Origins of the Substantive Right of Family Autonomy

The family unit has traditionally been regarded as the cornerstone of society. In recognition of this, the right of family autonomy has been said to be constitutionally protected from incursion by the state.[1] This protection, however, has been balanced against the state's power to intervene as *parens patriae* into the familial relationship.[2] Such intervention may cause parents to lose custody of their children or, in more extreme circumstances, the termination of parental rights altogether.

Some commentators have taken the position that many termination statutes are vague, allowing too broad a sweep into protected areas without due deference to the constitutional rights of parents and families.[3] This criticism may be especially true in light of the modern judicial trend toward extending greater deference to the best interests of the child while shifting emphasis away from the rights of the parents.[4] Situations concerning the placement of children by parents into foster homes, placements which are supposedly voluntary but which are in fact "coerced by the threat of neglect proceedings," are most disturbing.[5] In the majority of these cases, the families are poor and uneducated and may not fully realize the extent of their rights.[6] A judicial decision which allowed the removal of a child from his natural family because of an "unkempt" house[7] is just one example of the effect these vague statutes can have on the family unit in spite of the constitutional right of a parent to his child or of the integrity of the family unit itself.

In light of this volatile setting, a comment that explores the source of the right of family autonomy is in order. Before the right is balanced away in the name of the best interests of the child, the nature of the right should be fully understood. In order to attain this understanding, the origin of the right must be bared. It is one thing to say that the family possesses rights deemed "essential," which are "basic civil rights of man;"[8] it is another

1. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1943); Poe v. Ullman, 367 U.S. 497, 551 (1960) (Harlan, J., dissenting).

2. 321 U.S. at 166.

3. *See* Levy, *The Rights of Parents*, 1976 B.Y.L. REV. 693 (1976); Comment, *The State vs. The Family: Does Intervention Really Spare the Child?*, 28 MERCER L. REV. 547 (1977).

4. *See* J. GOLDSTEIN *et.al.*, BEYOND THE BEST INTEREST OF THE CHILD (1973).

5. Smith v. Organization of Foster Families, 431 U.S. 816, 834 (1976).

6. *Id.*

7. *See, e.g.*, Mnookin, *Child-Custody Adjudiciation: Judicial Functions In The Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 269 n.194 (Summer, 1975).

8. Stanley v. Illinois, 405 U.S. 645, 651 (1972), *quoting from* Meyer v. Nebraska, 262 U.S. 390, 399 (1923), *and* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

to ask why we possess these rights and from where they come. From what constitutional sources are these rights derived? It is the purpose of this comment to trace the origins of the right of family autonomy and to find the circumstances under which the right will be deemed protected.

For the welfare of his Ideal Commonwealth, Plato devised the following law:

> That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place as they should be.[9]

Why are not these the only substantive rights to which families are entitled? A common response to this question is that the right to have a family is a God-given right which no mortal, except in the most extreme circumstances, has the right to deny another. In essence, this argument is based on the old notion of natural law. Indeed, natural law has been recognized as a major source from which parental and family rights are derived.[10] Of course, the more modern label for natural law is substantive due process. The Equal Protection Clause of the Fourteenth Amendment is also of major importance in the recognition of these rights.[11]

As early as 1942, the U.S. Supreme Court in *Skinner v. Oklahoma*[12] held that procreation is a basic liberty. In *Skinner*, the Court struck down, on equal protection grounds, an Oklahoma statute[13] that provided for the judicially ordered sterilization of three-time felony offenders when the felony was one that involved moral turpitude. Justice Douglas, in writing for the majority, stated that this legislation "involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[14] The holding in *Skinner* was the first hint from the Court that the right to decide whether to have a child resides with the individual rather than the state.

In *Griswold v. Connecticut*,[15] a physician and the Executive Director of the Planned Parenthood League of Connecticut were convicted as accesso-

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9. 262 U.S. at 401.

10. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

11. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967).

12. 316 U.S. 535 (1942).

13. Oklahoma Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57, §§171-195 (West 1969).

14. 316 U.S. at 541.

