9 Child-Parent-State: The Absence of Community in the Courts' Approach to Education

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Introduction

The family context has long been a source of perplexity for liberal theories. How can a theory committed to individual freedom and choice make sense of an institution built upon mutual obligation and love? The traditional solution was to hold a distinction between two separate realms of life: the private and the public. According to this view shielding the individual against the coercion of state power calls for a recognition of the family as a private sphere beyond the reach of state intervention. By granting privacy rights to the family we help create a protected sphere in which individuals enjoy the freedom to exercise their autonomy. In other words, the family should serve as a private sanctuary of individual freedom, safe from intervention by government. Such was the traditional story told to us by liberal theory. The fallacy in this story was brought to light by feminists who unravelled the violence and coercion some members of the family (i.e., women and children) had to endure under the veil of family privacy.[1] They exposed a potential conflict between the need to insulate family relations from the power of government and a commitment to safeguard the autonomy of the individual members of the family. Feminist writers argued that within a sphere cordoned off as 'private' and removed from state intervention, family members, including children, remain individuals who may have or who may lack rights to appeal to the state. The challenge that we face today is to find a way to reconcile the doctrine of family privacy with the basic aspiration of a liberal state to enhance the autonomy of its individual members.[2]

I would like to explore these questions by reflecting on the area of education. More specifically, I would like to raise some questions regarding the common assumption that parents should have a right to choose their children's religious education according to their own beliefs and values.[3] Protected by the doctrine of family privacy, the educational decisions of parents are usually shielded from governmental scrutiny. This protection is meant to strengthen the autonomy of the individual in accordance with the basic liberal value of freedom of choice. The question remains, however, whose freedom and whose autonomy does this doctrine actually protect? What happens, for example, when parents are divided about the proper education of their children? Whose freedom does a privacy right protect in this case? What happens when parents agree about their child's education but their choice conflicts with basic values of the larger society regarding the well-being of children? How should we reconcile the universalist-liberal values of autonomy and equality with the particularist values of religious communities? And finally what happens when the parents' educational choice conflicts with the manifested will of the child? In short, how should the law settle disputes concerning the education of children?

Recently the Supreme Court of Israel has attempted to clarify the analytical perplexities that arise in decisions concerning the religious education of children provided by their parents. The court, under the leadership of Chief Justice Meir Shamgar, considered a new framework for deciding these matters. The case under consideration involved a custody conflict between parents who disagreed as to whether to expose their children to the beliefs and values of the Jehovah's Witnesses sect.[4] These beliefs were held by the mother at the time of the trial. Chief Justice Shamgar, in a long and well-reasoned opinion, introduced a new approach to resolve the controversy. Shamgar suggested that a *children's rights* model that he elaborated can resolve many of the analytical, ideological, and practical difficulties arising in disputes about the religious education of children.[5] This new approach, however, was received with reluctance by the other members of the court. Their reluctance can be explained as stemming from the radical transformation that such an approach might bring about to a very sensitive and delicate area of law.[6] In order to evaluate the changes that a 'children's rights' approach entails in conflicts about the religious education of children, I begin my investigation with two earlier court decisions by Israeli courts. Thereafter, I turn to explore the changes that a rights approach can bring about in the balance of powers among children, parents, state, and the religious community. In particular, I inquire how we

can *accommodate/reconcile* the role of the religious community in the education of children with a commitment to basic liberal values.

The Two-Tier Model

The first case I would like to discuss is a district court opinion 661/83 *Ploni v. Plonit* (1983) delivered by Judge Zeiler (hereafter, the '*Deri* Case').[7] Here, the parents were engaged in a custody struggle over their youngest child Deri. The mother challenged the custody rights of the father over the son, mainly because of the religious education that the father provided. The father belonged to a small religious sect (Jews for Jesus), a group that leads an insular life from the outside world in a small settlement in the desert. The mother, a former member of this religious group, asked the court to grant her the physical custody over her son and the right to educate him according to her present secular beliefs, in Jerusalem, where she lived at the time of the trial.

In order to decide the controversy Judge Zeiler began by elaborating an analytical map to guide his ruling. This map was meant to reconcile two basic liberal values, the autonomy of the family and the freedom of the individual. Judge Zeiler offered a two-tier model to delineate the line between parents' control over their children's education, and legitimate state interference in parents' decisions. According to this model, in the ordinary situation, where the family unit is functioning and parents agree about the education of their children, the state should respect the family's autonomy and refrain from intervention (unless there is a clear indication of harm to the health or life of the child). In other situations, where there is a complete breakdown in family relations and an agreement between the parents about their children's education cannot be found, the state has the right to intervene through its court system. Interventions in such cases can be reconciled with the fundamentals of liberal theory, since the family unit has already dissolved, and as a result there is no longer a need to protect its privacy. Moreover, by bringing the controversy to court, the parents indicate their consent to state intervention. According to liberal theory, however, not every decision by the court will be upheld, only one that remains neutral as between the values and beliefs of the parents. The traditional solution in Israeli law was to apply the 'best interests of the child' test as a neutral yardstick to adjudicate the competing claims of the parents. This test was understood as protecting the interests of the child while paying due respect to the parents' beliefs and values. Applying this test to the case at hand, Judge Zeiler decided that neither the father nor the mother should be granted custody rights over their child Deri. Instead, the child would be sent to a state institution or to a foster family. I will return to this part of the decision later on.

The First Tier

Let us examine more closely the two-tier model that guides Judge Zeiler's decision. Is it really capable of accommodating basic liberal values? I would like to suggest that a closer look of the two-tier model reveals its shortcomings at both stages of its application. Take for example cases falling under the first tier where the state is required to defer to parents who agree about their children's religious education. Is there no situation short of criminal misconduct (child abuse and neglect) that should warrant the state's intervention? Are we not neglecting the child's present and future autonomy by giving absolute precedence to the parents' choice?

A serious commitment to an individual's autonomy requires that the child will enjoy the physical as well as the cognitive and cultural conditions that will enable him to exercise meaningful autonomy in the future.[8] However, according to the two-tier model, the court is allowed to intervene only in extreme situations of demonstrable physical or emotional harm to the child. Consider the example that the court offered to demonstrate the extent of the court's deference to parents' choices. A father who is a medical doctor decides to go and help starving people in Africa. The father takes his child with him to be raised in an isolated place. Judge Zeiler maintains that as long as the mother agrees to this arrangement, the state should not intervene.

