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Constitutional Protection for Personal Lifestyles

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CONSTITUTIONAL PROTECTION FOR PERSONAL LIFESTYLES*

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INTRODUCTION

Personal tastes, preferences, impulses, and expressions appear to be candidates for a new constitutional protection. No recent constitutional trend, in fact, seems more significant. One is hard pressed to account fully for this development, much less for the recurrence of personal lifestyle issues in what is supposedly a more conservative and more traditionalist Supreme Court. Perhaps the new trend portends a fundamental shift in values: the emergence of a national ethic that, in matters of style and morality, personal choice is paramount. Perhaps the momentum of racial and sexual egalitarianism has brought with it a demand for acceptance of a panoply of personal lifestyles. Or perhaps it is simply that as we perceive ourselves less capable of influencing our national and communal fates, we demand greater freedom to direct our lives as individuals.

Although its causes are complex, the phenomenon itself is

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clear. The Supreme Court is increasingly being invited to extend constitutional protection to personal lifestyle choices.[1] By "lifestyle choice" we mean an individual's decision to exercise control over the most personal aspects of his or her life. The term lifestyle is used in its original sense, stripped of popular connotations: it refers to the capacity to craft one's initimate, personal existence in the manner that one sees fit.

Such is the pace of constitutional litigation in this area that *Griswold v. Connecticut*[2] already seems something of a grandfather case. Part of *Griswold*'s mystique is its utter imprecision: Justice Douglas' opinion has generated more emanations than those on which it purported to draw.[3] It is no accident that Justice Douglas was the most ardent and explicit champion of lifestyle freedom yet to sit on the Court.[4] He left much in the way of stirring words and phrases, precious little in the way of analytic definition. The void seems unfortunate, because no constitutional issue has been more prone to loose platitude and sweeping assertion than the relationship of law to personal lifestyle choice.

Our discussion of lifestyle freedom attempts to refine some existing constitutional categories and to present a unified framework for analysis of lifestyle issues reaching the Court today. We do not focus exclusively on a right of privacy, although privacy may at times be a propitious and even a necessary condition for personal lifestyle choices to operate. But many of the personal choices deemed eligible for protection—personal appearance, for example—are at least in part visible to the public and do not involve governmental intrusion or surveillance. Nor are we discussing only a right of autonomy, if that term is confined to personal activities that involve no demonstrable harm to others.[5] Exercise of lifestyle freedom may adversely affect others, whether they be the children of a broken marriage or even, in the Supreme

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[1] The invitation is not always accepted. *See* Kelley v. Johnson, 425 U.S. 238 (1976); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

[2] 381 U.S. 479 (1965).

[3] See the extensive Comments on the *Griswold* case by Professors Dixon, Emerson, Kauper, McKay, and Sutherland in 64 MICH. L. REV. 197-288 (1965).

[4] *See, e.g.*, Department of Agriculture v. Moreno, 413 U.S. 528, 538 (1973) (concurring opinion, Douglas, J.); Doe v. Bolton, 410 U.S. 179, 209 (1973) (concurring opinion, Douglas, J.); Ham v. South Carolina, 409 U.S. 524, 529 (1973) (concurring in part and dissenting in part, Douglas, J.); Papachristou v. Jacksonville, 405 U.S. 156 (1972). *But see* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[5] *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 654-55 (9th ed. 1975); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

Court's words, those having merely "the potentiality of human life."[6]

Our treatment of the lifestyle cases concentrates initially upon three basic categories, which can be represented in terms of "freedoms." The first is a freedom of personal companionship, where the individual claims the right to select his most intimate domestic associates. The second is a freedom of personal sexual conduct. And the third is a freedom of personal dress and appearance.

The scope of each of these freedoms will be analyzed in detail in succeeding sections. Our analysis implicitly asks three related questions: First, what kinds of lifestyle issues is the Court currently confronting? Second, what lifestyle freedoms is it protecting and what competing state interests is it taking into account? Third, what standards for judicial review currently dominate the personal lifestyle area?

Finally, in a concluding section we consider lifestyle issues from a more general perspective. We set forth justifications for judicial intervention to protect lifestyle freedoms; we discuss the scope of a general constitutional lifestyle right; and we survey and assess the state interests in restricting lifestyle choices. We conclude that within certain limits judicial protection of personal lifestyle choices is constitutionally warranted and socially desirable, that the Court reaffirms its historic function by protecting lifestyle choices, but that indiscriminate and unreasoned vindication of lifestyle freedoms is no more desirable than insensitivity to them.

I

DOMESTIC COMPANIONSHIP

The peculiar intimacy of the home environment and the relationships within it have in the past decade caused the Court to guarantee a significant measure of personal control over domestic companionship. This section will demonstrate that the right of domestic association is broader than is commonly supposed, that it is, within certain limits, a legitimate candidate for constitutional protection, but that unless the Court gives serious thought to those limits, the right may soon take on "strange boundaries as yet undiscernible."[7]

The Court's struggle with the new right of domestic compan-

[6] Roe v. Wade, 410 U.S. 113, 162 (1973).

[7] Stanley v. Illinois, 405 U.S. 645, 668 (1972) (dissenting opinion, Burger, C.J.).

ionship has been inextricably related to recent pervasive changes in American family life. Those changes have been the subject of such intense discussion elsewhere[8] that a brief summary suffices here. The trend has been from uniformity to diversity and individuality in domestic lifestyles. Larger numbers of Americans are rejecting the idea that marriage is a lifelong union and that the formal family is the exclusive unit for bearing and raising children.[9] Marriage itself is changing as men and women alter such traditional roles as providers and housewives. Divorce is becoming more commonplace and less stigmatized.[10] Children are more likely to be born out of wedlock and raised by a single parent.[11] Indeed, more Americans are finding it advantageous to bypass formal marriage altogether and cohabit in what one writer terms the "shadow institution [of] informal de facto marriage."[12]

The primary legal battleground for such changes is, of course, state domestic relations law and not constitutional law. The state, through its police power, has traditionally regulated popular morality, and the Supreme Court still formally acknowledges that domestic relations "ha[ve] long been regarded as a virtually exclusive province of the States."[13] State law has not invariably been resistant to changes in domestic lifestyles. Divorce laws have become more lenient and now include no-fault grounds alongside

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[8] *E.g.*, L. CASLER, IS MARRIAGE NECESSARY? (1974); N. O'NEILL & G. O'NEILL, OPEN MARRIAGE (1972); A. SKOLNICK & J. SKOLNICK, FAMILY IN TRANSITION (1971); B. YORBURG, THE CHANGING FAMILY (1973); Glick, *A Demographer Looks at American Families*, 37 J. MARR. & FAM. 15 (1975); Novak, *The Family Out of Favor*, HARPER'S MAGAZINE, Apr. 1976, at 37.

[9] *See* R. LIBBY & R. WHITEHURST, RENOVATING MARRIAGE: TOWARD NEW SEXUAL LIFESTYLES (1973); C. ROGERS, BECOMING PARTNERS: MARRIAGE AND ITS ALTERNATIVES (1972); Ramey, *Intimate Networks: Will They Replace the Monogamous Family?*, 9 FUTURIST 175 (1975).

[10] *See* H. CARTER & P. GLICK, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY (1970); J. EPSTEIN, DIVORCED IN AMERICA (1974); Bernard, *Note on Changing Life Styles, 1970-1974*, 37 J. MARR. & FAM. 582, 583-84 (1974); *More and More Broken Marriages*, U.S. NEWS & WORLD REPORT, Aug. 14, 1972, at 30.

[11] As one reporter describes this trend:

> Despite the array of alternatives for today's woman—contraception, abortion, adoption—the number of unmarried women giving birth and then raising their children has risen dramatically. Though still just under 1 percent of all families, their numbers have increased five-fold in the past fifteen years, with the fastest rise taking place since 1970. . . . Associated primarily with poor people, or occasionally with the Bohemian chic of the upper classes, the phenomenon of the unmarried mother, though still rare, is becoming more visible among women with middle class backgrounds. Sawyer, *For Unmarried Mothers, There are Feelings of Fulfillment Mixed With Resentment*, Washington Post, Apr. 15, 1976, § D.C. (district weekly), at 1, col. 3.

[12] Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 665 (1976).

[13] Sosna v. Iowa, 419 U.S. 393, 404 (1975).

or in lieu of fault grounds.[14] New alimony and support statutes require state courts to rely less on gender and more on the circumstances of a particular marriage.[15] Criminal laws prohibiting extramarital sexual behavior have been either relaxed or indifferently enforced.[16] State barriers to marriage, always minimal, have become even less stringent.[17] Indeed, state law will inevitably be encouraged to keep pace with shifting lifestyle trends, or else risk evasion or irrelevance. If, for example, the barriers to marriage become too strict, couples may be encouraged to ignore them and cohabit. If divorce becomes too difficult, spouses might be inclined to remarry surreptitiously before an existing marriage has been formally dissolved, or simply to terminate their marriage informally. If prospects of alimony or child support appear unfair or burdensome, spouses might be tempted to flee the jurisdiction and so escape the obligations of formal marriage separation.

Thus state law, however sluggishly and reluctantly, is forced to accommodate domestic lifestyle changes. But the question of how constitutional law ought to respond to this evolving domestic lifestyle pattern is more subtle and difficult. Constitutional law, unlike state law, has the unique potential to bestow a national benediction upon unconventional domestic lifestyles. The Supreme Court, more than any other instrument of American government, is institutionally receptive to pleas for national tolerance of those whose domestic arrangements have heretofore received little popular support. As we shall see, the effect of constitutional law in the domestic lifestyle area is potentially fourfold: to guarantee greater freedom of entry into and exit from formal family relationships, to encourage and validate role changes within the family or marriage partnership,[18] to make available formal family status to unor-

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[14] *See* Foster & Freed, *Divorce Reform: Breaks on Breakdown?*, 13 J. FAM. L. 443 (1973-74). As of June 1, 1974, only five states—Illinois, Massachusetts, Mississippi, Pennsylvania, and South Dakota—retained marital misconduct as the sole ground for divorce. Freed, *Grounds for Divorce in the American Jurisdictions*, 8 FAM. L.Q. 401, 401 (1974).

[15] *See, e.g.*, the 1975 amendment to VA. CODE § 20-61 (1975), requiring reciprocal support between the spouses during marriage, and the 1975 amendment to VA. CODE § 20-107 (1975), insuring that alimony could be awarded to either spouse upon dissolution of marriage.

[16] *See, e.g.*, Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 688-89 (1966).

[17] *See, e.g.*, R. BARROW & H. FABING, EPILEPSY AND THE LAW 30 (2d ed. 1966) (noting removal of marriage prohibitions on epileptics); M. PAULSEN, W. WADLINGTON & J. GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 131 (2d ed. 1974) (noting similar removal in favor of persons with tuberculosis).

[18] This has been the effect of the Court's recent attack on sex discrimination, discussed in Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1.

thodox groups, and to confer legitimacy and recognition upon extrafamilial relationships.[19]

In each of these instances, the force of constitutional law confronts the traditional order. The Court must often decide whether to use the Constitution to deprive the family—long regarded as the cornerstone of American society—of its favored status under law. It is true that the law has always been limited in its capacity to maintain conventional family arrangements; witness the widespread use of perjury and collusion to evade statutes limiting divorce to fault grounds alone.[20] Yet in areas involving traditional morality, society values law as much for its instructional as for its coercive effect. Law is a vehicle by which democratic majorities reaffirm shared moral aspirations and summon society's allegiance to a common set of behavioral goals. Deploying the Constitution to undermine conventional precepts of domestic morality is a step not lightly taken.

It is, however, a step the Court will sometimes take. There will always be some Americans who resist traditional conceptions of family life and regard the favored legal status of the nuclear family as economically oppressive and a source of indignity and affront. Most obvious are those Americans who live outside the traditional family unit for reasons at least partly beyond their control. Such a category would include illegitimate children, homosexuals whose preferences preclude marriage, fundamentalist Mormons for whom polygamy is religiously mandated, and members of minority groups for whom economic, social, and cultural pressures cause disproportionate rates of family breakdown. To date the Court has dealt erratically with these "outsiders," vindicating on occasion the rights of illegitimates,[21] while upholding enactments against homosexuals[22] and polygamists.[23]

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[19] *E.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

[20] *See* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 33 (1966).

[21] *E.g.*, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (invalidating statute denying welfare benefits to households with illegitimate children); Gomez v. Perez, 409 U.S. 535 (1973) (invalidating statute denying right of parental support to illegitimate children); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (invalidating statute denying right of illegitimate child to recover workmen's compensation benefits); Levy v. Louisiana, 391 U.S. 68 (1968) (invalidating statute denying right of illegitimate child to recover for wrongful death). *But cf.* Mathews v. Lucas, 96 S. Ct. 2755 (1976) (upholding statute requiring that, in order to qualify for Social Security benefits, illegitimate child must prove that deceased wage earner was parent and was living with or contributing to child's support at time of death); Labine v. Vincent, 401 U.S. 532 (1971) (upholding intestate succession statute excluding illegitimate child in favor of collateral heirs).

[22] Doe v. Commonwealth's Attorney, 403 F. Supp. 119, *aff'd mem.* 425 U.S. 901 (1976).

[23] Reynolds v. United States, 98 U.S. 145 (1878).

Other Americans deliberately choose to live outside the traditional family unit, preferring for a variety of reasons to live together without the legal ties of marriage. With regard to such persons the Court faces a formidable dilemma. The family is indubitably a cornerstone of American society and should be favored by the law; yet choice of domestic companionship constitutes the kind of intimate personal decision that also deserves constitutional respect. With such tensions in mind, three sets of lifestyle choices are discussed herein: marriage and divorce, procreation, and extrafamilial association.

A. *The Choices of Marriage and Divorce*

The first modern case to significantly protect domestic companionship was *Loving v. Virginia*,[24] where the Court held unconstitutional a Virginia statute prohibiting interracial marriage. It is true, of course, that marriage and the sharing of a household need not always coincide. Persons may marry without living together, and they may live together without marrying, but the general meaning of marriage remains that of a shared life within a common abode. Had its result rested solely upon equal protection grounds, *Loving* would have been a case addressed more to the evils of racial discrimination than to the blessings of marriage. But the Court held that the Virginia statute violated the due process clause as well, explaining that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[25]

The due process rationale of *Loving* calls into question other state restrictions on the right of consenting persons to marry. It appears, on reflection, that the Court could extend *Loving* beyond the confines of race without granting an unrestricted marriage right, but that such a course would not be without its complexities and difficulties.

Minimum age requirements are, for example, one restriction upon marriage that ought to survive post-*Loving* scrutiny, provided that the minimum age is the same for male and female[26] and, arguably, that disabilities on youthful marriage are removed by the age of eighteen.[27] Minimum age restrictions are constitutionally

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[24] 388 U.S. 1 (1967).

[25] *Id.* at 12.

[26] Stanton v. Stanton, 421 U.S. 7 (1975), appears to require as much.

[27] Although the twenty-sixth amendment of the Constitution secures the vote for 18-year olds in state and federal elections, it is doubtful that the Court would decree a substantive due process right to marry at the same age.

justified because the age disability is temporary, because it applies equally to all members of society, and because it is obvious that with respect to age some arbitrary line must be drawn. The Court, in fact, has consistently noted that the fundamental right to vote can be denied to those under a state-prescribed minimum age.[28] Finally, in light of the frequent failure of early marriages, age restrictions serve as a logical means of controlling the ill effects of youthful marriage on the parties, their offspring, and the public generally.[29]

More troublesome are prohibitions based upon consanguinity and affinity which *permanently* prevent, as did the *Loving* prohibition, desirous parties from marrying. Civil laws against consanguineous marriages, often paralleled by criminal prohibitions of incest, are said to prevent the genetic deformities of inbreeding and to promote family harmony by preventing intrafamily sexual jealousy and rivalry.[30] Both of these ends are clearly legitimate, and the maintenance of family tranquility alone should permit the state to prevent parent-child and brother-sister unions, even if no genetic evidence supports such a bar. It is questionable, however, whether either of the above interests are served by prohibiting, for example, marriages between first cousins. The enamorment of first cousins seems not nearly so traumatic to the family structure as are sexual attractions within the nuclear unit itself. *Loving* would suggest that the state at least ought to bear the burden of establishing a greater than normal likelihood of birth defects arising from marriages of first cousins before being allowed to prohibit such unions.[31]

The Court has not had frequent occasion to test other possible parameters of *Loving*. One recent case,[32] which the Court declined to hear, involved the request of an inmate in the Utah prison

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[28] *E.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).