15. 381 U.S. 479 (1965). The conviction was pursuant to CONN. GEN. STAT. ANN. §§53-32 and 54-196 (West 1958) (repealed, Supp. 1979).

ries to the crime of using contraceptives. They had given medical advice to and prescribed contraceptives for married couples. In *Griswold,* the Court elaborated on the right to decide whether to conceive. The Court, relying on a substantive due process argument, held that there is a veil of marital privacy embraced within the concept of marriage which forbids state interference in the decision of marital partners whether to conceive. The Court held that the right of privacy precluded legislation from intruding into the marital bedroom. The origin of this right was found to derive from the right of privacy, which in turn has its origin in the Bill of Rights.[16] Thus, the U.S. Supreme Court has recognized that the right to decide whether a married couple will produce a family lies with that couple rather than with the state. Further, the right to make unburdened decisions in matters relating to the family does not arise only after the family exists, but arises earlier upon the initial decision whether to start a family.

While the Court in *Griswold* concerned itself with the rights of married persons and marital privacy, the right of autonomy in the realm of making decisions relating to conception was extended to unmarried individuals in *Eisenstadt v. Baird.*[17] In *Eisenstadt,* the Supreme Court overturned a conviction for an offense which included distribution of contraceptives to an unmarried woman. The Court, in finding a violation of the Equal Protection Clause, stated: "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . 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."[18]

The idea of a right of the individual to make unfettered decisions independent of any marital relation was developed further in *Roe v. Wade,*[19] in which the Court upheld the right of the individual to decide, free of intrusion by the state, whether to terminate pregnancy during the first trimester. This right too was found to be protected by the individual's right of privacy. The "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[20]

In light of these decisions, another question concerning the origin of the right of family autonomy is raised—one which the Court has not specifically addressed. That question is whether the right of family autonomy

16. The Amendments referred to in the opinion as having "penumbras" are the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments of the U.S. Constitution.

17. 405 U.S. 438 (1972).

18. *Id.* at 453 (emphasis in original).

19. 410 U.S. 113 (1973).

20. *Id.* at 153.

derives solely from the individual through his right of personal privacy or whether the right derives through the individual in his or her role in the family unit. Since the Court in *Griswold* spoke in terms of marital privacy, that case could be viewed as authority for the proposition that the right of family autonomy derives from a marital or family setting. However, because *Eisenstadt* and *Wade* extended the right to unmarried individuals as well, it seems implicit that the origin of the right does not necessarily flow from the marital setting.[21] In fact, in the case of *Carey v. Population Services International*[22] the right to choose whether to have children was extended even to unmarried minors. In that plurality opinion, Justice Brennan said, "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of child bearing from unjustified intrusion by the State."[23] The Court relied heavily on its earlier decision in *Planned Parenthood of Central Missouri v. Danforth.*[24] In that decision, the Court held unconstitutional a Missouri statute[25] that required prior written consent of a woman's husband before she was entitled to an abortion, unless the abortion was necessary to preserve her life.

Arguments by the state to uphold the statute in *Danforth* centered on the notion that, since in marriage the consent of both parties is generally needed to start a family, changes in the family structure that were set in motion by this joint consent should be terminated only by joint consent. The argument was derived from the idea that when a couple is married, the right to make decisions concerning the make-up of the family rests on them as a unit, and thus the statute is merely a reflection of the state's "perception of marriage as an institution."[26] The Court disagreed, reasoning that the effect of the statute would be to give the husband a right to veto the abortion. The Court stated that it "cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right."[27] The Court said further that "inasmuch as it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[28] Thus, the Court reemphasized the fact that the right of autonomy in making decisions relating to the family does not necessarily

21. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§15-21, at 987 (1978).
22. 431 U.S. 678 (1977).
23. *Id.* at 687.
24. 428 U.S. 52 (1976).
25. The Missouri statute in question is set out in full in the appendix to the decision. 428 U.S. at 84-89.
26. 428 U.S. at 68, *quoting from* Brief for Appellee Danforth.
27. *Id.* at 70.
28. *Id.* at 71.

arise from the marital setting. The Court instead chose to view each partner individually and to weigh each one's rights, thereby deciding whose rights were most compelling in the situation. Necessarily, when the Court said that the state could not interfere in any way in this decision, the protection was not based on a right derived from marriage but on one drawn from the right of privacy of the individual.[29]

