Joint Custody As A Fundamental Right

Ellen Canacakos

In the introduction to *The Disposable Parent*,[1] William Haddad, one of the book's co-authors, relates his encounter with the court's process of determining custody following his divorce. Haddad proposed to the judge a joint custody arrangement whereby he would share custody of his three daughters equally with his ex-wife; he offered to submit the matter to a panel of psychiatrists in order to determine his fitness as a parent and the impact of the proposed arrangement on the children.[2]

When the hearing was over, the judge awarded Haddad's ex-wife sole custody.[3] Haddad was allowed to see the children on Thursdays after school until 8:00 p.m. and on alternate weekends.[4] He was not allowed to see them at any other times, except to drive them to school in the mornings.[5] He was not allowed to be with them the two or three nights of each week his wife was not at home. When she had to be out of town for a week or longer, the children were not to be allowed to stay with their father but were instead sent to stay with relatives or friends.[6]

The judge refused the joint custody arrangement despite the facts that Haddad's fitness as a parent had not been challenged, he lived only a few blocks away from his ex-wife, and the children would always attend the same school and never be far away from their friends.[7] From talking to his daughters, Haddad learned that the judge had talked to them in chambers and that each had told the judge of a desire to try the joint custody arrangement.[8] According to the children, the judge instructed them not to tell either parent what the judge had said or what

1. M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY (1978).
2. *Id.* at 8.
3. *Id.* at 2.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 9.
8. *Id.* at 12.

preferences the children had expressed concerning custody.[9]

Given the factual situation, the outcome of this case seems unfair and possibly atypical. But in fact, at operation in this case is the common presumption in favor of maternal custody.[10] The assumptions underlying such a presumption have been the object of frequent criticism by both courts[11] and commentators.[12] What is often not noticed, however, is that the presumption of maternal custody rests upon an even more important and general presumption—namely, the presumption of sole custody. The presumption is that one parent alone, rather than both parents together, should have custody of the children following a divorce.[13]

---

9. *Id.* at 13.

10. *See* Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 463 (1976-77); Watson, *The Children of Armageddon: The Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 82 (1969); Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U. CAL. D. L. REV. 471, 479 (1979).

Up until the nineteenth century, English common law gave the father absolute custodial rights over the children as against the mother. P. WOOLLEY, THE CUSTODY HANDBOOK 257 (1979). The Chancery, acting on behalf of the king's parens patriae authority, interfered with the father's custody only in cases of gross parental abuse. *Id.*

During the late nineteenth and early twentieth centuries, many social changes began to impinge upon the father's superior right to custody. The Industrial Revolution began to change the country from a primarily agricultural, rural society to an industralized, urban one. Significant numbers of women joined the labor force, some owned property, and, in 1919, the nineteenth amendment was passed giving women the right to vote. It was during this period that psychologists, educators and philosophers became enamored with the developmental state known as "childhood". *See id.* at 256. Public education improved and child labor laws became more stringent. *Id.* Upon the popularization of Freud's theories, men, as well as society in general, embraced the idea that the mother-child relationship is a key to the emotional and psychological well-being of the child. *Id.* Thus, mothers should be at home with, and in the event of divorce, have custody of, their young children. *See* Ward v. Ward, 88 Ariz. 130, 137, 353 P.2d 895, 900 (1960); Harmon v. Harmon, 264 Ky. 315, 317, 94 S.W.2d 670, 673 (1936). This conviction that mothers were naturally the better and more nurturing figure in the child's development became the rationale for what was to be called the "tender years" presumption. P. WOOLLEY, *supra* at 258.

In 1925, the "best interest of the child" standard began to replace the tender years doctrine. *See* Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925). In practice, however, courts often held that it was in the child's best interest not to be separated from the mother unless the mother was shown to be unfit. *See* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 LAW & CONTEMP. PROB. 226, 235 (Summer 1975). Thus, psychological principles concerning the importance of a loving, consistent mother figure in the child's development became the basis of a presumption in favor of maternal custody. *See, e.g.*, Washburn v. Washburn, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100 (1942); Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. 1938); Jenkins v. Jenkins, 173 Wis. 592, 595, 181 N.W. 826, 827 (1921).

11. *See, e.g.*, State *ex rel* Stanfield v. Stanfield, 435 S.W.2d 690, 692 (Mo. 1968); Watts v. Watts, 77 Misc. 2d 178, 181, 350 N.Y.S.2d 285, 288-89 (1973); Hamachek v. Hamachek, 270 Wis. 194, 201, 70 N.W.2d 595, 599 (1955). *See also* Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105, 123 (1979) (authors compile a comprehensive list of those states that have rejected the tender years doctrine by court decision).