[29] *See* Monahan, *Does Age at Marraige Matter in Divorce?*, 32 SOC. FORCES 81 (1953); Schoen, *California Divorce Rates by Age at First Marriage and Duration of First Marriage*, 37 J. MARR. & FAM. 548 (1975); Weed, *Age at Marriage as a Factor in State Divorce Rate Differentials*, 11 DEMOGRAPHY 361 (1974).

[30] *See* I. HERSKOWITZ, GENETICS 207-08 (2d ed. 1965).

[31] *See* Moore, *A Defense of First-Cousin Marriage*, 10 CLEV.-MAR. L. REV. 136 (1961). Prohibition on marriage by affinity, or among in-laws not related by blood, differs from consanguineous marriages only in that the state interest in preventing deficient offspring is not present. As with consanguineous marriages, however, *Loving* ought to require that any prohibition be shown by the state to have more than a speculative bearing on the goal of easing intrafamilial tension.

[32] *In re* Goalen, 30 Utah 2d 27, 512 P.2d 1028 (1973), *cert. denied*, 414 U.S. 1148 (1974).

system and one Ann Goalen to marry. The Utah Supreme Court, in an intemperate opinion, held that "the refusal of the warden to permit the marriage . . . does not violate petitioner's [Goalen's] constitutional rights or those of her convicted friend."[33] Justice Stewart, joined by Justices Douglas and Brennan, dissented briefly from the denial of certiorari, noting that "[t]he extent to which this right [of marriage] may be diluted for one in prison is something the Court has never decided."[34]

Reversal of the Utah Supreme Court in this instance would not have involved an undue extension of the *Loving* rationale. The claim that marriage would create disciplinary problems in prison ignores the fact that inmates married at the time of incarceration often remain so while in prison. Contact between the inmate and his wife could still be carefully regulated. Indeed, the state's only justification for its denial rested on the premise that an inmate denied the right to marry might behave better in prison so as to obtain early release; thus, the state claimed that the denial "act[ed] as an incentive for the convict to aid in his own rehabilitation."[35] Yet there are sufficient rehabilitative incentives in the form of good-time credits, prison privileges, and the possibility of joining one's spouse full time upon release that would serve the same end without denying the inmate a basic civil right.

A first look thus suggests that the inmate's claim should have been upheld. On a second level, however, the claim raised a volatile issue at the outer perimeters of *Loving*—the very nature of the marriage contract itself. The inmate was capable of deriving psychological pleasure and comfort from the thought of being married; he could, in addition, meet many legal obligations of marriage despite his incarceration.[36] He was incapable, however, of experiencing many conventional aspects of marriage: a shared home, regular and unsupervised sexual access to his partner, and the paternal care of offspring. In this light, the question is whether the state can deny the right to marry to persons who cannot, at least for a while, engage in many of its conventional incidents. With respect to many such persons, the state makes no effort to deny the right: soldiers going off to war and women beyond menopause remain free to marry. The prospect of the soldier's prolonged

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[33] *Id.* at 31, 512 P.2d at 1030-31.

[34] 414 U.S. at 1150.

[35] *Id.* at 1149.

[36] It would make little difference in the administration of tax and inheritance statutes, for example, whether a partner to marriage were an inmate or not.

separation from the common abode or of the woman's childlessness are not thought sufficient to deny such persons the other gratifications of a married state.

The question raised by inmate marriage thus has wider implications. The Court may one day face the question of why a homosexual couple, professing deep mutual affection and willing to assume the requisite legal obligations, should be denied the pleasure, the legitimacy, or even the tax benefits of being married.[37] The fact that homosexuals cannot fulfill our conventional idealizations of marriage—and bear children—may not appear to the Court a permissible reason to proscribe such a union, any more than a state could deny marriage to sterile heterosexuals or to those who chose to remain childless. Likewise wanting is any state interest in banning promiscuous sexual habits, since marriage is presumed to stablize rather than to diversify sexual activity.

More persuasive, however, would be the state's assertion that granting homosexual affection the regard long accorded heterosexual matrimony would undermine the stability of traditional family life. It is fair to argue that the stability of the nuclear family in America has been fortified by a conception of marriage as an exclusively heterosexual union. There is, moreover, a difference between decriminalizing private, consensual conduct between homosexuals and affirmatively blessing such relationships through marriage. The former step signifies a removal of hostility and an expression of social tolerance that stops short of approval. The latter requires the state to give elevated and hallowed status to an alternative sexual lifestyle fundamentally at odds with the moral precepts of most Americans. Thus, even if private homosexual conduct were decriminalized as a matter of constitutional right, a freedom to marry would not follow.

The outer limits of *Loving* press still further. One can argue, simplistically, that *Loving* ought to guarantee all consenting adults the right to be bound in civil marriage, whether the combination be one male and two females (polygyny), two males and one female (polyandry), or, for that matter, three males and two females, as long as each additional partner joins a consensual union. Bigamous unions have faced a long history of prohibition, with which the Supreme Court has been closely involved. The Court in *Reynolds v. United States*[38] upheld a federal criminal statute prohibiting biga-

[37] *See* Comment, *Constitutional Aspects of the Homosexual's Right to a Marriage License*, 12 J. FAM. L. 607 (1973); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

[38] 98 U.S. 145 (1878). *See also* Cleveland v. United States, 329 U.S. 14 (1946); Davis v.

mous marriages, even against Mormon claims that such marriages were religiously mandated. What was denied then against assertions of free religious exercise is not likely to be sanctioned, close to a century later, as a lifestyle right. Indeed, despite the plea of one recent Justice for reversal of *Reynolds*,[39] the Court has flatly stated that "[s]tatutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment . . . ."[40]

The case against constitutional protection of bigamy is rather more complicated than the Court suggested. The state interests opposing recognition of bigamous marriages are several. Public administration of tax laws, welfare benefits, estate distribution, and alimony and support payments would become more complex if bigamous marriages were recognized, although such "administrative inconvenience," as the Court is wont to term it, is not normally given great deference when a constitutional right is involved.[41] The claim that bigamous marriages threaten our traditional monogamous family arrangements might be met with some skepticism, given the strength of the monogamous tradition, the practical difficulty of supporting two or more families simultaneously, and the fact that divorce and successive remarriages are becoming more readily available to one who falls in love with someone other than his or her present spouse. Finally, one may question whether children of bigamous marriages would suffer greater deprivation than those presently living in single-parent homes. And if *Stanley v. Illinois*[42] prohibits a conclusive presumption that a single parent is unfit to raise children, can a ban of bigamous marriages be justified on the conclusive presumption that all bigamous parents are unfit?

The disinclination of the Court to extend *Loving*-type protection beyond the heterosexual and monogamous context suggests that the Court fears extension of constitutional protection to bizarre lifestyle choices would threaten traditional American conceptions of family life. So great, in fact, is our emotional investment in orthodox family life that the rationality of these fears and

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Beason, 133 U.S. 333 (1890); Cannon v. United States, 116 U.S. 55 (1885); Murphy v. Ramsey, 114 U.S. 15 (1885).

[39] Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) (dissenting in part, Douglas, J.).

[40] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973).

[41] *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646 (1974); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971). *But cf.* Mathews v. Lucas, 96 S. Ct. 2755 (1976) (upheld validity of administrative convenience as state concern in cases of less than strict scrutiny). *See* note 21 *supra*.

[42] 405 U.S. 645 (1972).

the reality of the threat may never be fully tested. The final irony of *Loving* is thus laid bare. Too tightly constricted, that decision becomes the repository for our most provincial mores; too freely expanded, it might make traditional marriage a meaningless concept. Unlike universal voting, for example, a universal right for consenting persons of whatever sex and in whatever number to marry could well undermine the very sanctity that led the Court to regard the right to marry as fundamental in the first place.

Loving protected the right to join together in marriage. The constitutional right to be rid of an unwanted spouse was first addressed in *Boddie v. Connecticut*.[43] There the Court held that Connecticut's sixty dollar filing fee in divorce actions was, as applied to indigents, a violation of due process.

It is not readily apparent which current of fourteenth amendment analysis *Boddie* best represents. Justice Harlan's opinion for the Court spoke in terms of procedural due process, claiming that "the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages . . . ."[44] Yet the fit with pre-*Boddie* procedural due process decisions was less than perfect. Those decisions had, as Justice Harlan recognized, "typically involved rights of defendants—not, as here, persons seeking access to the judicial process in the first instance."[45]

The *Boddie* Court also sidestepped an equal protection rationale for the decision that would have required either extending the fundamental right of court access to civil actions,[46] or labeling de facto discriminations against indigents suspect.[47] Instead, Justice Harlan laid the foundation for a substantive due process right to divorce, against which he found the state interests of recouping court costs and of discouraging frivolous actions insufficiently compelling, and the means of promoting those interests through a fee requirement too drastic.[48] Such heightened scrutiny of the burdens placed upon the right to divorce comports with Harlan's

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[43] 401 U.S. 371 (1971).

[44] *Id.* at 380.

[45] *Id.* at 375.

[46] The right was first thought to have been established for criminal actions in Griffin v. Illinois, 351 U.S. 12 (1956).

[47] Every public fee, whether a sales tax, municipal water rate, or tuition charge at a public university, operates as a de facto discrimination on those least able to pay. *See* Douglas v. California, 372 U.S. 353, 361-62 (1963) (dissenting opinion, Harlan, J.).

[48] 401 U.S. at 381-82.

willingness elsewhere to discern substantive content in due process.[49] The rhetoric of *Boddie* suggests that the right to divorce has become a necessary, if less than glorious, feature of our "living tradition" of due process; divorce is identified as "the adjustment of a fundamental human relationship"[50] and the method by which "two consenting adults may . . . mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage . . . ."[51] A subsequent case, which upheld filing fee requirements, distinguished *Boddie* as turning "on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship." "On many occasions," the Court noted, "we have recognized the fundamental importance of these interests under our Constitution."[52]

The emergence of divorce as a lifestyle right was sidetracked by *Sosna v. Iowa*,[53] where the Court upheld Iowa's requirement that a person reside one year in the state before bringing an action for divorce against a nonresident. Harmonizing *Sosna* and *Boddie* is difficult. The *Sosna* majority disregarded the heightened standard of scrutiny applied by the *Boddie* Court to a law burdening the right to divorce and reverted to a rational basis test. The Court deferred to Iowa's interests in not becoming a "divorce mill" and in protecting its divorce decrees against collateral attack,[54] even though less drastic means of promoting those interests were available.[55] More important was the *Sosna* Court's purported distinction of *Boddie*. The Connecticut statute, noted the Court, worked a "total deprivation" of divorce opportunities; the Iowa law resulted only in a delay.[56]

One clear implication of the delay-deprivation distinction is that state laws requiring lengthy periods of separation before couples become eligible for divorce are clearly constitutional. Before *Sosna*, such laws might have been attacked as impermissible bur-

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[49] *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 500-02 (1965) (concurring opinion). For intriguing speculation on how Justice Harlan might have voted in the abortion decisions, see Redlich, *A Black-Harlan Dialogue on Due Process and Equal Protection: Overheard in Heaven and Dedicated to Robert B. McKay*, 50 N.Y.U. L. REV. 20, 33-34 (1975).

[50] 401 U.S. at 383.

[51] *Id.* at 376.

[52] United States v. Kras, 409 U.S. 434, 444 (1973). *Accord*, Ortwein v. Schwab, 410 U.S. 656 (1973).

[53] 419 U.S. 393 (1975).

[54] *Id.* at 407.

[55] A less drastic alternative would have required that the party seeking divorce prove himself to be a domiciliary of Iowa. *See id.* at 424-27 (dissenting opinion, Marshall, J.).

[56] *Id.* at 410. The distinction was criticized in Justice Marshall's dissent. *Id.* at 422 n.2.

dens upon the right of divorce. What public interest, one might argue, is threatened by the essentially private matter of whether *X* and *Y* remain married? A state interest in the welfare of the children appears insufficient, since unhappy parents can separate anyway, and a life of constant parental friction may harm the child more than divorce. Another state interest in separation periods, that marital relationships not be lightly broken off, can be adequately protected by the obstacles of property settlement, alimony, child support and custody decrees, the embarrassment of public declaration of marital failure, and the emotional cost of terminating so intimate a relationship. At least, one might argue that a six-month waiting period, as opposed to two years, for example, adequately serves any state interest in providing a reasonable period for a couple to reflect upon the prospects of reconciliation.[57]

After *Sosna*, however, such arguments are fanciful. The right of divorce now seems constitutionally inert and much less fundamental than the right of marriage. The present Court would presumably tolerate a two-year separation requirement prior to divorce, while it is hard to imagine any court upholding a two-year waiting or acquaintanceship period prior to marriage. The logical consistency of granting a right freely to enter a relationship that one has no right freely to dissolve is questionable. Confinement in a destructive relationship is arguably as damaging as being prevented from forming a desired union. The destructive impact of the former may indeed be lessened by physical, if not legal, separation, but so may unmarried persons maintain physical, if not legal, togetherness. In fact, state burdens upon divorce might be challenged under *Loving* itself as impermissible infringements upon the right to marry, or to remarry, as the case may be.

Despite such arguments, the Court is well advised to accord the right of marriage a more elevated status than that of divorce. The Court's position comports with a persistent assumption in American life that marriages are more easily made than broken. The very conception of marriage as a contract implies that marital unions, once made, may not be trivially or inconsequentially undone. The Court has some obligation to further this conception. If marriage is to exist primarily for the self-gratification of the individual partners, then perhaps it should be permitted to dissolve at the first diminution of affection. If, on the other hand, the state intends it to signify an enduring relationship of reciprocal duty

[57] A shortened time period in the context of durational residency requirements for voters was required by the Court in Dunn v. Blumstein, 405 U.S. 330, 348 (1972).

and commitment,[58] as well as of mutual emotional involvement, then a required pause before dissolution should not be unconstitutional. Constitutional law must confront the paradox that making divorce fundamental, and thus readily obtainable, might in the end make marriage seem much less so.

All this is not to say that the right of divorce ought to be stripped of all constitutional protection. The law should not force a person to endure indefinitely a close relationship he or she has come to despise. Divorce is a lifestyle choice of sufficient intimacy to override laws that, at least in comparison with those of sister states, make divorce unduly difficult to obtain.[59] Such a comparative standard may contradict the maxim that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[60] Yet the Court has often noted that states may not experiment at will with important human rights.[61]

B. *The Choices of Procreation and Nonprocreation*

The Supreme Court has afforded further constitutional protection to lifestyle choices customarily associated with, although not limited to, the formation and character of the nuclear family. As one has at least a limited right under *Loving* to marry whom one pleases, so one enjoys constitutional protection in the fundamental decision "whether to bear or beget a child."[62] The leading procreational case, *Skinner v. Oklahoma*,[63] struck down as violative of the equal protection clause an Oklahoma statute that inflicted compulsory sterilization on habitual larcenists but not on habitual embezzlers. Procreational rights have also been protected short of state-imposed incapacitation. In *Cleveland Board of Education v. LaFleur*,[64] the Court found that mandatory maternity leaves for public school teachers after the fourth and fifth months of pregnancy

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[58] The duty seems stronger in the case of families with children, where the state has a heightened interest in the prospects of marital reconciliation. Thus, more stringent divorce laws for married parents than for childless couples might be constitutionally permissible.

[59] For example, before being amended in 1966, 1962 N.Y. Laws, c. 313, § 170, permitted divorce only on grounds of adultery. And presently, some states still adhere solely to fault grounds for divorce. *E.g.*, S.D. COMPILED LAWS ANN. § 25-4-2 (1967).

[60] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion, Brandeis, J.).

[61] The fourteenth amendment incorporation of the federal Bill of Rights proceeds on such an assumption.

