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ARTICLE: JOINT CUSTODY: CONSTITUTIONAL IMPERATIVES

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LEXISNEXIS SUMMARY:

... The family, one of society's most fundamental institutions, increasingly has been subjected to breakdown, fragmentation and restructuring. ... Adequate protection of this parental right requires that parents be awarded joint custody of their children upon divorce unless a compelling state interest directs otherwise. ... Whether or not such a right was implicit in earlier decisions, *Roe* and *Carey* clearly established a fundamental liberty interest, or substantive due process right, to choose not to procreate. ... This constitutional doctrine constitutes the foundation for the primary thesis of this Article, which is that upon divorce each parent has a fundamental right to be awarded joint custody of his children. ... The best interest standard clearly is an inappropriate standard for courts to use in determining the custody of children upon divorce. ... This fact, in turn, logically impels the conclusion that parents have a fundamental right to retain joint custody of their children upon divorce, and that they cannot be deprived of this right by the state absent compelling reasons. ... Such a presumption would prohibit a state from depriving a parent of his or her fundamental right of joint custody upon divorce unless it first establishes that such deprivation is essential to the accomplishment of the compelling state interest of protecting children from harm. ...

TEXT:

[*27] I. INTRODUCTION

The family, one of society's most fundamental institutions, increasingly has been subjected to breakdown, fragmentation and restructuring. Breakdowns that occur in families containing children often present courts with the difficult task of determining which parent should receive custody of the children. Many jurisdictions, by statute, give threshold recognition to the principle that, in the absence of misconduct, both parents have an equal right to custody of their children. n1 Traditionally, however, courts have viewed the right to custody as one belonging exclusively to the

"victor" of a contested custody proceeding. Thus, a judge presiding over a custody matter typically will feel compelled to make a choice between the parents involved. In making such a choice, judicial concerns regarding the protection of parental equality generally are replaced by the desire to protect the rights of the "deserving" parent. In order to give real substance to the concept that each parent has an equal right to custody, custody awards should, as a matter of law, be granted jointly, unless there are compelling reasons why an exclusive award is required to serve the child's interests. Ideally, whether inside or outside the context of marriage, parenting is a shared responsibility undertaken by both parents. Custody awards should reflect this ideal where feasible.

Joint custodyⁿ² has been proposed as the preferred alternative [*28] to exclusive custody on a number of policy grounds.ⁿ³ A few states have adopted, either by legislative or judicial action, joint custody as the presumptively proper custody arrangementⁿ⁴ and several other states have authorized joint custody as an option to be considered by the courts making custody awards.ⁿ⁵ In addition, a number of commentatorsⁿ⁶ have argued in favor of greater use and encouragement of joint custody by state courts, although [*29] these efforts largely have been limited to policy arguments and proposals for statutory interpretation.

This Article seeks to shift the joint custody debate to an entirely different plane: it argues that current constitutional doctrine, when applied to the parent-child relationship, mandates a presumption on the part of states that joint custody is the proper means of giving appropriate recognition to each parent's fundamental right to be intimately involved in the upbringing of his or her child. The Article recognizes that exclusive custody is permissible, but suggests that this is so only in circumstances where the child would clearly be harmed by a joint custody arrangement. This Article also suggests that the "best interests of the child" standard, as it traditionally has been articulated and applied, does not justify denial to either parent of a share in custodial rights and responsibilities.

In order to develop these points the Article first outlines the concept of joint custody and reviews briefly the advantages and disadvantages of exclusive custody. Second, the Article addresses the limited reception joint custody has had in American law. Third, the Article considers current constitutional doctrine, which recognizes that certain rights inhere in the family relationship, and determines that there is a fundamental parental right. Finally, the Article looks at joint custody through the lens of this fundamental parental right and concludes that a presumption of joint custody is constitutionally compelled.

II. THE CONCEPT OF JOINT CUSTODY

"Joint custody" as a legal concept emerged from a dissatisfaction with the consequences of the concept of sole custody.ⁿ⁷ Sole custody and the adversarial process that generates it result in [*30] serious problems for both the parents and children involved. For the parents, the "winner take all" consequences of the traditional emphasis on exclusive custody awards typically fuel the bitter, intense frictions already existing as a result of a deteriorated marriage. For the children, the transfer of parental hostilities from the home to the courtroom merely represents a continuation, if not an intensification, of a painful situation that they see themselves as virtually helpless to influence.

During an intact marriage, both parents legally are vested with equal authority to make decisions concerning their child and they must cooperate in reaching those decisions.ⁿ⁸ Divorce terminates the marriage but not the family; therefore, while the parties to the marriage no longer occupy the roles of husband and wife with regard to each other, they retain the roles of father and mother in relation to the children of the marriage. Because the same parent-child relationships continue to exist after parents separate, the rights and responsibilities of both parents towards their children logically should remain the same as prior to separation, absent special reasons dictating otherwise.

Under current practice, however, the formerly equal and joint decisionmaking authority of the parents typically is replaced by a grant of exclusive decisionmaking authority to one parent, and a denial of virtually all such authority to the other.ⁿ⁹ Modern research has revealed the severely adverse consequences of this approach. The physical, emotional, and psychological problems often experienced by children and parents after divorce formerly were thought to result from the inherently traumatic nature of the divorce process itself. However, recent scientific evidence now has

linked several of these problems directly to two phenomena [*31] that often accompany one another: parental conflict and the sole custody arrangement. n10

It has been argued that the present approach to custody determination should be changed. Both the adversary system of custody adjudication and the sole custody model encourage an all-or-nothing battle rather than cooperation between the parents. [*32] Both require the courts to select a winner (custodial parent) and a loser (noncustodial parent). The alternative of joint custody has been put forth as the model that reflects a commitment to continuing the equal rights and responsibilities and shared, cooperative parenting that existed during the marriage. n11 By requiring the parents to share decisionmaking and caretaking responsibilities regarding the child, joint custody maximizes the child's physical and emotional access to both parents in meaningful, day-to-day interaction, and helps the child to see both parents as sources of love and security and as positive role models. n12 By relieving some of the stresses inherent either in fulltime parenting or in the complete lack of involvement in parenting, n13 joint custody also can have positive psychological and practical effects on parents, which in turn can enhance the relationships between the child and each parent. n14 In fact, it has been argued that, by requiring parents to share the responsibility for decisionmaking, joint custody actually may help to minimize the need for power struggles between parents. n15 The joint custody [*33] model thus may provide the most effective method of implementing the states' paramount public policy interest -- the protection of the best interests of the children of divorced parents.

Several arguments have been leveled at joint custody, however. One argument is that joint custody increases the potential for parental conflict by requiring continued interaction between persons who have divorced. This argument misses the point, however, in that the problem of parental conflict exists regardless of the type of custody arrangement that has been instituted. It is the existence of the child and not the imposition of a particular custody decree that makes continued contact between divorced parents necessary. n16 There is some evidence that the level of parental conflict is no greater and may even be less in a joint custody arrangement than it would be in a sole custody arrangement. n17

A second and more serious argument against joint custody simply is that the parents will refuse to cooperate. Several factors must be argued in response to this concern. First, the increasing number of parents across the country voluntarily seeking joint custody arrangements indicates that many parents in fact desire the opportunity to cooperate in childrearing after divorce. Second, even in situations where the parents are totally unable to subordinate their personal animosities to their concern for the welfare of their children, it is not necessarily true that sole custody would be more appropriate than joint custody. It is extremely questionable whether warring parents could cooperate with any greater success in an arrangement involving limited visitation than one where custody is split more evenly. The need for positive interaction between the parents and the need for each parent to strive to preserve the child's positive image of the other parent exists in a sole custody arrangement as it does in a joint custody arrangement. Regardless of the form of the custody decree, children can be expected to suffer damaging effects from parental conflict and also from the extended absence or nonavailability of one parent. n18 No custody arrangement can guarantee protection against the former, but joint custody at least prevents the latter. In fact, noncustodial parents easily could argue that it is precisely [*34] in the "hostile parent" situation that they are most in need of the legal protection afforded by joint custody. n19

Further, parents who allow their own personal animosities to override their concern for their child's welfare and healthy development are not acting to protect their child's best interests. Although hostility and even conflict may be inevitable, it is not inevitable that the conflicts create difficulties for the child. It not only is possible but necessary for mature adults to separate their feelings toward each other from their functioning as parents. n20 Children have enough difficulty adjusting to the necessary restructuring of their physical and emotional environment that follows a divorce without having to cope with being a battlefield for their parents' hostility. It may be argued that parents should be required to accept the consequences naturally flowing from their behavior, and that the state should make it clear to them that failure adequately to discharge parental responsibilities may result in a forfeiture of parental rights.

[*35] Dissatisfaction with a system that favors sole custody has prompted the argument that joint custody is a desirable alternative to the traditional approach. At this point however, although joint custody has made some inroads it yet has not received general acceptance.

III. THE STATE OF THE LAW OF JOINT CUSTODY

Twenty-six states presently have in force statutes expressly authorizing joint custody. n21 The statutes understandably are diverse, and range from provisions making joint custody an option only in circumstances where the parents agree to it to provisions that encourage the use of joint custody awards by creating a statutory presumption in favor of them.

Five states by statute permit their courts to award joint custody only in those cases where the parents have agreed to it. n22 A sixth state, Connecticut, is more ambiguous. The Connecticut statute apparently allows the court to impose joint custody awards even in the absence of parental agreement. n23 At least seven additional states merely authorize the granting of joint custody awards by the court without including any further provisions either limiting [*36] or encouraging its use. n24 Seven other states permit their courts to award joint custody upon the request of one parent. n25 One of these states, California, was the first to establish a presumption that joint custody is in the best interests of the child if the parents have agreed to a joint custody arrangement. n26 This presumption substantially limits the ability of the court to deny a joint custody award in the face of parental agreement to the arrangement, and a similar presumption has since been adopted by at least three other states. n27

There are two remaining types of joint custody statutes, both of which go much further than the California type in actively encouraging joint custody. Both Kansas and New Mexico have enacted statutes that make joint custody the first custody award to be considered by the court, without regard to whether the parents have agreed to joint custody. n28 For example, the New Mexico statute directs that "[i]n any proceeding in which there is at issue the custody of a minor, the court should first consider an award of joint custody of the minor if it is in the best interests of the minor." n29 This type of statute, by moving away from a requirement of parental agreement as a prerequisite to joint [*37] custody, goes far towards redefining and restructuring the present custody model.