12. *See* M. ROMAN & W. HADDAD, *supra* note 1, at 40-47; Mnookin, *supra* note 10, at 235-36; Nash, *The Father in Contemporary Culture and Current Psychological Literature*, 36 CHILD DEV. 261, 271-74 (1965); Podell, Peck, & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 53 (1972); Roth, *supra* note 10, at 442-43; Comment, *Examining Oklahoma's Maternal Preference Doctine: Gordon v. Gordon*, 13 TULSA L.J. 802, 805-07 (1978).

13. *See* Marriage of Pergament, 28 Or. App. 459, 462, 559 P.2d 942, 943 (1977) ("When a family is split by dissolution of the marriage the child of necessity can be in custody of only one parent and the custodial parent is given the primary responsibility for rearing the child.").

Thus, when a father stresses his "equal" right to the custody of his children, it is often with the purpose of demonstrating that he, instead of the mother, should be the object of a sole custody award.[14] Yet, if the positions of the two parents are indeed equal, then neither parent alone should be presumed to have a right to sole custody. The equality of each parent's right to custody should be reflected in a presumption of joint custody—a presumption to be rebutted only by such factors as harm to the child.[15] Joint custody, unlike sole custody,[16] preserves equality in that both parents retain legal responsibility and authority for the care and control of the child.[17]

In what follows, it shall be argued that what seems intuitively fair—that the recognition of equal parental rights be reflected in a presumption of joint custody[18]—is constitutionally mandated. More spe-

14. *See* Kapner & Frumkes, *The Trial of a Custody Conflict*, 52 FLA. B.J., 174, 175 (1978); Solomon, *The Fathers' Revolution in Custody Cases*, TRIAL, Oct. 1977, at 33-35. *See generally*, Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1224-26 (1974).

15. The requirement of proving "harm" to the child is a standard often employed in proceedings where the state seeks to terminate the rights of an allegedly unfit parent. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769, 776-79 (M. D. Ala. 1976); Alsager v. District Court, 406 F. Supp. 10, 23, 24 (S.D. Iowa 1975) *aff'd*, 545 F.2d 1137 (8th Cir. 1976). The harm standard differs from the "best interest of the child" standard in that the former applies only to custody proceedings where the state is the party seeking to assume custody while the latter is appropriate in proceedings where the parties have an equal right to custody, such as pursuant to a divorce. 417 F. Supp at 779 n.12. *See also* text & notes 91-96 *infra*.

16. Sole custody awards vest ultimate control and legal responsibility for the child in the parent awarded such custody. In most cases, the other parent has regular visitation. *See* S. RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY 49, 64 (1979); Miller, *Joint Custody*, 13 FAM. L.Q. 345, 354-57 (1979); Mnookin, *supra* note 10, at 233.

17. Odette R. v. Douglas R., 91 Misc. 2d 792, 795, 399 N.Y.S.2d 93, 96 (Fam. Ct. 1977); *see* Cox & Cease, *Joint Custody*, 1 FAMILY ADVOCATE, Summer, 1978, at 10; Foster & Freed, *Joint Custody—A Viable Alternative*?, TRIAL, May, 1979, at 26.

18. Joint custody encompasses both joint "legal" custody and joint "physical" custody. *See* Miller, *supra* note 16, at 360. Legal custody secures the right of a parent to participate in making child-rearing decisions, such as decisions about the child's education, health care and religious training. Comment, *Joint Custody: An Alternative For Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1087 (1979). Joint physical custody, on the other hand, involves the sharing of physical custody by both parents on an equal or split-time basis. Miller, *supra* note 16, at 360. Courts and commentators are unable to agree on exactly what mix of legal and physical custody constitutes the joint custody arrangement. For instance, the court in Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d 401, (Sup. Ct. 1978) remarked:

> Joint custody has been defined as giving both parents 'legal responsibility for the child's care and alternating companionship'. An examination of the joint custody cases in New York reveals that there has been no uniform application of the term 'joint custody' and no single arrangement which results when a joint award is made. Joint or divided custody decrees generally give both parents legal responsibility for the child's care, but when physical or actual custody is lodged primarily in one parent, custody may be 'joint' in name only.

Id. at 644-45, 403 N.Y.S.2d at 403 (citations omitted). Roman & Haddad, characterized joint custody as "that post divorce custodial arrangement in which parents agree to equally share the authority for making all decisions that significantly affect the lives of their children." M. ROMAN & W. HADDAD, *supra* note 1, at 175.

