummo* 1155).

Thus, Judge Kelly dispensed with the automatic equation of harm with stress and conflict. As for the argument equating psychological harm with instability and change, Judge Kelly argued that "we are compelled ... to expressly disavow the suggestion ... that governmental interests in maintaining stability in spiritual inculcation exist which could provide a justification to encroach upon constitutionally recognized parental authority and First Amendment Free Exercise rights of a parent to attempt to inculcate religious beliefs in their children" (*Zummo* 1150). Acknowledging the "genuine comfort and reassurance a child *may* derive from *any* religion in a time of turmoil like divorce," Judge Kelly made the wry observation that "stability in a path to damnation could not be said to be more in a child's 'best interests' than an instability which offered the hope of movement toward a path to eternal salvation." Alluding to more skeptical views of religion, he noted as yet another possibility the theory that "all religions or a particular religion [are] merely harmful and repressive delusion," in which case "stability in such a delusion could not be said to be more in a child's 'best interests' than instability which might pave the way to escape from the delusion." The existence of such diverse views, as Judge Kelly saw it, only reinforces the case for non-intervention. "Because government cannot presume to have any knowledge as to which if any religions offer such eternal rewards or repressive delusions," Judge Kelly concluded, "the government simply cannot constitutionally prefer stability in religious beliefs to instability" (*Zummo* 1150).

For Judge Kelly, these arguments rejecting the equations commonly drawn between stress, confusion, conflict, and instability, on the one hand, and psychological harm, on the other, served to refute both the best interests approach, followed by many courts, and the contractualist approach, which, as we have seen,

implicitly rests on the common best interests analysis. The best interests approach justifies judicial intervention in spiritual custody disputes, regardless of the existence of a prior spiritual custody agreement. It counsels deciding whether or not to grant the exclusive rights of spiritual custody to a parent on the basis of an open-ended inquiry into whether or not that outcome would be in the best interests of the child. The best interests inquiry is typically guided by the common assumptions regarding children's psychological interests in stability and consistency that were discussed above. In this now familiar view, anything that generates a sense of confusion or conflict is a kind of emotional harm that children have a right to be protected from. It is but a short step from this general proposition to the conclusion that courts must step in to protect children from the confusion and conflicts inherent in a bi-cultural upbringing. But once this general proposition is undermined, the argument that courts should make spiritual custody awards for the sake of the children crumbles.

With the best-interests argument weakened, the contractualist argument also loses one of its principal props. The question remains, however, why spiritual custody agreements should not be enforced, if not for the sake of the children, then for the sake of the general principles of freedom of contract and freedom of choice, which underlie ordinary contract law. If David Zummo, and others like him, freely entered into such contracts and made commitments of their own volition, why shouldn't they be held to them, as a matter of the basic principles of liberalism? Why should they be allowed to wriggle out of their commitments, especially given the seriousness of the stakes for everyone involved?

Judge Kelly took on this more fundamental contractualist argument on both narrow grounds of contract law doctrine, and on the grounds of general constitutional principles. As a matter of the technicalities of contract law, Judge Kelly argued that most spiritual custody agreements, like the oral commitment made by David Zummo, fail to satisfy the basic legal requirements for creating enforceable contracts. The terms of the agreement are simply too "indefinite" and "too vague to demonstrate a meeting

of minds, or to provide an adequate basis for objective enforcement." Before they married, David and Pamela indeed made an agreement to raise their children as Jews. But, Judge Kelly observed, they "not surprisingly" had different understandings of the meaning of this commitment. Pamela envisioned "intense and exclusive Jewish religious indoctrination with exposure to only the most secular aspects of the father's Italian/Catholic heritage." David envisioned "that his children would receive formal Jewish education, [but] he did not understand it to preclude him from exposing the children to Catholic mass and other aspects of his cultural and religious heritage on a periodic basis" (*Zummo* 1145). Given these divergent understandings, which are quite typical in spiritual custody disputes, there *is* no mutual agreement, no "meeting of the minds," to be enforced.

Judge Kelly also made a more general case against enforcing spiritual custody contracts. Here, his argument referred not to the vagueness and indefiniteness of the terms of the agreement, but rather to the notion that unforeseeable changes in circumstances are not appropriately governed by contracts. This, too, is a standard contract law doctrine. But Judge Kelly applied the changed circumstances doctrine of contract law in a way that expressed a particular vision of the meaning of the principles of the constitution, a vision that forms the boldest and most distinctive part of his opinion.