Although the Kansas and New Mexico statutes are progressive in that they require that the court consider joint custody even when the parents have not agreed to or requested such an arrangement, these statutes are not as effective in promoting the joint custody arrangement as those that require certain findings by the court before joint custody may be rejected. By far, the most progressive joint custody statutes enacted to date are those of Florida, Idaho and Louisiana, all of which were adopted in 1982. n30 These statutes create a "pure" presumption that joint custody is in the best interests of the child, and place the burden of persuasion upon the party arguing against joint custody. The Louisiana statute provides that "[t]here shall be a rebuttable presumption that joint custody is in the best interest of a minor child." n31 The Idaho statutory presumption is somewhat stronger and a little more specific, and requires that: "[a]bsent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children." n32 The Idaho statute therefore at least establishes the burden of proof necessary to rebut the presumption. However, neither of these statutes provides any real guidance as to what sort of evidence is needed to rebut the presumption in favor of joint custody. The Florida statute, by contrast, does not specify the burden of proof needed but requires the court to "order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child." n33 The operative standard of the Florida statute, which requires a finding of detriment to the child before either parent can be deprived of his or her right to custody, is much narrower and stricter than the "best interest of the child" standard employed in the Louisiana and Idaho statutes. n34 The Florida statute thus is even more protective and supportive of the rights of parents and children alike to continue [*38] the shared parenting arrangement that existed during the marriage. The Florida legislature clearly has served notice on its citizens that joint custody, rather than sole custody, is now the preferred custody arrangement, and that specific facts must be shown before a court will find that an award of joint custody is inappropriate.

Of the approximately twenty remaining states that as yet have enacted no legislation dealing expressly with joint custody, a few states have authorized joint custody by case law. n35 The courts in these states have inferred the authorization to make joint custody awards from their states' existing custody statutes, which usually are worded broadly. For example, the New York Court of Appeals in *Braiman v. Braiman* affirmed the authority of the state trial

courts, based on the New York custody statute, to make joint custody awards. n36 The *Braiman* court was of the opinion, however, that joint custody would be an appropriate custody arrangement only in narrowly limited circumstances, "primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion." n37 The court's statements suggest that it would approve of joint custody awards only in cases where both parents have agreed to joint custody; however, the court did not delineate specific requirements or establish guidelines for courts to use in considering whether to make joint custody awards. n38

Similarly, the New Jersey Supreme Court in *Beck v. Beck* affirmed a trial court's conclusion that New Jersey's custody statute is broad enough to authorize New Jersey courts to make joint custody awards. n39 While the court specifically declined to [*39] establish any presumption favoring joint custody, on the ground that it might discourage "meticulous fact finding" by courts, n40 the court went much further than the New York court in *Braiman* in establishing precise criteria for a court to use when considering a joint custody award. n41 The court found the following four issues to be of paramount importance: whether the child has established beneficial relationships with both parents; n42 whether both parents are fit to fulfill the role of parent; n43 whether both parents are willing to accept custody; n44 and whether the parents have exhibited a potential for cooperation regarding child-rearing. n45 If these four criteria are present, the *Beck* court held, a court may award joint custody; however, whether the court should or must award joint custody in such a case was left unanswered. n46 The New Jersey Supreme Court in *Beck* stopped short of adopting any form of presumption favoring joint custody, but in establishing its criteria it encouraged the use of joint custody as an option much more than do cases that merely authorize joint custody awards without providing meaningful guidelines for decision. n47 The *Beck* decision further encouraged use of joint custody by taking a more realistic approach to what may be required from parents in the way of cooperation. Rather than requiring that parents eliminate conflict, a prerequisite that would limit very narrowly the availability of joint custody, the court demanded only that the parents be able [*40] to separate, rather than to eliminate, their personal conflicts from their parental roles. n48 Especially with the assistance of supports such as counseling and mediation, many parents can be helped to handle their personal conflicts in such a manner as to allow them to manage a joint custody arrangement. Thus, the overall effect of the New Jersey court's approach is to encourage, rather than merely to authorize, the use of joint custody and to make it a viable option in many situations.

As the above discussion indicates, the state of the law definitely is moving toward a more favorable perception of joint custody as an appropriate option for custody upon divorce. However, it is also clear that the movement is a slow and deliberate one, with few states taking the extreme position that joint custody is the preferred court award even in the absence of parental request or agreement.

IV. CONSTITUTIONAL RIGHTS TO A PARENT-CHILD RELATIONSHIP

The thesis of this Article is predicated on the theory that parents not only have equal rights concerning their children, but also that parents possess a fundamental right to exercise *joint* custody over their children following the termination of marriage. This fundamental right follows from each parent's fundamental right of parental autonomy, and it protects the emotional parent-child relationships that were developed during the marriage. Such a right has not yet been recognized expressly by the Supreme Court, but it flows clearly from several strands of constitutional doctrine recognizing related rights.

The argument can be summarized simply. It is accepted constitutional doctrine that the due process clause of the fourteenth amendment protects interests that are recognized as constituting "life," "liberty," or "property." n49 In a number of decisions, the Supreme Court has recognized that individuals possess a fundamental liberty interest -- entitled to constitutional protection -- regarding such matters as the decisions whether to have children, decisions concerning the upbringing of their children, and the retention of their children through the exercise of custody. n50 Read [*41] together, the cases clearly establish a zone of privacy around the parent-child relationship, which only can be invaded by the state when the state possesses a sufficiently compelling reason to do so. As a result, when marital breakdown occurs, both parents are entitled to constitutional protection of their right to continue to direct the upbringing of their children through the exercise of custody. Adequate protection of this parental right requires that parents be

awarded joint custody of their children upon divorce unless a compelling state interest directs otherwise. The following discussion outlines the various areas of Supreme Court doctrine affecting parental rights, and demonstrates how these doctrines support finding a fundamental right to joint custody.

A. *The Decision to Procreate: A Part of the Right to Privacy*

There is no doubt that the present Court remains committed to recognizing a right of privacy that protects certain decisions regarding private sexual relations, and the consequences of such relations, from state regulation. n51 A critical question for this Article, however, is whether the right to privacy is not really, at least in large part, a right to procreate as opposed to a right to decide not to procreate. Finding the existence of a right to procreate is the first component of the thesis of this Article. To establish this point, a careful examination of the precedents that recognize a right of privacy must be made.

The Supreme Court's clearest statement on rights relating to procreation is contained in *Roe v. Wade*. n52 In *Roe*, the Court held that the individual's right to privacy encompassed a woman's decision to terminate her pregnancy and therefore not to procreate. n53 The Court grounded the pregnant woman's right of privacy in "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." n54 Not surprisingly, however, the Court determined that the woman's right is not absolute and must be balanced against legitimate state interests in protecting maternal health and potential life. The Court held that after certain progressive stages in pregnancy have been [*42] reached the state's respective interests become sufficiently compelling to justify increasing forms of state intrusion upon the regulation of the woman's right to obtain an abortion. n55

Although the origins of *Roe* can be traced to seminal cases such as *Griswold v. Connecticut* n56 and *Eisenstadt v. Baird*, n57 none of the pre-*Roe* decisions indicated a basis for finding a fundamental privacy interest in decisions concerning procreation. The Court in *Roe* took a major step beyond its holdings in *Griswold* and *Eisenstadt* and expressly recognized that the individual right to privacy [*43] includes a woman's substantive due process right to choose not to procreate and to implement that decision, thereby terminating a pregnancy. n58 The Court also indicated that while the right to decide whether to procreate is not absolute, it is fundamental in character and cannot be regulated by the state except to the extent necessary to accomplish a sufficiently compelling state interest. n59

In *Carey v. Population Services International*, n60 the Supreme Court built upon its recent decision in *Roe* in order to answer the question it left dangling in *Griswold* and *Eisenstadt*, n61 and in so doing concluded that "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception" as well as regarding abortion. n62 The Court invalidated provisions of a New York statute that imposed substantial restrictions upon the distribution, as opposed to the use, of contraceptives. n63 The Court pointed out that

[*44] A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception. Limiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so. n64

Having established that the state's policy of restricting distribution of contraceptives substantially burdened the individual's right to choose to use them, the Court then reaffirmed the fundamental nature of the right to use contraceptives by applying the "compelling state interest" test. After carefully examining all of the justifications proposed by the state, the Court concluded that none of them was sufficient to justify the burdens the statute placed upon the right to choose to use contraceptives. n65

Whether or not such a right was implicit in earlier decisions, [*45] *Roe* and *Carey* clearly established a fundamental liberty interest, or substantive due process right, to choose not to procreate. Can it therefore be said that *Roe* and the cases adopting its holding also establish the corollary of that right, the right to procreate? It may be argued

that *Griswold*, *Eisenstadt*, *Roe* and *Carey* do not establish such a right; their holdings all dealt specifically with the right not to procreate, either by preventing conception or by terminating pregnancy. Nevertheless, certain statements of the Court that were made long before the contraception/abortion line of cases at least suggest that the Court recognized a right to procreate.

In *Meyer v. Nebraska*, the Court stated that the "liberty" guaranteed by the due process clause of the fourteenth amendment included "the right of the individual to . . . marry, establish a home and bring up children." n66 In *Skinner v. Oklahoma*, the Court invalidated on equal protection grounds an Oklahoma statute providing for compulsory sterilization of certain classes of criminals, holding that the classifications of convicted criminals who were subject to sterilization were not justified. n67 Although the Court chose to base its holding on the guarantee of equal protection, and therefore did not hold that the defendant had a substantive due process right to procreate, n68 it did apply "strict scrutiny" to the legislative classifications involved. n69 Strict scrutiny under the equal protection clause has been reserved by the Court for legislative classifications that involve either a suspect class, such as race, or a fundamental right, such as the right to marry. n70 Because the Court did not expressly hold that the classifications of the Oklahoma statute implicated either a suspect class or a fundamental right, its exact reasons for applying strict scrutiny are not entirely clear. However, the Court explained:

[*46] We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. n71

This strongly suggests that the Court concluded both that because the right to marry and to procreate are necessary to the survival of the race they are truly fundamental rights, and therefore legislation that deprives individuals of these rights must be subjected to strict scrutiny, and that because the power to sterilize carries with it the potential to destroy minority races or groups, which are suspect classes, legislation granting the state such power also must be subjected to strict scrutiny. The Court in admitting the necessity of procreation for preservation of the race certainly had admitted that the right of procreation is fundamental in fact, even if there had yet been no need for the Court to recognize the right as fundamental in law. n72

The Supreme Court's summary affirmance of the decision of the United States District Court for the Eastern District of Virginia in *Doe v. Commonwealth's Attorney of Richmond* may be read as an indication that the Court intends to limit the protection of the right of privacy to decisions and activities related to marriage, family life and procreation. n73 The federal district court in *Doe* upheld the constitutionality of Virginia's consensual sodomy statute as it applied to adult male homosexual relations conducted consensually and in private, concluding that the statute did not offend any constitutional rights. n74 The district court stated that the plaintiffs' claim that their homosexual activity was protected by the right of privacy enunciated in *Griswold* misconstrued the ruling in *Griswold*, which "was put on the right of marital privacy . . . and . . . on the sanctity of the home and family." n75 Having excluded private and consensual homosexual relations from the protection of the right of privacy, the district court reviewed the [*47] legislation with only the minimal "rational basis" level of scrutiny. n76 The court held that the state's legitimate interest in promoting morality and decency was a sufficient justification for it to brand homosexual activity as criminal, and that the state clearly could take action to suppress crime, whether committed in public or in private. n77

The trial court's analysis in *Doe*, by emphasizing the "marital privacy" focus of *Griswold* and the sanctity of the home and family life, and particularly by approving the state's right to proscribe nonmarital sexual activity, both homosexual and heterosexual, appears to be an attempt to cast the right of privacy in very narrow terms. Apparently, the *Doe* court felt that the privacy right was designed to protect those decisions and activities operating within the sphere of "legitimate" relationships, such as the marital and family relationships. Although the Supreme Court's summary affirmance of the trial court's decision might imply its approval of the reasoning of the district court, such a narrow reading of the right of privacy seems inconsistent with the Supreme Court's earlier decisions in *Eisenstadt* and *Roe*. n78 In *Eisenstadt*, although not holding that an unmarried persons' decision to use contraceptives was protected by

the constitutional right of privacy, the Court did hold that, as a matter of equal protection, access to contraceptives must be the same for unmarried persons as for married persons. n79 To admit of any right of access to contraceptives in unmarried persons, when the contraceptives presumably would be used in the context of nonmarital sexual activity, implies some limitation on the state's power to prohibit nonmarital sexual activity through whatever means it chooses. The practical effect of the holding in *Eisenstadt* was to provide some measure of constitutional protection to intimate sexual relations occurring outside of marriage.