How can we reconcile this hypothetical example with a liberal commitment to the autonomy and freedom of the individual child? What can justify privileging the rights of one class of individuals (parents) over another (children)? One answer would be to view the child as lacking, in the present time, the full capacity to exercise her freedoms, and to see the parents as social agents who are responsible for acting on the child's behalf (trusteeship theory).[9] This answer, however, does not give a good enough reason why the state should refrain from interfering when the parents' educational decision today has the tendency to undermine the future autonomy of the child. Nor does it give a good reason why we should ignore the autonomous choices of the child when the parents agree to the contrary.[10] Judge Zeiler could remain silent about these troubling questions, however, because the *Deri* case presented him with an easier situation in

which the parents disagree among themselves, and 'invite' the state to intervene. The court's opinion regarding the hypothetical case remains a *dictum* and our questions remain unanswered on this matter.

In order to answer these troubling questions we shall introduce our third case, which was decided long before the Deri case. In this case, the concerns we raised materialised into a grim reality for the Reuben children. The case of *Attorney General v. Reuben*[11] (hereafter, the '*Reuben* Case') tells the story of an Israeli Jewish couple who, after a failed attempt to arrange for their children's adoption, decided to send their children to be educated in a Christian Mission. The state petitioned the court to intervene and to appoint an attorney *ad litem* on the children's behalf. If we were to apply the two-tier model to this case, it would have dictated non-intervention, since the parents were in full agreement as to their children's religious education (i.e., first tier). One recognised exception to the rule of non-intervention is when parents neglect their minimal legal duties towards their children, and Judge Kister examined this issue.[12] However, the judge was not satisfied with the whole framework of the two-tier model, apparently because he thought that it did not probe the issues deeply enough. Judge Kister explained that in his view parents' freedom of religion was not a sufficient reason to grant the parents absolute control over their children's education. This was so because protecting an absolute right of parents' freedom of religion involves, *inter alia*, the well-being of their children. This danger exposes the limits of the two tier model in the area of parent-child relations. A conception of family autonomy serving as a boundary against state intervention cannot accommodate the complexity of the problem, because in family matters granting rights against the state to one individual always has an impact on the internal balance of power among the other members of the family. Judge Kister suggested, therefore, balancing the parents' interests and rights against the children's interests and rights - including the right of a Jewish child to receive a Jewish education.[13]

Judge Kister's approach deviates from the two-tier model in three central respects. First, the judge was unwilling to give an absolute priority to the parents' rights without first balancing them against the needs, interests and rights of the child. Secondly, he did not limit his enquiry to the child's physical and emotional well-being but was also concerned with providing the child with a consistent moral and religious environment. Thirdly, Kister's approach is informed by a deep understanding of the role of community in the development of the child's identity, a consideration

which makes him sensitive to the potential clash between communities in relation to the education of children.

To sum up, the rule against intervention in cases falling under the first tier fails to respond to the full complexity of situations like the *Reuben* controversy, because it requires that the state keep out of the controversy when parents agree among themselves, even though their decisions impede the present or future autonomy of the child.

The second tier

The difficulties with the two-tier model are not restricted to cases decided under the first tier. Situations involving the second tier, when parents disagree about the education of their children and the state intervenes, raise their own difficulties. Here the main issue that the court confronts is how to guarantee the *neutrality* of state intervention. Israeli courts developed the 'best interest' test in order to decide these conflicts in a neutral and professional way. Doubts arise, however, as to the capability of this test to guarantee the court's neutrality. For example, it is a well known fact that when familial conflicts are brought under the jurisdiction of Rabbinical courts in Israel, the child's best interest is interpreted according to Jewish law.[14] An ideological bias in the application of the 'best interest' test can be detected in secular court decisions as well. For example, there is a growing body of research documenting the gender bias in custody decisions in the US court system.[15] In cases of this type we can detect value judgments underlying the professional language of 'best interests'. To what extent are these value judgments shaped by the values of the communities to which the parties and the judges belong?

The court's decision in the *Deri* case can demonstrate that the district court was not immune from the particularist values of its community in determining Deri's best interest. The court, you may recall, was asked to evaluate the potential harm to Deri, the child, from receiving the religious education of his father and his religious community. Deri's father had to answer charges concerning the impact of his religious education on the child's best interests, especially the potential harm from the lack of exposure of the child to outside stimulation. It can be argued that similar charges can always be raised against those who choose a pioneer way of life. Applying the best interest test to such cases is suspected of an ideological bias because it tends to burden unequally those who choose a pioneer way of life and those who conform to the standard way of living. Responding to the charge of ideological bias, the court tried

to defend the neutrality of its decision by distinguishing adults from children, and by introducing the incapacity doctrine. Judge Zeiler explained that choosing to endure the physical and spiritual difficulties in pursuing a pioneer way of life should be recognised as the prerogative of an adult (an autonomous person) and the court will refrain from interfering. However, when such a decision involves children who are not yet fully autonomous, the court is justified in protecting them from the irresponsible decisions of their parents. Put another way, the future autonomy and well-being of the child require that the court restrain the parents from burdening their children with their idiosyncratic ideals which result in hardship and lack of outside stimulation for their children. The court's purpose is to protect the future autonomy of the child by exposing him at the present time to the variety of life styles and beliefs within a heterogeneous society like the Israeli one. Only through such an exposure will the child be prepared to make an informed decision when reaching adulthood. Notice, however, that such scrutiny of a pioneer way of life, notwithstanding its professional aura, is difficult for an Israeli court to uphold. It stands in conflict with a long line of decisions that defended the rights of Israeli parents to decide their children's education even when these decisions subjected their children to a pioneer way of living.[16]

In order to tackle this difficulty the court introduced yet another distinction between a well established movement like Zionism, and esoteric and marginal groups such as 'Jews for Jesus'. The court explained that

> [Golda Meir] set out to fulfil an ideal that was upheld by representatives from all quarters of the Jewish people, a movement that received the blessing of the United Nations.

In contrast, Deri's father

> belongs to a new religious belief that has no historical roots among the Jewish people; it is a pioneer movement that has very few believers among the Jewish people and within Israel. There are merely twenty people or so in this settlement.

Paradoxically, according to this distinction, a pioneer way of life would receive the blessing of the court only when it had stopped being a pioneers' movement. The court justified its distinction by tying it to the best interest of the child, i.e., measuring objectively the amount of exposure to outside stimulation that the child receives. Thus, judicial bias in favour of the dominant ideology of Zionism is camouflaged by professional language about children's best interests.

