NOTES

FORNICATION, COHABITATION, AND THE CONSTITUTION
OR

LOCHNER REDIVIVUS?

BEING
AN INQUIRY INTO THE CONSTITUTIONALITY
OF

LAWS MAKING CRIMINAL ACTS OF FORNICATION AND COHABITATION;

TOGETHER WITH OCCASIONAL REMARKS

UPON THE NOTION THAT THE CONSTITUTION PROTECTS A RIGHT OF PRIVACY;

AS WELL AS SOME SPECULATIONS ON THE RELATIONSHIP BETWEEN THAT RIGHT

AND THE MOURNFUL HISTORY OF THE DUE PROCESS CLAUSE,

FROM WHICH IT WAS INFERRED
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INTRODUCTION

Prostitution may be our oldest profession; fornication is
surely among our oldest crimes. 1 The crime of fornication was a
preoccupation of the legal system in the earliest colonies 2 and as
late as the period directly preceding the Revolutionary War oc­
casioned 210 of the 370 criminal prosecutions in one Massachusetts

1. Indeed, the word "fornication" derives from the Latin for brothel (fornix). 1
OXFORD ENGLISH DICTIONARY 1061 (1971). Like most glib beginnings, however, this one
must be somewhat qualified. The Bible, of course, frequently and vigorously condemns
fornication. E.g., Acts 15:20. Fornication was not a common-law crime, but like much
sexual behavior, it could be punished by the Ecclesiastical Courts of the Church of Eng­
record of the Ecclesiastical Courts in the enforcement of sexual morality was largely one
of failure." Id. For a general and historical discussion of fornication as a crime, see id. at
136-57.

2. Professor Demos, for instance, reports "a steady succession of trials and convic­
tions for sexual offenses involving single persons" in Plymouth Colony. J. DEMOS, A LITTLE
COMMONWEALTH 152 (paperback ed. 1972).
county. It remains a crime in fifteen states and the District of Columbia. States have also sought to prevent fornication by making it illegal for unmarried men and women to live together. Cohabitation in this sense is illegal in sixteen states. Today laws regulating fornication and cohabitation are as honored in the breach as in the observance, and economics has joined lust as a motive for crime—couples whose pensions or alimony will be cut off or reduced upon marriage sometimes resort to non-marital cohabitation. It has been estimated that six to eight million people are cohabiting without benefit of clergy and that the number of such couples increased from 1960 to 1970 by over 700 percent.

The same period which has seen a higher rate of cohabitation has also seen considerable and significant litigation which can be read as casting doubt on the constitutionality of laws regulating consensual adult sexual activity. The Supreme Court's modern treatment of that issue began in 1961 with Justice Harlan's pre-scient dissent in Poe v. Ullman, in which he attacked the constitutionality of a statute making it a crime for married couples to use contraceptives. When four years later the Court in Griswold

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3. The period was 1760 to 1774, the county was Middlesex. Nelson, Emerging Notions of Modern Criminal Law in the Revolutionary Era, 42 N.Y.U. L. Rev. 450, 452 (1967).
6. See note 97 infra.
8. Id. (citing Boston Evening Globe, May 26, 1976, at 2, cols. 1-6); M. King, Cohabitation Handbook 2 (1979). The Census Bureau estimates there has been a 100% increase since 1970. TIME, Nov. 21, 1977, at 111. Since not all states outlaw fornication or cohabitation, not all these couples are breaking the law. And, of course, a higher incidence of cohabitation is no sure indication that more couples are breaking fornication laws.
v. Connecticut\(^\text{10}\) ruled that such a statute was indeed unconstitutional as an invasion of a right of privacy protected by the fourteenth amendment, the search began for the boundaries of that right.\(^\text{11}\) Decisions extending the right to use contraceptives to the unmarried\(^\text{12}\) and establishing a right to abortions\(^\text{13}\) heartened those who believed that the boundaries enclosed at least consensual adult sexual activity. Some lower state courts have nurtured this hope by striking down sodomy laws on the ground that “the right of privacy in sexual conduct between consenting adults is fundamental,”\(^\text{14}\) although only two state supreme courts have so held.\(^\text{15}\) Meanwhile, commentators have seized with energy and enthusiasm on the expansive language in some Supreme Court opinions and have advocated a liberally defined right of sexual privacy.\(^\text{16}\)

Nevertheless, while the Court has not limned precisely the perimeters of the right of sexual privacy, it has repeatedly confirmed in dicta the state’s right to regulate sexual conduct.\(^\text{17}\) And,

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10. 381 U.S. 479 (1965).
17. In his often cited dissent in Poe, Justice Harlan wrote, “I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.” 367 U.S. at 552. Justice Goldberg’s concurring opinion in Griswold (in which Chief Justice Warren and Justice Brennan joined) noted that the constitutionality of Connecticut’s statutes forbidding adultery and fornication was “beyond doubt.” 381 U.S. at 498. In declining to find that the Constitution “incorporates the proposition that conduct involving consenting adults only is always beyond state regulation,” the Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), cited Southern Surety Co. v. Oklahoma, 241 U.S. 582, 586 (1916), “as to fornication.” 413 U.S. at 68 n.15. (The Court was evidently referring to the statement in Southern Surety that “[a]dultery is an offense against the marriage relation and belongs to the class of subjects which each state controls in its own way.”) Cf. Zablocki v. Redhail, 434 U.S. 374, 398-99 (1978) (Powell, J., concurring in judgment):

In my view, analysis must start from the recognition of domestic relations as “an area that has long been regarded as a virtually exclusive province of the States.” . . . The State, representing the collective expression of moral aspirations,
in a delphic summary affirmance, the Court sustained a three-judge federal court's refusal to declare Virginia's sodomy statute unconstitutional when applied to active, regular, consensual, adult, private homosexual relations. That affirmance has been taken to indicate that the state may indeed significantly regulate sexual behavior. Most recently, the Court voted seven to two not to hear a case which might have permitted the Court to ponder these uncertainties. Certainly the net result of the Court's dicta and decisions is that no lawyer asked by clients about the constitutionality of a state fornication or cohabitation statute can counsel with confidence.