In *Roe* the Court went further and expressly held that a woman's decision to terminate her pregnancy is protected by the constitutional right of privacy. In so doing the Court did not limit the [*48] protection guaranteed by the right of privacy to married women only; in fact, the plaintiff in *Roe* was unmarried. n80 When the Court took the analysis one step further in *Carey* and expressly extended the constitutional right of privacy to a person's decision whether to use contraceptives, the class covered by the Court's decision included both married and unmarried adults and minors. n81

How can the Court's affirmance in *Doe* be reconciled with these decisions? The Court evidently was unwilling to grant any of the protection of the right of privacy to homosexuals' decisions to engage in intimate nonmarital sexual activity, but it was willing to grant full protection of the right of privacy to the contraception and abortion decisions of nonmarital sexual activity between heterosexuals. Perhaps the Court's basis for the different treatment lies in the fact that the decisions regarding contraception and abortion that attend intimate heterosexual relations are related to procreation, whereas decisions attending intimate homosexual activity are not. This explanation, if accurate, would reinforce the assessment of the constitutionally protected right of privacy as a right to choose whether to procreate, and it is consistent with the spirit of the contraception/abortion line of cases, which, although dealing with factual situations involving decisions not to procreate, reaffirm the fact that "[t]he decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices." n82

B. Retaining Parental Rights over Children

As the second component of the thesis of this Article it is suggested that, once procreation has occurred and a biological parent-child relationship has been created, parents retain a constitutionally protected, fundamental liberty interest in maintaining full and meaningful relationships with their children. These relationships are effected to a large extent through the parents' exercise of certain rights of control over their children. The Supreme Court has decided several cases dealing with the rights of parents over their children. A close examination of these cases reveals at least two separate lines of cases. One focuses on the rights of parents to make important decisions regarding their [*49] children's upbringing, while the second and more recent line of cases focuses specifically on the rights of parents to maintain control over their children's upbringing by retaining custody of the children.

1. The Right to Make Important Decisions Regarding One's Children's Upbringing

As the following discussion demonstrates, the Supreme Court recognized early that parental rights over children contain a substantive due process aspect and it took steps to protect these fundamental rights from coercive state intervention in several contexts. This resulted in the creation of protected areas into which state regulation may intrude only under strictly limited circumstances. These early Supreme Court cases focused on the right of parents to make important decisions regarding their children's upbringing.

As early as 1923, in *Meyer v. Nebraska*, the Court found that the due process clause of the fourteenth amendment prevents a state from forbidding the teaching of languages other than English in its elementary schools. n83 In describing the protected "liberty" interest that invalidated the state law, the Court stated, "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children." n84 Two years later, in *Pierce v. Society of Sisters*, the Court used the rationale developed in *Meyer* to invalidate a state statute that required parents to send their children to public school. n85 The Court stated:

Under the doctrine of *Meyer v. Nebraska*, . . . the Act . . . unreasonably interferes with the liberty of parents and

guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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. n86

[*50] While *Meyer* and *Pierce* might be discounted insofar as they were decided during the heyday of substantive due process, the Court has continued to give recognition to the zone of privacy surrounding parental control. In *Prince v. Massachusetts*, although the Court found that the rights of parental control are under some circumstances subject to the state's exercise of its *parens patriae* duties, the Court reinforced its view that the boundaries of parental authority are broad, and that those of the state are correspondingly narrow. n87 Citing *Meyer* and *Pierce*, the Court explained:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. n88

Approximately thirty years after *Prince*, in *Wisconsin v. Yoder*, n89 the Court invalidated the application of a state's compulsory education law, which required that children attend a public school until the age of sixteen, to Amish schoolchildren. n90 The Court in reaching its conclusion relied on the Amish parents' rights both of religious freedom and of parental authority. n91

The cases discussed above establish a zone of privacy around the family that protects the family from unjustified state interference. They also create a zone of privacy that surrounds the parent specifically, and even more importantly that limits the state's power to interfere with the parent's substantive due process "liberty" interest in exercising parental authority over his child and in making important decisions that affect the child's upbringing. These decisions thus place substantial limits on the state's power to interfere with a parent's right to decide how to raise his or her children.

2. The Right to Retain Custody over One's Children

None of the cases discussed in the preceding section raised the issue of a parent's constitutional right to custody of his children. [*51] In a line of more recent cases, however, the Supreme Court has had occasion to discuss the nature and extent of the parent's right to control his child's upbringing by retaining custody of his child.

In *Stanley v. Illinois*, n92 the Court discussed an unwed father's right to custody of his children. The Court pointed out that it repeatedly has placed emphasis on "the importance of the family," and it stated that "[t]he rights to conceive and raise one's children have been deemed 'essential', 'basic civil rights of man' and 'rights far more precious . . . than property rights.'" n93 After the Court established that the biological father's rights concerning his children are "important" and "essential," the *Stanley* Court held that an Illinois statute that automatically made illegitimate children wards of the state upon the mother's death denied the father his rights to procedural due process. n94 The Court further concluded that the fact that the statute required a hearing and proof of unfitness in custody cases involving all other classes of parents -- including married mothers and fathers and unwed mothers -- the state in denying this opportunity to unwed fathers violated the unwed father's equal protection rights as well. n95

A result similar to that reached in *Stanley* was reached in *Santosky v. Kramer*, where the Court held that a state could not permanently terminate all of a parent's rights in his child unless it employed proceedings requiring at least a "clear and convincing evidence" standard of proof that the child had been neglected. n96 The Court referred to the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty protected by the Fourteenth Amendment," and added that "the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." n97 Accordingly, the Court found that, [*52] in order to protect this fundamental right, an intermediate standard of proof was necessary. n98

The cases dealing with termination of parental rights, either in the adoption context of *Stanley* or in the abuse or neglect context of *Santosky*, have decided only what process is due; those cases do not address explicitly the scope of the rights involved, or the nature of governmental interests that justify state interference with such rights. n99 However, in order to explain the fact that the Court in those cases expressly recognized that some process was due, it must be assumed that the Court in *Stanley* and *Santosky* implicitly recognized that the parental right to custody is a fundamental right as a matter of substantive due process. This conclusion is compelled by two considerations. First, it has been clear, at least since the companion cases of *Board of Regents v. Roth*, n100 and *Perry v. Sinderman*, n101 that the Supreme Court will apply the due process clause of the fourteenth amendment literally, and so will extend the constitutional guarantee of procedural due process only as far as it finds a protected interest in either life, liberty or property. n102 In accordance with this mode of analysis, the Supreme Court will, when faced with a claim of procedural due process, first determine whether the plaintiff has an interest that qualifies for protection, and it will deny due process protection to interests that although real and important do not qualify as one of the protected kinds of interests. n103

[*53] The converse of the proposition that a protected interest is necessary to invoke procedural due process is especially critical for purposes of the analysis put forth in this Article. The converse proposition states that the mere fact that an interest is one that cannot be abridged without certain procedures demonstrates that it is a fundamental life, liberty, or property interest. Since it seems unlikely that a parent's interest in a continued parental relationship with his child is an interest in life or property, it follows that cases such as *Stanley* and *Santosky* necessarily reflect the Court's recognition of a protected liberty interest. Having said that, it necessarily follows that whatever substantive guarantees the due process clause mandates also must apply to the parental right. The precise substantive protection, of course, remains to be developed, but the recognition of procedural due process rights is sufficient to imply corresponding substantive protections. n104

[*54] The contours of the substantive due process rights in this context remain to be defined. Whether the state need merely demonstrate that its substantive standard is "rational," or whether the state will be called upon to meet a higher level of scrutiny cannot, of course, be determined from cases such as *Stanley* and *Santosky*, which deal only with procedural issues. The important point for present purposes, however, is that these procedural due process decisions reinforce the inference drawn from the right to procreate cases that there is, in fact, a fundamental parental right. n105

An argument therefore can be made that the Supreme Court has explicitly recognized that a parent has a fundamental, substantive due process liberty interest in and right to custody of his or her children, despite the fact that the Court never has expressly so held. In a manner reminiscent of its treatment of the right to procreate, the Court has made statements in dicta that strongly suggest the Court's own recognition that such a right exists.

In *Stanley*, the Court admitted that the father's interest in retaining custody of his children was at least "cognizable and substantial," and that it "undeniably warrants deference and, absent a *powerful* countervailing interest, protection." n106 In *Smith v. Organization of Foster Families for Equality & Reform*, n107 the Court admitted that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights." n108 In that case, a group of foster parents in New York had brought a class action suit alleging that the New York state procedures for removing foster children who had been placed in their homes violated their asserted "constitutionally protected liberty interest [and] 'right to familial privacy' . . . in the integrity of their family unit." n109 The Court [*55] was willing to recognize only a very limited liberty interest in the foster family relationship, in contrast to the liberty interest found in the biological family relationship. The Court explained that although "ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another," the situation before it was unique, in that according a foster family procedural protection created substantial tension with the natural parents' "constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right." n110 The Court therefore concluded: "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." n111 The fact that the Court so clearly favored the interests of natural parents over that of foster parents indicates that the Court considers that the substantive

interest of natural parents in protecting their parentchild relationships is of fundamental proportions and clearly is superior to that of all others except the state. It should be noted, however, that the case did not involve a conflict between the rights of natural parents and those of the state, and so did not address specifically the limits of the substantive power of the state to interfere in the relationship between natural parent and child.

The *Santosky* case, by contrast, did involve a conflict between parental interests and state interests. n112 The Court in that case stated that parents have a "fundamental liberty interest in the care, custody and management of their child," which did not "evaporate" simply because the parents in that case had lost temporary custody of their child to the state. n113 Although the Court's holding was limited to a resolution of issues concerning what process is due, even more clearly than in *Smith* the Court recognized the fundamental character of a parent's substantive right to custody of his child. n114 The fact that the Court imposed a "clear and convincing evidence" standard of proof, which is [*56] only one step below the "evidence beyond a reasonable doubt" standard applied in criminal prosecutions, lends further support to the Court's acceptance of parental rights as fundamental in nature.

These statements by the Court strongly indicate that a parent's substantive right to custody is fundamental. It easily is imagined that it would be difficult for the Court to hold otherwise given the appropriate factual circumstances. n115 Thus, despite the fact that the Court never has held expressly that a parent's right to custody is fundamental, it can be reasonably inferred from the Court's treatment of the issue to date that the Court has granted both implicit and explicit recognition to this principle.