Another example of the ideological underpinning of the best interest test is revealed through the examination of the conditions of 'difference and idiosyncrasy' imposed on Deri by the father's education at home. The court explained that Deri was likely to feel alienated and different from the larger society of children at school who dressed differently from him and did not share his religious beliefs. Taken to its extreme, this type of reasoning, if applied, for example, to children of orthodox Jews in the Diaspora, would have justified intolerance by the larger community towards differences in clothing, language, or beliefs that the parents' education might impose on the child.[17] Indeed, the court admitted that an experience of alienation and difference is not unfamiliar to Jewish children living in the Diaspora, but distinguished between living in the Diaspora and in Israel: Here in Israel, as opposed to the Diaspora, a Jewish child who lives among his own people should not be made to feel so very different from his peers.[18]

Finally, the court considered the anarchist outlook of the father's conduct, and the practices of his community. This community sets its own norms of behaviour and leads a life independent from the larger norms of society. Although members of this community commit no criminal offences, they ignore the laws of the land in areas that conflict with their religious beliefs. For example, they marry Jews and non-Jews, ignore conventional medical standards and in general lead a life of total lack of respect for the laws of the country.[19] This atmosphere of lawlessness, the court reasoned, is sure to harm the proper education of the child.

These three examples demonstrate how the court's interpretation of the child's 'best interest' tends to favour dominant Israeli culture (secular Zionism). It has little protection to offer to an insular community that claims a right to educate its children according to its own beliefs (and lacks political power). Notice that the cultural conflict between the religious community and Israeli society at large (and the court as its agent), a conflict that is typical in this type of case, tends to disappear under the guise of professional talk about the 'best interest' of the child. Under the guise of professional talk, the court never confronts the communal tensions surrounding its decision and, therefore, this aspect of the decision remains immune from critical evaluation.

Children's Rights

Concerns about the neutrality of the best interests test, similar to the ones I have mentioned, convinced Justice Shamgar in the Jehovah's Witnesses case to consider an alternative approach to resolve such disputes. Justice Shamgar acknowledged the possibility that an ideological bias was likely to appear in the application of the best interests test to disputes about the religious education of children. Indeed, this consideration was one of the main reasons for Shamgar's suggestion to replace the best interests test with a new approach which he called 'children's rights'. This approach, he claimed, can better guard against an ideological bias in courts' decisions because it requires that the claims of the parties to the dispute be linked to recognised rights. Under the children's rights approach the court considers the child's rights independently of the parents' rights, and in this way the objectivity of the decision is enhanced. We shall examine this claim by examining the place of particularist values of different communities under the new rights approach.

From a traditional liberal perspective the advantages of the children's rights approach seem clear. First, it claims to give an independent voice to the child in matters of family life that concern his or her well-being, thus strengthening the court's commitment to individual autonomy. Secondly, it purports to set clearer boundaries to state intervention by limiting the court's ability to introduce ideological considerations under the guise of the 'best interests' test.[20] In particular, it requires that the state's agents demonstrate firmer grounds such as legal rights to justify intervention.[21] In this way, Shamgar explains, a rights' approach can provide better safeguards against undue intrusion by state officials in family matters. It also claims to ameliorate some of the drawbacks that we identified in the 'best interests' approach. In particular, granting legal rights to each member of the family ensures that the court will strike a more informed balance among the interests of all the concerned parties to the dispute (at least, all the parties whose interests are protected as legal 'rights').[22]

Leaving aside the question to what extent the court achieved its goals[23], I would like to consider a rather neglected aspect of the children's rights approach: its effect on the balance of power between child, parent and state. At the outset of the paper I suggested that the two-tier model can be viewed as an attempt to strike a delicate balance between individual autonomy and family privacy. I would like to examine now what happens to this balance under the rights approach. Justice Shamgar claims that the balance does not change significantly under a children's rights approach since it accepts the two-tier model as the larger framework. This statement is a bit misleading since replacing a 'best interests' test with a 'children's rights' approach signals the beginning of the framework's collapse. Indeed, Justice Shamgar admits at one point that the adoption of a children's rights approach would tend to justify a greater intervention in family matters by the state. It could, therefore, undermine in some respects the 'privacy' accorded to the family unit under the two-tier model. Apart from this erosion in family autonomy, which can be justified from a children's rights perspective, I would like to suggest that the new approach has repercussions for the court's ability to take into account the positive role of the religious community in the development of the child's identity.

The Child and the Religious Community

The analytical clarity that the model of rights produces is bought at a cost. The model has the tendency to downplay the communal aspects inherent in decisions about children's education. The model of children's rights as interpreted by the court is a model of individual rights, i.e., it is atomistic in nature. Communal units that are affected by the decision, such as the family, the religious community, cultural and ethnic groups, etc., cannot find a legal form to articulate their concerns. This has obvious effects on the protection of the interests of the cultural and religious community in the education of its children. I would like to evaluate the effects of a change to rights discourse from the child's viewpoint. My point is that in so far as the community has a role to play in shaping the child's identity and enabling his or her future autonomous choices, a rights approach that fails to consider this aspect might prove deficient. In other words, a rights approach that has no tools to articulate the role of the community in the identity-formation of the child and in the development of capacities for autonomous choice, cannot confront the ideological considerations within the court's decisions in this area.

From liberty to identity

A recent article that discusses the issue of community rights within a liberal framework argues that liberal theories do not pay enough attention to issues of cultural identity in their discussion of human rights.[24] This observation is true of the children's rights discourse as well. The court's discussion

focuses on the protection of the liberties of the individual child and has difficulty discussing the interest of the individual child in the protection of her identity culture. This deficiency is particularly apparent in controversies about the education of children since such controversies raise mixed issues of identity and liberty.[25] We can point out the lack of attention to the identity-culture of the child in the decisions we have discussed so far. In the *Deri* case, for example, the court's decision to grant custody to the mother was followed by a change in the identity culture of the child (from 'Jews for Jesus' to secular Judaism). Likewise, for the *Reuben* couple the court's decision involved a choice between two religious-cultural identities - Jewish and Christian. Finally, Justice Shamgar's decision in *Plonim* protected the children's identity as Jews by forbidding their mother to continue to expose them to the Jehovah's Witnesses culture.[26] When dealing with children who are in the process of becoming autonomous persons, the centrality of the community in the formation of the child's identity is apparent.[27] However, since rights are traditionally understood as protections of the liberties of the individual by setting boundaries between individuals (and between the individual and the state), they fail to address the child's interest in an identity culture as a pre-condition for practising liberties. The rights discourse does not provide answers to the difficult question of how to secure a meaningful interaction between the child and other members of her community(ies) to address the child's interest in an identity culture.