> Joint custody has been negatively defined as not meaning that one person is to have a child for six months and the other for another six months, though it can mean a sharing of the living arrangements. Joint custody is more than an arrangement wherein one child resides with two parents—it is a flexible and open arrangement for living, sharing, and loving.

cifically, this Note will argue that a presumption of joint custody proceeds logically from each parent's fundamental right of parental autonomy.

A. *The Impact of Divorce on Parental Rights*

The Supreme Court has acknowledged that the relationship between parent and child and other relationships within the family enclave are constitutionally protected from state intrusion.[19] As long as the family unit remains intact, the Constitution recognizes and protects against state interference the rights of both the mother and the father to the custody and control of their children.[20] When divorce occurs, however, the constitutional protection normally afforded the rights of parents gives way to the legal standard normally referred to as the "best interest of the child."[21] This standard embodies the state's paramount concern for the welfare of the child.[22] Thus, upon divorce, the right of

---

Grote & Weinstein, *supra* note 16, at 45.

Persia Woolley describes joint custody as "any method that permits the children to grow up knowing and interacting with each parent in an everyday situation, whether that comes about by splitting the time on a fifty-fifty basis each week or by having the children go live with the other parent several years or more." Woolley, *Shared Custody*, FAMILY ADVOCATE, Summer, 1978, at 6. Suzanne Ramos maintains that

> [i]n joint custody, separated or divorced parents agree to act as equal partners in raising the children. Both parents share in decisions regarding where the children live, where they go to school, who their friends are and in what activities they are involved. They share in paying the bills equitably as their incomes allow, spend roughly the same amount of time with the children and otherwise participate in all decisions and responsibilities having to do with them.

S. RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY 86 (1979).

Similarly, David Miller describes the essence of joint custody as the sharing, by both parents of responsibility and authority concerning the children. Miller, *supra* note 16, at 360. As Miller describes the arrangement:

> This involves parental consultation and agreement on all major decisions affecting the children. The decision making process thus approximates that of an intact nuclear family. Parents with joint custody make joint decisions on all matters having a significant impact on their children's lives. Such matters include the upbringing, education, religion and financial support of the children. Also included would be medical and psychological help, if necessary, school vacations and trips, summer camp, and extracurricular activities and associations. The specifics of these decisions are left to the parents themselves; in the eyes of the law the parents are on an absolutely equal footing.

Id. (footnotes omitted).

19. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

20. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Carey v. Population Serv. Int'l, 431 U.S. 678, 708 (1977) (Powell, J., concurring in part and concurring in the judgment); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

21. The "best interest of the child" test was first articulated by Justice Brewer in *Chapsky v. Wood*, 26 Kan. 650, 652-53 (1881). In that case, the court awarded custody of a 5 year old girl to her grandmother rather than to her father; although the father had a natural right to custody, the paramount consideration was the welfare of the child. *See generally id.*

This legal test has since become the focal point of most state custody statutes. *See, e.g.*, GA. CODE ANN. § 30-127(a) (Supp. 1979); MINN. STAT. ANN. § 518.17 (West Supp. 1978); UTAH CODE ANN. § 30-3-10 (Supp. 1979).

22. *See* Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925). In *Finlay v. Finlay*, Justice Cardozo explained the test as follows:

> The chancellor in exercising his jurisdiction upon petition does not proceed upon the

parents to the custody and control of their children becomes subject to the court's perceptions[23] of the advancement of the child's welfare.[24]

Before attempting to understand why, in matters involving child custody following a divorce, the rights of parents have been ignored in the name of the best interest of the child, the nature of those parental rights must be fully understood. Of particular importance is whether the constitutional protection afforded the rights of parents is incident to the desire to protect and promote the traditional institution of the nuclear family or whether such protection proceeds from the law's respect for certain relationships that are typically, but not necessarily, contained within the traditional nuclear family. If constitutional protection of parental rights depends upon the continued existence of the nuclear family unit, then dissolution of that unit by divorce would make constitutional protection of those rights inapposite. If, however, the protection afforded the nuclear family unit derives from the individual rights of those within the family, then application of the best interest of the child standard in adjudicating child custody pursuant to a divorce may contravene constitutionally protected parental rights. The following section will demonstrate that such protection derives not from the family unit per se but from the rights of individuals within the family.

B. *Parental Autonomy as a Fundamental Right*

Free societies are concerned with the protection of the autonomy of their citizens.[25] Autonomy, as a philosophical idea, is the right to

---

theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise affectionate, and careful parent' . . . and make provision for the child accordingly.

Id. (citation omitted).