V. THE FUNDAMENTAL RIGHT OF PARENTS TO EXERCISE JOINT CUSTODY UPON DIVORCE

An analysis of the Supreme Court's treatment of the parental right to custody points compellingly to the conclusion that parents do, in fact, have a fundamental individual right to retain custody of their children. Moreover, the Supreme Court clearly has established that a state cannot deprive individuals of any right denominated as fundamental unless it has established a compelling justification for doing so. The state must demonstrate that deprivation of the right in question is necessary to accomplishment of a "compelling state interest." n116 Both the sufficiency of the state's asserted interest, and the fundamental nature of the right claimed to have been burdened are circumstances open to judicial scrutiny. n117

[*57] This constitutional doctrine constitutes the foundation for the primary thesis of this Article, which is that upon divorce each parent has a fundamental right to be awarded joint custody of his children. An award of joint custody is the only method by which the state can prevent the deprivation of either parent's fundamental right to retain the custody exercised over the children during the marriage. Thus, following the constitutional analysis to its logical conclusion requires that, as a matter of federal constitutional law, state courts must establish a presumption that parents are entitled to joint custody of their children upon divorce. Constitutional doctrine also requires that the presumption be rebutted only by the court's determination, based on clear and convincing evidence, that an award of joint custody in the particular case would be detrimental or harmful to the children involved. n118

[*58] It might be argued that the attainment and protection of the "best interests" of the children involved constitute sufficiently compelling state interests to justify deprivation of a parent's fundamental right to custody upon divorce. However, an examination of that standard as it actually operates demonstrates that it provides inadequate protection to the fundamental parental right. In fact, the only state interest that should be considered sufficiently compelling to justify deprivation of the divorced parent's fundamental right to custody is the state's interest in protecting children from detriment and harm. There is a significant conceptual difference between the "best interest of the child" and the "detriment to the child" standards of custody determination.

[*59] The "best interests" standard is a necessarily broad and vague formulation, which the courts have found difficult both to define and to apply. n119 By its terms, the standard indicates that the objective of the court must be to select what custody arrangement it thinks would be "best" for the child. From a purely objective viewpoint, when faced with more than one fit and qualified claimant for custody, a prediction of which claimant would be most likely to

provide what is best for the child is extremely difficult to make. Such a standard is extremely susceptible to a judge's personal value judgments regarding what is best for children, since the intended content of the term "best" is not defined. n120 It has been necessary, through case law, for courts to attempt to determine what types of considerations are relevant and appropriate to use in application of the standard. n121 In fact, the way in which courts attempt to apply the "best interests" test actually may amount to application of a much more limited type of standard instead. For example, in *Matter of Adoption of J.S.R.*, the District of Columbia Court of Appeals was presented with a challenge on the grounds of unconstitutional vagueness to the "best interests of the child" standard contained in the District [*60] of Columbia's adoption statute. n122 In upholding the best interest standard against the challenge, the court explained that the best interest standard actually required a judge to determine which alternative would be the least detrimental to the child, which was a standard the court found to be sufficiently precise. n123

All of the difficulties associated with the best interest standard -- its inherent vagueness and consequent lack of clear and definite guidelines, which makes it highly susceptible to the personal inclinations and value judgments of judges attempting to apply it -- ultimately may lead to a conclusion that the standard should be abandoned altogether. The best interest standard clearly is an inappropriate standard for courts to use in determining the custody of children upon divorce. The fundamental right of each parent to custody cannot be adequately protected through use of such an amorphous and vague concept. A much more narrow and clearly defined standard must be adopted by state courts if they are to establish the compelling justification that is required before a court can deprive either parent of custody upon divorce.

A "detriment to the child" standard arguably qualifies as sufficiently narrow. Rather than attempting to predict which placement out of a range of two or perhaps even more possible placements would be best for a child, the court under this standard would limit its inquiry to whether the particular placement in [*61] question would be likely to cause harm or detriment to the child. Only after such a finding had been made would the court consider making a different custody placement. n124 Those factors that would be likely actually to harm a child usually are much easier for a court to identify and evaluate than those factors that would result in the best possible environment for a child, because the probable harmful effects may be much more readily apparent. For example, the consequences of physical abuse, of being provided with inadequate food, shelter and clothing or with inadequate medical attention are clearly observable in children. Similarly, the consequences of inadequate parental supervision and discipline may be reflected in injuries suffered by children, or in delinquent or other antisocial behavior. Emotional abuse or neglect may also result in observable symptoms of emotional and psychological problems in children. A finding by a court of the existence of any of these signs of harm or a finding that factors exist which would be very likely to result in such harms occurring if a particular parent were granted custody of the child obviously would justify a court in depriving that parent of his or her fundamental right to custody.

It is instructive to examine the way in which state courts handle parent-nonparent custody determinations for any guidance it might offer regarding how state courts should handle custody determinations between parents upon divorce. Some states consider a natural parent's right to custody, relative to third parties, to be fundamental. n125 Most states, even if not taking that position have incorporated the "parental preference doctrine" or presumption into their law. This doctrine was described by the New York Court of Appeals as "the generally accepted view that a child's [*62] best interest [requires] that it be raised by its parent unless the parent is disqualified by gross misconduct." n126

Many states have incorporated the best interests standard into this parental preference doctrine by requiring the courts to make some type of threshold finding, either of fault of the parent or a likelihood of detriment to the child if placed in parental custody, before it can apply the best interests standard and consider an award of custody to a nonparent over the parent. n127 For example, the New York Court of Appeals held in *Bennett v. Jeffreys*, "The State may not deprive a parent of the custody of a child absent surrender, abandonment, neglect, unfitness or other like extraordinary circumstances. If any of such extraordinary circumstances are present, the disposition of custody is influenced or controlled [*63] by what is in the best interest of the child." n128 The court in that case concluded that a prolonged separation between the mother and child was an extraordinary circumstance that triggered the best interest test. n129 California, by statute, has adopted a similar standard that requires that a court make a finding that an award

of custody to a parent would be detrimental to the child before it awards custody to a nonparent. n130 By applying the parental preference doctrine and requiring the establishment of parental unfitness or other extraordinary circumstances that create a likelihood of detriment to the child, the courts in these states arguably are treating the parent's right to custody as fundamental, whether they denominate it as such or not.

The Supreme Court's decision in *Smith v. Organization of Foster Families for Equality & Reform* also involved an application of the "parental preference" doctrine, insofar as the Court in that case elevated the rights of natural parents to the return of their children over the rights of foster parents. n131 The Court stated:

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized [*64] liberty interest that derives from blood relationship, state law sanction, and basic human right -- an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents. n132

This language reinforces the argument put forth earlier in this Article, that the Court's resolution of conflicts between natural parents and foster parents strongly suggests that the Court regards the substantive right of natural parents to the possession of their child as fundamental, at least in relation to third parties.

The experience state courts have developed in resolving parent/nonparent disputes should aid those courts in resolving custody disputes between parents. If the parental right to custody is fundamental as a matter of federal constitutional law, as this Article has argued, parents in custody determinations upon divorce should have the benefit of a standard at least as strict as the detriment or harm standard, which has been applied by some states that may not even explicitly recognize that the parental right to custody is fundamental in nature. In a determination of custody upon divorce, parents should be entitled to receive the same protection they would receive if the determination of custody were being made between them and a third party, and thus the applicable standard should be the same.

VI. CONCLUSION

Joint custody of children upon divorce already has been recognized by many states as a viable option under certain circumstances that vary from state to state. It also has been adopted by a few states as the preferred custody arrangement upon divorce, because it furthers the state's commitment to preserving full and meaningful relationships between both parents and children after breakdown of the marriage. However, under the present state of the law, the right of parents to exercise joint custody of their children upon divorce has been treated as a state law issue. The states have been free to ignore the existence of any such parental right and to limit narrowly or to reject altogether the availability of joint custody as an option upon divorce.

[*65] It appears that the Supreme Court has at least implicitly, if not explicitly, recognized that the parental right to retain custody of one's children is fundamental in nature. This fact, in turn, logically impels the conclusion that parents have a fundamental right to retain joint custody of their children upon divorce, and that they cannot be deprived of this right by the state absent compelling reasons. As a consequence of the fundamental nature of the right involved, it is essential to "constitutionalize" child custody law, and thereby bring uniformity and equality of application to the diverse patchwork of custody law currently employed by the states. This can best, and perhaps only, be achieved by the adoption, as a matter of federal constitutional law, of a presumption of joint custody of parents over their children upon divorce, which could be rebutted only by clear and convincing evidence that an award of joint custody in a particular case would be detrimental to the children. Such a presumption would prohibit a state from depriving a parent of his or her fundamental right of joint custody upon divorce unless it first establishes that such deprivation is essential to the accomplishment of the compelling state interest of protecting children from harm. This limitation on the power of the states not only is constitutionally mandated, it is ultimately in the best interests of all parties involved -- the parents, the

children and the state -- in that it effectively preserves full and meaningful relationships between the child and both parents despite the breakdown of the family unit following divorce.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsPresumptionsExceptionsStatutory PresumptionsEvidenceScientific
EvidenceGeneral OverviewFamily LawChild CustodyAwardsStandardsBest Interests of Child

FOOTNOTES:

n1 *See, e.g.*, ALASKA STAT. § 25.20.060(b) (1983); ARIZ. REV. STAT. ANN. § 25-332(d) (West Supp. 1984-1985); IND. CODE ANN. § 31-1-11.5-21(a) (Burns Supp. 1984-1985); KY. REV. STAT. § 403.270(1) (1984); LA. CIV. CODE ANN. art. 146, § A(2) (West Supp. 1984); MD. FAM. LAW CODE ANN. § 5-203(c)(2) (1984); MISS. CODE ANN. § 93-13-1 (1972); MONT. CODE ANN. § 40-4-223(2) (1983); N.J. STAT. ANN. § 9:2-4 (West 1976); N.Y. DOM. REL. LAW § 240 (McKinney 1977); N.D. CENT. CODE § 14-09-06 (Supp. 1983); TEX. FAM. CODE ANN. § 14.01(b) (Vernon 1975); VT. STAT. ANN. tit. 15, § 652(c) (Supp. 1984); VA. CODE § 20-107.2 (Supp. 1984); WASH. REV. CODE ANN. § 26-16.125 (1961); WIS. STAT. ANN. § 767.24(2) (West 1981).

n2 The legal concept of joint custody has been defined by a number of state legislatures, in terms that range from the vague and general to the specific and detailed. Some of the vaguest statutes do not contain an express guarantee of equal parental rights and responsibilities, but merely provide that the parents share in caring for the child. *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 1275.4(B) (West Supp. 1983-1984) (stating that joint custody means "the sharing by parents in all or some of the aspects of physical and legal care, custody, and control of their children"). Other statutes provide for equal rights of the parents but are vague about what "equal rights" entail. *See, e.g.*, WIS. STAT. ANN. § 767.24(b) (West 1978) ("Joint custody . . . means that both parties have equal rights and responsibilities to the minor child and neither party's rights are superior."). Other statutory provisions for joint custody are quite specific about the areas of shared parental responsibility. The Minnesota statute, for example, draws a distinction between "joint legal custody," which includes "the right to participate in major decisions determining the child's upbringing, including education, health care and religious training," and "joint physical custody," which gives a parent responsibility for "the routine daily care and control and the residence of the child." MINN. STAT. ANN. § 518.003(3) (Supp. 1984); *see also* CAL. CIV. CODE § 4600.5(c) (West 1983) (distinguishing between joint physical and legal custody without defining either); MISS. CODE ANN. § 93-5-24(5) (1984) (distinguishing between joint physical and legal custody, and providing that in cases in which both are awarded, parents shall "exchange information concerning the health, education and welfare of the minor child, and . . . shall confer with one another in the exercise of decision-making rights, responsibilities and authority").