A liberal state is committed to enhancing the autonomy of the individual. When we consider the issue of individual autonomy, taking adults as our example, we tend to focus on the *liberty* of the individual against undue intrusion by the state (and other individuals) as helping the individual protect his or her identity culture of choice. However, when we shift our attention from adults to children we tend to approach questions of autonomy by deciding a controversy between communities about a choice of the child's *identity* culture. For a child the future promises autonomy and freedom of choice, but the present is often characterised by restrictions and hierarchical relationships, at home, in school, and elsewhere. The child's interest in autonomy, therefore, requires that we probe the issue of identity formation directly and examine the role of communities in developing and nurturing the identity culture of the child. Indeed, the efforts of parents, siblings, teachers and other significant adults in the child's life are directed to shaping the child's identity in a way that will enable him or her to practise meaningful choices in the future. Hence, conceptualising

autonomy solely in terms of liberty does not resonate well with the needs and experiences of children.

The two points of view about autonomy (that of an adult and that of a child) are related to the different life experiences that shape them. The adult's viewpoint points in the direction of enhanced protection of liberty interests (identity following on the way). The child's viewpoint emphasises identity interests (autonomy following on the way). By moving between these standpoints, we can gain a more complete understanding of autonomy as a condition that depends on a mixture of the two ingredients (liberty and identity).[28] Moreover, entertaining both viewpoints simultaneously helps us notice that a static framework (either the two-tier model, or a rigid interpretation of rights as boundaries) can hinder our understanding of the temporal dimension of children's education.[29]

Considering the question of autonomy with the child in mind, we are reminded that identity is always a communal enterprise that involves more than a free-willing individual. The identity of the individual is always shaped in relation to a larger set of communal identities. In turn, a viable collective identity, be it religious or secular, needs a community for its creation and preservation. In as much as the future autonomy of the child is dependent upon the successful formation of his or her identity, it remains indebted to the community (or communities) that provides the child with the necessary cultural materials. But communities are not created overnight. They are dependent upon the continuing commitment of their members to pass the tradition on to the younger generation.[30] Sometimes in the name of this tradition communities demand that we limit the freedoms of some individual members of the community, in particular children, in order to preserve the community's identity. In such cases courts have to make a difficult decision whether to allow the survival interest of the community to enter the equation.[31] But even in disputes that fall short of these extreme situations, focusing on questions of identity is likely to expose a clash among communities about the education of the young, a clash that tends to disappear under the traditional framework of rights. When this clash involves agents of the state (in the name of basic liberal values) and a religious community, it is often about the treatment of weaker members of the community, and about the claims of the religious community to exclusivity.

From identity to equality: The clash between communities

Robert Cover, in his seminal article 'Nomos and Narrative', reminds us of the communal aspects that are involved in legal disputes about education. Cover argues that often controversies about the education of the young are also conflicts about the collective identities of social groups. He explores this tension in American society, saying,

> Precisely because the school is the point of entry to the paideic and the locus of its creation, the school must be the target of any redemptive constitutionalism ... Through education, the social bonds form that give rise to autonomy, to the jurisgenerative process .... The judge must resolve the competing claims of the redemptive constitutionalism of an excluded race, on one hand, and of insularity, the protection of association, on the other.[32]

Cover uncovers the clash between two communities and two collective narratives in America: the constitutional narrative of larger American society about racial equality and the narrative of the insular religious community of fundamental Christians about racial exclusivity. According to Cover, the abstract language of rights and freedoms of individuals fails to give due respect to the struggle over communal identity implicit in these educational controversies.

Israeli courts face a similar dilemma in cases concerning violence against women and children in which a 'cultural defence' is raised.[33] One famous case dealt with the use of violence against children by an Arab nun in a Greco-Catholic orphanage.[34] In this case (hereafter, *Dalal Rasi*) an Arab Nun was blamed for biting and maiming several of her female students. The attorney for the defence raised a 'cultural defence' argument, i.e., the need to respect practices of the minority community even if these practices contradict the values of larger Israeli society. The Supreme Court decided to reject the 'cultural defence' argument and convicted the nun of battery. The reasons given by the three Justices for their decision are illuminating. They are indicative of the way in which the conflict between communities in Israel shape the Justices' interpretations. Justice Cheshin construed the controversy as one between a modern enlightened community (Israeli) and a traditionalist backward community (Arab-Christian). He relied on legal materials from the common law that dealt with the cultural conflict between the British colonialists and the native Muslim culture regarding 'family honour'. Justice Cheshin suggested replacing the word

'British' with the word 'Israeli' and proceeding to apply the English precedents to the case at hand.[35] His conviction of the nun carried with it the additional effect of presenting the conflict between the Israeli and Arab communities as one between a higher culture and a lower one. Justice Asaf (a Jewish Rabbi) also saw the controversy as a conflict between two communities. However, for him the real clash was between the Orthodox Jewish community (one with a long and respectable tradition) and all 'other' communities in Israel (identified negatively as those that have not received the 'secret wisdom' of the Jewish tradition). According to Justice Asaf the court should turn to 'our' tradition (i.e., Jewish *Halacha*) in order to decide the case. In the *Halacha* Asaf discovered a 'secret wisdom' according to which the harms of hitting a child exceed the benefits.[36] Justice Landau's opinion strikes a different note. Although he agreed with his brethren that the teacher should be convicted according to the Israeli penal law, he refused to interpret the dispute in terms of 'us' against 'them'. Landau J. chose, instead, to base his conviction on testimonies of witnesses for the defence who testified that the teacher's behaviour was unacceptable according to the norms of her own culture. Thus, by refusing to reify the tradition of the 'other' to 'our' traditions, and by noticing different voices in the Arab-Christian community, Justice Landau managed to justify the state's intervention without extracting the additional cost of painting the Arab-Christian community as inferior.[37]

An approach that tries to reduce conflicts about education to their very basic units (rights of individuals) obscures the fact that the liberal state does not function in the area of education as a neutral body. As the *Dalal Rasi* case demonstrates, the state acts as a collective, interested in transmitting its own values (such as values of equality and autonomy) to the younger generation.[38] Similarly, a religious group which claims a right over education does it as a way of preserving the group's distinct culture, tradition, and social practices. A rights approach as interpreted by the court tends to obscure these elements and to shield them from critical evaluation. A crucial point in Justice Shamgar's judgment warrants our attention in this respect. Justice Shamgar classified the controversy in the Jehovah's Witnesses case under the legal rubric of 'parent-child relations' and not under the rubric of 'freedom of religion.'[39] This formulation helped neutralise the cultural clash that the case displayed between two communities (secular Israeli society, and Jehovah's Witnesses). In other words, the court's rhetoric tended to privatise (or domesticate) the conflict.