The right of the individual to make totally unfettered decisions relating to family life, however, has not been absolute. At one time it was suggested that the right of the individual, taken to its logical conclusion, would possibly entitle a wholly self-defined family to heightened protection from state interference, based entirely on the individual's right of personal privacy in decisions affecting family life.[30] Arguably, the Court had taken a small step in that direction with its decision in *United States Department of Agriculture v. Moreno,*[31] in which there was at least an indication that the Court would look beyond the proffered legislative ends of a statute and require a legitimate, articulated governmental goal before legislation that tended to discriminate against households comprised of unrelated individuals, but not adversely affecting households comprised of related individuals, would be upheld.[32]

In *Village of Belle Terre v. Boraas,*[33] however, the Court seemed to close the door to constitutional protection for the self-defined family, at least in its most extreme form. Here, appellees attacked the constitutionality of a zoning ordinance that restricted land use to single family units, with the term "family" being defined as those related by blood, adoption, or marriage. For purposes of the statute, a family also included "a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit . . . ."[34] Appellees included three unrelated college students and the owners of the house in which the students were living. The Court found no fundamental right involved and held that the ordinance did not deny appellees equal protection of the law. Thus, the case appears to limit the logical progression of *Eisenstadt* and *Wade,* and to stand for the proposition that merely because the individual possesses a right of personal autonomy in making decisions dealing with the family, it does not necessarily follow that this protection extends to relationships which do

29. In *Danforth,* the Court held also, on much the same grounds, that the statute was unconstitutional when it required an unmarried woman, if under 18, to obtain her parent's consent before being entitled to an abortion. This too points to the fact that the origin of the right does not flow only from the marital setting.

30. *See* Soifer, *Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary,* 7 CONN. L. REV. 1, 23 (1974).

31. 413 U.S. 528 (1973).

32. *See* Soifer, *Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary,* 7 CONN. L. REV. 1, 20 (1974).

33. 416 U.S. 1 (1974).

34. *Id.* at 2. Pertinent portions of the village zoning ordinance are discussed at 416 U.S. at 2-3.

not lie within the traditional confines of the family group. Therefore, although the right of family autonomy is traced to individual privacy, the presence or absence of a traditional family setting in turn colors the instances in which the right of individual privacy[35] will be deemed to arise.[36]

Another case in which the Court seems to suggest that the presence or absence of a traditional family setting affects the circumstances under which the right of individual autonomy will arise is *Doe v. Commonwealth's Attorney*.[37] The Court in *Doe* dealt with the right of homosexuals to have sexual relations "consensually and in private,"[38] free of governmental intrusion. The Court upheld, without opinion, the district court's decision that refused to find that plaintiffs' actions were entitled to any constitutional protections. The district court said that the earlier U.S. Supreme Court decisions had recognized protected personal privacy in the marital or family setting, which of course did not cover plantiffs' actions. Here too, as the dissenting judge argued,[39] the majority seemed to draw away from the idea, born in *Eisenstadt*, of pure individual autonomy. Thus, even though the protection of individual privacy would logically seem to extend to cover this case, the case can be reconciled with *Eisenstadt* and its progeny because elements of the traditional family setting are not present, elements which, as in *Boraas*, were necessary in order for heightened protection to attach.[40]

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35. This statement, of course, is not intended to convey the idea that the right of individual autonomy can never arise unless exercised in the family setting. The statement merely stands for the proposition that in the context discussed in this comment, the presence or absence of the traditional family setting has determined whether the right of individual autonomy would arise.

36. While the right of a woman to decide whether to terminate her pregnancy during the first trimester is an incident of the right of individual autonomy, at first blush this right seems to have little in common with the traditional family setting. This is especially true when the woman is single and the pregnancy to be aborted is not the product of a steady, husband-wife relationship. However, the more general right to decide whether to bear a child is an essential incident of marriage, a traditional bond. Thus, it may be argued that the right of the unmarried individual to decide whether to bear a child has been protected because this type of decision is closely akin to the decision made by marital partners. Therefore, while the specific right to decide to abort pregnancy may not be a traditional right, the more general right to decide whether to bear a child is traditional and is the right which has been protected.

37. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

38. 403 F. Supp. at 1200 (Italics in original.)

39. *Id.* at 1203 (Merhige, J., dissenting).