23. Upon divorce, the courts in all states are automatically vested with the jurisdiction to determine the future care and custody of any minor children. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.3, at 576 (1968); A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS §§ 14(3)-14(4) (1978 & Supp. 1979).

24. *See* People v. McCanliss, 255 N.Y. 456, 457, 175 N.E. 129, 130 (1931); Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

25. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. See also, J. RAWLS, A THEORY OF JUSTICE, 60 (1971) (According to Rawls, the basic demand of social justice is contained in the following principle: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."); Murphy, *Therapy and the Problem of Autonomous Consent*, INT'L J.L. & PSYCH. 415, 415 (1979).

control the important aspects of one's destiny by one's choices; stated differently, it is the right to be free from the intentional interference of others, especially the state, in the making and enacting of such choices.[26]

This section contains an analysis of the constitutional cases addressing the rights of parents in various contexts. In that regard, first it will be shown that these cases establish what will be called a "fundamental right of parental autonomy"—the right to participate in the basic decisions that affect the life, future, and welfare of one's children. It will be argued that each parent enjoys this right equally, independent of the confines of the traditional nuclear family setting. The practical implication of continuing to recognize the fundamental right of each parent following divorce, however, is that unless one parent consents to the other's custody of the child, the parents' respective rights will appear to conflict with one another in a subsequent adjudication of child custody. This conflict may be resolved by a presumption of joint custody—no other presumption being consistent with the equality of the rights established.

Before a discussion of the relevant constitutional cases, however, two points of clarification are in order. First, it is important to remember that in constitutional law, the concept of a fundamental right is defined as the following: a right so basic or essential that the state must have a compelling interest to override it[27] and must, even in those cases, use the least restrictive means possible to secure the compelling interest.[28] Second, it is important to note that fundamental rights belong to individuals, not groups or abstract entities.[29] This concept is particularly important to remember in the present context because in many cases, the Supreme Court speaks somewhat loosely of "family rights" or "family autonomy."[30] On a superficial reading of such terms, one might reasonably assume that what is being protected are

26. Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453-54, 463-65 (1972).

27. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162-63 (1973); Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

28. The least restrictive alternative doctrine was defined in *Shelton v. Tucker* as follows:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of the least drastic means for achieving the same basic purpose.

364 U.S. 479, 488 (1960).

29. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

30. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977); Smith v. Organization of Foster Families for Equality, 431 U.S. 816, 842-44 (1977); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

not individual rights but rather the rights of some social complex—the family. As will be shown, however, even the cases couched in such language are essentially concerned with the protection of individual rights. An individual may acquire a certain right (*e.g.*, a right of parenthood) by virtue of a certain relationship (*e.g.*, biological parenthood). Rights associated with such relationships derive from those relationships in a manner that rights acquired simply by being a citizen (*e.g.*, the right of free speech) do not. It may also be true that such relationships are typically, though not always, present in nuclear families. Courts sometimes speak loosely of simply the "rights of the family" when it is clear that their real concern is to protect certain valued relationships and the individual's right to those relationships. Justice Harlan saw this distinction clearly in *Poe v. Ullman*,[31] when he stated, "[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . ."[32]

The family, then, is protected because the relationships it contains are deemed worth protecting.[33] These relationships are deemed worth protecting because they are presumed to be important to the intergrity and welfare of the individuals who are parties to them.[34] With these thoughts in mind, the relevant constitutional cases will now be explored.

The Supreme Court has long recognized the existence of certain fundamental rights that, although not specifically mentioned in the Bill of Rights, are "basic values 'implicit in the concept of ordered liberty' "[35] and are thus accorded the full protection reserved for enumerated rights.[36] Although the right of parental autonomy is not specifically mentioned in the Constitution, the Supreme Court cases dealing with parental rights suggest that they are so basic that they must be regarded as fundamental.[37]

---

31. 367 U.S. 497 (1961).

32. *Id.* at 551-52 (Harlan, J., dissenting).

33. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 860-63 (1977) (Stewart, J., concurring); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

34. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

35. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

36. *See* Roe v. Wade, 410 U.S. 113, 152 (1973). The mechanism for identifying rights protected by the due process clause is contained in Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1967) in the following terms:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. . . ."

Id. at 3 (citations omitted).

37. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Poe v. Ullman, 367 U.S. 497, 551-

The earliest of such cases is *Meyer v. Nebraska*.[38] In that case, the Supreme Court upheld the parents' right to have their children taught their native German language in American schools.[39] In upholding this right, the Court referred to the social structure discussed in Plato's *Republic* where parental custody and control of children was to be replaced entirely by state child-rearing activities such that "no parent is to know his own child, nor any child his parent. . . ."[40] Discussing that system, the Court responded:

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[41]

The Court thus concluded that the "liberty" guaranteed by the fourteenth amendment protects the right of the *individual* "to marry, establish a home and bring up children. . . ."[42] Although the *Meyer* Court did not clearly articulate its reasoning regarding the constitutional protection afforded parental rights, this newly forged right was reaffirmed and given substance in *Pierce v. Society of Sisters*.[43]

In *Pierce*, the Supreme Court overturned an Oregon statute requiring compulsory public education of children.[44] The Court based its decision on the parents' due process right to be free from unreasonable state interference in raising their children as they saw fit.[45] The Court denied that the state had the "general power . . . to standardize its children. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[46] Thus, the *Pierce* Court further limited the power of the state to interfere with child-rearing decisions.

More recently, in *Wisconsin v. Yoder*,[47] the Supreme Court upheld parental claims, based on grounds of both religious and parental auton-

---

52 (1961) (Harlan, J., dissenting); Prince v. Massachusetts, 321 U.S. 158, 166 (1944). To Justice Goldberg, "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected." Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

38. 262 U.S. 390 (1923).
39. *Id.* at 400-03.
40. *Id.* at 401-02.
41. *Id.* at 402.
42. *Id.* at 399.
43. 268 U.S. 510 (1925).
44. *Id.* at 534-36.
45. *Id.* at 534-35.
46. *Id.* at 535.
47. 406 U.S. 205 (1972).

omy, to exempt children from state compulsory education laws as applied to children beyond the eighth grade.[48] The Court found secondary education to be at odds with the religious convictions of the Amish parents and an infringement on their parental prerogatives to transmit values; it was thus held impermissible for a state to require Amish children to attend school until age sixteen.[49] More specifically, the Court in *Yoder* said that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirements under the First Amendment."[50] In so holding, the Court noted that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[51]

The *Meyer-Pierce-Yoder* line of cases make it clear that parents have a fundamental right to direct the upbringing of their minor children. In this context, the Constitution extends to parents the right to decide what values and beliefs will be inculcated in their children.[52] What remains to be examined, however, is whether these parental rights exist only when the parents are united in a traditional nuclear family or if these rights can still be present independently of such a structure.

The Supreme Court addressed that question in *Stanley v. Illinois*.[53] At issue in *Stanley* was the constitutionality of a state adoption statute providing that upon the death of their mother, an illegitimate child becomes a ward of the state without a hearing on the parental fitness of the biological father.[54] In holding that the fourteenth amendment entitled the father to such a hearing, the Court stated:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her chidren 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from

48. *Id.* at 234-36.
49. *Id.*
50. Id. at 233, (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).
51. *Id.* at 232.
52. *See* Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).
53. 405 U.S. 645 (1972).
54. *Id.* at 646-48.

shifting economic arrangements.'[55]

Thus, the *Stanley* Court recognized the right of the biological father, absent a showing of unfitness, to continue to raise his children even though the traditional bond of marriage was absent in this family setting.[56]

The importance of a biological relationship as a basis for extending constitutional protection was made clearer in *Moore v. City of East Cleveland*.[57] In *Moore*, the Court invalidated a zoning ordinance that imposed criminal sanctions on a grandmother living with her two grandchildren.[58] The Court distinguished *Village of Belle Terre v. Boraas*,[59] where the Court upheld the constitutionality of a zoning ordinance that restricted land use to single family dwellings containing no more than two unrelated individuals.[60] The ordinance in *Boraas* differed from the one challenged in *Moore* because:

> [t]he ordinance there affected only *unrelated* individuals . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . . When a city undertakes such intrusive regulation . . . the usual judicial deference to the legislature is inappropriate. 'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'[61]

In addition to making explicit what was only implicit in *Stanley*—the importance of a biological relationship—the Court intimated that the element of tradition played an important role in its decision to extend constitutional protection to the extended family in *Moore*. Justice Powell's opinion for the *Moore* plurality notes that:

> [U]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.[62]

Stanley and *Moore* thus suggest that relationships linked biologically or occupying a place in the American tradition functionally similar to that of the nuclear family are constitutionally protected from state interference.

---

55. *Id.* at 651 (citation omitted).
56. *Id.* at 658-59.
57. 431 U.S. 494 (1977).
58. *Id.* at 506.
59. 416 U.S. 1 (1974).
60. *Id.* at 9-10.
61. 431 U.S. at 498-99 (quoting Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974)).
62. 431 U.S. at 501 (plurality opinion).