The children's rights approach, as interpreted by Justice Shamgar, does not avoid the ideological conflict among communities that we

identified in the 'best interest' approach. It only drives the conflict underground. It allows the judge to introduce value judgments and wrap them up in the universalist language of rights. For example, by adopting a certain interpretation of children's rights as the right to remain within the religion of one's birth, Shamgar's decision favours established religious communities and discriminates against new ones.[40] Applying this interpretation to the case at hand happens to match the interests of the larger Jewish community, since the children were born Jews and only later did their mother join the Jehovah's Witnesses. If the court were to apply this approach to the *Deri* case it would have granted custody to the father and his community ('Jews for Jesus'), because both parents shared these beliefs at the time of Deri's birth. I have doubts, though, whether the *Deri* court would have adhered strictly to this test, given the fact that Judge Zeiler preferred to send Deri to a state institution, where the child would be raised as a Jew, rather than allow him to continue his religious education with his father. [41] Note that Judge Zeiler presented his decision as a neutral one since he claimed to refrain from choosing between the parents. However, if we consider the conflict from the stand-point of the communities involved in this case, we realise that Zeiler's decision (sending the child to a Jewish educational institution) is biased in favour of the Jewish community to which the mother belonged at the time of the trial. Note that the *Reuben* court, rejecting the two-tier model, was willing to engage in a more candid approach to resolving such clashes between communities. Note also that Judge Kister was willing to examine the conflict between the Jewish and Christian communities directly by balancing their respective claims with regard to the education of the *Reuben* children. [42] This type of balancing, as our exploration of the new rights' approach reveals, is unlikely to occur under a legal framework that leaves no space for the consideration of the interests of communities.

The Role of Community from a Child-Centred Perspective

Introducing children to our theories of rights can offer a more dynamic understanding of autonomy, as a capacity that is shaped over time. It also helps articulate the child's interest in her identity-culture. Finally, it exposes the communal aspects that are involved in many of the legal controversies about children's education. The traditional concept of rights as static and atomistic is inadequate to deal with the dynamic and communal aspects of children's education. My criticism, however, should not be read as suggesting that we abandon the model of rights altogether.

Instead, it should encourage us to be creative in finding ways to combine the value of protecting the community with a commitment to the basic liberal values. It calls for a greater attention to the interpretation we give to rights in the area of children's education. Indeed suggestions in this direction have been previously offered by two scholars, Martha Minow and Jennifer Nedelsky, who developed a relational framework for rights.[43] The gist of their argument is that the dependency of children on adults (which shifts over time to a dependency of old people on their children) makes the traditional conception of rights as boundaries between individuals inadequate.[44] Rights should not be understood simply as walls between individuals because they have an important role to play in facilitating human relations within a community.[45]

In contemporary writing one can identify two opposing views about the value of the community to the individual. Communitarian writers such as Michael Sandel and Alasdair MacIntyre praise the value of the community to the individual and criticise liberal theories for adopting an atomistic conception of the individual that ignores this role.[46] Feminist and critical writers, on the other hand, expose the role of community in oppressing the weakest members in the community, often women and children.[47] Even though the two schools perceive themselves as diametrically opposite, I would like to suggest that their teachings can be integrated with our approach to children's education. Both approaches criticise the private/public divide by pointing to their intermingling in institutions such as the family and the religious community.[48] A closer look at their arguments reveals that the two schools emphasise opposite sides of the same coin and highlight an ingredient that is missing from liberal discussion in courts - the place of the cultural community in litigation about children's education.

Both the value of the community to the individual child and the dangers of oppression by a given community are manifest in controversies about the religious education of children. On the one hand, a child's religious community can provide the cultural resources to reinforce the child's developing identity. It often shields and protects the child from parents' violence and indifference by supervising parents' behaviour, and by acting as a buffer between the parents and the child. On the other hand, due to the special vulnerability of children to adults who have power over them, a religious community can enhance the imbalance by isolating the child from reaching external sources of help, to a degree far more complete than the parents can achieve on their own accord.[49] The unique value of a viable community to the child's development, and the special vulnerability

of the child to it, are important starting points for a critical evaluation of the role of the community in children's education.

A critical evaluation should examine what is hidden behind the professional language, such as considerations of 'continuity'[50] and 'reducing cultural conflicts'. Thus, for example, in both the *Deri* and *Plonim* decisions professional talk about the 'conflict of cultures' to which the children were exposed justified putting restrictions on the exposure of the child by one of the parents. In the *Deri* case the court's intervention meant sending Deri away from his father's community, and in *Plonim* it meant forbidding the mother from continuing to expose her children to her religious beliefs. The alternative of exposing the child to two different cultures was depicted as 'unhealthy' to the child. The value judgment in preferring homogeneity over plurality was hidden and the conflict was transformed into a professional decision about the 'health' of the child. This move is apparent in a case where a more candid discussion about the conflict in the district court disappeared in the appellate court's decision. The controversy was about the education of a child aged thirteen, the son of a Muslim father and a Jewish mother.[51] The physical custody of the child was granted to the father because of his better suitability as a parent. Thereafter, the issue of 'cultural contrast' was raised in the district court by the mother who complained about the father's decision to relocate with the child in an Arab village. The father continued to send the child to a Jewish boarding school. The district court decided that the 'best interest' of the child required the reduction of the cultural conflict in the child's life, but the court left the choice between the cultures to the father (to remain in the Arab village and send the child to an Arab school, or to move to a Jewish settlement and continue the child's education in a Jewish school). When the question was appealed to the Supreme Court, the court narrowed down the choice to one, i.e., sending the child to a Jewish school and relocating the family to a Jewish settlement. The court used the professional language about the need to mitigate the 'religious and social contrast' in the child's life. No justification was given for the priority that the court gave to the 'Jewish' alternative, notwithstanding the father's Muslim religion. Introducing the community factor to our discussion can help expose this gap in the Supreme Court's reasoning. Further questions could be raised about the desirability of giving an absolute priority to the need to reduce 'cultural and social clashes' in the child's life. It may well be that from a certain age an exposure of the child to different cultures might strengthen the child's capacities for autonomous choice as well as our commitment as a society to social pluralism.[52]

This point brings us back to the Supreme Court's decision. My criticism of Justice Shamgar's approach is not meant to suggest that we should give priority to the community over the individual in matters of education. On the contrary, I believe that Justice Shamgar identified the particular sources of danger to the child from a religious community and made a strong case for extending the protection of rights to children in this area. My argument is that when granting rights to individual children we should not ignore the interests of children in their identity culture. I have suggested some central issues that a critical approach to children's rights would have to consider but the full model will have to be developed elsewhere. I would like to conclude by reminding ourselves that matters of education are complicated precisely because they require us to balance the respective rights of individuals and groups. Reducing the controversy to a single matrix (of individual liberties) will buy us analytical clarity instead of deeper understanding of the problems.