Some states have included in their statutory definitions detailed directions regarding how joint custody arrangements are to be structured by the court. For example, the Kansas statute provides that when a court makes a joint custody award, it may determine "that the residency of the child shall be divided either in an equal manner with regard to time of residency or on the basis of a primary residency arrangement for the child." KAN. STAT. ANN. § 60-1610(a)(4)(A) (1983). The statute also provides that the court "may require the parents to submit a plan for implementation of a joint custody order upon finding that both parents are suitable parents or the parents, acting individually or in concert, may submit a custody implementation plan to the court prior to issuance of a custody decree." *Id.* The Florida legislature has chosen to use the term "shared parental responsibility" instead of "joint custody," but likewise explains what the term means and how the arrangement

may be structured. *See* FLA. STAT. ANN. § 61.13(2)(a) (Supp. 1970-1985) (providing that "in ordering shared parental responsibility, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interests of the child").

n3 *See infra* text accompanying notes 7-20.

n4 *See, e.g.*, FLA. STAT. ANN. § 63.13(2) (Supp. 1970-1983); IDAHO CODE § 32-717B(4) (West Supp. 1984); LA. CIV. CODE ANN. art. 146(C) (West Supp. 1984).

n5 *See infra* notes 25-32 and accompanying text

n6 *See, e.g.*, Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523 (1979); Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979); Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 WOMEN'S L.F. 559 (1979); Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641 (1983); Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213 (1980); Note, *Joint Custody: A Revolution in Child Custody Law?*, 20 WASHBURN L.J. 326 (1981); Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 UCLA L. REV. 1084 (1979).

n7 For example, the California statute authorizing joint custody speaks in the broad terms of legislative policy by providing that joint custody entitles the parents to share in physical custody of the child "in such a way as to assure the child or children of frequent and continuing contact with both parents." CAL. CIV. CODE § 4600.5(c) (West 1983).

n8 *See, e.g.*, ILL. ANN. STAT. ch. 3, § 132 (Smith-Hurd 1978); KY. REV. STAT. § 405.020(1) (1984); MD. FAM. LAW CODE ANN. § 5-201(B)(2) (1984).

n9 Several states by statute have provided that a court may grant exclusive decisionmaking authority to the custodial parent. *See, e.g.*, KAN. STAT. ANN. § 60-1610(a)(4)(B) (1983) ("The custodial parent shall have the right to make decisions in the best interests of the child, subject to the visitation rights of the noncustodial parent."); MINN. STAT. ANN. § 528.003(3) (West Supp. 1984) ("Legal custody' means the right to determine the child's upbringing, including education, health care and religious training"); MISS. CODE ANN. § 93-5-24(5)(d) (West Supp. 1984) ("legal custody' means the decisionmaking rights, the responsibilities and the authority relating to the health, education and welfare of a child").

In a few states with no express statutory provision on the subject, the same rule is reflected in judicial decisions, which typically grant the custodial parent exclusive control over the discipline, education and religious training of the child. The approach of the New Jersey courts is fairly typical of the approaches taken in other states. *See, e.g.*, *Esposito v. Esposito*, 41 N.J. 143, 146, 195 A.2d 295, 297 (1963) (enunciating rule, with regard to child's religious training, that "[c]ustody normally carries with it full control of the child's religious upbringing. At this time there is no occasion for considering when, if ever, a court would be justified in interfering with the custodian's religious selection and guidance"); *see also* *Pogue v. Pogue*, 147 N.J. Super. 61, 63, 370 A.2d 539, 540-41 (Ch. Div. 1977) ("This court will not interfere . . . with the day-to-day discipline of the custodial parent unless some basic problem involving the welfare of the child is involved."); *Schumm v. Schumm*, 122 N.J. Super. 146, 150, 299 A.2d 423, 426 (1973) ("[The] custodian has the right to determine the

kind of education which is suitable for the child entrusted to its care."); *Boerger v. Boerger*, 26 N.J. Super. 90, 104, 97 A.2d 419, 427 (Ch. Div. 1953) (stating, in course of finding custodial parent free to control child's life without interference from noncustodial parent, that "[t]he parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child. The mother, who lives with the child more than six days a week, as contrasted with the father's limited visitation of a few hours on Sunday, is the one who actually rears the child and shapes its moral, mental, emotional and physical nature.").

n10 Various commentators have discussed the fact that evidence indicates that the traditional sole custody system has an adverse impact both on the child and on the parents. For example, it is recognized that sole custody imposes significant burdens on the custodial parent, who most often is the child's mother. See Folberg & Graham, *supra* note 6, at 553-54. A mother with sole custody might tend to feel over-burdened and exhausted, with the result that the mother becomes socially isolated. *Id.* It is often difficult for a divorced mother to establish a career and to break free of her financial dependence upon the former spouse. A child living in such an arrangement may sense the strains felt by the mother, and accordingly may feel that he is a burden. Miller, *supra* note 6, at 356-57; Trombetta, *supra* note 6, at 221-22; Comment, *supra* note 6, at 1115.

In addition, sole custody arrangements often have a harmful effect on the noncustodial parent. As one commentator has stated: "If mothers feel 'over-burdened' following divorce, fathers usually are not sufficiently 'burdened'." Folberg & Graham, *supra* note 6, at 555. In addition to the stress and sense of loss that frequently overwhelm men following any divorce, the adjustment from home and family to the limitations of visitation rights and support obligations, with none of the attendant rewards of continuing contact with one's children, may make a divorced father give up the attempt to maintain contact with his children. See *id.* Even if the father continues to see his children through periodic visits, the father-child bond characteristically is a weak one, because of the fact that the father is seen by the children only as an infrequent visitor and not as a feature of everyday life. See Miller, *supra* note 6, at 355-56.

Evidence also supports the conclusion that the traditional sole custody arrangement has a detrimental effect on children. One commentator has identified the following problems with that arrangement: feelings of loss and abandonment, strained interactions with both parents, disturbance in cognitive performance, and sex role identification problems. See Trombetta, *supra* note 6, at 217-20; see also Miller, *supra* note 6, at 354-59; Robinson, *supra* note 6, at 644-49; Trombetta, *supra* note 6, at 215-17, 220-24; Comment, *supra* note 6, at 1113-17.

n11 See Miller, *supra* note 6, at 403, 411; Robinson, *supra* note 6, at 645-46; Trombetta, *supra* note 6, at 230-31; Note, *supra* note 6, at 332-33.

n12 One commentator asserts that "joint custody provides the most continuous, loving situation for the child. . . . The child sees that both parents continue to love him enough to want to retain custody of him, and he sees that he can love one parent without being disloyal to the other." Note, *supra* note 6, at 333-34. Others have noted that "[s]ome experts believe that joint custody, by reducing the child's feelings of rejection and abandonment, as well as supplying continued positive role models, is conducive to the child's emotional stability." Folberg & Graham, *supra* note 6, at 557; see also Miller, *supra* note 6, at 362-64; Robinson, *supra* note 6, at 650; *supra* note 10 (listing commentators' discussions of harms to child resulting from sole custody arrangements).

n13 See *supra* note 10 (discussing adverse effects of sole custody on custodial parent and on noncustodial parent).

n14 A joint custody arrangement may allow a mother, who otherwise might have been burdened with the responsibilities of sole custody, the opportunity to establish her financial independence and to develop a life outside of her home. At the same time, the arrangement will help to assuage the guilt that the mother might feel if she ceded sole custody to the child's father in order to avoid the pressures of full-time custody. See Folberg & Graham, *supra* note 6, at 553-54. The parent who might otherwise not have been awarded custody will likewise benefit from the chance to participate in his child's upbringing. This benefit might in turn help the child, in that a parent who enjoys sharing in the moral and legal obligations of parenthood may be more apt to take seriously the financial obligations of parenthood. See Note, *supra* note 6, at 333; Miller, *supra* note 6, at 365.

n15 Joint custody may alleviate some of the struggles between divorced parents because of the fact that the child no longer is in an environment where it is necessary for him to "choose" between his parents, and accordingly the parents will feel less fear of rejection. Comment, *supra* note 6, at 1116; see also Folberg & Graham, *supra* note 6, at 554-55.

n16 Comment, *supra* note 6, at 1108.

n17 See M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY 52 (1978); Ramey, Stender & Smaller, *supra* note 6, at 574.

n18 See *supra* note 10.

n19 Granting a hostile and bitter parent exclusive decisionmaking authority and physical possession of the child arguably places that parent in a superior legal position to the other parent, and thus may give the custodial parent great power over the noncustodial parent. The custodial parent can use his rights to make the child unavailable to spend time with the noncustodial parent, as for example if he organizes such a full schedule of educational and social activities for the child that there is no time left for weekly visits with the other parent. The parent in custody may fend off attempts by the other parent to see the child by claiming that visits by the noncustodial parent disrupt the child's routine or interfere with the child's discipline. Such tactics can result in an ever-widening gulf between the noncustodial parent and the child, and are to a large extent the sort of acts with which a court is powerless to interfere. See Miller, *supra* note 6, at 355-56 (noting that a custodial mother often can employ "blackmail and vengeful tactics" against a father trying to maintain contact with his child); see also Robinson, *supra* note 6, at 670-72. Arguably, a joint custody award, by establishing comparable legal rights in both parents, would go a long way toward preventing this potential for abuse and would allow each parent a more meaningful opportunity to protect his rights in court. See Trombetta, *supra* note 6, at 233 (stating that "[e]ven when parties are highly antagonistic, the court can still protect each parent's right to be a parent, and each parent's obligation not to interfere in the areas delegated to the other party"); see also Robinson, *supra* note 6, at 679-80.

n20 A variety of options, including counseling and mediation, are available to aid divorced couples having difficulty in reconciling their hostilities toward the former spouse with their continuing obligations as parent. To the extent that continuing conflict between parents endangers a court-imposed custody arrangement, the court should require that parents take advantage of such options. See Robinson, *supra* note 6, at 655; Trombetta, *supra* note 6, at 232-33. It is possible that parents who have made a commitment to a joint custody arrangement to some extent already have demonstrated their good faith and willingness to work together for the benefit of their child. See Folberg & Graham, *supra* note 6, at 550.