40. *See also* Zablocki v. Redhail, 434 U.S. 374 (1978), in which the Court, in an opinion written by Justice Marshall, used a "critical examination" scrutiny to hold that marriage in its traditional form is a fundamental right. Justices Stewart, Powell, and Stevens, each writing a separate opinion, concurred. All three of the justices, however, indicated that while they agreed that the legislation was unconstitutional, they were concerned that the level of scrutiny used in the majority opinion was a bit too high. They expressed fears that this level of scrutiny could possibly threaten traditional state regulation of marriage such as proscriptions against incest, bigamy, and homosexuality. Justice Marshall in the majority opinion, however, expressly limited the holding of the case and its use of heightened scrutiny to

In *Moore v. City of East Cleveland,*[41] the constitutionality of a zoning ordinance much like the one in *Boraas* was attacked. Here, however, the ordinance made criminal the occupancy of a dwelling by certain members of a family even if related by blood.[42] A grandmother was sentenced to five days in jail and assessed a twenty-five dollar fine because her grandson lived in her house in contravention of the ordinance. The Court, in a plurality opinion, held that the ordinance was constitutionally defective because it denied the grandmother substantive due process. By its action, the Court stretched the right of family autonomy beyond the nuclear family to the extended family. It expressly distinguished *Boraas,* stating that

> [t]he ordinance there affected only *unrelated* individuals . . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . .
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> When a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate.[43] "This court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[44]

Thus, the element which sets this case apart from *Boraas* is a relation by blood, a traditional bond, rather than a "family" relation based purely on the choice of the individuals comprising the group, a nontraditional bond in this context.

From this spectrum of cases, then, it may be argued that the term "family" in the constitutional sense necessarily means a collective unit of individuals, with each individual exercising his or her right of personal autonomy. That group of individuals, however, will be protected as a unit only when certain relationships are present. The unit may consist of two adults of the opposite sex, married[45] or unmarried,[46] or else one or two

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statutory classifications that "interfere directly and substantially" with the right to marry. He said, "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." 434 U.S. at 386.

41. 431 U.S. 494 (1977).

42. The city zoning ordinance in question is set out in the Court's opinion. *Id.* at 496 n.1.

43. *Id.* at 498 (emphasis in original).

44. *Id.* at 498, 499, *quoting from* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (Italics in original).

45. *See, e.g.,* 434 U.S. 374 (1978); 388 U.S. 1 (1967); 381 U.S. 479 (1965).

46. The U.S. Supreme Court has never had occasion to explicitly recognize a constitutional right of family autonomy for unmarried couples of the opposite sex, even when that couple is living together under circumstances analogous to those of husband and wife. However, it may be argued that two people of the opposite sex, cohabitating for an extended period of time though unmarried, should be deemed to possess a sufficient number of the incidents of a "traditional family" to be included within the scope of that term. For the purposes of

parents, married or unmarried, and their children, both groups being related in a traditional or semitraditional manner. This right of autonomy then spills over to protect even the extended family,[47] since this type of family has traditionally been recognized and since its origin is traceable to the exercise of the fundamental right of procreation[48] rather than a purely associational bond.[49] Thus, while the right of family autonomy is nothing more than the collective rights of a group of related individuals, each one possessing a right of personal privacy, the traditional family has, in turn, affected the way in which the right of individual privacy has been defined. The right of family autonomy, then, is synonymous with the right of autonomy of the individual, but will be protected only if there is a marital, blood, or some other type of traditional bond present. The presence of one of these bonds gives rise to autonomy in the group.

The Supreme Court's decision in *Stanley v. Illinois*,[50] and its more recent decision in *Quilloin v. Walcott*,[51] when read in tandem, build on this analysis. In *Stanley*, the Court held that an Illinois statutory scheme[52] that irrebuttably presumed unwed fathers unfit to raise their children was violative of the Due Process Clause of the Fourteenth Amendment when it allowed a child to be declared a ward of the state with no prior hearing to determine the father's actual fitness as a parent. By denying the unwed father a hearing while extending it to all other parents whose rights to their children were challenged, the state also denied Stanley the equal protection of the law as guaranteed by the Fourteenth Amendment.[53] The importance of *Stanley*'s holding lies mainly in its impact on procedural rights in that the Court recognized that even unwed fathers are entitled to notice and a hearing before their parental rights may be terminated. The decision in *Stanley*, however, to an extent implicated subtantive rights of fathers as well.[54] The Court, when it held that the statute denied Stanley the equal

this comment, such a couple will be so included. *See, e.g.*, 410 U.S. 113 (1973); 405 U.S. 438 (1972).

47. 431 U.S. 494 (1977).

48. 316 U.S. 535 (1942).

49. 416 U.S. 1 (1974).