[62] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[63] 316 U.S. 535 (1942).

[64] 414 U.S. 632 (1974).

unduly burdened a teacher's decision to bear a child. *LaFleur* may in fact vindicate more than the right to procreate, for it upholds the right of a woman to combine a career with motherhood without unnecessary state restriction of either element.

The right to procreate also suggests a right not to procreate. The latter may have emerged sub silentio in *Griswold*, where the right to use contraceptives seemed secondary to the Court's focus on the "intimate relation of husband and wife."[65] Seven years later, in *Eisenstadt v. Baird*,[66] the Court announced that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[67] Only in *Roe v. Wade*,[68] however, did the right not to procreate gain firm recognition as a lifestyle decision. In upholding the right to abortion, the Court recognized that an unwanted child might create a "distressful life and future," with psychological, physical, and financial burdens for the woman concerned.[69] Although *Roe* has been severely criticized,[70] the decision is not an illogical extension of the Court's earlier decisions in matters of intimate association. Indeed, if procreation is to be labeled a constitutional right, it may imply a full freedom of negative choice, in the same sense that marriage implies a full choice not to marry, voting not to vote, and travel to remain at home. For the constitutional right of procreation can hardly be fundamental if one is compelled to exercise it.

The Court has extended the right of procreation rather freely. Procreational choice has been protected for males as well as females,[71] and for unmarried as well as married persons.[72] Moreover, the right may extend beyond the acts of intercourse and childbirth to the parent's right, as yet poorly defined, to make certain lifestyle choices of a practical and spiritual nature for his

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[65] 381 U.S. at 482.

[66] 405 U.S. 438 (1972).

[67] *Id.* at 453.

[68] 410 U.S. 113 (1973).

[69] *Id.* at 153.

[70] *E.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. The latter concludes that *Roe* is "symptomatic of the analytical poverty possible in constitutional litigation." *Id.* at 184. *But cf.* Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) (*Roe* represents ethical function of following cultural transformations in society).

[71] *Compare* Skinner v. Oklahoma, 316 U.S. 535 (1942) (males), *with* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (females).

[72] *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965) (married), *with* Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried).

offspring.[73] Yet clearly this lifestyle choice is not absolute, and labeling procreation "fundamental" creates more difficulties than it resolves. The Court itself has hinted that the right need not be underwritten by the public fisc: it has upheld maximum family-grant ceilings under the AFDC program,[74] as well as a state's exclusion of pregnancy and childbirth expenses from disability insurance coverage.[75] And Congress undoubtedly could "constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents."[76]

Other purposeful and common burdens are placed on procreation, as there must logically be on any act with consequences so formidable as the creation and introduction into society of a new being. For example, there is yet no legal right to procreate with impunity, for parents in every state may be made liable for child support. Nor is there a right to have sexual relations, much less to procreate, with any willing partner, for criminal and civil sanctions still attach to incest and adultery. Thus procreational choices are, despite their constitutionally protected status, limited by laws that identify marriage with possessive and exclusive sexual relations and that favor the family as the best environment for raising offspring.

The focus of the right to procreate is often less on the sexual act itself than on the gratifications and burdens of raising children. In a society where sexual and procreational choices seem ever more distinct, this emphasis is appropriate. Thus, in *Stanley v. Illinois*[77] the Court spoke of "the interest of a parent in the companionship, care, custody, and management of his or her children,"[78] and of the "warm, enduring" bonds between parent and child.[79] This emphasis on the rewards of child-rearing may in time lead to recognition of a fundamental right of adoption or of child custody, insofar as courts may insist that public agency procedures affecting placement of children be both open and fair.[80]

For example, characteristics of prospective adoptive parents

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[73] Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[74] Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[75] Geduldig v. Aiello, 417 U.S. 484 (1974).

[76] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (concurring opinion, Powell, J.).

[77] 405 U.S. 645 (1972).

[78] *Id.* at 651.

[79] *Id.* at 652.

[80] For an overview of the procedures of adoptive agencies, see CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE (rev. ed. 1973).

such as age, physical resemblance to the child, length of residence in the community, or length of marriage might not be allowed to operate as conclusive presumptions of parental unfitness,[81] although an adoptive agency might still be allowed to consider carefully such factors in making a placement. Although the doctrine of conclusive presumption has been repeatedly criticized,[82] it has gained its greatest acceptance in the area of child-bearing and custody rights.[83] Certainly the use of *rebuttable* presumptions would have the advantage of not replacing agency expertise with constitutional command. Thus, the Court might not overturn the use of certain factors as presumptions, but instead might require adoptive agencies to give prospective parents a brief hearing on their application, a statement of reasons for an adverse decision, and, perhaps, a limited opportunity to review an initial rejection. Such a course would not be without substantial costs,[84] but the Court may find it more awkward to differentiate the rights of natural parents, whose custody right it has already protected,[85] from the rights of persons seeking the gratifications of parenthood through adoption.[86]

As with other lifestyle choices, the right to procreate has been imperfectly analyzed by the Court; only a few of its many implications have been examined.[87] Before the post-World War II baby boom, *Skinner* declared that the right to procreate was "fundamental to the very existence and survival of the race."[88] Certainly, this

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[81] Professor Clark has argued similarly with respect to religious belief: "Many, if not most, adoptions affect children too young to have formed religious beliefs. With the contemporary trend toward earlier adoption, some children go direct from the hospital to their adoptive parents. It makes little sense to talk of their religion." H. CLARK, LAW OF DOMESTIC RELATIONS 647 (1968).

[82] *See* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974).

[83] *E.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[84] For an analysis of the costs of procedural due process, see Wilkinson, *Goss v. Lopez: The Supreme Court As School Superintendent*, 1975 SUP. CT. REV. 25, 52-62.

[85] Stanley v. Illinois, 405 U.S. 645 (1972).

[86] Parents seeking to adopt a child would, however, be requesting a hearing on an *application* for child custody. The Court to date has only required hearings on a *threatened deprivation* of a liberty or property interest.

[87] The whole question of compulsory sterilization, for example, raises complex constitutional problems. *See* Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas*, 41 U. CINN. L. REV. 529 (1972); Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917 (1974); Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856 (1971).

[88] 316 U.S. at 541.

rationale is not persuasive in an overpopulated world. Although all lifestyle rights are linked to an unusual degree to the moral perceptions of the times, the right to procreate seems peculiarly vulnerable to shifting social and political perceptions. The stature of the right may diminish in a period more concerned with the legitimate dangers of overpopulation, or with the related and volatile question of public support for dependent children. How a future Court might react to such state motivations for burdening the right is unforeseeable.

C. *Extrafamilial Lifestyle Choices*

Each of the constitutional rights discussed above is associated with the creation or dissolution of the nuclear family or, in the case of procreation, with a lifestyle choice that is most often exercised within the formal family unit. A crucial question, however, is whether extrafamilial lifestyle choices of domestic companionship and association likewise merit constitutional protection. The first cases where the Court extended such protection to biological relationships outside the formal family involved discrimination against illegitimate children. The Court forbade states from disadvantaging illegitimates in the recovery of wrongful death[89] and workmen's compensation benefits,[90] and in their right to support from their natural fathers.[91] The primary state interest in burdening illegitimacy—that of expressing disapproval of extrafamilial sexual activity—was held insufficient to support such discrimination.

The illegitimacy cases make clear, however, that the Court was more concerned with the penalties suffered by innocent offspring than with the extramarital lifestyle choices of parents.[92] The Court did not intend to disparage support of the formal family unit as a legitimate state end; it was concerned with the means—the stigmatizing of innocent offspring—by which the end was furthered.[93] Yet it is significant that the Court was willing to undertake even this scrutiny of means, given that the state's interest in preserving family stability was at stake.

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[89] Levy v. Louisiana, 391 U.S. 68 (1968).

[90] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[91] Gomez v. Perez, 409 U.S. 535 (1973). The protection for illegitimates has not, of course, been complete. *See* Mathews v. Lucas, 96 S. Ct. 2755 (1976); Labine v. Vincent, 401 U.S. 532 (1971).

[92] *But cf.* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (construction of statute as barring wrongful death recovery by mother of illegitimate child held violative of equal protection).

[93] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972).

More dramatic than the illegitimacy cases is *Stanley v. Illinois*.[94] There the petitioner was not the innocent victim of an extramarital liaison, but rather was one who had shunned formal wedlock during eighteen years of friendship with a woman by whom he had fathered three children. Indeed, Chief Justice Burger in dissent suggested that the petitioner's chief interest was "with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children."[95] In any event, the petitioner challenged an Illinois procedure under which children of an unwed father automatically became wards of the state upon the death of the mother. In holding that the petitioner was entitled to a hearing on his fitness as a parent before his children were taken from him, the Court rejected the dissent's argument that Illinois was justified in recognizing only "those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings."[96] The law should not refuse, the Court stated, "to recognize those family relationships unlegitimized by a marriage ceremony . . . . [F]amilial bonds in such cases [are] often as warm, enduring, and important as those arising within a more formally organized family unit."[97]

On its face *Stanley* stands for the proposition that a father's personal interest in the raising and companionship of his children is not defeated by his decision to remain unwed. Thus *Stanley* may be seen to protect two lifestyle freedoms: a person may choose both to remain unwed and to raise children, and the law may not force a choice between the two. Read in such a manner, *Stanley* may suggest, in an adoption setting, that an agency may not declare a man or woman ineligible as an adoptive parent solely because he or she is single. Read even more expansively, *Stanley* may suggest that the raising of children in a commune may not be declared impermissible by the state solely on the ground that the three, four, or ten adults most directly responsible for a child's upbringing are not united by formal ties of marriage. It is true, of course, that prospective adoptive parents and adults in a commune are not all, as was Peter Stanley, the natural parents of the child. Yet it may be questioned whether the lack of a blood relationship should over-

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[94] 405 U.S. 645 (1972).

[95] *Id.* at 667 (dissenting opinion, Burger, C.J.).

[96] *Id.* at 663 (dissenting opinion, Burger, C.J.). *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (statute limiting benefits to "ceremonially" married parents with children held violative of equal protection).

[97] 405 U.S. at 651-52.

ride *Stanley*'s basic premise that the absence of a legal marriage may not alone disqualify otherwise capable adults from child-raising and custody.

Such thoughts seem to be journeys in fantasy. The context of the *Stanley* decision suggests that its implications for extrafamilial lifestyle choices must be cautiously interpreted. To begin with, the Court may have been persuaded to the petitioner's claim of parental fitness by his personal circumstances. He had "lived with the two children whose custody [was] challenged all their lives, and . . . [had] supported them."[98] In addition, the Court was seemingly moved by the fact that Illinois forced unwed fathers to forfeit their offspring, yet permitted "married fathers—whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they [were] fit to raise their children."[99] Finally, Stanley's victory was a partial one, for he won only the right to a hearing on his parental fitness under ground rules as yet unclear. A state may not, after *Stanley*, use unwed fatherhood as conclusive evidence of unfitness, but, conceivably, it may still establish a rebuttable presumption that such a father is unfit.[100] And if an unwed father is not as easily identified and located as was the petitioner in *Stanley*, the state may yet be able to terminate the right of parenthood without any hearing at all.[101]

In *Stanley*, a biological relationship buttressed the claim of domestic companionship. The Court has also heard cases where unrelated persons asserted a right to share a home. Such claims confront the Court with a dilemma: should the right of domestic companionship be extended to protect those whose living arrangements are not "domestic" in the conventional sense of the word?

The home occupies a special place in constitutional law. It has been protected against the groundless intrusion of the state; it is a sanctuary where our most intimate feelings may flower. Sharing home life with others has helped serve humanity's most elemental needs: to fulfill sexual desires, to provide a place to raise a family, and to ward off spiritual desolation through close companionship with others. For some, sharing a home may mean a "doubling up against the adversities of poverty"[102] or the taking in and ministering to a stranger, or a simple coming together of "persons bound

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[98] *Id.* at 650 n.4.

[99] *Id.* at 647.

[100] *See id.* at 657 n.9; Bezanson, *supra* note 82, at 651-52.

[101] *See* 405 U.S. at 657 n.9.

[102] Department of Agriculture v. Moreno, 413 U.S. 528, 542 (1973) (concurring opinion, Douglas, J.).

by profession, love, friendship, religious or political affiliation."[103] But while the home may serve as the locus of rewarding and enduring human relationships, it may also be the site of the most corrosive and destructive ones. In the latter instances the question, as we have seen, is whether a household has a constitutional right to dissolve as well as to form.

The earliest case involving the right of household association for unrelated individuals was *Department of Agriculture v. Moreno*.[104] At issue in *Moreno* was a 1971 amendment to the Food Stamp Act that excluded from the food stamp program any household whose members were not all related. The *Moreno* claimants included a fifty-six-year-old diabetic woman who lived with a female friend and the latter's three children, and two women sharing living expenses together in an apartment so that the daughter of one might attend a nearby school for the deaf. Wishing to assist such people, yet concerned to avoid creating a broad constitutional right to live with whom one pleases, the Court merely declared the "unrelated person" amendment to be "wholly without any rational basis."[105]

The Court's evasion did not go unnoticed. Justice Rehnquist, in dissent, found it rational for Congress to conclude that funding only family units "provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps."[106] Given such a rational basis for the family unit preference, it is difficult to resist the conclusion that *Moreno* represents the "unacknowledged application" of a more stringent standard of scrutiny.[107] The elevated scrutiny most likely was triggered by the Court's awareness, as Justice Douglas put it, of an associational right of "[p]eople who are desperately poor but unrelated [to] come together and join hands with the aim better to combat the crises of poverty."[108] The Court's opinion itself may subtly support such a lifestyle right, for it condemns the amendment as an exclusion of "*only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."[109]

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[103] Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (dissenting opinion, Marshall, J.).

[104] 413 U.S. 528 (1973).

[105] *Id.* at 538.

[106] *Id.* at 546 (dissenting opinion, Rehnquist, J.).

[107] *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 133 (1973).

[108] 413 U.S. at 543 (concurring opinion, Douglas, J.).

[109] *Id.* at 538.

The issue of associational choice for unrelated persons was more directly confronted one term after *Moreno* in *Village of Belle Terre v. Boraas*.[110] Unsuccessfully challenged in *Belle Terre* was a village zoning ordinance restricting land use to one-family dwellings and to household units containing not more than two unrelated persons. Justice Marshall, in a vigorous dissent, characterized the ordinance as permitting "any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but [limiting] to two the number of unrelated persons . . . who can occupy a single home."[111] The village, Marshall argued, had "in effect . . . acted to fence out those individuals whose choice of lifestyle differs from that of its current residents."[112] Nevertheless, in upholding the ordinance the Court appeared to condone, at least tacitly, the preservation of social and class homogeneity as a valid zoning goal:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[113]

Moreno and *Belle Terre* are not easily reconciled. Both cases concerned laws that burdened the right of domestic association of unrelated persons. Although rational basis scrutiny was ostensibly employed in both cases, the scrutiny in *Belle Terre* was of the traditional toothless kind, while that in *Moreno* was of the modern, more interventionist variety.[114] In upholding the zoning ordinance in *Belle Terre*, the Court observed that it was dealing with "economic and social legislation,"[115] where legislative judgment routinely merits deference. Yet the statute overturned in *Moreno* was likewise "economic and social" and involved the area of public appropriations, where the Court has tolerated burdens even upon well-established lifestyle rights.[116] So ambivalent an approach to the

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[110] 416 U.S. 1 (1974).

[111] *Id.* at 16 (dissenting opinion, Marshall, J.).

[112] *Id.* at 16-17 (dissenting opinion, Marshall, J.).

[113] *Id.* at 9.

[114] *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

[115] 416 U.S. at 8.

[116] *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974); Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). *See generally* Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 1005-17 (1975).

associational rights of unrelated persons defies easy explanation. Perhaps the Court in *Belle Terre* simply recoiled from a full investigation of exclusionary zoning practices, which fairly bristle not only with burdens upon lifestyle rights but with difficult questions of wealth discrimination.[117] Or perhaps the difference in the two cases reflects nothing more than the fact that in *Moreno* the plaintiffs were representatives of the handicapped poor, while in *Belle Terre* they were six college students.