n21 See CAL. CIV. CODE §§ 4600(b)(1), 4600.5(b) (West 1983 & Supp. 1984); COLO. REV. STAT. § 14-10-124(5) (Supp. 1984); CONN. GEN. STAT. ANN. § 46b-56(a) (West Supp. 1984); FLA. STAT. ANN. § 61.13(2) (West Supp. 1983); HAWAII REV. STAT. § 571-46(1) (1976 & Supp. 1983); IDAHO CODE § 32-717B (1983); IOWA CODE ANN. §§ 598.21(b), .41 (West Supp. 1984-1985); KAN. STAT. ANN. § 60-1610(a)(4)(A) (1983); KY. REV. STAT. § 403.270(3) (1984); LA. CIV. CODE ANN. art. 146(D) (West Supp. 1984); ME. REV. STAT. ANN. tit. 19, § 214(2)(C) (West Supp. 1984-1985); MASS. ANN. LAWS ch. 208, § 31 (Michie/Law. Co-op. Supp. 1983); MICH. COMP. LAWS ANN. § 722.26a (West Supp. 1984-1985); MINN. STAT. ANN. § 518.17(2) (West Supp. 1984); MISS. CODE ANN. §§ 93-5-24(2), (3) (Supp. 1984); MONT. CODE ANN. § 40-4-222 (1983); NEV. REV. STAT. §§ 125.480(1), (3)(a) (1983); N.H. REV. STAT. ANN. § 438:17(II) (1983); N.M. STAT. ANN. § 40-4-9.1 (1981); N.C. GEN. STAT. § 50-13.2(b) (1984); OHIO REV. CODE ANN. § 3109.04(A) (Page Supp. 1983); OKLA. STAT. tit. 12, § 1275.4 (West Supp. 1983-1984); OR. REV. STAT. § 107.105(1)(a) (1977); PA. STAT. ANN. tit. 23, § 1005 (Purdon Supp. 1984-1985); TEX. FAM. CODE ANN. § 14.06(a) (Vernon Supp. 1985); WIS. STAT. ANN. § 767.24(1)(b) (West 1981).

n22 See COLO. REV. STAT. § 14-10-124 (1983); MASS. GEN. LAWS ANN. ch. 299, § 31 (West 1981); OHIO REV. CODE ANN. § 3109.04(A) (Page Supp. 1983); TEX. FAM. CODE ANN. § 14.06(a) (Vernon 1975); WIS. STAT. ANN. § 767.24(i)(b) (West 1981).

n23 CONN. GEN. STAT. ANN. § 46b-56(a) (West Supp. 1984). The statute provides that a court may award custody to the parents jointly "according to its best judgment upon the facts of the case." *Id.* This broad language could be read as giving the court authority to impose a joint custody award even in the absence of parental agreement to joint custody. However, the sentence quoted above is expressly made "[s]ubject to the provisions of section 46b-56a." *Id.* In that section it is provided that a court may award joint legal custody without joint physical custody where the parents merely have agreed upon joint legal custody. See *id.* § 46b-56a(a). It is arguable that this provision is expressive of a general legislative intent to allow the use of joint custody only to the extent that it has been consented to. However, militating against this conclusion is the fact that this broad principle is nowhere stated in the statute, and also the fact that the framers of the statute used the word "may" in § 46b-56a(a), which may have been intended to preserve the court's broad discretion. See *id.*

The Connecticut statute also contains the provision, unique in that it only has been adopted by a few states, that it is presumed that joint custody is in the best interests of the child when both parents have agreed to it. See *id.* § 46b-56a(b); *infra* notes 26-27 and accompanying text.

n24 See ALASKA STAT. § 25.20.060(c) (1982); IND. CODE ANN. § 31-1-11.5-21(f) (West Cum. Supp. 1984-1985); IOWA CODE ANN. § 598.21.6 (West 1981); KY. REV. STAT. § 403.270(3) (1984); MINN. STAT. ANN. §§ 518.003, .17 (West Cum. Supp. 1984); N.C. GEN. STAT. § 50-13.2(b) (1976); OR. REV. STAT. § 107.105(1)(a) (1977).

n25 See CAL. CIV. CODE §§ 4600, 4600.5 (West 1980); HAWAII REV. STAT. §§ 571-46, -46.1; MICH. COMP. LAWS ANN. § 722.23(6a) (West Supp. 1984-1985); MISS. CODE ANN. § 93-5-24 (Supp. 1984); MONT. REV. CODE ANN. § 40-4-222-25 (1983); OKLA. STAT. ANN. tit. 12, § 1275.4 (West Cum. Supp. 1984-1985); PA. STAT. ANN. § 1005 (Purdon 1966).

n26 See CAL. CIV. CODE § 4600.5(a) (West 1983).

n27 *See* CONN. GEN. STAT. ANN. § 46b-56a(b) (West 1984); ME. REV. STAT. ANN. § 214 (1981); MISS. CODE ANN. § 93-5-24(4)(Supp. 1984).

n28 KAN. STAT. ANN. § 60-1610(a)(4)(A) (1983); N.M. STAT. ANN. § 40-4-9.1(A) (1978).

n29 N.M. STAT. ANN. § 40-4-9.1(A).

n30 *See* FLA. STAT. ANN. § 61.13(2) (West Supp. 1983); IDAHO CODE § 32-717B(4) (1983); LA. CIV. CODE ANN. art. 146(c) (West Supp. 1984).

n31 LA. CIV. CODE ANN. art. 146(C).

n32 IDAHO CODE § 32-717 B (4).

n33 FLA. STAT. ANN. § 61.13(2).

n34 *Cf. id.*; IDAHO CODE § 32-717B(4) (speaking in terms of "best interests of the child"); LA. CIV. CODE ANN. art. 146(c) (same).

n35 *See, e.g.*, Kerns v. Kerns, 59 Md. App. 87, 474 A.2d 925 (1984); Beck v. Beck, 86 N.J. 480, 485, 432 A.2d 63, 65 (1981); Braiman v. Braiman, 44 N.Y.2d 584, 589, 378 N.E.2d 1019, 1020, 407 N.Y.S.2d 449, 450 (1978).

n36 44 N.Y.2d 584, 589, 378 N.E.2d 1019, 1020, 407 N.Y.S.2d 449, 450 (1978). The court based this opinion in particular on the part of the statute allowing the court to "give such direction . . . as, in the court's discretion, justice requires." *Id.* (quoting N.Y. DOM. REL. LAW § 240(1) (McKinney 1977 & Supp. 1984-1985)).

n37 *Id.* at 589-90, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451 (citations omitted).

The court made the comment that imposing joint custody upon embattled parents "[could] only enhance familial chaos." *Id.*

n38 The court stated only that joint custody may not be "indiscriminately substituted" for a sole custody award. *See id.* at 591, 378 N.E.2d at 1022, 407 N.Y.S.2d at 452.

n39 86 N.J. 480, 485, 432 A.2d 63, 65 (1981) (citing N.J. STAT. ANN. § 2A:34-23 (West 1952 & Supp. 1983-1984)). The court noted, moreover, that the use of joint custody is encouraged by a separate statute which provides that when courts make custody determinations the rights of both parents to care for their children shall be considered as equal. *Id.* (citing N.J. STAT. ANN. § 9:2-4 (West 1976)). The court also found that a policy allowing for joint custody is in accordance with the preexisting common-law rule in that state. *See id.* (citing Turney v. Nooney, 5 N.J. Super. 392, 397, 69 A.2d 342, 344 (App. Div. 1949)).

n40 *Id.* at 488, 432 A.2d at 66.

n41 *Cf. Braiman*, 44 N.Y.2d at 591, 378 N.E.2d at 1022, 407 N.Y.S.2d at 452.

n42 86 N.J. at 497, 432 A.2d at 71 (stating that "it is necessary only that the child recognize both parents as sources of security and love and wish to continue both relationships").

n43 *Id.* at 498, 432 A.2d at 71 (defining "fit" as "physically and psychologically capable").

n44 *Id.*, 432 A.2d at 71-72. The court stressed, however, that the parents need not have agreed upon joint custody. *See id.*

n45 *Id.*, 432 A.2d at 72. The potential for cooperation, the court stated, should be assessed outside the "emotional heat" of the divorce setting. An amicable relationship between the parents is preferable but not required, and the parents need only to be "able to isolate their personal conflicts from their roles as parents" and to spare their children "whatever resentments and rancor [they] may harbor." *Id.*

n46 *See id.*

n47 *See id.*; *cf. Braiman*, 44 N.Y.2d at 591, 378 N.E.2d at 1022, 407 N.Y.S.2d at 452 (authorizing joint custody without indicating factors to be considered in selecting custody award).

n48 *See Beck*, 86 N.J. at 498, 432 A.2d at 71-72.

n49 *See* U.S. CONST. amend XIV, § 1.

n50 *See infra* notes 51-115 and accompanying text.

n51 *See* *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

n52 410 U.S. 113 (1973).

n53 *Id.* at 153.

n54 *Id.*

n55 The Court adopted a three-stage plan that sets the limits based on the shift in the balance of interests accompanying each stage of pregnancy. Under this plan, state interests in protecting health or life are not sufficiently compelling to justify state interference during the first trimester of the pregnancy. After the approximate end of the first trimester, the state has sufficient interests to justify regulations that are reasonably

related to the protection of the mother's health, and once the fetus becomes "viable," or capable of surviving outside of the womb, the state's interest in protecting potential life allows the state to prohibit abortion except where necessary to protect the mother. *Id.* at 164.

n56 381 U.S. 479 (1965). In *Griswold*, the Supreme Court held that the State of Connecticut could not constitutionally prohibit a married couple from using contraceptives in the privacy of their bedroom. The Court recognized that the marital relationship is surrounded by a zone of privacy, which was grounded by the majority in the "penumbras" cast by several Bill of Rights guarantees, and by the concurrence in the ninth amendment. *See id.* at 484, 487. However, the Court did not explain whether this right of privacy extended to give the Griswolds a substantive right to choose not to procreate and to implement that decision by using contraceptives. A more narrow construction of the Court's holding would find that although individuals possess no affirmative right to use contraceptives, the state cannot prohibit the use of contraceptives by married couples because its enforcement measures would violate the "privacy" surrounding the marital relationship. *Id.* at 485-86 (speaking in terms of "the notions of privacy surrounding the marriage relationship"). If the more narrow construction is correct, it suggests that although a state cannot prohibit the *use* of contraceptives by married couples, it legitimately can impose a ban on their manufacture, distribution and sale. Thus *Griswold* left open the question of whether the right of privacy includes a substantive right to make choices related to procreation and to implement those choices without undue interference from the state.

n57 405 U.S. 438 (1972). In this case, the Supreme Court invalidated a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons for the purpose of preventing conception. (Contraceptives could be distributed to unmarried persons for the purpose of preventing disease.) The Court recast the right described in *Griswold* in terms of an individual right of privacy, but did not identify the substantive elements of such a right. The Court explained:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If 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.