50. 405 U.S. 645 (1972).

51. 434 U.S. 246 (1978).

52. ILL. ANN. STAT. ch. 37, §701-14 (Smith-Hurd 1972) (revised, Supp. 1979). ILL. ANN. STAT. ch. 37, §702-1 (Smith-Hurd 1972); ILL. ANN. STAT. ch. 37, 702-4 (Smith-Hurd 1972); ILL. ANN. STAT. ch. 37, §702-5 (Smith-Hurd 1972).

53. While the Court formally relied on the equal protection clause, the case actually turned on the basis of due process considerations. For an enlightening insight into the Court's use of equal protection in this case, *see* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 25-26 (1972).

54. *Stanley* is one of a number of decisions the Supreme Court decided under the "irrebuttable presumption" analysis. Briefly, this analysis is that statutes which classify and yet deny certain individuals access to that class because of some common trait possessed by those individuals, are unconstitutional. The legislature cannot irrebuttably presume that these individuals are not members of the class on the basis of one common trait which may

protection of the law, recognized the fact that at least in this instance, Stanley possessed a substantive right to be treated in the same manner as all other parents.

While Stanley had lived with the mother and their children intermittently for eighteen years, the language in the opinion did not specifically limit the holding to that factual setting. In fact, if read broadly enough, its holding could arguably be extended to a parent who had merely conceived the child and done nothing more. In other words, the mere fact that the father had exercised his right as an individual to conceive could arguably entitle that person, as the biological parent, to rights which are not available to would-be adoptive parents or foster parents who in reality may be much better suited to the rearing of children than the natural parent.

However, in *Quilloin,* the Court, in a unanimous decision, limited the holding of *Stanley*. Quilloin, an unwed father, sought to prevent the adoption of his illegitimate child.[55] In this case, unlike the situation in *Stanley,* the father and the child had never lived together. The father had provided support only on an irregular basis and had done little more than visit the child on occasion. The mother had married and her new husband had petitioned for adoption of the child. In *Quilloin,* the natural father had been extended notice of the pending adoption proceedings and a hearing on his individual interests in the child, at which hearing he was allowed to present evidence on any matter he thought relevant.[56] Nonetheless, he was denied the right to veto the adoption because he had failed to legitimate the child during the eleven years prior to the petition for adoption, and because the trial judge found that the adoption would be in the best interests of the child. On appeal from the trial court, the Georgia Supreme Court affirmed the denial of appellant's right to veto the adoption,[57] even

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not actually be indicative of whether those individuals should be members of the class. *See, e.g.,* Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rash, 380 U.S. 89 (1965); Vlandis v. Kline, 412 U.S. 411 (1973); United States Dep't of Agriculture v. Murray, 413 U.S. 508 (1973).

By its nature, the doctrine, although usually resulting in procedural rights to a hearing or an individualized showing by the litigant successfully asserting the doctrine, also results in the individual's being recognized as possessing a substantive right not to be foreclosed from a statutory class or treatment. If the statute contains an irrebuttable presumption, the statute is usually invalidated. The doctrine as of late, however, is apparently disfavored by the Court. *See, e.g.,* Mourning v. Family Public Services, 411 U.S. 356 (1973); Weinberger v. Salfi, 422 U.S. 935 (1975).

55. The statute in question is GA. CODE ANN. §74-403(3) (1973) (revised, Supp. 1978). *See* GA. CODE ANN. §74-406 (Supp. 1978).

56. Quilloin, after Walcott had filed for adoption of the child, filed for a writ of habeas corpus to obtain visitation privileges, filed a petition for legitimization pursuant to GA. CODE ANN. §74-103 (1973), and formally objected to the adoption. 434 U.S. at 249-50. All of these petitions were heard simultaneously in the Superior Court of Fulton County, Georgia. The trial judge "expressly stated that these matters were being tried on the basis of a consolidated record to allow 'the biological father . . . a right to be heard with respect to any issue . . . upon which he desire[s] to be heard, including his fitness as a parent. . . .'" *Id.* at 250.

57. 238 Ga. 230 (1977).

though he had not consented to the adoption nor been found an unfit parent.