The Court's performance in *Moreno* and *Belle Terre* is disappointing not only in its inconsistency but in its failure even to address the central issue pervading both cases: the extent to which unrelated persons have a constitutional right to one another's personal, domestic companionship. A starting point for such an inquiry is *Stanley v. Georgia*,[118] which upheld the right of an adult to possess and view obscene materials in the privacy of his home. Courts may extend *Stanley* to the right to share the home with whom one pleases, for the home furthers the pleasures of intimate companionship as much as it permits the solitary viewing of obscene materials.[119] Yet it is likewise clear that *Stanley*'s protection of the home as a haven is not unlimited, for the Court would not uphold a constitutional right to murder in the home, to emit raucous noise, or to possess narcotics, illegal firearms, stolen goods, or even such quantities of obscene materials as are inconsistent with personal possession and use.[120]

Courts may ultimately hold *Stanley* to represent the proposition that one enjoys a constitutional right to do anything in one's home that does not harm others. In other words, the state would have no right to prohibit persons from sharing a home, absent some showing of community harm.

A standard of community harm is, however, more easily stated

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[117] *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780-98 (1969).

Voiding the ordinance in Belle Terre need not have involved the Court in the zoning thicket. That ordinance imposed a direct prohibition on unorthodox lifestyles. All zoning laws are not so blunt. Minimum lot and minimum house size ordinances, for example, may make it more difficult for persons of certain lifestyles to associate, but they do not constitute outright prohibitions on unconventional associations.

[118] 394 U.S. 557 (1969).

[119] One reading of *Stanley* might suggest that the petitioner was protected only because he exercised a constitutional right, *i.e.*, the first amendment "right to receive information and ideas." *Id.* at 564. The Court's emphasis on the special nature of the home suggests, however, that it was at least as much the setting as the nature of the activity that prompted protection. This interpretation prevailed in Paris Adult Theater I v. Slaton, 413 U.S. 49, 65-66 (1973).

[120] *See* 394 U.S. at 568 n.11.

than applied. Assuming that a state or township wishes to regulate population density—and surely such regulation would serve a legitimate interest by reducing the imposition on the community of more guests and friends, more noise and arguments, more comings and goings, and more cars, motorcycles, household trash, and the like—the state could do so by flatly prohibiting more than two, or three, or whatever number of adults from sharing the same dwelling unit. Thus, the state could satisfy its legitimate interest in regulating population density—itself reflective of lifestyle values—without using means that so broadly discriminate against the lifestyle choices of unrelated persons.[121]

The real issue in *Moreno* and *Belle Terre* leads to other problems. Legal discrimination against households of unrelated persons often has as its chief object the regulation of sexual activity outside marriage.[122] Yet a major failing of the "unrelated persons" provision in *Moreno* lay in the burden it placed on even the elderly poor of the same sex who shared joint living arrangements.[123] Thus, the lesson of *Moreno* may be that extramarital sexual activity cannot be reached by such overbroad means as a blanket discrimination against unrelated households. Direct prohibition of extramarital sexual activity, however, is another subject.

II

PERSONAL SEXUAL CONDUCT

Sex in American society has traditionally been identified with heterosexuality, with monogamous marriage and the nuclear family. Outside these contexts, personal sexual conduct has been regularly tabooed, through the use of law as well as of other social sanctions. The emerging constitutional dilemmas in the area of sexual conduct involve challenges to those taboos. The challenges, taken together, raise the question whether intimate sexual relations in forms not traditionally sanctioned are constitutionally protected. Should certain values associated with sexual conduct—love, pleasure, intimacy, mutual interdependence—be given the protection of the Constitution, or is that protection reserved for other

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[121] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 19 (1974) (dissenting opinion, Marshall, J.).

[122] The Court in *Moreno* noted that a central purpose of the food stamp amendment may have been to exclude "hippie communes" from participation in the program. It then declared that purpose impermissible. 413 U.S. at 534.

[123] In this respect, the ordinance in *Belle Terre* may have seemed less punitive to the Court; it at least permitted two unrelated persons to share a home. *See* 416 U.S. at 8.

values—childrearing, monogamous marriage, heterosexuality, adulthood—with which intimate sex has customarily been linked?

The current lifestyle choices spawning controversy in the area of sexual conduct, then, are choices to engage in unconventional sexual relations. Such modern lifestyle choices result in what many legislatures have termed "unnatural" sexual practices. Because of the intimate nature of sexual conduct, "unnatural" sexual practices have not been regularly analyzed or even legislatively particularized; hence an implicit legislative association has been made. A form of intimate sex (homosexuality) has been thought "unnatural" and therefore outlawed; practices (fellatio or cunnilingus) identified with that form have similarly been prohibited, even in their heterosexual variations.[124]

Current sexual conduct cases typically involve violations of sodomy statutes. The following dicussion seeks to show that recent decisions on sodomitic conduct are not merely delineating the scope of the constitutional right of privacy, but are confronting a more basic issue. That issue is whether the state has an interest in confining intimate sexual conduct to "acceptable" contexts, or whether sexual conduct is to be constitutionally protected regardless of the unpopular, offensive, or "unnatural" form it may take.

A. *The Doctrinal Framework: The Evolving Meanings of Constitutional Privacy*

The courts have regularly analyzed sodomy in terms of constitutional privacy, a concept that in the course of its evolution has embraced three distinct ideas. One is protection from intrusion, summed up in the maxim that a man's home is his castle. This concept of privacy derives from the fourth amendment, which forbids the state's invasion of one's home, office, automobile, person, or effects absent the issuance of a warrant or, in carefully specified situations, a law enforcement officer's determination of probable cause.

A second concept of privacy might best be labeled seclusion. In *Griswold* and in *Stanley v. Georgia*, the Court attempted to link privacy to intimate places, such as the marital bedroom or, more generally, the home. *Stanley* left open the question of the limits of this

[124] A typical example is Virginia's statute, VA. CODE § 18.1-212 (Cum. Supp. 1974): Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

zone of privacy, and later decisions, notably *Paris Adult Theater I v. Slaton*,[125] have confined the protected zone to the home. This has resulted in some anomalies, such as a distinction between obscene books read in the home (protected) and obscene books in transit from one home to another or read on a wilderness vacation (apparently unprotected).[126] The boundaries of constitutional privacy as seclusion are thus indeterminate, but it is clear that some peculiarly intimate places associated with an individual's private life are protected simply because the individual has a right "to be let alone."[127]

Moreover, the concept of seclusion implies protected acts as well as protected places. The concept suggests that one can, in seclusion, engage in activities that would be offensive and even illegal outside a protected, private zone. But the locus of the activity is not dispositive: protection for activity within the home is, as previously noted, far from absolute.[128] Equally important in the *Griswold* and *Stanley* results was the Court's conviction that the acts in question—sexual intercourse and reading obscene literature—had a relatively low potential for working harm beyond the secluded zone.

Meanwhile still another *Griswold* source of privacy—the marital relationship—was undergoing refinement, and a third meaning of constitutional privacy as personal autonomy began to emerge. *Griswold* had tied privacy, or at least sexual privacy, to approved relationships. Unmarried persons might not be able to assert privacy claims since they could not identify themselves with the "sacred" institution of marriage.[129] *Eisenstadt v. Baird*[130] undercut any such reasoning by requiring that access to contraceptives, however defined, "be the same for the unmarried and married alike." "[T]he marital couple," noted the *Eisenstadt* Court, "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."[131] Hence, *Eisenstadt* freed the right of privacy from the marital context and seemed to liberate the right from any preoccupation with place. Privacy, the Court hinted, might mean not only freedom from intrusion or a right to seclusion, but freedom to

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[125] 413 U.S. 49 (1973).

[126] *See id.* at 66.

[127] Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion, Brandeis, J.).

[128] *See* text accompanying notes 118-21 *supra*.

[129] *See* 381 U.S. at 485-86.

[130] 405 U.S. 438, 453 (1972).

[131] *Id.* (emphasis added).

make decisions about certain personal matters. "If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[132]

Roe v. Wade,[133] the Court's principal abortion decision, expanded the *Eisenstadt* meaning of privacy as autonomy to uphold a limited constitutional right to decide to have an abortion. Again, privacy was not confined to freedom from intrusion or to the *Stanley v. Georgia* meaning of seclusion: abortions take place in public hospitals, and participants are not subjected to searches and seizures. What is private about a decision to have an abortion, the Court argued in *Roe*, is the element of personal choice. The decision to have an abortion is intimate, because it reflects the special concerns of one individual, not because it occurs in a private place. Hence privacy in the *Eisenstadt-Roe* sense primarily means freedom to make personal choices about one's intimate affairs. Yet the *Roe* Court stopped short of completely equating privacy with autonomy. "[I]t is not clear to us," the Court stated, "that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions."[134]

The evolving meanings of constitutional privacy reflect the growing confidence of the Court in the privacy concept. Intrusion, the earliest meaning, derived from rights explicitly protected by the fourth amendment. Seclusion, a broader meaning, then increasingly overshadowed intrusion as privacy rights became more entrenched. Finally, protection for a right of autonomy developed out of the Court's recognition that the right to privacy was a doctrine which had taken hold of the public's imagination: it did not make its appearance until seven years after *Griswold*.

Clashes between the divergent meanings of privacy seem inevitable, especially in the area of sexual conduct. On some occasions a personal choice to engage in intimate sex simultaneously affirms the values of seclusion and autonomy, thereby creating a privacy right of considerable strength; but at other times that choice invades the seclusion and restricts the autonomy of others. Forcible rape in public involves neither seclusion nor autonomy values and is obviously not protected. Seclusion without autonomy

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[132] *Id.* (emphasis in original).
[133] 410 U.S. 113 (1973).
[134] *Id.* at 154.

is likewise insufficient. Rape in a private residence may be sufficiently secluded, but of course forfeits protection in its invasion of the victim's autonomy. Autonomy without seclusion may also be unprotected: a consensual sexual act in public invades the seclusion rights of onlookers. Only private, consensual sexual behavior taps both strains of the Court's recent privacy cases and, in so doing, creates a substantial lifestyle right against which various state interests must be carefully weighed.

B. *Judicial Confrontation of Taboos: Some Recent Sodomy Cases*

Recent challenges to state sodomy statutes on privacy grounds illustrate the need to unravel the various meanings of constitutional privacy. Most such statutes flatly outlaw "unnatural" or "deviant" sex; they fail to create exemptions for classes of persons or specific conditions. Fellatio, cunnilingus, and other forms of sodomy are banned whether engaged in openly or in seclusion, and whether engaged in by consenting married adults or by other persons. In light of the evolving meanings of privacy, such statutes seem vulnerable to constitutional challenge. They restrict personal decisions about intimate matters, and their prohibitions reach into areas, such as the home, associated with seclusion. In short, they intrude into the very core of constitutional privacy.

Essential to a blanket prohibition of "unnatural" sexual conduct on moral grounds is a firm and generally shared belief that the prohibited conduct is in fact immoral. When such a general understanding exists, reasons justifying suppression of certain conduct leap to mind. Murder is prohibited because it takes another life, and to take another life without privilege is considered immoral. Arguably, a comparable understanding does not exist to justify the prohibition of "unnatural" sexual conduct. Indeed, one consequence of the more extended and open discussion of sexuality characterizing American life in the 1960's and 1970's has been a greater collective doubt as to which sexual practices are "unnatural" and why. The reflex leap of faith that allows American legislators to punish murder under their police power does not exist for private consensual sexual conduct. Consequently, the state interest in prohibiting "unnatural" sexual practices simply as a regulation of public morality needs particularization.[135]

A significant "unnatural" sexual practice case is *Doe v. Commonwealth's Attorney*.[136] There a group of male homosexuals

[135] *See* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 103-08 (1973).

[136] 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

sued in federal district court for declaratory and injunctive relief, arguing that Virginia's sodomy statute[137] was unconstitutional as applied to consensual homosexual acts performed in private by adult males. The case was first heard by a three-judge panel that voted two to one to sustain the statute, both on its face and as applied to the petitioners.

The majority opinion asserted that state legislation regulating personal sexual conduct is constitutionally suspect only when it "trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life."[138] To support this assertion the majority announced that *Griswold* was controlling,[139] yet it failed even to mention the possible extensions of *Griswold* in *Stanley v. Georgia*, *Eisenstadt*, and *Roe*. The majority then quoted at length[140] from dicta in a dissent by Justice Harlan in *Poe v. Ullman*,[141] where Harlan had argued that homosexuality could be criminally prosecuted even if privately practiced, and closed by recapitulating the long ancestry of sodomy legislation. In short, the majority confined permissible sexual conduct to contexts—marriage, home, family—where it had traditionally been accepted, and demonstrated no awareness whatsoever of the evolving meanings of constitutional privacy.

An emerging constitutional quandary—whether after *Stanley*, *Eisenstadt*, and *Roe*, a right existed to engage in private sexual practices outside the traditional marital context—was thus assumed away by the *Doe* majority. Judge Merhige, however, argued in dissent that *Roe* and *Eisenstadt* demonstrated that "intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause," and that "[t]he right to select consenting adult sexual partners must be considered within this category."[142] Merhige maintained that "fundamental rights of such an intimate facet of an individual's life as sex, absent circumstances warranting intrusion by the state, are to be respected."[143] This was especially true where the activity took place within "the private dwelling of a citizen."[144]

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[137] *See* note 124 *supra*.
[138] 403 F. Supp. at 1200.
[139] *Id.* at 1200-01.
[140] *Id.* at 1201-02.
[141] 367 U.S. 497, 546, 552-53 (1961).
[142] 403 F. Supp. at 1204.
[143] *Id.* at 1205.
[144] *Id.*

The Supreme Court, on direct appeal, summarily affirmed. Justices Brennan, Marshall, and Stevens voted in favor of noting probable jurisdiction and setting the case for oral argument. In some respects, however, the procedural posture of the case made it an unattractive one for a full-blown decision. At most a threat of prosecution had taken place; no circuit court had considered the case; and the complexity of the issues involved had been aired only preliminarily in Merhige's dissent. Given these circumstances, we suggest that the decision of the Court to summarily affirm, although an adjudication on the merits, should not be taken as an indication that the Court is prepared to sustain sodomy statutes in all situations. Rarely does the Supreme Court understand a prior summary affirmance to preclude subsequent plenary consideration of an important issue. Nor can significant issues of constitutional law be definitively resolved in so peremptory a fashion.

Nonetheless, *Doe v. Commonwealth's Attorney* does establish the proposition that state efforts to prohibit private, consensual homosexual conduct are constitutionally permissible, despite *Stanley v. Georgia*, *Eisenstadt*, and *Roe*. Pending more thorough Supreme Court review, lower courts are bound to that proposition. Unfortunately, the Court announced its decision without any accompanying rationale. If a lifestyle right for consenting adults to engage in intimate sex free from governmental interference is taken seriously, a rationale for the *Doe* result will not be easy to formulate. Consent assumes that neither partner has imposed his sexual inclinations on the other; adulthood assumes that any special interest the state might have in the sexual protection of minors is absent; seclusion assumes that others are not exposed to the practices. Thus, an autonomy right to freely engage in sex combines with a seclusion right not to be disturbed in the private practice of intimate sex to produce a constitutional lifestyle claim of some power.

Despite these considerations, state interests of significant strength support a prohibition of homosexuality. First, a state may be interested in discouraging public behavior that gives widespread offense. This legitimate interest cannot be dismissed by simply announcing, as did Judge Merhige, that constitutionally permissible homosexual conduct is limited to private settings.[145] Sexual liaisons necessarily involve some public contact, especially at their inception. Heterosexuals meet in public places, share each other's company, flirt, and indulge in various displays of affection; homosex-

[145] *See id.* at 1204-05.

uals do as much. To equate sexual conduct wholly with private, intimate acts is to compartmentalize sexual encounters in an unrealistic fashion.