And here we come to the core of his opinion: Spiritual custody awards, he argued, should not be granted on the basis of prior agreements between a couple because "such agreements generally will not be able to anticipate the fundamental changes in circumstances between their prenuptial optimism, their struggles for accommodation, and their ultimate post-divorce disillusionment." In short, in Judge Kelly's description, such agreements are hopelessly "hopeful" (one might better say, wishful) and "naive" – not, Judge Kelly suggests, because the couples who make them and break them are any more naive than the rest of us, but because the circumstances of romantic commitment have naivete, as it were, built into them. It would

therefore be inappropriate, Judge Kelly goes on to argue, for courts to accept to enforce them, Judge Kelly. We no longer enforce wedding vows either, Judge Kelly reminds us, marriage being another arena where the value of "freedom from," embodied in the right to divorce, has been at least as fully recognized as the value of "freedom of" (*Zummo* 1147). And, if the marriage contract itself can be abrogated, why should a spiritual custody agreement be enforced?

Judge Kelly's argument here returns us to our original comparison of marriage and religion – and serial monogamy and serial faith – in the American popular imagination. Judge Kelly's opinion expresses a distinctive vision of the meaning and nature of freedom that is deeply rooted in American culture and popular religion. It is a distinctively liberal vision, but one that differs from other, perhaps more common understandings of liberalism, such as that which informs ordinary contract law doctrines. The liberal vision which Judge Kelly articulates gives pride of place not to the values of freedom of contract and commitment, but rather, to "the freedom to question, to doubt, and to change one's convictions." In Judge Kelly's interpretation, *these* are the core values enshrined in the First Amendment. Insisting that "religious development is a lifelong dynamic process even for people who continue to adhere to the same religion, denomination or sect," Judge Kelly gave voice to a vision of religous and personal freedom that emphasizes liberal (or what one might call, following the legal theorist Roberto Unger, "super-liberal") values of dynamism, transformation, and ongoing change, as against the inherently conservative values of stability and contractual obligation (*Zummo* 1146).

Such a dynamic understanding of freedom, centered on the right to change, reveals the essential link between "freedom of" or "freedom to" and "freedom from" or "freedom not to." For change always implies both a movement away from a former status quo, and a movement towards a new one. The right to change is, by definition, perpetual, or, in the more common language of liberal rights, "inalienable," and for that very reason, not to be

conveyed away by contract, like some sort of material good. As Judge Kelly explained:

> The First Amendment specifically preserves the essential religious freedom for individuals to grow, to shape, and to amend this important aspect of their lives, and the lives of their children. Religious freedom was recognized by our founding fathers to be *inalienable*. It remains so today. Thus, while we agree that a parent's religious freedom may yield to other compelling interests, we conclude that it may be bargained away (*Zummo* 1148).

This, of course, is the same dynamic understanding of personal development that has come to prevail in the area of the law of marriage and divorce, where we have elevated the freedom to change one's mind (or one's heart) over the value of unbreakable commitments. (It was Milton who penned the first great liberal argument for the right to divorce, based on the right to changes of heart, in the name of deeply religious Christian conception of liberty and love.) (Milton). Indeed, it appears that in the domain of marriage, we have come to tolerate almost unlimited amounts of conflict and change, whereas only in the context of custody proceedings are changes of religious faith and religious conflicts between parents expected to be legally contained and subdued. As Judge Kelly noted, it is an anomaly that we permit spiritual custody disputes to take place between parents who are married to each other, virtually without restraint, and only subject parents who are not married to each other to judicial intervention (*Zummo* 1140).

Of course, the normative implications of the anomalous treatment of marriage could cut either way. One could just as well make the case for judicial intervention in "healthy marriages," as argue against making spiritual custody awards in cases of divorce, if the sole concern is consistency. It is only Judge Kelly's emphasis on the value of the right to "grow," "amend," and change in the religious sphere that makes it clear which way the anomaly

has to cut. The right to divorce represents the triumph of the dynamic understanding of liberalism, centered on the freedom to change, over more conservative notions of stabilizing contracts and commitments. So too, does the right to diverge from one's spouse, or former spouse, or even from one's former self when it comes to the religious upbringing of one's children.