Id. at 453 (emphasis in original). The last sentence quoted strongly suggests that the Court recognized a constitutional right of privacy that provides substantive protection to an individual's right to decide whether to procreate. However, the Court refused to phrase its holding in such broad terms, and it invalidated the particular ban on the distribution of contraceptives in the case before it on the fact that the ban drew an arbitrary distinction between married and unmarried persons that was impermissible under the equal protection clause. *Id.* at 453-54.

n58 *See* 410 U.S. at 163; *see also* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976). In *Danforth*, the Supreme Court reinforced the individual character of a woman's privacy right to decide whether to terminate her pregnancy by invalidating state-imposed requirements of spousal and parental consent for abortions obtained during the first twelve weeks of pregnancy. The Court held that the state cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." *Id.* at 69 (quoting district court dissent).

n59 410 U.S. at 163-64.

n60 431 U.S. 678 (1977).

n61 *See supra* notes 56-57.

n62 431 U.S. at 685. In reaching this conclusion, the Court rejected the narrow readings of *Griswold* and *Eisenstadt* that were urged upon it by the appellants. Under the proffered readings of the cases, *Griswold* would stand only for the narrow proposition that the Constitution protects the rights of married persons to use, not to procure, contraceptives; *Eisenstadt* would be seen to have extended *Griswold* only to prevent the state from denying rights to unmarried persons that were guaranteed to married persons. Instead, the *Carey* Court held, *Griswold* and the cases following it stand for the principle that "individual decisions in matters of childbearing" are protected by the Constitution from unwarranted governmental intrusion. *Id.* at 686-87.

n63 *Id.* at 681-82. The statute at issue made it a crime for anyone to sell or distribute contraceptives to minors under the age of 16, for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16, and for anyone, including licensed pharmacists, to advertise or display contraceptives. *Id.* (citing N.Y. EDUC. LAW § 6811(8) (McKinney 1972)).

n64 *Id.* at 687-88.

n65 The state had argued that by limiting the right to sell nonprescription contraceptives to pharmacists the law would prevent young people from selling contraceptives, serve as a quality control device and facilitate enforcement of the other provisions of the statute. *Id.* at 690. The Court did not believe that the statute was really intended to serve either of the first two asserted goals, and further concluded that "the first [asserted goal] can hardly justify the statute's incursion into constitutionally protected rights." *Id.* Regarding the third goal asserted by the state, that of enforcing other provisions of the statute, the Court commented that "[a]s to ease of enforcement, the prospect of additional administrative inconveniences has not been thought to justify invasion of fundamental constitutional rights." *Id.* at 691.

To invalidate the statutory prohibition against distribution of contraceptives to minors, the Court relied on its earlier decision in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), and concluded that since the state could not impose a blanket prohibition on a minor's choice to terminate her pregnancy during the first 12 weeks, nor require parental consent before the minor exercised that choice, "the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed." *Id.* at 694. The Court pointed out that the state's interests in protecting both the minor and potential life were "clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive." *Id.* The Court also rejected the argument that the State could discourage minors' sexual activity "by increasing the hazards attendant upon it." *Id.*

The *Carey* Court also summarily affirmed the district court's holding that the statutory prohibition against advertising contraceptives was unconstitutional, based on the principle that a state "may not 'completely suppress the dissemination of concededly truthful information about entirely lawful activity,' even when that information could be categorized as 'commercial speech'." *Id.* at 700 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976)).

n66 262 U.S. 390, 399 (1922).

n67 316 U.S. 535, 541 (1941). The Court struck down the statute's provision that subjected prisoners with repeated convictions for only those felonies involving "moral turpitude" to a risk of sterilization. *Id.* at 536-37. The Court stated that no justification for the classification had been provided by the state, and found rather that

the statute treated differently those who had committed "intrinsically the same quality of offense," and in so doing had made "as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.* at 541.

n68 The Court did not reach the question of whether certain procedural safeguards were required before a prisoner could be sterilized. *See id.* at 538.

n69 *See id.* at 541.

n70 *Loving v. Virginia*, 388 U.S. 1 (1967) (involving right to marry); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (involving classification by race).

n71 316 U.S. at 541.

n72 *Id.* at 536 (stating that statute at issue implicated "a right which is basic to the perpetuation of a race").

n73 425 U.S. 901 (1976)(mem.), *aff'g*, 403 F. Supp. 1199 (E.D. Va. 1975).

n74 *Doe v. Commonwealth's Attorney of Richmond*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976).

n75 *Id.* at 1200-01.

n76 *See id.* at 1202.

n77 *See id.* The district court quoted heavily from the statements of Justice Harlan to the effect that adultery, homosexuality and extramarital sexual activity are "*intimacies which the law has always forbidden and which can have no claim to social protection.* . . . Thus, [he] would not suggest that *adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.*" 403 F. Supp. at 1201-02 (emphasis in original)(quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961)(Harlan, J., dissenting)).

n78 *See supra* text accompanying notes 60-64.

n79 *See Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

n80 *See Roe v. Wade*, 410 U.S. 113, 120 (1973).

n81 *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 681-82 (1977).

n82 *Id.* at 685.

n83 262 U.S. 390, 403 (1923).

n84 *Id.* at 399.

n85 268 U.S. 510, 534 (1925).

n86 *Id.* at 534-35.

n87 321 U.S. 158, 166 (1943). The *Prince* Court upheld a state statute limiting child labor, despite claims that the state could not exercise control in the area because of the rights of both parental authority and religious freedom. *See id.* at 163.

n88 *Id.* at 166 (citations omitted).

n89 406 U.S. 205 (1972).

n90 *Id.* at 207.

n91 *See id.* at 233.

n92 405 U.S. 645 (1972).

n93 *Id.* at 651 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941); *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923)).

n94 *Id.* at 658. The Court held that the father was entitled to a hearing on the issue of his fitness as a parent. *Id.*

n95 *See id.*

n96 455 U.S. 745, 769 (1982). The state had been employing procedures under which a showing by a "fair preponderance of the evidence" that a child had been permanently neglected was sufficient to terminate parental rights. *Id.* at 747.

n97 *Id.* at 753.

n98 *Id.* at 756.

n99 For example, the *Santosky* Court simply assumed that upon a proper finding of "permanent neglect," which required the state to prove that the parents had failed "substantially and continuously or repeatedly to

maintain contact with or plan for the future of the child although physically and financially able to do so," the state had a sufficiently compelling interest to justify terminating the parent's rights in his child. *See id.* at 748 (quoting N.Y. FAM. CT. ACT § 614.1(d) (McKinney 1983)).

n100 408 U.S. 564 (1971).

n101 408 U.S. 593 (1971).

n102 *See Roth*, 408 U.S. at 569 ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."); *Perry*, 408 U.S. at 599 (stating that "the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract").

n103 A comparison of the Supreme Court's holdings in *Roth* and *Perry* provides an excellent illustration of this point. In *Roth*, the plaintiff had been granted a teaching contract at a state university for one year only with no provision for contract renewal. When his contract was not renewed, the plaintiff claimed that the failure of university officials to give him notice of their reasons for not rehiring him and an opportunity for a hearing violated his right to procedural due process. 408 U.S. at 566. The Court held that the right to procedural due process attached only to a threatened deprivation of a liberty or property interest, and found that under the facts of the case, plaintiff had neither a liberty nor a property interest in being rehired. *See id.* at 569. In rejecting the claim of a liberty interest in continuing employment, the Court stated that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.* at 575.

In rejecting the claimed property interest in being rehired, the Court noted that a person does not acquire a property interest merely from an "abstract concern" that he be rehired, but rather must have an expectation of employment grounded in "existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577-78. Accordingly, the Court rejected the plaintiff's demand for notice and a hearing. *See id.* at 578.

In *Perry*, however, the plaintiff had been employed at the same college for several years, and alleged that he had earned tenure under a de facto tenure program in effect at the college. The Court found that, although a "mere subjective 'expectancy'" was insufficient to invoke the protection of procedural due process, institutional policies and practices that created an understanding of continued employment could create a property interest that would trigger procedural due process protection. 408 U.S. at 602-03.

n104 The linguistic analysis is reinforced by a more straightforward argument: the protection provided by procedural due process rights is meaningful only if there is some underlying substantive right to be protected. For example, in a public employment case, a full panoply of procedural rights would be meaningless if the employer could discharge a tenured employee for any reason at all, such as for combing his hair on the left side. In the parental right context, the fact that in *Stanley* the Court accorded the father a right to a hearing prior to adoption and the fact that in *Santosky* it recognized a "clear and convincing evidence" test in a parental rights termination context, would both be rendered meaningless if the state was wholly free to establish the governing substantive standard. The cases would confer no real protection if parental rights in either instance could be

terminated, after a full hearing with a clear and convincing evidence test as to whether the parents "always displayed perfect sensitivity to their child's developmental needs." Since few, if any, parents could satisfy such a standard, procedural parental rights would provide no protection at all.

n105 *See supra* text accompanying notes 51-72 (discussing *Roe* and other cases involving right to procreate).

n106 *Stanley v. Illinois*, 405 U.S. 645, 652, 651 (1972)(emphasis added). It should be noted that requiring the state to show a "powerful" interest comes very close to requiring it to show a "compelling" one, which it must do to justify deprivation of a fundamental right. *See infra* note 116.

n107 431 U.S. 816 (1976).

n108 *Id.* at 845.

n109 *See id.* at 842 (quoting *Organization of Foster Families v. Dumpson*, 418 F. Supp. 277, 279 (S.D.N.Y. 1976)).

n110 *Id.* at 846.

n111 *Id.* at 846-47.

n112 *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

n113 *Id.*

n114 *See id.* at 753. It should be noted that *Santosky* did not deal with the initial deprivation of custody of the child -- the children already had been removed from the parents' home temporarily -- but with the state's right to deprive the parent of custody permanently. *See id.* at 751; *cf. Stanley v. Illinois*, 405 U.S. 645, 646-47 (1972)(involving state proceedings depriving unwed father of custody when children lived with father).

n115 For example, it seems very unlikely the Court would hold that a state could deprive a parent of custody, after providing notice and a hearing, on the basis of a showing by clear and convincing proof that the parent had not "always displayed perfect sensitivity to his child's developmental needs." Such a standard for state intervention would be so broad that the extensive procedural protections granted to parents would be rendered meaningless, and such a holding would do violence to, or at least be very difficult to reconcile with, past statements of the Court.

n116 *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977)(requiring compelling state interest to justify significant burdens on right to obtain contraceptives); *Roe v. Wade*, 410 U.S. 113, 154 (1973)(requiring that state show compelling interests to justify interference with woman's right to abortion).

n117 The Court repeatedly has exercised its right to question with a strict standard of scrutiny a state's assertion that certain interests are sufficiently compelling to justify interference with individuals' fundamental rights. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (in reviewing statute placing burdens upon individuals' right to marry, Court found proffered state interests "legitimate and substantial" but not sufficient to justify broad impingement on individual rights); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 690-91 (1977) (in reviewing statute placing restrictions on distribution of contraceptives, Court found statute not substantially related to underlying state interests); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (Court rejected statute burdening abortion rights because statute not drawn narrowly enough to protect only compelling state interests).

n118 This proposed presumption reflects the point made earlier in this Article that fundamental rights such as the parental right to custody require both substantive and procedural due process protection. *See supra* part IV. In order to provide adequate substantive due process protection it may be argued that the state must show actual detriment to the child in order to refuse joint custody rather than merely denying joint custody because it is not in the best interests of the child.