Thus, constitutional protection for secluded homosexual acts might well produce a greater public exposure to homosexuality in general. Criminalizing homosexual acts has certainly not succeeded in suppressing all public display of homosexual affection; conversely, decriminalization would not eliminate the social disapprobation that causes many homosexuals to conceal their sexual preference. But it is safe to assume that removal of criminal sanctions from private acts would lead to more open homosexuality, both because homosexuality would no longer expose one to criminal penalties, and because of the greater degree of tolerance that the removal would imply.

Stanley v. Georgia and *United States v. Reidel*[146] suggest one answer to the state interest in avoiding increased public exposure. Taken together, these cases hold that although possession of obscenity in the home is protected, the preconditions to such possession, such as distribution of obscenity, are not. By analogy, the state's interest in saving its citizens public offense could be protected by obliging the state to respect secluded activity, while permitting arrest even for mild public displays of homosexual affection. Such a suggestion, however, is fraught with difficulty. Law enforcement officials might well be unable to differentiate milder forms of homosexual affection from normal expressions of friendship and camaraderie. The *Stanley* "solution" would thus perpetuate the sporadic and volatile street enforcement that exists under present law.[147]

Moreover, it is debatable whether the state interest in protecting the public from offense is alone sufficient to support the *Doe* result. Surely the state may continue to prohibit the assault on sensibilities that would be caused by public performance of the most intimate homosexual acts, just as it now possesses that unquestioned power with respect to heterosexual acts. And, it will be argued by some that public sensibilities would adjust to the milder sight of homosexuals holding hands or walking arm-in-arm just as easily as those sensibilities have adjusted to the presence of long hair, "suggestive" dancing, and other contemporary sights that once were considered shocking.

The very fact of such adjustment, however, brings us to con-

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[146] 402 U.S. 351 (1971).

[147] *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 286-95 (1968).

sideration of a final state concern. The most threatening aspect of homosexuality is its potential to become a viable alternative to heterosexual intimacy. This argument is premised upon the belief that the practice of an alternative mode of sexual relations will inimically affect the predominant mode. Thus, any recognition of a constitutional right to practice homosexuality would undermine the value of heterosexuality and the institutions and practices—conventional marriage and childrearing—associated with it.

This state concern, in our view, should not be minimized. The nuclear, heterosexual family is charged with several of society's most essential functions. It has served as an important means of educating the young; it has often provided economic support and psychological comfort to family members; and it has operated as the unit upon which basic governmental policies in such matters as taxation, conscription, and inheritance have been based. Family life has been a central unifying experience throughout American society. Preserving the strength of this basic, organic unit is a central and legitimate end of the police power. The state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer.

Disapproving sexual conduct that might threaten traditional family life is arguably a means related to this end. Criminal law provides perhaps the strongest vehicle for expressing such disapproval. On the other hand, it is not the only vehicle for enforcing conventional mores; community disapproval of errant behavior is arguably a more potent enforcement mechanism than the law. Moreover, the criminal law's effectiveness will be reduced if social practices and attitudes run counter to its underlying assumptions. Yet criminalization, whatever its lack of perfection as a deterrent, is a dramatic symbol of social disapprobation.[148] Decriminalization means, quite literally, the removal of disapproval, the recasting of the state's posture as one of neutrality.

In seeking to regulate homosexuality, the state takes as a basic premise that social and legal attitudes play an important and interdependent role in the individual's formation of his or her sexual destiny. A shift on the part of the law from opposition to neutrality arguably makes homosexuality appear a more acceptable sexual lifestyle, particularly to younger persons whose sexual preferences are as yet unformed. Young people form their sexual identity partly on the basis of models they see in society.[149] If homosexual

[148] *See id.* at 42-43.

[149] *See* Acosta, *Etiology and Treatment of Homosexuality: A Review*, 4 ARCHIVES SEXUAL BEHAVIOR 9, 16-18 (1975).

behavior is legalized, and thus partly legitimized, an adolescent may question whether he or she should "choose" heterosexuality. At the time their sexual feelings begin to develop, many young people have more interests in common with members of their own sex; sexual attraction rather than genuine interest often first draws adolescents to members of the opposite sex. If society accorded more legitimacy to expressions of homosexual attraction, attachment to the opposite sex might be postponed or diverted for some time, perhaps until after the establishment of sexual patterns that would hamper development of traditional heterosexual family relationships. For those persons who eventually choose the heterosexual model, the existence of conflicting models might provide further sexual tension destructive to the traditional marital unit.

Thus, *Doe v. Commonwealth's Attorney* ultimately presents a significant lifestyle claim balanced against at least one important countervailing state interest. The question raised by *Doe* is a difficult one: Should the state be constitutionally required to abandon an ancient sanction, when abandonment might in time lead to increasing, although statistically unpredictable, defections from heterosexual behavior and traditional family life?[150] On the answer to this last question the authors have been unable to agree. Mr. Wilkinson would uphold the state's interest in the preservation of the traditional family; Mr. White would desire stronger empirical proof that the state interest is truly put in jeopardy by homosexual practices among consenting adults. Both authors acknowledge the intuitive elements in their judgments.

The balancing analysis we suggest for *Doe*-type cases is appropriate in other instances where the concept of seclusion is involved. Such a case was *Lovisi v. Slayton*,[151] a recent Fourth Circuit decision. The question in *Lovisi* was whether a married couple could be constitutionally prosecuted for consensual sodomy in the presence of a third party.

Aldo and Margaret Lovisi, a married couple, were convicted of sodomy under the same Virginia statute at issue in *Doe*. Prosecution of the Lovisis came when one of their daughters brought an erotic photograph to elementary school and claimed that her home was filled with similar pictures. A properly executed search revealed many such photographs, including one depicting Margaret Lovisi performing fellatio on her husband. A third party, one Earl

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[150] See G. HUGHES, THE CONSCIENCE OF THE COURTS 23 (1975) for a view that the defections would not prove substantial.

[151] 539 F.2d 349 (4th Cir. 1976), *aff'g* 363 F. Supp. 620 (E.D. Va. 1973).

Romeo Dunn, was present when the photographs were taken and had engaged in sexual activity with the Lovisis.[152]

In a habeas corpus proceeding, the Lovisis challenged the constitutionality of Virginia's statute as applied to their sodomitic conduct with each other. The district court found that *Griswold*, *Eisenstadt*, and *Roe* secured protection of individual sexuality, but held that the Lovisis had waived that protection by allowing their activity to become public through careless exposure of the photographs.[153] The Fourth Circuit, splitting five to three, affirmed, but used a different rationale. Although the court recognized a right of privacy that embraced "marital intimacies," protection dissolved when "a married couple admit[ted] strangers as onlookers" to their sexual activities.[154] The test for protection was apparently secrecy-in-fact: the presence of "observed 'peeping Toms'" or "chance acquaintances" would be considered "accept[ed]," and constitutional protection would thereby be lost.[155] In addition, the Fourth Circuit majority read *Doe v. Commonwealth's Attorney* as "necessarily confin[ing] the constitutionally protected right of privacy to heterosexual conduct, probably even that only within the marital relationship."[156]

In two dissenting opinions, three judges in *Lovisi* found constitutional immunity for consensual sodomy practiced by a married couple, "whether practiced in secret or in the presence of a third party or a camera."[157] "Privacy," one of the dissenters maintained, was a freedom "not limited to the conduct of persons in private." It was better described as "personal autonomy" or "the right to be let alone."[158]

Lovisi thus illustrates how sexual conduct cases reveal the multiple meanings—sometimes reinforcing and sometimes opposing—of the concept of constitutional privacy. An autonomous lifestyle choice to engage in sodomy sometimes combines with a choice to be left alone. A consensual sodomitic act by a married couple in their bedroom presents a paradigm instance where the two privacies reinforce one another. On other occasions, a choice to practice sodomy is deliberately not secluded in the conventional

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[152] There was sharp controversy throughout the case over whether the pictures were taken by the daughters or by a self-timing camera. *See* 363 F. Supp. at 622.

[153] *Id.* at 627.

[154] 539 F.2d at 351.

[155] *Id.*

[156] *Id.* at 352 addendum.

[157] *Id.* (dissenting opinion, Winter, J.).

[158] *Id.* at 356 (dissenting opinion, Craven, J.).

sense. It involves more than two persons; it takes place outside the home; it may even take place in the presence of strangers. In such instances, the autonomy of the actors may conflict with the seclusion rights of others. The two currently dominant meanings of privacy collide.

In *Doe*, of course, the strength of the lifestyle right derived from the convergence of the autonomy and seclusion aspects of privacy. In *Lovisi*, the constitutional claim is not self-evident: the autonomy dimension of privacy is present, but seclusion is more doubtful. The leading cases are of limited help in determining the meaning of seclusion. Both *Griswold* and *Stanley v. Georgia* involved unquestioned instances of secluded activity. The Court depicted Stanley as "sitting alone in his own house,"[159] and the Court in *Griswold*, in discussing the privacy of the marital bedroom, surely did not contemplate the presence of a third party.

The scope of the seclusion aspect of sexual privacy remains uncertain. It obviously does not extend to sexual activity on a streetcorner, or sexual activity before an unwilling viewer dragged into the marital bedroom. Nor do seclusion rights hinge solely on the willingness of the observer; a couple clearly could not, after *Paris Adult Theatre I v. Slaton*,[160] offer admittance to every member of the public who wished to see them perform sexual intercourse. The really difficult questions of seclusion come in cases of selective viewings in intimate places. Should a *Stanley*-type petitioner, for example, be able to claim seclusion rights for a dinner party at which guests are invited to view obscene slides? Should protection for sexual seclusion rights turn on the presence of two, and only two, consenting persons?

Before *Eisenstadt*, courts might have seized upon the presence of a third-party observer as evidence that the marital sexual intimacy of *Griswold* had been converted into something more akin to sport, and thus have denied constitutional protection. After *Eisenstadt*, however, it is uncertain whether the Court regards protected sexual intimacy as a function of marriage or as a function of a prescribed number of persons.[161] It is debatable whether the Lovisis lost the seclusion half of their right to privacy the moment third-party observers were admitted to their bedroom solely because such observers were likely to spread word of the Lovisis'

[159] 394 U.S. at 565.

[160] 413 U.S. 49 (1973).

[161] Presumably large numbers of persons engaging in sexual activity within a home could be regulated under a properly drawn breach of the peace and public nuisance statute.

sexual peccadilloes.[162] But we believe that the Lovisis did forfeit their seclusion right when they took and carelessly stored photographs of their activity. Photographs are, of course, a way of preserving and reliving pleasant experiences, of which marital sex is surely one. Yet any couple that fails to take precautions against so vivid and durable a record of their intimate relations reaching the hands of others risks losing the seclusion right important to any lifestyle claim of sexual privacy. Thus, the district court more correctly pinpointed the rationale for the decision: "that snapshots taken by the Lovisis were not kept at home in such a way that the children would be denied access to them."[163]

Notwithstanding the difficulties of determining the limits of seclusion, we believe it to be a necessary and indispensable part of a lifestyle claim of sexual privacy. Not only may nonparticipants be offended by the debasement of intimacy suggested by public sexual acts, but they may also take offense at the acts themselves. And if public offense is certain, seclusion becomes a necessary condition for the legitimate practice of "unnatural" sex. Even if one takes seriously the right of an individual freely to choose his sexual practices, that right must end where it infringes upon the right of others to reject as offensive the mere observation of those practices. If the autonomous choices of some are not to invade the autonomous choices of others, seclusion appears necessary.[164]

Finally, it must be reemphasized that even though a constitutional right to private sexual activity may exist, it still must be weighed, as in *Doe v. Commonwealth's Attorney*, against countervailing state interests. Adultery is one type of sexual activity in which seclusion and autonomy rights may combine, but which the state may still regulate to further its interest in the preservation of the traditional family. Clarification of the values at stake in the area of sexual conduct can only come, we suggest, when taboos are examined with a view toward understanding the social assumptions

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[162] The Fourth Circuit believed that the Lovisis could "converse with friends or write books about their sexual relations, recounting in explicit detail their own intimacies and techniques, [and still] remain protected in their expectation of privacy within their own bedroom." 539 F.2d at 351. This concession seems inconsistent with the Fourth Circuit's conclusion that the presence of a third party onlooker alone destroyed the Lovisis' seclusion rights.

[163] 363 F. Supp. at 627. The district court noted testimony by an investigative officer that " 'thousands' of photographs were to be found all over the house" and "were freely available throughout the house to whomever lived there." In such circumstances the court concluded that the Lovisis had "relinquished their right to privacy in the performance of these acts." *Id.*

[164] *See* Knowles & Poorkaj, *Attitudes and Behavior on Viewing Sexual Activities in Public Places*, 58 J. Soc. & Soc. Research 130 (1973-74).

on which they rest, and when those assumptions are scrutinized in practice, so that corrosiveness is distinguished from unconventionality, and harms are differentiated from fears. The balancing process we have proposed seeks, above all, a forthright discussion of matters heretofore treated euphemistically.

III

Personal Appearance: Hair Style and Dress

Kelley v. Johnson[165] tested and upheld the validity of a police department regulation limiting the length of policemen's hair. In dissent, Justice Marshall argued that the "liberty" protected by the fourteenth amendment encompassed "matters of personal appearance."[166] Such a reading, Marshall suggested, was consistent with "the values of privacy, self-identity, autonomy, and personal integrity that . . . the Constitution was designed to protect."[167] After *Roe*, *Stanley v. Georgia*, and *Griswold*, Marshall maintained, the right of a citizen "to choose his own personal appearance" was unquestionable; historically it had "simply been taken for granted."[168]

In contrast, Justice Rehnquist's opinion for the majority seemed less certain about the existence of a right to choose one's personal appearance. Rehnquist found the asserted appearance liberty to be distinguishable from the liberties protected by the *Griswold-Stanley v. Illinois-Eisenstadt-Roe* line of cases: those cases involved choices "with respect to certain basic matters of procreation, marriage, and family life."[169] Whether a choice of appearance was comparable, Rehnquist maintained, was a question on which previous cases offered "little, if any, guidance."[170] Indeed, he characterized appearance claims as involving "only the more general contours of the [fourteenth amendment's] substantive liberty interest,"[171] and ultimately held, for the Court, that a member of a uniformed civilian service had no fourteenth amendment right to wear his hair as he chose.

Kelley highlights the threshold difficulties in subjecting personal appearance choices to constitutional analysis. The contours of

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[165] 425 U.S. 238 (1976).
[166] *Id.* at 250 (quoting majority opinion at 244).
[167] *Id.* at 251.
[168] *Id.*
[169] *Id.* at 244.
[170] *Id.*
[171] *Id.* at 245.

an "appearance right" remain uncertain; the context for protection of that right, if it exists, has not been delineated; the entire area lacks evaluative criteria. In the courts, impressionistic judgments have predominated, ranging from Justice Black's belief that long-hair cases were "purely local affairs,"[172] to Justice Marshall's association of appearance "with the historically recognized right of 'every individual to the possession and control of his own person,' . . . and . . . with 'the right to be let alone . . . .' "[173] The following discussion examines the sources of constitutional protection for the appearance right and the diverse contexts in which claims have recently surfaced. We end by proposing a framework for substantive due process analysis of appearance issues.

A. *The Doctrinal Background*

One intriguing aspect of the history of the United States Constitution has been the emergence of constitutional protection for various liberties at times when, for complex cultural reasons, political suppression of those liberties was considered desirable. For many years after the repeal of the Alien and Sedition Acts,[174] free speech issues were seldom raised in the courts; only in the early twentieth century, when fears of radical European ideologies and anxieties associated with World War I produced anti-subversive legislation, did the first amendment begin to take on its modern protective significance.[175] If one believes, with Justice Marshall, that the assumption that "a man should have a right to wear his hat if he pleased"[176] was so widely shared at the time the Constitution was drafted that statement of an appearance right would have belabored the obvious,[177] an analogy to the history of free speech is suggested. Pressures to define a freedom to choose one's personal appearance have surfaced only when that freedom was threatened. Such threats have occurred when certain appearances were thought subversive. This perceived subversion has been a consequence of the association of unconventional hair and dress styles with political protest. If modern protection for free speech is a child of World War I, potential protection for appearance choices is largely the offspring of the Vietnam years.

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[172] Karr v. Schmidt, 401 U.S. 1201, 1203 (1971).