Quilloin appealed to the U.S. Supreme Court, which affirmed the decision of the Georgia Supreme Court. The Court held that in light of the fact that the father had "never exercised actual or legal custody over his child, and thus never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,"[58] neither equal protection nor due process warranted a termination of his parental rights before a petition for adoption could be granted. Thus the Court held that Quilloin possessed no substantive right to veto the adoption even though parents of legitimate children and mothers of illegitimate children possess such a right in the absence of a finding of unfitness.[59]

What does this case add to our inquiry into the origins of family autonomy? First, it limits *Stanley*. *Stanley*, as already noted, if read broadly enough could have been interpreted to mean that procreation alone gives rise to the same rights in the child as if the father had been married or taken an active role in the rearing of the child. The *Quilloin* decision also seems to imply that procreation of the child, an exercise of a basic right of the individual, is essential to give rise to these rights. The decision, however, goes further and intimates that even though the father procreated the child and even though this act is associated with the traditional family setting, these facts alone are not sufficient to allow his interest to be protected at the expense of important state interests.[60] Thus, the decision calls for procreation plus marriage, or procreation plus substantial support or the establishment of a strong emotional tie with the child. The decision is not entirely clear as to what else is needed other than biological parenthood. However, from the language of the case, it may be easily argued that the something else that is needed is some relationship with the child, in addition to biological parentage, which further approximates the traditional family setting. Thus, it seems that when the state evidences a substantial competing interest, the individual, in order to have his relationship with the child protected, must in turn, show that his relationship

58. 434 U.S. at 256.

59. GA. CODE ANN. §74-403(1), (2), (3) (1973) (revised, Supp. 1978). *See* GA. CODE ANN. §74-406 (Supp. 1978). *See*, Caban v. Mohammed, ___ U.S. ___, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979), a recent decision holding unconstitutional a New York statute, N.Y. DOM. REL. LAW §111 (McKinney's 1977) which gave the mother of an illegitimate child the right to consent before that child could be adopted and denied the father the right to such consent. The Court held that the statute constituted an unconstitutional gender classification under the Equal Protection Clause of the Fourteenth Amendment. The Court, citing *Quilloin*, however, noted that this right would not arise where the father has never "come forward to participate in the rearing of his child. . . ." 99 S. Ct. at 1768, 60 L. Ed. 2d at 307.

60. In *Quilloin* the parties opposing the father were the mother and her husband, a stable family unit. In *Stanley*, the child was to become a ward of the state. Thus, in *Quilloin*, the state's interest in having the child reared in a stable environment was more substantial than was the state interest proffered by Illinois in *Stanley*.

with the child is one *very* closely analogous to the type of relationship usually associated with the traditional family setting.[61]

Why have blood and marital ties and other incidents of the traditional family setting been singled out as key elements? These ties have been singled out because blood and marital ties are usually thought to give rise to stronger bonds than do purely associational ties. Members of a "family" unit based purely on associational bonds presumably have the option to totally dissolve the relationship whenever they desire, without resort to any legal process such as divorce or the legal termination of parental rights, formalities which have been developed and long utilized by society for dissolutions of the more traditional type family. Being so easily terminated, with nothing having been ventured, the relationship is so unstable that it affords society little benefit. Thus, society extends the unit no new right to heightened protection. Indeed, the bond of friendship is already protected by the right of association under the First Amendment.

Finally, the above theory of the origin of family autonomy is supported by the recent case of *Smith v. Organization of Foster Families for Equality and Reform.*[62] In *Smith,* foster parents and a foster parents' organization brought suit claiming that New York's procedures governing the removal of foster children from foster homes were unconstitutional. The foster parents' attack centered on the argument that "when a child has lived in a foster home for a year or more, a psychological tie is created between the child and the foster parents which constitutes the foster family the true 'psychological family' of the child."[63] It was asserted that the foster family has a "constitutionally protected liberty interest . . . a 'right to familial privacy' . . . in the integrity of their family unit."[64] The court upheld the constitutionality of the state's procedures without actually deciding whether these foster parents were the child's family in the constitutional sense. However, in writing for the majority, Justice Brennan laid down some of the elements which he considered important in defining the term "family."[65] He said, "[f]irst, the usual understanding of 'family' implies biological relationships. . . ."[66] He also found marriage and adoption to constitute suitable relationships. The emotional attachment that develops between a parent and a child over long periods of time was recognized as

61. Since *Quilloin* held that the father had no substantive right to veto the adoption even though other parents were extended this right, the holding necessarily means that he was not entitled to the procedural protections which the state extended other parents before their substantive rights could be terminated.