Notes

1 Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform', 96 *Harv.L.R.* 1497 (1983); Catharine A. MacKinnon, *Toward A Feminist Theory of the State* (Harvard University Press, 1989) 184-194.

2 For contemporary re-interpretations of liberal theory extending autonomy rights to women and children 'behind the veil of family privacy' see, Bruce A. Ackerman, *Social Justice in the Liberal State*, (Yale University, 1980) pp. 139-167; Will Kymlicka, *Contemporary Political Philosophy, An Introduction* (Oxford University Press, 1990) pp. 247-262.

3 The issue was discussed in a series of American court decisions about the proper limits of public education see: *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Mozert* v. *Hawkins County Board of Education* 827 F.2nd 1060 (1983). American courts drew the line between legitimate state interference in the education of children and family's autonomy according to the public/private distinction. Parents were allowed control over their children's private education, while the state retained its control over the public school curriculum. In Israel the balance between state and parents is drawn differently. For example, public education of Jewish children is divided into two separate systems, secular and religious, and parents can choose between the two systems. In addition, the government finances a large portion of the budget of private schools belonging to ultra-religious groups. For an evaluation of the Israeli system of education, see Stephen Goldstein's contribution to this volume at Chap.

8 above. My paper does not examine the Israeli system of public education in general but is limited to the narrower issue of the state's intervention in the religious education provided by parents to their children. This issue is often raised in custody disputed between parents. I will focus on three such cases and examine the balance between the competing interests involved.

4 C.A. 2266/93 *Ploni* v. *Ploni*, 49(1) P.D. 221 (1995).

5 The 'children's rights' approach has been used in different contexts to mean different things. Some advocates of children's rights refer by the term to increased *protection* for children; others use rights to advance the *autonomy* of children. For an analysis and classification of the different uses of the term 'children's rights', see Michael S. Wald, 'Children's Rights: A Framework for Analysis' 12 *U. of California*, 255-281 (1979). Wald suggests distinguishing between those approaches that are based on a new conception of children as autonomous human beings, and those approaches that continue to uphold the traditional view of children as dependent. It is unclear what conception of children's rights Justice Shamgar adopts. According to the theoretical part of his opinion, it is rights as autonomy (giving an independent voice for the child in custody disputes). However, when it comes to application, Shamgar does not give much weight to the children's own preferences. Instead, he advocates a narrow rule that forbids any change in the religion of the children until they are mature enough to decide for themselves. This test seems to respond to the more traditional use of rights as enhanced protection to children.

6 It seems that the main disagreement among the Justices was about the priority that should be given to the children's rights model over the 'best interest of the child' test whenever they point in opposite directions (see the separate opinion of Justice Strasberg-Cohen). For a discussion of the differences between the two approaches (children's rights, and best interests analysis) see P. Shifman, *Family Law in Israel* (vol II.) pp. 236-240.

7 P.M. 45(2) 353 (1983).

8 Ackerman, *supra* note 3.

9 See, Richard J. Arneson and Ian Shapiro, 'Democratic Autonomy and Religious Freedom: A Critique of *Wisconsin v. Yoder*', in *Nomos* vol. 38 (Ian Shapiro and Russell Harding eds., 1996) pp. 365, 366. This approach draws a rigid line between childhood and maturity and neglects to take into account the child's developing capacities for autonomous choice over time. The limitations of such an approach can be demonstrated in cases that deal with teenagers such as B.N. 26/92 Tel Aviv Youth Court (Judge Rotlevi) (not published, on file with author) in which a teenage girl left her parents' (religious) household to lead a secular life and enrolled in a secular high-school. The court refrained from returning the teenager back to her parents' home and upheld her freedom of choice. The court explained, however, that its decision is not meant to give preference to one lifestyle over another

because the conflict between the teenager and the parents goes deeper than a disagreement about religious beliefs. In recent years we witness a growing number of Israeli teenagers who leave their secular homes (partly or fully) in order to lead a religious life in a 'yeshiva'. See A. Kesler, 'Standing against the Yeshiva' *Tel Aviv* (3.1.97); Y. Adiram, 'Parents whose son 'hazar be'tshuva' would ask the court to order him back to them' *Yediot aharonot* (10.2.97). In such cases, applying the two-tiers model would require that the court refuse to take into account the child's choice no matter what her age is and defer exclusively to the parents' decision.

10 As Judge Rotlevi from the Tel Aviv Youth Court explains: 'In matters of choosing a way of life and a life style ... we must give greater weight to the child's choice as the child approaches maturity.' B.N. 26/92 *id.* The judge focuses on the *gradual* development of autonomy in the child and the need of the court to respond to this process by refraining from drawing rigid lines.

11 P.M 39 (1963) p. 15.

12 See, Capacity and Guardianship Law (1962) (Laws of Israel, 1962, p. 120) section 17 (the parents' duty to act as devoted parents would have applied under the circumstances.)

13 A similar question was considered by the court under a different legal rubric. C.A 103/67 *The American European Beith El Mission v. Ministry of Welfare*, P.D 21(2) (1967) 325. In this case a Christian institution for the education of children petitioned the court because of the terms of the licence granted to it by the Minister of Welfare. According to the terms of the licence the institution was not to accept any child who did not belong to the Christian religion. The institution challenged the constitutionality of this condition because it interfered with the free exercise of religion by the parents. Justice Witkon, rejecting this contention, explained that the child's welfare (avoiding religious conflicts) should be given priority over the right of the parents to choose their child's religious education. The court was willing to classify matters of education as concerning the parents' freedom of religion only in cases where the parents (and not just the children) first converted to another religion. See also, *Change of Religious Community Ordinance*, 1927. P.G. - No. 201 of the 16th December 1927, p. 908 (English Edition). This explanation does not apply in cases where the conflict results from divisions within the same religion (such as between religious and secular Jews). See for example, B.N 109/86 *supra* note, 10. (after the court denied the parents custody of their children on welfare grounds, the father requested that the children be sent to a religious boarding-school. The court refused to grant the father's request because it did not recognise the parents' lifestyle as religious. Interestingly, the court's interpretation of what constitutes a 'Jewish religious' lifestyle reveals a deep cultural bias against the self understanding of Sephardic Jews (such as the father) who regard going to the synagogue on the Sabbath

and having a Sabbath dinner as constituting a religious lifestyle. The court's interpretation coincides with the 'Ashkenazi' orthodox Jews' interpretation and disregards alternative interpretations of conservative Jews and reform Jews, as well as of Sephardic Jews.