[173] 425 U.S. at 253 (citations omitted).

[174] Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of July 6, 1798, ch. 66, 1 Stat. 577; Act of July 14, 1798, ch. 74, 1 Stat. 596.

[175] *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

[176] 425 U.S. at 252 (quoting I. BRANT, THE BILL OF RIGHTS 54 (1965), in turn quoting Rep. Sedgwick, August 13, 1787) (emphasis deleted).

[177] *Id.* at 251-52.

Two Warren Court doctrinal innovations are among the sources of constitutional protection for appearance choices. First is the Warren Court's retreat, late in its history, from the dichotomy between first amendment "speech" and "conduct." In cases such as *Cohen v. California*[178] and *Tinker v. Des Moines School District*,[179] the Court protected expressions—the wearing of a sweatshirt and the wearing of an arm band—which were meant to communicate political ideas, but which were not "pure" speech. Although the Court's rationale in *Cohen* and *Tinker* stressed the content of the messages conveyed, the cases could be read to extend first amendment protection to symbolic speech as manifested in dress.

Second, in *Griswold* the Warren Court developed a "penumbral rights" theory that allowed the Court to derive constitutional rights from emanations from textually designated rights. *Griswold* furthered the potential emergence of an appearance right in two respects. Substantively, the decision created protection for privacy, which in the Burger Court has taken on a meaning of personal autonomy, a value that arguably should encompass appearance choices. And methodologically, Justice Douglas' *Griswold* opinion appeared to free constitutional protection from the limitation of explicit textual designation. If judges could protect marital sexual privacy even though the Constitution did not single it out for protection, why could they not protect other privacies as well?

In its effort to secure certain privacy-derived protections, the Burger Court created another, and perhaps more powerful, potential source of constitutional protection for appearance choices. One textual means of protecting privacy lay in labeling the right a "liberty" interest protected by the fourteenth amendment. The *Griswold* Court had been unwilling to exercise that option: judicial glosses on "liberty," it said, revived the discredited technique of substantive due process.[180] But by *Roe v. Wade* the Burger Court was prepared to concede, for the purposes of candor or clarity, that a limited right to have an abortion was a fourteenth amendment "liberty."[181]

The revival of substantive due process in the privacy cases of the seventies reminds us that although substantive readings of the due process clause have gone in and out of fashion, a desire for some judicial freedom from the restraints of constitutional literalism has always existed. Substantive due process, ordered

[178] 403 U.S. 15 (1971).
[179] 393 U.S. 503 (1969).
[180] 381 U.S. at 481-82.
[181] 410 U.S. at 153.

liberty,[182] fundamental fairness,[183] and other phrases associated with judicial glosses on the Constitution have sought to respond to a problem inherent in an enumerated Bill of Rights: How shall rights too obvious to be enumerated receive constitutional protection if their obviousness evaporates? Personal appearance choices pose a recent concrete example.[184]

B. *A "Liberty" of Hair Style: Due Process Analysis*

There is, of course, no designation of personal appearance as a "liberty" encompassed in the due process clause. The Court in *Kelley* assumed arguendo that such a liberty exists, but held that it could be infringed. The Court's rationale was, as we shall argue, flawed in giving such short shrift to the constitutional significance of appearance choices. To introduce our argument it is helpful to consider initially a more fully reasoned appearance case: the Fifth Circuit's en banc decision in *Karr v. Schmidt*,[185] which held that a Texas school board's regulation restricting the length of male students' hair violated no constitutionally protected right.

Although student "long-hair" cases are now diminishing in number, they remain an important benchmark in the debate over lifestyle rights. The majority in *Karr* seemed concerned about two aspects of such cases: the burden they placed on the federal courts and the relatively trivial nature of the claims they raised. "[N]either the Constitution nor the federal judiciary," the majority announced, "were conceived to be keepers of the national conscience in every matter great and small."[186] Concerned that different federal judges might interpret the reasonableness of hair-length regulations differently, anxious to avoid court congestion, and unable to conceive appearance claims as rising to the dignity of a great constitutional right, the Fifth Circuit laid down a per se rule that school board hair-length regulations were constitutionally valid. In the process the court considered and rejected each of the potential sources of constitutional protection for appearance choices.

Of the various sources reviewed by the Fifth Circuit, only substantive liberty under the due process clause received extended treatment. The majority dismissed the relevance of the first amendment to appearance cases by asserting that the wearing of

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[182] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[183] Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (dissenting opinion, Harlan, J.).

[184] *See generally* Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

[185] 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972).

[186] *Id.* at 618.

long hair did not have "sufficient communicative content" to invoke first amendment protection.[187] Karr, a student affected by the regulation, had protested its enforcement because he "like[d] [his] hair long."[188] Nor was a penumbral analysis persuasive.[189] *Karr* antedated *Eisenstadt* and *Roe*, and the Fifth Circuit read *Griswold* as being confined to intrusions into the home.[190] Substantive due process arguments, however, raised more substantial issues for the court. But fourteenth amendment liberties, it felt, could be "ranked in a spectrum of importance," at one end of which were "the great liberties" of speech, religion, association, and marital privacy, and at the other "lesser liberties."[191]

The right of a male student to choose his hair length was a "lesser" liberty. It was such because, first, cropped hair eventually grows back and thus "the interference with liberty [was] a temporary and relatively inconsequential one";[192] second, school boards enact numerous other regulations equally restricting the conduct of students, from parking rules to lunch privileges; and third, the federal courts ought not interfere with the management of local school affairs except where truly "fundamental liberties" were involved.[193]

The Fifth Circuit's triviality point is more easily stated than explained. If the triviality argument reflects a subconscious judicial downgrading of the rights of mere high school students, by far the most frequent long-hair plaintiffs,[194] that downgrading is unsupportable. If, however, it is the choice that is trivial, as opposed to those who exercise it, one wonders why school officials need bother to regulate the matter at all. Finally, in any ordering of appearance rights, a choice of hairstyle may rank among the most important, for unlike uniforms and other prescribed modes of dress, hair length follows a student from school into private life. Student hair-length regulations, then, may illustrate the presumptuousness of officials who interpret their power to regulate part of a person's daily regimen as a mandate to regulate the whole.

Moreover, if labeling the hairstyle right trivial is a shorthand way of declaring that the appearance right as a whole lacks impor-

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[187] *Id.* at 613.

[188] *Id.* at 614.

[189] *Id.* at 613.

[190] *Id.* at 614.

[191] *Id.*

[192] *Id.* at 615 (footnote omitted).

[193] *Id.* at 616.

[194] *See* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 764 (1973).

tance, the court's position is unacceptable. The values furthered by protection of personal appearance choices are quite similar to the values protected by the right of privacy—individual dignity, freedom of choice, and personal autonomy and integrity. Appearance, like speech, is a chief medium of self-expression that involves important choices about how we wish to project ourselves and be perceived by others. To link appearance with privacy and speech values is not, of course, to require similar constitutional treatment. It does imply, however, that we deal with a substantive constitutional liberty that "may reflect, sustain, and nourish . . . personality,"[195] and the repression of which may, in the words of Judge Wisdom, "smac[k] of the exaltation of organization over member, unit over component, and state over individual," forcing an "unwilling complier . . . to submerge his individuality in the 'undistracting' mass."[196]

Therefore, freedom to choose one's manner of appearance, like the freedoms discussed earlier, is a lifestyle right of some significance. And it is clear that at least one member of the *Kelley* majority proceeded on that assumption. Justice Powell, in his concurrence, found "no negative implication in the [majority] opinion with respect to a liberty interest within the Fourteenth Amendment as to matters of personal appearance."[197] Yet acknowledging a lifestyle right of appearance is no more than a first step in constitutional analysis under the due process clause. The second is to ascertain the context in which the choice has been made: What class of persons seeks to exercise the right, and what reasons has government advanced to regulate it? We focus, then, on the different contexts of *Karr* and *Kelley*: Should a choice of hairstyle be protected for students but not for policemen?

In *Karr* the school board argued that regulation of hair-length would serve the goals of inhibiting "classroom distraction," avoiding fights between long- and short-haired students, and eliminating potential health and safety hazards.[198] The Fifth Circuit called these "legitimate objectives,"[199] clearly within the state's police power. But proper due process analysis hardly stops with the abstract finding of a legitimate state interest. Where regulation impinges on a constitutional right—here, that of appearance—the means chosen by the state ought significantly to further the an-

[195] Kelley v. Johnson, 425 U.S. 238, 250 (1976) (dissenting opinion, Marshall, J.).
[196] Karr v. Schmidt, 460 F.2d 609, 621 (5th Cir. 1972) (dissenting opinion).
[197] 425 U.S. at 249.
[198] 460 F.2d at 617.
[199] *Id.*

nounced state objectives.[200]

Forcing only male students to cut their hair is an impermissible means of achieving the state interests at stake. Long hair on males is intrinsically no less healthy and no more distracting and disruptive of classroom work than long hair on females. Any difference is the result of custom alone; men, and not women, are traditionally short-haired. If conformity to custom is the unarticulated rationale for hair-length regulations in schools, it seems insufficient to justify the limitation on individual choice. The rationale suggests the untenable: that mere unconventionality of appearance is enough to bring the state's regulatory apparatus into play.

Finally, it must not be forgotten that the context of the student hair-length cases is the public school system. Certainly, order and discipline are values that public education in America seeks to foster, and conventionality and uniformity may be fairly thought prerequisites to the furtherance of those values. But American education prizes other values as well: diversity, individuality, and self-expression.[201] If public education aims to teach children how to adjust to a changing and pluralistic society, then schools ought to foster independence as well as instill respect for authority. Thus, schools are distinguishable from professions, such as the military, where conformity to an authoritarian ethos may be the overriding goal.

The student long-hair cases thus pit values fostered by protection of appearance choices against articulated state interests not served by the chosen means of regulation and unarticulated premises about the function of education in America that seem half-truths at best. There are, of course, stages of dress or undress that would quickly activate the state interest in orderly classroom instruction, and degrees of personal uncleanliness that would raise legitimate health concerns. But absent a showing of some definite relationship between hair-length regulations and legitimate educational goals, the regulations should not be permitted to stand.

Assuming one adopts the above analysis for student cases, should hair-length cases involving policemen and firemen, like *Kelley* and *Quinn v. Muscare*,[202] be analogized to the student decisions? The first step in the due process analysis is necessarily the same: appearance choices are liberties against the government,

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[200] Although serious scrutiny of means has thus far been utilized by the Court primarily in equal protection decisions, it seems equally necessary in cases which involve a significant due process right. *See* Gunther, *supra* note 114, at 42.

[201] *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969).

[202] 425 U.S. 560 (1976).

presumptively immune from regulation. But the second step reveals a different context for the appearance claim. Policemen and firemen, unlike students, are professionals who, because of their hazardous working conditions, must number group discipline and order among their paramount goals. The ambiguities of freedom versus order and self-assertion versus socialization that were identified with education are not found in professions that must necessarily be more authoritarian.

Conventionality of dress and appearance can therefore be more easily linked to the need for discipline, order, and efficiency. Uniformity of appearance may convey to the public and instill in the profession itself a more alert and rigorous approach to the job. But although such factors may make the state's case stronger, they do not end the constitutional inquiry. One may concede that some restrictions on the appearance of policemen and firemen are justifiable, without necessarily conceding that meticulous hair regulations, on and off the job, are constitutionally valid.

For example, suppose a policeman accepted uniform standards for hair length, but demanded a short-haired wig while on duty. Arguably, a wig would not sufficiently implement the profession's goals. Those goals go beyond mere functional convenience; they involve the promotion of a sense of professional homogeneity and togetherness, as symbolized by uniformity of appearance. The state might argue that wigs would convey the impression that uniformity of appearance was no more than sham and pretense, thereby undermining professional homogeneity and morale.

The *Kelley* and *Quinn* results may rest on a further, unexpressed premise. The Court perhaps assumed that when an adult chooses a profession, he accepts, within certain limits, restrictions on his behavior that flow from his professional status. Appearance restrictions, in varying degrees, are part of almost every profession. Where without undue strain they can be tied to a profession's basic functional imperatives, as in the case of police and firemen, they become part of the costs and benefits one weighs in choosing an occupation. It is possible, of course, that many persons do not "choose" to become firemen or policemen, but rather act from economic necessity, that they do not have perfect information about restrictions on their lifestyle when they make that choice, and that they therefore stand in roughly the same position as students, who up to a certain age do not choose to attend school. These arguments may have some validity in individual cases, but we think that a consciousness of reasonable lifestyle restriction in-

heres in most occupational choices.

Kelley and *Quinn* are thus defensible results: the hairstyle choices of policemen and firemen raise different issues from those of students. Yet the *Kelley* opinion provided only the most cryptic rationale for evaluating lifestyle choices of appearance. The majority found the policeman's occupational status "highly significant,"[203] and referred to Suffolk County's "recognition" that "similarity in appearance of police officers is desirable."[204] From these offhand statements the majority moved swiftly to conclude: "Certainly . . . the claim of a member of a uniformed civilian service based on the 'liberty' interest protected by the Fourteenth Amendment [need not] necessarily be treated for constitutional purposes the same as a similar claim by a member of the general public."[205] And thus, Suffolk County's long-hair regulation for policemen "did not violate any right guaranteed . . . by the Fourteenth Amendment."[206]

We wish the *Kelley* majority had developed its reasoning, especially since lower courts, notwithstanding Justice Powell's caveat, may treat the case as foreclosing constitutional protection for appearance claims. The Court in *Kelley* ultimately applied a "no-scrutiny" rational basis test to the police hair-length regulations,[207] partly on the ground that they involved the exercise of authority "unquestionably at the core of the State's police power."[208] But why and to what extent this supine rational basis standard will be used to test other burdens upon appearance choices[209] are questions the Court must soon clarify.

C. *The Appearance Overtones of "Unfettered Discretion" Cases*

Although the Court has only reluctantly involved itself in hair-length cases, it has extended constitutional protection to persons whose dress and demeanor may trigger discretionary charac-

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[203] 425 U.S. at 245.

[204] *Id.* at 248.

[205] *Id.* at 248-49.

[206] *Id.* at 249.

[207] The Court cited earlier opinions applying a rational basis standard to state economic regulation, especially Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) and Williamson v. Lee Optical Co., 348 U.S. 483 (1955). 425 U.S. at 247-48.

[208] 425 U.S. at 247.

[209] There is some fragmentary evidence that the Court will extend this standard. In Ham v. South Carolina, 409 U.S. 524, 527-28 (1973), the Court readily approved a state voir dire procedure that precluded questions to prospective jurors about bias against bearded defendants.

ter judgments by state officials charged with arrest or detention duties. The Court has thus far cast these "unfettered discretion"[210] decisions primarily in terms of the vagueness and overbreadth doctrines, which fail to reflect the analytical heart of the cases. The principal operational difficulty with vague or overbroad ordinances is not the lack of notice to detained parties—few people read state or municipal ordinances—but rather is the opportunity such ordinances create for arbitrary judgments by the police. In particular, ordinances with terms such as "common night walker,"[211] "annoying,"[212] or "suspicious"[213] invite the police to make subjective associations of conduct, including appearance, with criminality. Given the brevity of most police contacts with citizens who stand or walk on city streets, a citizen's appearance may play a substantial part in forming an officer's judgment about the citizen's "suspiciousness" or "annoying" qualities. Speaking for the Court in *Papachristou v. City of Jacksonville*,[214] Justice Douglas suggested that imprecise municipal ordinances may require "nonconformists . . . to comport themselves according to the lifestyle deemed appropriate by the . . . police."[215]

The appearance aspect of "unfettered discretion" cases underscores one of the basic rationales for protection of appearance choices. Americans purport to believe that a healthy society tolerates a multiplicity of viewpoints and lifestyles. The values of diversity and nonconformity have been identified as buttressing the first amendment. Hence, unconventional appearance choices test our commitment to the preservation of those values outside the area of speech. In a case overturning on grounds of statutory vagueness the conviction of a Massachusetts resident for "treat[ing] contemptuously" the American flag by wearing it sewn to the seat of his trousers,[216] the Court observed that "casual treatment of the flag in many contexts has become a widespread contemporary phenomenon," and that "[f]lag wearing in a day of relaxed clothing styles may be simply for adornment . . . ."[217] The Court refused to

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[210] The phrase is from Justice Douglas' opinion for the Court in Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972).