The Court's subsequent decision in *Smith v. Organization of Foster Families for Equality and Reform*[63] reaffirmed the proposition that biological linkage or some connection with tradition does, indeed, constitute a necessary condition for the extension of constitutional protection to certain relationships.[64] *Smith*, however, holds that such relationships are not, by themselves, sufficient to trigger such protection.[65]

In *Smith*, foster parents and a foster parents organization brought suit claiming that New York's procedures governing the removal of foster children from foster homes were unconstitutional.[66] The foster parents specifically asserted that they had "a constitutionally protected liberty interest . . . in the intergrity of their family unit."[67] The Court avoided the question of whether the foster family actually had such an interest by evaluating the removal procedures on the assumption that such an interest existed.[68] Although the Court held that New York's procedures satisfied due process, Justice Brennan, writing for the majority, indicated some of the elements he considered essential to the attainment of constitutional protection.

First, the Court noted that "the usual understanding of family implies biological relationships. . . ."[69] It found, however, that marriage and adoption would also constitute relationships important enough to warrant constitutional protection.[70] Second, the Court noted that the importance of the family stems from the emotional attachments that it involves.[71] Unlike the situation typically present in the traditional family, the ties of the foster parents have their source in state law and contractual arrangements rather than natural law and sentiment.[72] Thus, while reaffirming the importance of a biological relationship and tradition, the Court in *Smith* indicated that significant emotional ties and "natural" rather than state created rights constitute additional factors to be considered in identifying a constitutionally protected relationship. The extent the factor of emotional ties plays in identifying a constitutionally protected relationship was strongly stated in *Quilloin v. Walcott*.[73]

Quilloin, like *Stanley*, involved an unwed father's parental rights.

63. 431 U.S. 816 (1977).
64. *Id.* at 843-44.
65. *Id.*
66. *Id.* at 839.
67. *Id.* at 842.
68. *See id.* at 847.
69. *Id.* at 843.
70. *See id.* at 843 & 844, n.51.
71. *Id.* at 844.
72. *See id.* at 845. *But see* text & note 70 *supra* (adoption constitutes a constitutionally protected relationship, even though created by state law).
73. 434 U.S. 246 (1978).

In *Quilloin*, the father sought to prevent the adoption of his illegitimate child by the mother's new husband.[74] State law required only the consent of the mother.[75] Although Quilloin was extended notice of the pending adoption proceeding and a hearing on his individual interests in the child, he was denied the right to veto the adoption.[76] In denying Quilloin that right, the Court noted that the father had "never exercised any actual or legal custody over his child, and thus . . . never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child."[77] *Quilloin* may thus be read as suggesting that even though biological parenthood is associated with the traditional family setting, a constitutionally protected parental relationship requires procreation plus substantial support or the establishment of strong emotional ties with the child.[78]

From this spectrum of cases, then, it may be argued that the Court is not concerned with protecting families per se but with protecting individual rights grounded in certain relationships characteristic of the family. Since the rights protected are rights to control or at least participate in certain decisions affecting one's children, the rights may properly be regarded as part of a person's autonomy—the right to participate in the control of important parts of one's destiny through one's own choices. The right of family autonomy is thus a right of individual parental autonomy. As we have seen, however, the nature of the traditional family has greatly affected the way in which this right of individual parental autonomy has been defined. Because of this, the right will be recognized outside the family only if these "family-like" bonds are present: linkage by blood, emotional ties, relationships of support, and bonds recognized by tradition.

It seems clear from those elements isolated by the Court as necessary for a constitutionally protected relationship that the relationship between a divorced parent and his or her child is entitled to such constitutional protection. More specifically, the divorced parent typically possesses the necessary biological relationship stressed by the *Stanley-Moore-Smith* line of cases, has established the emotional ties singled out as controlling by the Court in *Smith* and *Quilloin*, has contributed the substantial support suggested as a relevant factor by the Court in *Quilloin*, has exercised actual or legal custody over the child as stressed

74. *Id.* at 247.
75. *Id.* at 248.
76. *Id.* at 249-50.
77. *Id.* at 256.
78. *But see* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (noting that adoptive relationships are "recognized as the legal equivalent of biological" relationships).

by the *Quilloin* Court, and, finally, occupies a place in one of the most traditional relationships of all—that of parent and child.

C. *Joint Custody as a Fundamental Right*

What are the implications of recognizing that the relationship of both divorced parents and their child is entitled to constitutional protection? As noted earlier, the Constitution protects fundamental rights from all but the most compelling interferences by the state.[79] The protected relationship of divorced parents to their child may be characterized as a fundamental right of parental autonomy. Upon divorce, each parent will continue to possess this fundamental right of parental autonomy equally because, even though the family has been dissolved, each parent still retains those "family-like" bonds (*i.e.*, biological relationship, emotional ties, substantial support, the exercise, at one time, of actual or legal custody over the child, and a traditional bond) recognized by the Court as essential to the right.