This dynamic vision of liberalism is what ultimately led Judge Kelly to reject the judicial award of spiritual custody to one parent on any grounds, be it the children's supposed best interests, or the parents' supposed agreement. If Judge Kelly is correct in holding that the First Amendment protects the "constitutional freedom to question, to doubt, and to change one's convictions," then there is never any basis for enforcing an exclusive right to control the children's upbringing against another parent, save for the extreme situation where a parent's religious practices threaten a child with actual, serious harm. As a general rule, non-intervention logically follows from this vision of personal freedom, centered on a right of perpetual change.

There are two great ironies to Judge Kelly's opinion. The first, already alluded to, is that this principle of non-intervention is subject to much the same critique that he made of the contractualist and best-interests approaches. While seeking to preserve both Pamela's and David's freedom of religion, the decision in *Zummo v. Zummo* inevitably gave full protection to only one parent's right to "shape this important aspect of their lives, and the lives of their children," while limiting the other's. David was in effect given free rein to give his children the "bi-cultural upbringing" he valued, while Pamela had to submit to input from David that cut against her desire for an exclusively Jewish upbringing. Judge Kelly's decision was no more neutral, in this respect, than any other. And it seems that there is simply no escaping from this dilemma of neutrality.

The other great irony of Judge Kelly's opinion is that, while it honors the general principle of the separation of church and state enshrined in the First Amendment's establishment clause, the vision it gives voice to is actually, in terms of its origins, a deeply religious one. More particularly, it derives from a specifically

Protestant tradition of valuing religious conversion experiences as the quintessential expression of religious commitment and choice. Conversion experiences have always had a special place in America's popular religious culture, thanks to the particular combination of Christian and Romanticist ideas that shaped American culture. From its Puritan beginnings, an American culture of "personal growth" and "religious freedom" has always invited individuals to consider embarking on new "spiritual journeys" and undergoing "changes of faith." Far from being a phenomenon unique to the inter-faith marriage situation, the possibility of transforming one's religious identity has long been regarded, and valorized, as a standing possibility for everyone, at any time.

Of course, there has never been any guarantee that one person's "spiritual growth" would proceed in lockstep with another's. Protestant lore is full of stories, like that of Christian in John Bunyan's The Pilgrim's Progress, whose journey to Jesus required that he leave his domestic hearth with his fingers stopped in his ears in order to prevent his being lured back by the cries of his wife and his children. The religious-romanticist tradition has always recognized that the freedom of the spirit necessitates breaking earthly commitments, in particular the commitments we make as a parent and as a spouse. Unlike some contemporary versions of liberalism, particularly those inflected with pop psychology, this religiously-rooted version of liberalism has never pretended that spiritual freedom is easy or conflict-free.

Over time, this Christian-Romantic conception of religion and religious freedom has steadily become secularized. We can recognize many of the elements of the originally Protestant conception of spiritual growth present in the contemporary theories of psychological development that shape our popular attitudes today. By the same token, religious denominations other than Protestantism have assumed many of its guiding values and reformed themselves in its image – not only the various non-Protestant denominations of Christianity, but non-Christian religions, such as Judaism, as well. In particular, the motifs of spiritual growth, and the concomitant right to changes of heart

and mind, recur today in all major American religious denominations.

From this perspective, the final irony may be that parents coming from different religious backgrounds clash at all, given the cultural convergence of all of the major American religious denominations on the values of religious freedom, spiritual growth, conversion, and the right to change. But the same spirit of individuality that gives you the freedom to embark upon a new spiritual journey means you can never be certain if your partner is along for the ride. In fact, given our commitment to the individuality of religious experience, it is likely that one partner's "spiritual" evolution is going to differ in more or less significant ways from the other's. Even when both partners start and finish as members of the same religious denomination, even when both partners are secular and consistently shun religious affiliations, in the absence of legal mechanisms that subordinate one parent to the authority of another, as in the patriarchal days of yore, some differences over their children's "spiritual" development are bound to occur, belying the myth of the culturally homogeneous family.

These, then, are the lessons of *Zummo v. Zummo*. In the words of a recent advice book to couples: *"every marriage is a mixed marriage"* (Stoner 20).

And everyone is born and raised in spiritual custody. There is no escape from spiritual custody, because even the most "liberal" of parents imposes a particular upbringing on their children, and even bi- or multi-cultural families transmit a particular culture – namely, the culture of multiculturalism. There is no such thing as "mere exposure," because exposure to competing points of view always shapes the children who are exposed in distinctive ways – ways different from those of a more insulated culture. Being exposed to more than one religious tradition takes certain choices away, at the same time that it opens up others. The same is true of being raised in a homogenous culture.