In order to provide adequate procedural due process protection of each parent's fundamental right to custody it is suggested that the court must employ a "clear and convincing evidence" standard of proof rather than merely a "fair preponderance of the evidence" standard of proof. The Supreme Court's decision in *Santosky*, although not directly on point, tends to support this argument. *See supra* text accompanying notes 96-98 (discussing *Santosky*). In *Santosky*, the Court recognized that natural parents have a "fundamental liberty interest in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In finding that the state must prove its allegations by clear and convincing evidence in order to interfere with this interest, the Court employed a three-part test that looked at the private interests involved, the risk of error inherent in the challenged procedure, and the state's interest in maintaining that procedure. *See id.* at 754 (citing *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 27-31 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Several of the Court's findings regarding these three factors properly could be applied in a custody proceeding between two fit parents.

First, the *Santosky* Court determined that the private interest affected weighed heavily against the use of the preponderance of the evidence standard and in favor of the clear and convincing evidence standard because "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760 (footnote omitted). Although a deprivation of custody, *per se*, does not terminate a parent-child relationship, as the state action in *Santosky* would have, there is substantial evidence that the strains often imposed upon the noncustodial parent-child relationship can seriously weaken, and in some cases eventually even destroy the relationship. *See supra* note 10. Because the potential for destruction of a parent-child relationship is inherent in a deprivation of custody, parents and the child have a vital interest in accurate factfinding in a custody hearing just as they have when permanent termination of parental rights is at stake.

Second, regarding the risk of error involved in the use of a "fair preponderance" standard, the *Santosky* Court pointed out that the fact that permanent neglect proceedings require a judge to apply imprecise standards and the fact that the state usually will be able to assemble a case that will overpower the parents' defense present a significant risk of erroneous termination of parental rights. *Id.* at 762-64. In the case of custody proceedings, it is arguable that the second consideration will not be present, because the state is usually acting only as a neutral arbiter and not as a prosecutor as well. However, the parents may face an equally serious problem -- a large arsenal of allegations and evidence presented by one parent in an effort to prove the unfitness of the other parent to exercise custody, that for the parents may be difficult to disprove. In addition, custody proceedings between parents, similarly to permanent neglect proceedings, "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." *See id.* at 762. These factors create a risk of erroneous deprivations of custody that is just as significant as the risk involved in terminations of parental

rights and that would be mitigated if a clear and convincing standard of evidence were used.

The third factor that the *Santosky* Court discussed was the state's interest in its present procedures. The Court found that at least one of the state's interests -- "a *parens patriae* interest in preserving and promoting the welfare of the child" -- was consistent with use of a stricter standard of proof. *Id.* at 766-67. In addition the Court found that the stricter standard would not burden the state's interests in administrative ease and in reasonable costs. *Id.* at 768.

The Court's findings in *Santosky* apply equally to custody proceedings between parents. As the Court there pointed out, "[t]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Id.* at 766-67 (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)). Nor would imposition of a clear and convincing evidence standard of proof in custody cases be any more likely to impose substantial fiscal or administrative burdens on the state than it would in parental rights termination proceedings.

n119 *See, e.g., Matter of Adoption of J.S.R.*, 374 A.2d 860, 863 (D.C. 1977) ("We have recognized that [the best interest] standard does not contain precise meaning. . . . [It] requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives . . ."); *In Re Adoption of Tachick*, 60 Wis. 2d 540, 543, 210 N.W.2d 865, 867 (1973) (pointing out that neither statutory law nor case law of state provides guidelines for application of "best interests" standard).

n120 One critic of the standard has remarked that "[a]lthough the best interests standard theoretically embodies the court's paramount concern for the welfare of the child, some authorities consider it merely an unsuccessful attempt to optimize the interests of both the children and the parents." Comment, *supra* note 6, at 1093-94. According to this argument, the best interest standard merely provides courts an excuse to apply traditional "societal preferences," which favor the mother as custodian of children of tender years and favor the father as custodian of children of educable years. *See id.* at 1091-92.

n121 The case of *Painter v. Bannister*, 258 Iowa 1389, 140 N.W.2d 152 (1966), provides substantial insight into the factors courts consider relevant and important in determining the best interests of the child. The case involved a custody dispute between the natural father and maternal grandparents of a seven-year-old boy. The father had placed the child with the grandparents two years earlier, following the death of the mother, and when he sought return of the child, the grandparents refused to relinquish custody. After concluding that none of the parties was unfit and that the very different lifestyles of the father and grandparents both represented normal settings for the child, the court engaged in a detailed look at the benefits offered by each living situation. The court noted that the grandparents' home provided security and stability, whereas the father's provided challenge and intellectual stimulation, and it elected to grant custody to the grandparents because of its belief that security was more important than intellectual stimulation in a child's development. *Id.* at 1396-97, 140 N.W.2d at 156.

Other courts have attempted to identify what factors properly should be considered in determining a child's best interest. In *In re Adoption of Tachick*, 60 Wis. 2d 540, 210 N.W.2d 865 (1973), the court stated that

the sole issue is whether [prospective parents] can provide food, shelter, clothing, love and affection, education and training which will aid the child to develop to his full potential as a human being. All facts and circumstances relating to that goal are factors to be considered and weighed separately and in conjunction with other factors. The weight to be given to a factor differs from case to case because of its interrelation; a factor may be almost controlling in a given case and rather insignificant in another situation.

Id. at 548, 210 N.W.2d at 869. *But cf. Bennett v. Jeffreys*, 40 N.Y.2d 543, 549, 356 N.E.2d 277, 283, 387 N.Y.S.2d 821, 826 (1976) ("The child's 'best interest' is not controlled by whether the natural parent or the

nonparent would make a 'better' parent, or by whether the parent or the nonparent would afford the child a 'better' background or superior creature comforts. . . . Instead, in ascertaining the child's best interest, the court is guided by principles which reflect 'considered social judgments in this society respecting the family and parenthood.'").

n122 374 A.2d 860 (D.C. 1977).

n123 *Id.* at 863.

n124 Some states by statute apply the harm or detriment standard in custody disputes between parents and nonparents, and refuse to permit an award of custody to a nonparent unless the court finds that an award of parental custody would be detrimental to the child. *See, e.g.*, CAL. CIV. CODE § 4600(c) (West Supp. 1985); LA. CIV. CODE ANN. art. 146B (West Supp. 1984).

n125 *See, e.g.*, *Massey v. Massey*, 410 So.2d 422, 424 (Ala. Civ. App. 1981) (stating that in order to deprive parent of custody, evidence must be clear and convincing that parental custody would be against best interests of child); *Pendergrass v. Watkins*, 383 So.2d 851, 854 (Ala. Civ. App. 1980) (holding that in parent-nonparent dispute, parent has primary right to custody because his right to maintain family integrity is fundamental right protected by due process standards of Constitution); *Gazaway v. Brackett*, 241 Ga. 127, 129, 244 S.E.2d 238, 240 (1978) (evidence must be clear and convincing in order to support award of custody to nonparent over parent); *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 451, 228 S.E.2d 839, 842 (1976), *cert. denied*, 432 U.S. 905 (1977) (stating that "[i]n a custody dispute between a parent and a nonparent, the best interests test is not used, and the parent must be awarded custody unless he has lost his statutory parental prerogatives or is unfit"); *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971) (similarly recognizing natural parent's right to custody as fundamental).

n126 *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971).

Courts in other jurisdictions have stated the parental preference doctrine in similar terms. *See, e.g.*, *B.G. v. San Bernadino County Welfare Dep't*, 11 Cal. 3d 679, 693, 523 P.2d 244, 254, 114 Cal. Rptr. 444, 454 (1974) ("California courts have long adhered to the principle that a court must award physical custody of a minor to a parent, if fit to exercise custody, as against a stranger."); *Ross v Hoffman*, 280 Md. 172, 178, 372 A.2d 582, 586 (1977) ("[T]he best interest of the child standard is always determinative in child custody disputes. When the dispute is between a biological parent and a third party, it is presumed that the child's best interest is subserved by custody of the parent.").

n127 *See, e.g.*, *LeRoy v. Odgers*, 18 Ariz. App. 499, 502, 503 P.2d 975, 976-77 (1972) (requiring finding of parental unfitness before parent can be deprived of custody in favor of nonparent); *Forman v. Forman*, 315 So. 2d 9, 10 (Fla. Dist. Ct. App. 1975) (same); *Jones v. Jones*, 577 S.W.2d 43, 44 (Ky. Ct. App. 1979) (same); *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 451, 228 S.E.2d 839, 842 (1976) (requiring that custody be awarded to parent over nonparent unless parent has lost statutory parental prerogatives or is unfit); *Ross v. Hoffman*, 280 Md. 172, 178-79, 372 A.2d 582, 587 (1977) (requiring that court find either parental unfitness or exceptional circumstances which would make parental custody detrimental to child's best interest before it can consider award of custody to nonparent); *Downing v. Downing*, 537 S.W.2d 840, 843 (Mo. App. 1976) (providing that parent's right to custody should not be denied unless it is shown that parent is unfit,

incompetent, or unable to care for child, or that welfare of child manifestly calls for different disposition under circumstances); *Cyphers v. Cyphers*, 304 S.E.2d 866, 868 (W. Va. 1983) (holding that courts will recognize and enforce natural parent's right to custody unless they find that parent is unfit, has waived right to custody, or has permanently transferred, relinquished or surrendered custody of child); *Summers v. Summers*, 33 Wis. 2d 22, 26, 146 N.W.2d 428, 430 (1966) (requiring finding that parents are either unfit or unable adequately to care for child before they can be deprived of custody).

n128 40 N.Y.2d 543, 544, 356 N.E.2d 277, 280, 387 N.Y.S.2d 821, 823 (1976). The New York Court of Appeals earlier had explained its use of the parental preference doctrine as follows:

[T]he issue is not . . . whether one choice of custody or another is better for the child, or, put another way, whether the [foster parents] would raise the child better than would the unwed mother, or which cultural or family background would be best for the child. . . . Nor is the issue whether natural parents or adoptive parents make "better" parents, whatever that may mean. The power of the State, let alone its courts, is much narrower. Child and parent are entitled to be together, unless compelling reason stemming from dire circumstances or gross misconduct forbid it in the paramount interest of the child, or there is abandonment or surrender by the parent.

Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 198, 274 N.E.2d 431, 432, 324 N.Y.S.2d 937, 939 (1971); *see also* *Ross v. Hoffman*, 280 Md. 172, 179, 372 A.2d 582, 287 (1977) (stating that only upon finding of extraordinary circumstances will court consider whether grant of custody to natural parent is in child's best interests).

n129 40 N.Y.2d at 548, 356 N.E.2d at 283, 387 N.Y.S.2d at 826.

n130 *See* CAL. CIV. CODE § 4600(c) (West Supp. 1985); *see also* *B.G. v. San Bernadino County Welfare Dep't*, 11 Cal. 3d 679, 699, 523 P.2d 244, 258, 114 Cal. Rptr. 444, 458 (1974) (construing § 4600(c)); *cf.* LA. CIV. CODE ANN. art. 146B (West Supp. 1984) (requiring finding of harm to child before custody granted to nonparent).

n131 431 U.S. 816 (1977).

n132 *Id.* at 846 (footnote omitted).