In adjudicating child custody incident to a divorce, it would appear that the court is faced with an irresolvable conflict between two equal rights—that of the father against that of the mother.[80] But the foregoing analysis suggests that this is to view the whole matter improperly. The right of parental autonomy is not the right of each parent to total or final custody of control[81] over the child. If each parent had such a right, then the conflict between them may indeed be irresolvable.[82] But the conflict between them is by no means irresolvable if we see the right to be not a right to total or final control but rather an equal right to share in the control of the child.[83] Since this is the strongest right possessed by either parent during the marriage vis-à-vis the child, it would be odd indeed to imagine either acquiring an even stronger right after the dissolution of the marriage. Thus, two crucial points emerge to resolve the conflict: (1) The right of each parent must be regarded as equal with that of the other; and (2) The right in question is a right not to total control but rather a right to the same level of control that one had in the marriage—a right to share in the control of the child.

Given the analysis of rights just sketched, the basic question with

79. *See* text & notes 30-31 *supra*.

80. *See* Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1328 (1980).

81. In this context, the word "control" is merely a shorthand way of describing the complex of parental rights: care, custody, companionship, education, and religious training, to name a few.

82. A conflict between two competing fundamental rights could, of course, be resolved by the assertion of a compelling state interest by one of the parties—e.g., child abuse or neglect by one of the parents. *See* text & notes 27-28 *supra*.

83. *See* text & note 18 *supra*.

respect to custody is now obvious: What legal approach to custody decisions will both secure the rights in question and secure them equally for each parent? Once the question is put this way, its answer is also obvious: a presumption in favor of joint custody.[84] Such a presumption will come as close as possible to leaving the rights and obligations toward the child the same as those that existed during marriage.[85] Unlike an award of custody to a single parent where the rights of the noncustodial parent are considerably more restricted than those of the custodial parent,[86] joint custody is a formal recognition of the equality of the right of each parent. In joint custody, both parents have equal authority and responsibility for all facets of raising the child.[87]

D. *Joint Custody, Harm, and The Best Interests of the Child*

The fundamental right to joint custody,[88] like all rights, merely establishes a presumption—not an absolute and final determination in all cases. It can, for example, be waived by a parent who does not desire custody. Since the right is fundamental, however, it may be overridden by the state only when the state possesses a compelling reason for so doing.[89]

What might such a compelling reason be? It is tempting to think that the state is offering such a compelling reason by citing the principle of "the best interest of the child." But, if the above analysis is correct, that line of thought is mistaken. The fundamental right of parental autonomy arguably is identical both within the traditionally recognized nuclear family unit and outside that traditional family unit so long as

84. *See* M. ROMAN & W. HADDAD, *supra* note 1, at 173; Note, *supra* note 80, at 1329; Comment, *supra* note 16, at 1120-21.

85. *See* Burge v. City of San Francisco, 41 Cal. 2d 608, 616, 262 P.2d 6, 11 (1953) (joint custody "gives neither [spouse] a greater right than he or she had before the divorce."); Folberg & Graham, *Joint Custody*, 12 U. CAL. D. L. REV. 523, 536-37 (1979); Miller, *supra* note 16, at 360.

86. *See* Folberg & Graham, *supra* note 85, at 525-26; Miller, *supra* note 16, at 355; Mnookin, *supra* note 10, at 233; Comment, *supra* note 18, at 1095-99.

87. *See* authorities cited at note 85 *supra*.

88. Strictly speaking, the fundamental right is not a right to joint custody, but is rather the fundamental right of parental autonomy. From this right, the right to a presumption of joint custody may be derived in much the same way the right to have an abortion may be derived from the fundamental right of privacy. The derivation, detailed in the text, *see* text & notes 35-83 *supra*, may be summarized as follows: Any fundamental right of persons will be an equal right of those persons. *See* U.S. CONST. amend. XIV, § 1. Thus, in any case of conflict or apparent conflict between rights, the presumption must always be in favor of a solution that preserves the equality. *See* Nebraska Press Ass'n v. Stewart, 427 U.S. 539, 561 (1976). If equality cannot be preserved, then the presumption is in favor of the solution that comes closest to maintaining equality. *Id.*

In child custody adjudication following divorce, a presumption of joint custody is required as a matter of right because only such an arrangement preserves equality of the right of parental autonomy. If this presumption is overridden and joint custody cannot be awarded, then the presumption is in favor of whatever custody arrangement best preserves equality—*e.g.*, extended visitation. It is to avoid saying all of this in the text that the short phrase "fundamental right to joint custody" is used.