62. 431 U.S. 816 (1977).

63. *Id.* at 839.

64. *Id.* at 842, *quoting from* 418 F. Supp. 277, 279 (1976).

65. While *Smith* dealt with the term "family" in the context of procedural due process, it seems that the elements mentioned as being those usually associated with the term "family" in that context would also be of importance in the context of substantive due process.

66. 431 U.S. at 843.

an element as well. Concerning this last element, the Court stated that emotional ties may develop between a foster parent and a child in much the same way as between a natural parent and a child. However, the Court went on to say that, at least in the case of these particular foster parents, while an "intimacy of daily association"[67] and emotional ties may develop, these ties will not be protected as they would had they developed between natural parents and their children. This is because the emotional ties of these foster parents have their source in "state law and contractual arrangements,"[68] rather than a source traceable to natural law and tradition "older than the Bill of Rights."[69] Therefore, in the case of foster families, "where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties."[70]

Perhaps the ultimate question is whether the right of family autonomy can arise independently of the constitutional protection of the individual. Is the family, in any instance or under any circumstances, protected in its own right as a separate entity?

In a very narrow sense, after the decision in *Smith* the answer would apparently have been yes. As noted above, in *Smith* it was said that emotional ties that develop between the parent and child over a span of years in a family-type setting may lead to a constitutionally protected psychological family.[71] However, in light of all of the qualifications added by the Court, and especially in light of the subsequent interpretation that this language received in a decision by the Court of Appeals for the Fifth Circuit in *Drummond v. Fulton County Department of Family and Children Services*,[72] it would seem that whatever right arises, it will be deemed to arise only in the narrowest of circumstances. In fact, if some degree of a right to family autonomy were found to arise in a "psychological family," the court in *Drummond* makes it clear that whatever protection is extended to this "family," that protection will still not be as strong as that which would have been extended to a natural family under similar circumstances.[73]

First, as mentioned in *Smith*, for a "psychological" family bond to be entitled to constitutional protection, the relationship between the "parent" and the child must not have been created by state law,[74] but rather should have its origins somewhere else, presumably in natural law, thus paralleling the relationship between natural parents and their chil-

67. *Id.* at 844.
68. *Id.* at 845.
69. *Id., quoting from* 381 U.S. 479, 486 (1965).
70. *Id.* at 845-46.
71. *Id.* at 861.
72. 563 F. 2d 1200 (5th Cir. 1977), *cert. dismissed*, 437 U.S. 910 (1978).
73. 563 F. 2d at 1209.
74. 431 U.S. at 845-46.

dren. Second, the right will not be deemed to arise, or at least will be very attenuated, if the right of the psychological family to protection can be recognized only at the expense of the natural parents and their rights of familial privacy.[75] Finally, the relationship between the parent and the child should be one of long standing, presumably dating from the infancy of the child.[76] Thus, even under *Smith,* in only the most unusual factual setting would a court recognize any right of family autonomy in the psychological family.

The circumstances under which this independent right will be deemed to arise were further narrowed by the court of appeals in *Drummond.* In that case, a child had been placed in the custody of foster parents at infancy and the interests of the foster parents had been found not to be in conflict with the rights of the natural parents. Thus, although the rights of these foster parents, as in *Smith,* had their origins in state law, the way seemed open for the possible recognition of constitutional protection of the psychological family. The court, however, refused to recognize such protection. The court said that the Court in *Smith,*

> assumed *arguendo* the existence of a protected liberty interest, and then proceeded to test the New York child placement scheme against the strictures of due process. It was able to do this because the extensive procedural safeguards incorporated into the New York scheme were ultimately found sufficient protection for a liberty interest of any magnitude.[77]

The court went on to say that, because the procedural protections extended to the foster parents under the scheme in *Drummond* were not as stringent as those afforded in *Smith,* it would not be proper to say that the protections afforded the Drummonds were necessarily sufficient. Because of this, the court said that it was "required to face head on and resolve" the issue of whether this "psychological" family possessed a protected liberty interest. "In doing so we have concluded that there is no liberty interest here of full-fledged constitutional magnitude."[78] The court went on to decide that the state's procedures were "adequate to protect whatever interest might be at stake."[79] Thus the status of any right of family autonomy arising independently of the individual's right of privacy and autonomy seems to be up in the air.[80] In any event, whatever right of autonomy is found to arise, two general statements may be made about it: first, the right will probably not be entitled to the same degree of protection as that afforded a natural family; and second, the right will be recognized only