14 Shifman, *supra* note 6, at 241-253.

15 S. Berns, 'Living Under the Shadow of Rousseau', 10 *U. of Tasmania L.Rev.* 234 (1991)

16 This factor is known as the 'nationality consideration' according to which the best interest of a Jewish child is to grow up in Israel. It can be identified in court decisions in custody disputes between parents who do not share a domicile. See for example C.A. 125/49 *Amado* v. *Amado*, PD 4 at p. 5 (Justice Cheshin's dissenting opinion at pp. 22-23) (1949). See also, H.C. 201/57 *Hershkovitz* v. *District Attorney of Haifa*, PD 13 492, 502 (1957). For a general discussion of the revolutionary ideas about children's education in Israeli kibbutzim see, Bruno Bettelheim, *The Children of the Dream* (Avon, 1969).

17 A similar question was raised in C.A. 2266/93, *supra* note 4, where Justice Shamgar suggested distinguishing the religious pluralism present in the US (indicated by the level of religious inter-marriages) from Israeli type pluralism. In Israel different religious groups are treated separately (different school systems, different courts, etc.). Therefore, educating the child under more than one religion might label him as different from the more or less homogeneous social environment (pp. 250-251).

18 Note another distinction that the court ignored that seems to be crucial in the *Deri* case: the distinction between insulated communities and relatively open communities. An insulated community that provides its children a separate education can protect them from feeling different from children of the larger society. In contrast, a relatively open community that sends its children to public schools and is more tolerant to the values of the larger society, exposes its children to feelings of difference and is more likely to fail the 'best interest' test. This point was demonstrated in American law where the court found that the educational practices of parents in insular communities such as the Amish group could be reconciled with the 'child's best interests' and deserved the court's protection. See, *Yoder*, *supra* note 3. In contrast, American courts found it much harder to deal with Fundamental Christians who agreed to send their children to public school and only asked for permission to exclude them from reading certain materials that contradicted their religious beliefs. See, *Mozert*, *supra* note 3. See, Nomi M. Stolzenberg, ' "He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of Liberal Education', 106 *Harv.L.Rev.* 581 (1993). In Israel, not only does the government recognise the right of ultra-religious parents to educate their children according to their beliefs, but it also finances a large portion of their private system of education. The difficulties that were faced by Deri's father can be partly

explained by the fact that he exhibited a more tolerant attitude to secular Israeli culture and agreed to send his child to a public school. The irony is that the decision to send Deri to a public school was probably induced by the father's fear that he would be accused of not exposing his child to 'outside stimulation'. In other words, the logic of the best interest test puts the father in a double bind (lose-lose situation): either he sends his child to public school and exposes him to feelings of alienation and difference, or he refuses to do so, and can then be blamed for failing an equally important obligation to prepare the child for living in a modern pluralist society. In either case the father fails the 'best interest' test. The issue was also raised in C.A. 2266/93 *supra* note 4. The mother asked the court merely to 'expose' the children to her religious beliefs (Jehovah's Witnesses) but did not require exclusivity. The mere fact that granting this request would cause the children to be 'different' from the larger society of children justified, according to the court, a refusal to grant this request.

19 In particular the court was concerned with the sex education provided to Deri's sisters by the father and with the untraditional family structure in the 'town'. (Deri's father cohabited with two women in the same household.)

20 See p. 250 of the opinion. For a critique of the claim for 'enhanced objectivity' of a rights discourse see, Mark Tushnet, 'An Essay on Rights', 62 *Tex.L.R.* 1363 (1984) (Tushnet argues that a rights' discourse is informed by existing social structures and therefore cannot guarantee objective results, see pp. 1371-1382).

21 In the court's words: 'The advantage of children's rights is that the concept of the child's best interest is emotional and subjective, based on the court's interpretation of the facts, while children's rights is a normative and constitutional concept based on recognised rights.' (p. 254)

22 A 'more informed' decision in the sense that when rights are interpreted as giving an independent voice to the child such an approach broadens the scope of the court's examination before deciding the case. This is particularly important in situations where in the past the investigation of the child's interest was cut short because of a demonstrable right by the parent. See for example an earlier decision by Justice Shamgar C.A. 783/81 *Plonim* v. *Palmoni* 39(2) P.D. 1 (1981). Here the Supreme Court decided to remove the child from his grandparents' custody interpreting the parent's rights as 'trumps' that closed any further considerations of the child's 'best interest'. Under a children's rights approach the court might have been more willing to balance the right of the child to the continuation of a meaningful relationship with his grandparents against the right of the parent to establish his custody over the child. For a discussion of the rights of grandparents see, 'Note, Grandparents versus the State: A Constitutional Right to Custody', 13 *Hofstra Law Review*, 375 (1985); 'Comment: The Coming of Age of Grandparent Visitation Rights,' 43 *Am.U.L.Rev.* 563

(1994); For a general theory of rights as 'trumps' see, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

23 I do not discuss the children's rights model at length in this paper as it is discussed by Professor Falk (Chap. 7 above). I would just like to note, however, that the actual application of the rights approach in this case fell short of its full potential to bring about a radical change in the court's conception of children's autonomy as the basis for granting them independent rights, see *supra* note 5.

24 Haim Gans, 'National Liberalism' (unpublished manuscript, on file with author).

25 For example, a change of focus from liberty to identity would have allowed the court in C.A. 2266/93 to consider the effects of its decision not to allow the mother to discuss her religious beliefs with her children, on the religious identity of the mother as well as on the developing identities of the children.

26 The decision directly influenced the children's forming identity since they were raised from infancy by a mother who exposed them to the Jehovah's Witnesses religion. The court's ruling prohibited any 'exposure' of this kind until the children matured.

27 For general discussions of this matter, see Charles Taylor, *Sources of The Self, The Making of the Modern Identity* (Harvard University Press, 1989); Will Kymlicka, *Liberalism, Community and Culture* (Oxford University Press, 1989).

28 Gans, *supra* note 25.; Amy Gutmann, 'Communitarian Critics of Liberalism', (1985) *Philosophy and Public Affairs*, vol. 53, pp. 308, 316-318 (criticising the dualism that separates identity from liberty).

29 See *supra* note 10, B.N. 26/92 (The judge adopts a flexible test that attaches more weight to the child's choice as the child matures). For an attempt to introduce a temporal dimension to a liberal discourse of rights see, Ackerman, *supra* note 2 at pp.139-167; For a call to abandon a model based on strict lines and apply a more flexible test to determine the retirement age see, Ruth Ben-Israel, 'Retirement Age under the Equality Test: Biological or Functional Retirement' (1997, Hebrew, on file with author).