89. *See* text & notes 27-28 *supra*.

the relationships maintained outside the unit are "family-like" in the previously specified sense.[90] Since the state's right to interfere with these rights within the family is limited by a principle far more restrictive than "the best interest of the child", it is hard to see why state interference should become any less restricted after divorce.[91] Normally, the state may interfere with parental rights only to prevent harm or abuse to the child;[92] it may not interfere on the positive ground that so doing would simply be in the child's best interest.[93] Why should a comparable limitation on state judicial power not be present after divorce as well? Should not the only compelling interest which the state could cite to justify refusing an award of joint custody be the interest of protecting the child from harm?[94] The court must require proof that the child would be harmed by joint custody, not merely that the child's interests might be better served without it.

Even in those cases where it is possible to prove that joint custody will result in harm to the child, the actual custody arrangement imposed, inasmuch as it will restrict the custodial rights of one of the parents, should not be upheld unless it can be demonstrated that such an arrangement is "necessary" to protect the child from harm.[95] In other words, it must be proven that the custodial arrangement is the arrangement "least restrictive" of the rights of the restricted parent. For instance, the projected harm that may justify a refusal of joint physical custody might not be such as to support a radical restriction on other remaining parental rights—*e.g.*, rights to visitation or rights to partici-

---

90. *See* text & notes 26-27 *supra*.

91. *See* text & notes 30-31 *supra*. Justice Stewart has described the limits upon the power of a state to interfere in parent-child relationships as follows:

> One of the liberties protected by the Due Process Clause . . . is the freedom to 'establish a home and bring up children'. . . . If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring).

92. *See* Parham v. J.R., 442 U.S. 584, 604-05 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 652-53 (1972).

93. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 860-63 (1977) (Stewart, J., concurring); Roe v. Conn, 417 F. Supp. 769, 778-79 (M.D. Ala. 1976); *In re* B.G., 11 Cal. 3d 679, 699, 523 P.2d 244, 258, 114 Cal. Rptr. 444, 457-58 (1974).

94. *See* Devine v. Devine, 213 Cal. App. 2d 549, 551, 29 Cal. Rptr. 132, 134 (1963); *In re* Marriage of McGee, 613 P.2d 348, 350 (Colo. App. 1980). *See also* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 996-1001 (1975).

95. *See* Devine v. Devine, 213 Cal. App. 2d 549, 553, 29 Cal. Rptr. 132, 134 (1963) ("Because of the importance of the parent-child relationship and the likely benefits to the child as it grows up from reasonable . . . visits with the parent who does not have custody, the courts should not deprive such a parent of all visitation privileges absent a clear showing that any contact with such parent would be detrimental to the child"); *In re* Marriage of McGee, 613 P.2d 348, 350 (Colo. App. 1980) (drastically limited visitation rights for the noncustodial father unreasonable absent a showing that reasonable visitation would endanger the child physically or mentally).

pate in child-rearing decisions. Even in those cases where the presumption of joint custody can be successfully rebutted, it must still be proven that each restriction on remaining parental rights is necessary.

Given this analysis, it is a mistake for courts to continue the tradition of focusing on the best interest of the child in making custody awards. Courts should, instead, concern themselves solely with one basic question: Is joint custody likely to harm the child? It would be much easier to support the claim that joint custody may not be in a child's best interest than to support the claim that joint custody is actually harmful. Thus, the burden placed on those seeking to rebut the presumption of joint custody is much greater than what is normally required in present custody cases; to deny joint custody, it must be demonstrated that such a custodial arrangement would result in probable harm to the child. Such a burden is likely to be very difficult to bear in the vast majority of cases.

Conclusion

This Note has sought to introduce and defend the concept of joint custody as a constitutionally mandated presumption which follows as a corollary to the fundamental right of parental autonomy. Recognition of parental autonomy as a fundamental right proceeds logically from those cases securing to individual parents the right to participate in the control of their minor children. It has been argued that each parent has this right equally prior to divorce, and that the equality of rights between the parents should be retained after divorce. Joint custody is a mechanism for retaining this equality.

Given that the right to joint custody is fundamental, the state may override it only if it has a compelling interest in so doing. It can be argued that, contrary to common assumption, the pursuit of the "best interest of the child" cannot function as a compelling state interest in this context. The only defensible compelling state interest is something much more limited in scope: prevention of harm to the child.