[211] *See id.* at 156 n.1.

[212] Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971).

[213] Palmer v. City of Euclid, 402 U.S. 544, 544 (1971).

[214] 405 U.S. 156 (1972).

[215] *Id.* at 170.

[216] Smith v. Goguen, 415 U.S. 566, 568 (1974).

[217] *Id.* at 574.

reflexively equate unorthodox dress with contemptuous treatment of an important national symbol.

In sum, recent "unfettered discretion" cases suggest that appearance choices may no longer be restricted without precise articulation of the reasons for so doing. Although the decisions rest on the vagueness doctrine and mention appearance rights only in passing, they demonstrate at least an embryonic concern for the protection of appearance choices themselves. Significant testing of the appearance dimension of these cases awaits challenge to a more specific ordinance, not open to a vagueness attack. Such a challenge would present a situation analogous to the hair-length cases, and should, in our view, invoke the substantive due process analysis advanced therein.

D. *The Current Stature of Appearance "Liberties"*

Constitutional protection for appearance choices remains in an undeveloped state. First, there are doctrinal difficulties. Appearance choices are more conduct than pure speech and communicate with insufficient precision and consistency to invoke fruitful first amendment analysis. Substantive due process, in our view the most satisfactory doctrinal setting for appearance cases, has not been in fashion for much of the twentieth century and places special pressures on a judiciary that aspires to impartiality and neutrality. Thus, a credible, textual rationale for protection—a crucial element in effective constitutional adjudication—is not readily available.

Second, appearance choices have been burdened with the implicit judgment, made by judges from Justice Black[218] to the majority in *Karr*, that their stature as liberties is simply not very high; that if they are rights, they are de minimis. Our discussion has emphasized that this offhand treatment needs revision, despite the generally accepted feeling that personal modes of dress and styles of hair are of less than cosmic importance. Like the other lifestyle choices analyzed in this Article, appearance choices reflect a dimension of our individuality. If respect for the uniqueness of each person is a core value of American civilization, some degree of constitutional protection for personal appearance choices should follow.

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[218] *See* Karr v. Schmidt, 401 U.S. 1201 (1971).

IV

CONSTITUTIONAL PROTECTION FOR PERSONAL LIFESTYLES: AN OVERVIEW

A. *The Case for Creation of a Constitutional Lifestyle Right*

A basic question throughout this Article is why the Constitution should protect lifestyle choices at all. In *Griswold* and *Roe* the Court sensed that lifestyle values deserved constitutional protection but failed to articulate persuasively an analytical basis for conferring it. Providing the necessary articulation, however, is no easy task; lifestyle choices, as such, receive no explicit protection in the Constitution. As a result the Court has invoked the vaguest and most nebulous of constitutional doctrines and provisions—substantive due process,[219] the Bill of Rights' penumbras,[220] and the ninth amendment[221]—to safeguard them.

Although lifestyle freedoms are not expressly safeguarded, we believe that the spirit of the Constitution operates to protect them. We are aware of the historic dangers that attend judicial departure from specific constitutional mandates. Judging by inference from constitutional provisions, or from the Constitution as a whole, has plunged the Court into difficulties in the past.[222] Notwithstanding textual and institutional difficulties, judicial recognition of lifestyle freedoms as due process liberties better serves the basic purposes of the Constitution than dismissal of them.

A compelling mission of the Constitution has been to protect sanctuaries of individual behavior from the hand of the state. The choice of religion and the advocacy of ideas have been deemed matters outside the state's concern;[223] the privacy of the home[224] and the inner sanctity of the mind[225] have been guarded against governmental intrusion; the individual is protected from cruel and

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[219] Roe v. Wade, 410 U.S. 113, 152-56 (1973).

[220] Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (Douglas, J.).

[221] *Id.* at 488 (concurring opinion, Goldberg, J.). The three-judge district court in Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), also rested its decision upon a ninth amendment rationale. *See id.* at 1219.

[222] *E.g.*, Lochner v. New York, 198 U.S. 45 (1905). For an interesting attempt to vindicate rights of "personhood" without reviving the drawbacks of the *Lochner* approach, see Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699.

[223] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[224] Mapp v. Ohio, 367 U.S. 643 (1961).

[225] Malloy v. Hogan, 378 U.S. 1 (1964).

unusual punishment,[226] and indeed from any criminal punishment at all unless guarantees such as the right to counsel,[227] to jury trial,[228] and to confrontation[229] are observed. In this context, the Bill of Rights teaches that human dignity is meaningless without a proper measure of personal freedom from governmental interference.

That dignity is seriously diminished unless it includes those choices that most express our uniqueness and individuality. By our style of dress and appearance, our personal associations, our manner of speech, and our sexual behavior we seek to express our uniqueness as humans and to realize our destinies as individual beings. This does not mean that these expressions must be free from all governmental regulation, any more than is our freedom of speech under the first amendment. It does mean that as a starting point of analysis, courts should acknowledge their constitutionally protected status. For nothing is more central to self realization and fulfillment than these very personal decisions. If the concept of individuality is to have meaning, these choices must be protected.

There is another important reason for constitutional shelter of lifestyle choices. The Constitution, as interpreted by the Supreme Court, has increasingly served to protect powerless minorities—casualties of a majoritarian political process. There are, to be sure, distinct and important limits to the Court's role as protector of the powerless. But from the initial *Carolene Products*[230] formulation of "discrete and insular minorities,"[231] to the Warren and Burger Courts' protection of blacks,[232] indigents,[233] illegitimates,[234] resident aliens,[235] criminal suspects,[236] and disenfranfranchised[237] and underenfranchised voters,[238] solicitude for the disadvantaged has been a central theme in Supreme Court jurisprudence. Similarly, the subjects of lifestyle protection are likely to be persons unable to gain redress through the political process. A

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[226] Weems v. United States, 217 U.S. 349 (1910).
[227] Gideon v. Wainwright, 372 U.S. 335 (1963).
[228] Duncan v. Louisiana, 391 U.S. 145 (1968).
[229] Pointer v. Texas, 380 U.S. 400 (1965).
[230] United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 (1938).
[231] *Id.* at 152 n.4.
[232] *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).
[233] *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971).
[234] *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).
[235] *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971).
[236] *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
[237] *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
[238] *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

person of conventional tastes, having reputable friends, a courteous vocabulary, and an unobtrusive appearance, is for those very reasons not often considered offensive to the state in his lifestyle choices. Obloquy is reserved for those whose tastes are unconventional, whose tongues are thought sharp or vile, and whose dress or behavior seems irregular or shocking. Yet it is just such persons who give a constitution its mettle, and without whom human freedom would be limited to choices of which prevailing majorities approve.

It would, in fact, be incongruous for an American Supreme Court to be insensitive to diversity in lifestyle choices. From its origins America has contained a variety of races and peoples, with a multiplicity of thoughts and habits. Different ethnic and racial origins have invariably bred different ways of living. Protection for diverse lifestyles thus conforms to the character of a heterogeneous nation. Moreover, conventional roles are increasingly being discarded. Current lifestyles, for example, seem less the product of one's sex or race or social background and more the result of personal preference. The Court has been an important part of this process. The higher standard of equal protection applied to suspect classes has the stated purpose of freeing persons from the bondage of racial and other stereotyping and of encouraging them to seek their destinies as individual human beings.[239] For the Court to deny protection to unorthodox lifestyles would appear at odds with much of its modern history.

The purposes served by protection of lifestyle choices are also strikingly similar to those served by the first amendment. In personal behavior as well as in ideas, protection of individual choices preserves dissent from the tastes of the majority. Like protection of first amendment values, lifestyle protection attests to society's faith that a free market in lifestyles, as well as in ideas, best aids the individual in developing his own identity. And, as with the first amendment, lifestyle protection may require defense of the most idiosyncratic among us in order to discourage, at the outer perimeter, the state's natural inclination to compel its citizens to think and behave in orthodox patterns.

Thus, there appear to us general considerations, touching the very heart of the constitutional process, that argue for judicial rec-

[239] This was especially evident in Frontiero v. Richardson, 411 U.S. 677 (1973), where four members of the Court argued in favor of making sex a suspect class. See also such "middle-level" scrutiny cases as Reed v. Reed, 404 U.S. 71 (1971), and Stanton v. Stanton, 421 U.S. 7 (1975).

ognition of a lifestyle right. It is imperative, however, that so amorphous a concept as "lifestyle choice" be defined more precisely, a task to which we now turn.

B. *The Limits of the Lifestyle Concept*

The existence of persuasive reasons for the creation of a constitutional lifestyle right suggests a further elusive question. Which of our personal choices are to qualify for constitutional protection? These choices are literally endless: we decide where to live, what career to pursue, whether to seek a college degree, whether to indulge in tobacco, alcohol, or drugs, whether to buy or ride a motorcycle, or, to take even more common examples, whether to jaywalk, go to the movies, or buy chocolate or vanilla ice cream. All decisions at least potentially involve an assertion of personal freedom at the expense of the state's power to regulate. It is necessary, therefore, to consider why our discussion of lifestyle freedom should be limited to choices of domestic companionship, sexual conduct, and personal appearance, in the face of so many other individual decisions of comparable or greater magnitude.

We begin by noting that the individual lifestyle choices surveyed in the preceding sections need not constitute an exhaustive list. For example, an additional lifestyle freedom, which the Court appears to have recognized, is that of "personally flavored" speech. Thus, we may express our ideas and may do so in whatever manner and idiom we choose. In the leading decision, *Cohen v. California*,[240] the Court decided that to protect emotive vernacular such as "Fuck the Draft" was to safeguard the verbal lifestyles of America's countercultures.[241] "Indeed," the Court in classic lifestyle terms observed, "we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[242] Under *Cohen* and its progeny,[243] freedom of idiomatic expression has prevailed over the state's interest in protecting

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[240] 403 U.S. 15 (1971).

[241] Note the view of Professor Haiman that *Cohen* involved a verbal lifestyle that rose in popularity as "establishment figures revealed the fear and abhorrence produced in them by such words." Haiman, *How Much of Our Speech Is Free?*, 2 CIV. LIB. REV. 111, 125 (1975).

[242] 403 U.S. at 25. This lifestyle freedom may be constitutionally unique in that it is protected as a first amendment rather than as a due process or equal protection right.

[243] Lewis v. City of New Orleans, 415 U.S. 130 (1974); Brown v. Oklahoma, 408 U.S. 914 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Gooding v. Wilson, 405 U.S. 518 (1972).

the sensibilities of bystanders[244] and over everything, in fact, save a narrow public power to prevent the imminent outbreak of street violence.[245]

To note that our discussion of lifestyle freedoms is not exhaustive, however, is not to imply that such freedoms are numberless. The lifestyle freedoms discussed in this Article combine several prevalent characteristics. First, the choices themselves are intimate, whether that intimacy derives from a place, such as the home, or from personal use of one's body, as in the sexual conduct and personal appearance cases. And, although it cannot be said with assurance that even the most intimate choices of one person will not somehow affect those about him, lifestyle choices for the most part involve little prospect of direct or intentional harm to others.[246] Where they do involve personal harm to other parties, as to the children of a divorced couple or to parents upset about an adult child's choice of a spouse, society would very likely conclude that the lifestyle interests of the principals in being able to legally separate or marry override the potential side-effects on those nearby.

A further characteristic of lifestyle choices is their perceived importance, indeed their indispensability, in fulfilling individuality. Every personal choice is, of course, in part an expression and fulfillment of individuality, whether it be the choice of a home or car, a career, a college education, or whatever. Yet these latter choices, lying outside our lifestyle category, depend greatly upon economic means or personal ability; in a competitive world of limited resources, everyone will not obtain the career or home or college he prefers. Conversely, there is a greater universality to lifestyle choices. Marriage, child-raising, and intimate sexual expression are arguably more inalienable rights of living; they exist or should exist for all human beings, however circumstanced.

Thus it is ultimately irrelevant to our analysis that the right to choose a career seems easily more important than the right to wear long hair. Career choices simply lack, in our view, the degree of personal intimacy necessary to characterize them as lifestyle

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[244] 403 U.S. at 21-22.

[245] Indeed, *Cohen* and its progeny may have narrowed "fighting words" (Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) to direct facial insults to someone other than a police officer. *See* Lewis v. City of New Orleans, 408 U.S. 913 (1972) (concurring opinion, Powell, J.).

[246] Roe v. Wade, 410 U.S. 113 (1973), is an exception, if one takes the view that a fetus is a person.

choices. Expanding the concept of lifestyle freedom to include all important marketplace decisions having some personal element would eventually weaken the force of a lifestyle right and dilute the protection our most intimate choices ought to receive.[247]

Finally, the term lifestyle choice means a choice in the truest sense: the voluntary exercise of free will. Although courts ought to be reluctant to infer that one's choice is not one's own,[248] it would be anomalous and self-defeating to extend a theory of lifestyle freedom to forbid state regulation of, for instance, the injection of heroin, which for physiological reasons may not long remain a matter of choice at all. On the other hand, that physical or psychological gratification is the aim of a lifestyle choice is obviously no reason for failing to protect it.[249]

Drawing the line, however, is an exceedingly complicated and treacherous task. In order to avoid the difficulties of assessing the addictive qualities of different drugs and the compulsiveness of various personal habits, we would recommend that regulation of drugs and alcohol be left to the political process. Unlike marriage, divorce, and personal appearance, for example, drugs and alcohol have traditionally been associated with potential harm to others of a magnitude justifying criminal sanctions. As a result, courts, and certainly the Supreme Court, have largely stayed the hand of the Constitution in this area.[250] We wish we could predict with certainty that such judicial self-restraint will continue.

In sum, we are considering a domain of personal choice whose outer boundaries are not sharp, but which encompasses the most intimate and the most personally distinctive of life's decisions. We turn next to a review of the state interests that are most often advanced as justifications for restricting lifestyle freedoms. Throughout this Article we have stressed that constitutional analysis of lifestyle claims is a balancing process, necessitating judi-

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[247] This does not imply that career choices ought not to receive constitutional protection under some other method of analysis. *See* Wilkinson, *supra* note 116, at 984-98.

[248] The question of voluntariness will pose difficulty in the area of lifestyle rights for minors, especially for those who are very young. In voiding a blanket requirement of parental consent as a condition to abortion in the case of an unmarried minor during the first 12 weeks of pregnancy, the Court noted that "our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." Planned Parenthood v. Danforth, 96 S. Ct. 2831, 2844 (1976).

[249] It is difficult, in fact, to imagine a lifestyle choice not motivated, at least in part, by such considerations.

[250] Robinson v. California, 370 U.S. 660 (1962), in holding that the status of narcotics addiction may not be criminally punished, did not affect the state's power to regulate drug possession or use. *But see* Ravin v. State, 537 P.2d 494 (Alaska 1975) (adult possession of marijuana for personal home use protected under Alaska Constitution).

cial evaluation of both the asserted substantive due process lifestyle right and the various state interests supporting its restriction. We now turn to a more detailed examination of those state interests.

C. *An Assessment of Competing State Interests*

Regulation of lifestyle freedoms falls within the classic formulation of the state's police power, for "society . . . has traditionally concerned itself with the moral soundness of its people."[251] The lifestyle choices previously discussed each contain a significant moral component. The efficacy of legal enforcement of moral behavior has been the subject of inevitable controversy, but the interest of the state in the manners and morals of its citizens is well established. What seems to us required in constitutional analysis is a discerning look at the state interests advanced to restrict lifestyle choices, so as to ascertain, first, whether those interests are legitimate, and second, whether they are actually threatened by the particular lifestyle choice in question. In discussing the state interests in this area we avoid terms such as "rational" or "compelling," both because those terms carry unwanted freight from their use in other constitutional contexts and because the relationship of legislated morality to personal choice involves sensitive judgments having numerous subtle gradations. What follows is a brief and generalized treatment of several state interests in roughly an ascending order of importance.