75. *Id.* at 846.
76. *Id.* at 844.
77. 563 F. 2d at 1209.
78. *Id.*
79. *Id.*
80. For a more in-depth analysis of *Drummond's* effect on the *Smith* decision, *see* Note, *Long-Term Foster Parents and Children Have No Protectable Interest in Their Relationship,* 29 MERCER L. REV. 1137 (1978).

under circumstances which closely parallel the traditional family setting. That is, this right will arise only when its origins are not rooted in state law and only when the child has spent a long number of years in that particular household.

Another important facet of the right of family autonomy concerns the question of who decides how the children in a particular family will be raised. The Court has long held that the right to raise a child resides first in his natural parent. In *Wisconsin v. Yoder*,[81] a case that dealt with the right of parents to direct the religious upbringing of their children when that upbringing conflicted with statutory age requirements for school attendance, it was said that the "history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[82] As for the weight of this right, the Court in *Yoder* said that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirements under the First Amendment."[83] Thus, this aspect of the right of family autonomy does not seem to warrant exceptionally heightened protection unless it is coupled with another constitutional right. In fact, in *Yoder* it was said that the holding in *Pierce v. Society of Sisters*,[84] a case which, like *Yoder*, dealt with the right of parents to direct the upbringing of their children, "recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, . . . the State acts 'reasonably' and constitutionally in requiring education to age [sixteen]. . . ."[85]

As emphasized at the outset, however, the purpose of this comment is not merely to enumerate the different characteristics of the right of family autonomy, but rather to ascertain from where these different characteristics arise. It seems from the context of the language quoted above that the aspect of the right of family autonomy dealing with the right of parents to direct the upbringing of their children derives from history and tradition, or pure natural law. Thus, tradition is also a relevant factor in this aspect of the right of family autonomy, where traditions are deeply rooted, having been established long before the ratification of the Constitution.

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81. 406 U.S. 205 (1972).

82. *Id.* at 232.

83. *Id.* at 233, *quoting from* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

84. 268 U.S. 510 (1925).

85. 406 U.S. at 233 (emphasis in original). *See* Prince v. Mass., 321 U.S. 158 (1943); Meyer v. Neb. 262 U.S. 390 (1923); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72-5 (1976); Carey v. Population Serv. Int'l, 431 U.S. 678, 708-10 (1976) (Powell, J., concurring); Runyan v. McCrary, 427 U.S. 160, 176-77 (1976); Belloth v. Baird, 428 U.S. 132 (1976).

CONCLUSION

This comment has traced the origins of family autonomy and found that, at least in most circumstances, the substantive right to family autonomy and the right of individual autonomy and privacy are one and the same. Where, for example, the protection for the family will not usually arise unless the family is related by blood or marriage, neither will the individual's right of autonomy be recognized unless exercised in some more or less traditional manner. Thus, although the substantive right of family autonomy is derived from the individual's right of autonomy, the scope of the individual's right has, in turn, been affected by the various circumstances under which the family has traditionally developed. The only distinction between the two concepts lies in the fact that family autonomy implies protection for a group of individuals acting as a unit rather than protection for only one member of that group. Only where the right of family autonomy has been interpreted to apply to members of the extended family would it seem that the right is in any real sense distinct from that of the individual, so that it may be said that family autonomy has its *origins* in individual privacy, implying two separate concepts.[86] Furthermore, in only the narrowest of circumstances has the Court even hinted that protection may be extended to the family in its own right as an entity.[87] Because the scope of this "new" source of autonomy has been so narrowly drawn, its impact will lie not so much in its broad application in the field of family law, but rather in the mere fact that such an independent source has been recognized at all. With the recognition of this new source of autonomy, the Court will have finally acknowledged the right of family autonomy for the sake of no other interest than the protection of the emotional attachments and the close relationship developed between the child and its "parent." Indeed, this is the very relationship that society has long felt the family as an institution was divinely created to foster.

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86. In this instance, it appears that the two concepts are distinct, in that in *Moore*, emphasis was placed on the fact that the extended family as a unit had traditionally been protected. This seems to imply that protection for the extended family is rooted deeply in tradition and history rather than in deference to the right of individual autonomy.

87. 431 U.S. at 844.