These lessons help to explain the basic conundrum of religion's vulnerability in a liberal society, with which we began. Religious affiliations *are* vulnerable in a liberal society; liberalism *does*

threaten to disrupt the chain of cultural transmission from one generation to the next, as statistics on assimilation and secularization bear out. But what religious affiliations are vulnerable to – what it is that threatens to disrupt the chain of transmission is not precisely choice. Religious affiliations cannot be said to be entirely voluntary once we recognize the powerful forces of socialization and acculturation that are always at play in families in the form of "spiritual custody." What religious traditions are vulnerable to, as the case of *Zummo v. Zummo* shows, is not so much choice as each other.

In *Zummo*, it was David's religious tradition that threatened to undermine Pamela's (and vice verse) – not some detached faculty of free choice that the children would somehow magically come into possession of at the age of majority. In fact, David and Pamela's children were destined to be shaped by their experiences, and by the control exercised over them by both parents (as are we all). If the effect of the decision would be to lead them away from the Jewish identity that Pamela (and David) intended for them – and there is no predicting what the outcome would be – that would not be the result of their having escaped the common fate of being subject to cultural conditioning by one's parents, but rather, of having had the right to cultural conditioning by both parents guaranteed. It is not the absence, but rather, the *surfeit* of cultural conditioning that might – and one wants to emphasize only *might* – end up disposing the children against their mother's (or their father's) religious heritage. Conflict, then, not choice, appears to be the essential catalyst of religious transformation. Or to put it another way, conflict is the catalyst of choice – not the other way around.

Works Cited

Black, James C. and Donald J. Cantor. Child Custody. New York: Columbia UP, 1989.

Cowan, Paul and Rachel Cowan. Mixed Blessings. New York: Doubleday, 1987.

Dailey, Anne C. "Federalism and Families." University of Pennsylvania Law Review 143 (1995): 1787-1888.

Doyle. "The Roman Catholic Church and Mixed Marriages" Ecumenical Trends 14 (1985): 81.

Ellis, Sarah Strickney. The Women of England: Their Social Duties and Domestic Habits. London, 1839.

Fineman, Martha. "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making." Harvard Law Review 101 (1988): 727-774.

Freeman, Lauren D. "The Child's Best Interests vs. The Parent's Free Exercise of Religion." Columbia Journal of Law and Social Problems 32 (1998): 73-97.

Frideres, Goldstein & Gilbert 288-75 "The Impact of Jewish-Gentile Intermarriages in Canada." Journal of Comparative Family Studies 2 (1971): 268.

Gregory, John Dewitt. "Family Privacy and the Custody and Visitation Rights of Adult Outsiders." Family Law Quarterly 36 (2002): 163-187.

Gruzen, Lee F. Raising Your Jewish/Christian Child: Wise Choice for Interfaith Parents. Dodd Mead, 1987.

Guttman, Amy. Democratic Education. Princeton: Princeton UP, 1987.

Hackett v. Hackett. 146 N.E.2d 477. OH Com. Pl. 1957.

Kandel, Randy Frances. Family Law: Essential Terms and Concepts. New York: Aspen, 2000.

Macedo, Stephen. Diversity and Distrust: Civic Education in a Multicultural Democracy. Cambridge: Harvard UP, 2000.

Mayer, Egon. Love and Tradition: Marriage Between Jews and Christians. New York: Schocken, 1985.

Petsonk, Judy and Jim Remsen. The Intermarriage Handbook: A Guide for Jews and Christians. New York: Quill, 1988.

Rosenberg, Rabbi Roy A., Father Peter Meehan, and John W. Payne. Happily Intermarried: Authoratative Advice for a Happy Jewish/Christian Marriage. New York: Crowell-Collier, 1989.

Sandel, Michael. "The Procedural Republic and the Unencumbered Self." Political Theory 12 (1984): 81.

Stoner, Carroll. Weddings for Grownups: Everything That You Need to Know to Plan Your Wedding. San Francisco: Chronicle, 1997.

Strauber, Jocelyn E. "A Deal Is a Deal: Antenuptial Agreements Regarding Religious Upbringing of Our Children Should Be Enforceable." Duke Law Journal 47 (1998): 971-1012.

Walzer, Michael. "The Communitarian Critique of Liberalism." Political Theory 18 (1990): 6.

Zummo v. Zummo. 574 A.2d 1130. PA Super. Ct. 1990.