Least persuasive of the state's justifications for restricting lifestyle freedoms is the general promotion of morality. Such an interest requires a court to accept on faith, in the name of the police power, the state's moral judgment. Unfortunately, the Supreme Court has reacted to this interest most ambivalently. Chief Justice Warren once suggested in dissent that there is a "right of the Nation and of the States to maintain a decent society."[252] The Court in *Paris Adult Theatre I v. Slaton*[253] carried forward this theme and spoke approvingly of the state's power to regulate "the tone of society, . . . the style and quality of life, now and in the future."[254] It noted that "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions,"[255] and stated: "In deciding *Roth* [*v. United States*], this Court implic-

[251] Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (dissenting opinion, Harlan, J.).

[252] Jacobellis v. Ohio, 378 U.S. 184, 199 (1964).

[253] 413 U.S. 49 (1973).

[254] *Id.* at 59 (Quoting Bickel, *On Pornography: II, Dissenting and Concurring Opinions,* 22 PUB. INTEREST 25, 25-26 (1971)).

[255] 413 U.S. at 61.

itly accepted that a legislature could legitimately act on such a conclusion to protect *'the social interest in order and morality.'* "[256]

Other recent Court opinions, however, indicate that such general state assertions of moral righteousness will not suffice. The *Moreno* Court strongly hinted that attempts to regulate lifestyle choices on the bare assertion that the regulation serves morality would be impermissible.[257] Indeed, it seems impossible that the Court could have reached the results it did in *Griswold, Stanley v. Georgia, Eisenstadt,* and *Roe* without proceeding on just that premise. Somewhat ironically,[258] Chief Justice Burger's opinion in *Wisconsin v. Yoder*[259] provides the most explicit evidence that conclusory invocations of morality on the part of public authority will be found wanting: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[260]

Absent refinement and particularization, state interests in preserving morality lack the weight necessary to support restriction of the free exercise of lifestyle choices. Certainly, it would seriously abuse the legal process to condemn private and remote acts simply because the acts strike the majority as repulsive.

The privilege of living in a free and open society entails, we believe, some obligation to tolerate ideas and moral choices with which one disagrees. To think one's own moral predilections should invariably be embodied in law is unrealistic in a society committed, as ours is, to the freedom and dignity of the individual. Moreover, to uphold legal proscriptions on grounds of abstract morality would permit the state to ferret out and ultimately to try and punish offenders upon the assertion, not that the given behavior was socially harmful, but that it was revolting and unnatural. Such a rule of law would invite the majority to act upon its least noble and most prejudiced impulses.[261] Courts have the initial

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[256] *Id.* (quoting Roth v. United States, 354 U.S. 476, 485 (1957), in turn quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (emphasis in original).

[257] Department of Agriculture v. Moreno, 413 U.S. 528, 535 n.7 (1973).

[258] It is ironic because Chief Justice Burger was also the author of the opinion for the Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[259] 406 U.S. 205 (1972).

[260] *Id.* at 223-24.

[261] The question of the state's capacity to regulate unorthodox lifestyle choice in the name of morality is illuminated by the debate over Lord Devlin's position that society, for its protection, may criminalize deviant behavior on the basis of a strong community feeling of moral disapproval. P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

obligation to ensure that invasions of lifestyle choices rest upon firmer and more particularized grounds.

A second justification, aligned with the foregoing but deserving of more serious consideration, is that state regulation of lifestyle choices protects the individual from self-inflicted harm or self-degrading experiences. Here the state professes not to be regulating morality, but rather to be paternalistically saving the individual from himself.[262] Since society often wishes to save the individual from conduct society abhors, however, the moralistic and paternalistic rationales are frequently identical.

Paternalism underlies a great variety of state legislation, including that regulating gambling, drugs, and alcohol, that prohibiting suicide and "immoral" sex, and that requiring the payment of social security taxes and even the wearing of motorcycle helmets.[263] Such legislation, however, often protects against public as well as private harm. Drug legislation seeks to protect society against the crimes of an addict supporting his habit; motorcycle helmet laws allegedly prevent accidents and certainly minimize the costs to society of supporting injured riders and their dependents. In general, protection of the individual from readily demonstrable physical harm, whether from addictive drugs or motorcycle accidents, may be more supportable than protection of persons from acts alleged by the state to be "unnatural" or "immoral." Saving bodies, to be blunt, may be a more justifiable governmental purpose than saving souls.

Difficult questions yet remain. Almost every lifestyle choice involves some possibility of physical harm, especially with intemperate indulgence. A substance such as tobacco presents the hard

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Although it is beyond the scope of this Article to recapitulate the debate in its full subtlety, the response of Lord Devlin's opponents pinpoints our own reservations about the dangers of state regulation of lifestyle choice under so vague a guise as "morality." One commentator chides Devlin for inviting "intolerance, indignation and disgust" as the prerequisites for legal action. Anastaplo, *Law and Morality: On Lord Devlin, Plato's Meno, and Jacob Klein*, 1967 WIS. L. REV. 231, 238. Professor Dworkin criticizes Lord Devlin for permitting legal judgments on morality to be based on nothing more than "prejudice . . . and personal aversion." Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 1000-01 (1966). *See also* Hart, *Immorality and Treason*, 62 THE LISTENER 162 (London 1959); Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

[262] The seminal discussion of this interest is in J.S. MILL, ON LIBERTY, Ch. IV, *Of the Limits to the Authority of Society Over the Individual* (London 1859).

[263] The helmet requirement has created considerable controversy. *See, e.g.*, State v. Cotton, 55 Haw. 138, 516 P.2d 709 (1973); People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969); American Motorcycle Ass'n v. Department of State Police, 11 Mich. App. 351, 158 N.W.2d 72 (1968). *See generally* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 929-30 (1976).

case: the danger to heart and lungs is cumulative and eventual, and not as dramatic as heroin addiction or a motorcycle crash. Perhaps, as one commentator suggests, society's paternalistic interest should be limited to confronting

> smokers with the ugly medical facts so that there is no escaping the knowledge of what the medical risks to health exactly are. Constant reminders of the hazards should be at every hand and with no softening of the gory details. The state might even be justified in using its taxing, regulatory, and persuasive powers to make smoking . . . more difficult or less attractive . . . .[264]

But to proscribe smoking outright, and thus to substitute the medical judgment of the state for the personal lifestyle choice "is paternalism of the strong kind . . . and creates serious risks of governmental tyranny."[265]

The notion that the state may inform, warn, tax, and regulate, but not flatly proscribe allegedly self-destructive lifestyle choices, provides a useful touchstone. But it still does not resolve many difficulties. We would surely, even after *Griswold*, allow Connecticut to advise and inform potential users of the medical risks and dangers inherent in contraception. But to what extent might Connecticut publicly advertise the "immorality" of contraceptives, if a majority of its citizens regarded them as immoral? To what extent could it tax contraceptives? Could a state or locality that considered interracial marriages self-degrading and morally depraved post notices to that effect in public buildings? At some point such notices would raise a strong inference that the state intended to discriminate against those who pursued the disfavored activity. In short, professedly beneficent, paternalistic motives should not be an automatic justification even for regulation that stops short of proscription.

Curtailing activities that offend the public is a third rationale for state regulation of lifestyle choices. Certainly a citizen can assert some right not to be assailed in public by deeply revolting behavior. On the other hand, the very act of stepping out in public inevitably entails a risk that one's personal sensibilities will be offended. The public is by definition a diverse, variegated collection of individuals, with a multitude of idiosyncratic habits. Some of these habits—of dress, personal association, and mode of expression—constitute the exercise of lifestyle choices. And striking the bal-

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[264] J. Feinberg, *Legal Paternalism*, in TODAY'S MORAL PROBLEMS 33, 43 (1975).
[265] *Id.*

ance between public and personal rights in this area is often difficult.

Certain guidelines are helpful, however, in evaluating this third state interest. In assessing the degree to which certain behavior offends the public, courts ought to employ an objective rather than a subjective standard and ask whether the behavior in question would offend a reasonable person, not whether it distresses the most sensitive member of the community. Any lesser standard fails to give proper effect to the constitutional stature of lifestyle choices. Courts should also consider whether the offending behavior is a localized incident from which one can avert the eyes or walk away, whether it is temporary or permanent, whether it is unobtrusive or insistent in character, and whether either the state interest or the lifestyle choice could be exercised in a less intrusive manner.

A simple illustration may help. Compare, for example, the appellant in *Cohen v. California*,[266] who wore a "Fuck the Draft" message on his jacket in the Los Angeles County Courthouse, with a couple engaging in sexual intercourse in a visible area of a public park. In both situations a passerby could retreat from the incident by averting his gaze or step. And both Cohen's act and the couple's activity are presumably one-time incidents of limited duration. But the similarity ends there. A reasonable person would be substantially more offended by the sight of sexual intercourse in public than by a message reading "Fuck the Draft," a sentiment regularly encountered on the walls of public restrooms. Furthermore, Cohen's message might be less effective if conveyed in a less dramatic or personalized manner, and totally ineffective if confined to the privacy of his quarters. And although the shock value of whatever the copulating couple might be attempting to communicate would also be eliminated by privacy, the feelings of intimacy and pleasure associated with sexual intercourse would not. Thus the state interest in avoiding public offense more readily suffices to limit the lifestyle freedom of the couple than of Cohen.[267]

A fourth state interest in restricting lifestyle choices is the prevention of physical violence and disorder. Public display of unorthodox habit often meets with onlooker disapproval. Thus, authorities will inevitably be heard to argue that shocking manners of

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[266] 403 U.S. 15 (1971).

[267] For a demurrer to *Cohen*, see Rehnquist, *Civility and Freedom of Speech*, 49 IND. L.J. 1 (1973).

dress and speech, for example, pose serious threats to the maintenance of public peace.

Preservation of order is certainly a legitimate state concern. But the mere recitation of this interest would not justify state restriction of the lifestyle right. In analyzing tensions between lifestyle choices and the preservation of order, the "street speech" cases of the 1950's and 1960's seem particularly apt. Like verbal dissent, unorthodox lifestyle choices may "strike at prejudices and preconceptions" and "invite dispute."[268] Yet official condemnation of such choices should be based upon more than an "undifferentiated fear or apprehension of disturbance."[269] Authorities, in fact, may rightly be charged with some duty of protecting rather than restraining their exercise,[270] especially where such exercise is "peaceful" in character.[271]

An important variation on this fourth state interest lies in state protestations that restriction of the lifestyle right prevents public harm of a nonviolent nature. Examples would be a school's assertion that long hair poses not so much a risk of disruption, as a problem of hygiene, or the claim of the Village of Belle Terre that cohabitation by more than two unrelated persons threatens not a riot, but the community's general repose. In such situations, involving important constitutional claims and legitimate state concerns, scrutiny of means becomes especially important. The means employed by government ought to significantly advance the asserted legitimate state interest, not some punitive alternative one. Thus, in *Belle Terre* the limitation only upon *unrelated* persons living together may not fully implement the village's asserted interest in tranquility, and in the long-hair cases, the means often sweep too broadly by eliminating all unusual hairstyles without regard to cleanliness. Such dramatically under- and over-inclusive selection of means, in relation to the asserted state purposes, creates suspicion that the true aim of the state is more the elimination of variant lifestyle behavior than the promotion of its legitimate goals.

A fifth and final state interest is that removal of legal constraints on lifestyle freedoms may jeopardize the most hallowed and basic institutions of society. Thus state regulation of matters

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[268] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[269] Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969). The state may, of course, act to prevent the outbreak of violence. *See* Feiner v. New York, 340 U.S. 315 (1951).

[270] *See id.* at 326 (dissenting opinion, Black, J.).

[271] *See* Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

such as divorce and sexual conduct becomes a means of fortifying institutions, such as marriage and the family, that impart meaning and elevation to human life.

The state interest in preserving the family unit needs to be carefully understood. Arguably, the state has no legitimate interest in restricting living arrangements to a narrow ideal of domestication: to, for example, the middle-class family of four safely cottaged in the suburbs. That model has been with us too briefly[272] and is changing too quickly[273] to be the real basis of the state's interest in this area. Rather, the state's proper concern derives from the basic functions performed by "family" units in society: from sexual fulfillment and reproduction, to education and rearing of the young, to economic support and emotional security.[274] It is true, of course, that sexual and reproductive acts take place outside the family unit, and that education of the young and economic support often come from the state.[275] Still, the vital purposes of the family—child rearing and emotional fulfillment of its members—appear to require some fidelity and constancy of relationship. Margaret Mead recently put it best:

> There needs to be a place where children will know that they belong, where they have an unquestioned right to be, where there will always be responsible adults to welcome them and care for them. For teenagers there needs to be a place from which they can run away without going too far, and come home again, as they try out what it is like to be on their own. For adult men and women, there needs to be a place where someone will always know and care if they fail to return when they said they would, however far they have traveled.[276]

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[272] The common view is that urbanization and industrialization have encouraged shifts in American family structure from an extended kinship pattern to the present nuclear unit. Sociologists disagree on the degree to which American family life resembles the isolated nuclear or the extended kinship model. *See* Winch, *Some Observations On Extended Familism in the United States*, in SELECTED STUDIES IN MARRIAGE AND THE FAMILY 127 (R. Winch & L. Goodman eds. 1968).

[273] *See* notes 8-12 and accompanying text *supra*.

[274] *See* Murdock, *The Universality of the Nuclear Family*, in A MODERN INTRODUCTION TO THE FAMILY 37, 43 (N. Bell & E. Vogel eds., rev. ed. 1968).

[275] For the view that the family has now lost many of its central and traditional functions, see Ogburn, *The Changing Functions of the Family*, in SELECTED STUDIES IN MARRIAGE AND THE FAMILY, *supra* note 272, at 58.

[276] *The Once and Future Home*, Washington Post, July 4, 1976, B1, B5. Dr. Mead continues:

> Over and over again, throughout history, there have been attempts to destroy this family unit and to invoke mythological past happenings to justify contemporary social experiments, such as the assertion that in earlier times there was no family

This necessary stability of home and family life is often fostered by legal recognition of marriage, legal regulation of marital dissolution, and legal condemnation of promiscuous sexual behavior. Law adds to such stability both by defining acceptable standards of behavior and by discouraging deviation from them. Where vindication of lifestyle diversity can be shown to damage so basic an institution as the family, courts should not order it.

The difficulty comes in the showing. The withdrawal of law from certain areas of moral choice does not inevitably portend a collapse of the social order. In this regard, a historical analogy may be appropriate. Perhaps no moral and social force has been as powerful and pervasive in America as organized religion. Yet the framers of the Constitution deliberately removed religious choice and allegiance from the domain of law and placed them within the realm of personal decision. Nonetheless, organized religion and religiousity have survived the first amendment and have remained important ingredients in American life over the generations. And atheism and agnosticism, despite being protected by the Constitution, have never really taken root.

Understanding why organized religion and religiosity have remained important forces in American life provides an instructive lesson. They have flourished, in large part, because there exist, independent of law, powerful ways for society to check unorthodox and dissident behavior. Even if the law may not be used to enforce conventional lifestyle choices, the private forces of society will retain other means of maintaining conformity: for example, social exclusion from private gatherings and organizations, denial of employment and career advancement, and use of derogatory epithets, all of which largely lie beyond the reach of the Constitution. A reality of American life is that community acceptance, respect, and influence are bestowed upon those whose behavior is generally conventional.

Our plea, finally, is for a balanced and sensitive approach to the central dilemma examined in this Article. Every great society, as a predicate of existence, has rallied the allegiance of its members to some common responsibilities and patterns of living, an allegiance backed to a significant extent by the power and majesty of the law. Definite accommodation must be reached with the rights

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and human beings practised "group marriage," for example. So far in human history, however, societies have not found a way to rear children without the ties of parents to children and children to parents.

Id.

of dissident members, but not so complete an accommodation as to leave the conventional social fabric without legal support. We must be wary of creating, in the high name of constitutional right, nothing more than a regime of self gratification and indulgence. Equally distressing, however, would be an orthodoxy so pervasive that personal creativity, expression, and realization would be stifled and denied. The Constitution must remain a charter of tolerance without becoming an instrument of social dissolution. There will be no more difficult task.