30 An example from Jewish tradition is the reading of the Hagada, a story describing the Exodus from Egypt, on Passover evening.

31 In the limited space I have here I do not discuss the difficult issue of granting collective rights to communities and how to reconcile them with basic liberal rights of individuals. For an elaboration of this topic see, Will Kymlicka, *supra* note 27.

32 Robert Cover, 'Nomos and Narrative', in *Narrative, Violence and the Law* (Minow, Ryan and Sarat, (eds), University of Michigan Press, 1992) p. 170

33 For a general discussion of cultural relativism in the context of murders induced by 'family honour' see, Dani Rabinovitch, 'The White Woman's Burden', 7 *Theory and Critique* 5, John Simons, 'Feminism in the Boundary Region', 7 *Theory and Critique* 20.

34 C.A. 7/53 *Dalal Rasi v. Attorney General of the State of Israel*, 7 P.D. (1953) 790.

35 Ibid. p. 796. According to article 46 of The Palestine Order in Council, 1922. P.G. - No. 75 of the 1st September 1922, p. 2 (English Edition), the Israeli court was expected to turn to English precedents where there were no Israeli precedents. However, it is clear from the decision that the Justice also identifies with the 'superior' British values of the English precedents and is proud to put Israelis and British together by opposing to the Arab as the 'other'.

36 Ibid. p.800. Interestingly, the justice's sole reliance on Jewish sources effaced the gender context of the controversy (a nun and her female students) since the Halacha discusses male education (described as an unbroken chain of rabbis-fathers-sons). Jewish girls according to the Halacha do not enjoy an equal right to education. For an elaboration of changes in women's education according to Jewish law see the opinion of Justice Elon, H.C. 257/89, 2410/90 *Hofman* v. *The Minister of Religious affairs*, P.D 48 (2) 265,

37 For a critique of simplistic views that regard the Arab community as homogenous and stable see, Manar Hasan 'Growing up Female and Palestinian in Israel', *Calling the Equality Bluff - Women in Israel* (Swirski and Safir, (eds), Pergamon Press: 1991) p. 66.

38 Stolzenberg, *supra* note 18.

39 At p. 233.

40 It gives preference to older and established religions (Judaism, Islam, Christianity, etc.) over less established groups that are labelled 'religious sects'. This result is due to the fact that people tend to join these sects only later in their life. On the high level of abstraction manifested in the opinion ('normative, constitutional rights' discourse') the children who are deemed Jewish (having been born Jews and never converted) have a right to remain Jewish. However, a more concrete examination reveals that the children were all raised as Jehovah Witnesses from infancy.

41 A case that can demonstrate a difference between a children's rights approach (interpreted as a right to remain within one's religion) and a 'best interest' approach is case no 86/63 *Hasan Al Safdi* v. *Baruch Benjamin*, P.D. 17, pp. 1419, 1426. In this case the court validated a decision to move a Muslim child to a Jewish institution rather than allowing her to be raised by her Muslim family because of the child's 'best interest' (health conditions). A children's rights model would have required that we leave the child with the family (and improve the sanitary conditions) or place her in a Muslim institution with proper hygienic conditions.

42 This investigation leads Judge Kister to acknowledge what he considered to be the justified claims of the larger Jewish society in this case. Indeed,

acknowledging the clash between communities in areas of education does not dictate a solution; rather, it calls for judicial integrity in discussing what is really at stake in the decision, and balancing the respective claims. Robert Cover criticises the American court for lack of candour in this area. See *supra* note 32, p. 170: 'The court assumes a position that places nothing at risk and from which the Court makes no interpretative gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional.'

43 Martha Minow, 'Rights for the Next Generation: A Feminist Approach to Children's Rights' 9 *Harvard Women's Law Journal* (1986) 1; Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities,' 1 *Yale Journal of Law and Feminism*, (1989) 7.

44 Nedelsky, ibid., p. 21.

45 Martha Minow, *Making all the Difference: Inclusion, Exclusion, and American Law*, (Ithaca: Cornell University Press, 1990) at pp. 267-311.

46 Alasdair MacIntyre, *After Virtue* (University of Notre Dame Press, 1984); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1982).

47 See for example, Iris M. Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

48 Arneson, *supra* note 9. For an approach which suggests viewing the family as part of the public sphere, see Anne C. Dailey, 'Constitutional Privacy and the Just Family' 67 *Tulane Law Review*, 955 (1993).

49 For one, the parents usually cannot afford to educate their children all by themselves and, hence, have to allow other social agents to take part in this process. A religious community with its independent educational institutions and cultural activities can isolate the child from external influences to a much larger degree. Indeed, in Israel in recent years we have faced a cultural war conducted through a competition with regard to children's education. Thus, the Sephardic religious party (Shas) has directed much of its public funding to establish a network of kindergartens and schools (El-Ha'maayan) that tries to insulate the children from secular influences of Israeli society. See N. Mendler, *Ha'arez*, 24.1.90 ('The pied piper lives in Ofakim'), 28.6.90 ('Ensnared in the orthodox net'), S. Erlich, *Ma'ariv*, 5.10.90 ('The temptation of the *Shas* day-care centres'); H. Kim (arguing that *Shas* is deliberately trying to discourage the children from receiving general education in order to enhance the party's power and control over them). For the historical roots of the connections between education and political parties in Israel see, Arick Carmon, 'Education in Israel - Issues and Problems', in *Education In An Evolving Society, Schooling in Israel*, 125-186 (Walter Ackerman, Arick Carmon, David Zucker, (eds), 1985) (Hebrew).

50 For the importance of continuity in children's life see J. Goldstein, A.J. Solnit, S. Goldstein and the late A. Freud, *The Best Interests of the Child - The Least Detrimental Alternative* (The Free Press: 1996).

51 C.A. 2991/91 *Plonit* v. *Ploni*, (1992) (not published, on file with the author).

52 Ackerman, *supra*, note 2 at pp. 150-167; Amy Gutman, *Democratic Education* (Princeton University Press, 1987) (Gutman argues that every child should receive an education that enables her to engage in a critical evaluation of different conceptions of the good). A more unsettling question is related to the value of autonomy for the child's welfare. This question can be raised in cases in which adhering to the child's choice of a custodian parent exacts a considerable psychological cost for the child. See for example, H.C. 1842/92 *Bloygrond v. Rabbinical Court* 46(3) P.D. (1992) 423; C.A. 113/89, 740/87 *Mazar v. Kabiliyo*, P.D. 43(1) (1989) 661.