This Note begins with the indisputable assumption that laws prohibiting fornication and cohabitation are nowhere explicitly forbidden by the Constitution. If a right to engage in consensual adult heterosexual activity exists, it will most convincingly be inferred from the Court's cases establishing a right of "privacy." The Note first seeks to discover an adequate definition of privacy which might lead to a decision whether "privacy" encompasses the right to fornicate or cohabit (a right which, for brevity's sake, we will somewhat imprecisely call the right to sexual privacy), but it finds no such definition. The Note therefore proceeds to investigate the Court's usual test for fundamental rights, a test which calls for the Court to look to society's traditions and has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.

21. Hollenbaugh v. Carnegie Free Library, 99 S.Ct. 734 (1978). Justice Brennan noted he would grant certiorari; Justice Marshall wrote a dissent. In fact, the case was a good deal less than an ideal vehicle for a Court which wished to address the problem of regulating consensual adult sexual activity. Ms. Hollenbaugh, a librarian in a public library, had been fired for living with the library's janitor and their illegitimate child. The Court might simply have held, as a district court had held in Mindel v. United States Civil Serv. Commn., 312 F. Supp. 485 (N.D. Cal. 1970), that the employee's sexual conduct was simply too unrelated to her work to be a legitimate ground for dismissal, especially since, as in Mindel, her work had not been unsatisfactory. 99 S.Ct. at 737. Cf. Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (6th Cir. 1975) (rule barring employment of unwed parents in school system insufficiently related to any legitimate objective to satisfy equal protection clause); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974 (M.D. Ala. 1974) (despite contractual provision that a teacher may be fired for "immorality," cancellation of a teacher's employment contract on evidence growing out of her consultation with a doctor about an abortion is an unconstitutional violation of privacy). Nor was the propriety of laws regulating fornication directly involved, since Pennsylvania had repealed both its fornication and adultery statutes, 99 S.Ct. at 735.
collective conscience. But those two criteria, the Note argues, likewise tell us little about any right to sexual privacy. The definitional and historical approaches having failed, the Note must resort to inquiry by analogy. The Note thus proceeds to state and test several hypotheses by which the right to sexual privacy might be justified. The Note contends that what it calls the right to marital privacy, especially when regarded in the light of the other kinds of privacy, provides an adequate analogy for a right to sexual privacy.

But that a right is fundamental does not mean that a law which conflicts with that right, ipso facto, unconstitutional, for such a law is permissible if it is narrowly drawn to serve a compelling state interest. The Note examines the state interests which laws forbidding fornication and cohabitation might serve. The Note suggests that several of these interests are indeed "compelling," but that the best evidence—the behavior of the states which have enacted but rarely enforced these laws—shows that the laws are hardly necessary to achieve those interests. The Note ultimately concludes, then, that laws prohibiting fornication and cohabitation are unconstitutional.

I. THE CREATION OF AN AMBIGUOUS RIGHT

To chronicle the development of the Court's decisions on sexual and familial privacy would be wasteful and ridiculous excess: it has often been done before. Nevertheless, a glance at a few of the salient cases is necessary to discover whether the Court has developed a definition we could simply consult to learn whether consensual adult heterosexual activity is constitutionally protected. However, while that glance reveals no such definition, it does reveal some origins of the ambiguities of the right to sexual privacy and the concerns and uncertainties which underlie the Court's privacy opinions, and which must inform our evaluation of any right to sexual privacy.

A. The Background

A specter haunted the Griswold Court—the specter of Lochner. Lochner v. New York, of course, is the celebrated case in which the Supreme Court declared a New York law limiting bakery employees' working hours an unconstitutional interfer-

23. 198 U.S. 45 (1905).
ence with the right to contract: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." The case symbolizes what is now commonly perceived as a misuse of the fourteenth amendment and of the power of judicial review to annul legislation inimical to the Court's social and economic beliefs even where that legislation offends no explicit constitutional provision. Critics of _Lochner_ thought it dangerous not simply because it seemed insecurely grounded in the Constitution, but because of the practical difficulties of identifying the kinds of rights the fourteenth amendment does protect, its consequently limitless reach, and the considerable power that reach gives the Court. Thus Justice Black, who had left the United States Senate for the Court in 1937, when _Lochner_ was a live and bitter memory to liberal politicians, characterized the formulas used to identify fourteenth amendment rights as reincarnations of old "natural justice" notions, and he summoned up Justice Iredell's 1798 attack on that doctrine:

24. 198 U.S. at 53.

25. This roughly paraphrases Justice Holmes's dissenting remarks in _Baldwin v. Missouri_, 281 U.S. 586, 595-96 (1930). Justice Holmes did not deny that the fourteenth amendment could be the basis for an attack on a law if it could be said "that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." _Lochner v. New York_, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). For an example of the Court's own criticism of _Lochner_, see _Day-Brite Lighting, Inc. v. Missouri_, 342 U.S. 421, 423 (1952), where, after referring to _Lochner_, the Court said, "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation." But see Deutsch, _Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science_, 20 STAN. L. REV. 169, 231-32 (1968):

It might be argued that, if the function of the Court is truly to afford our society an opportunity for "sober second thought" concerning measures that challenge, in some significant way, either cherished ideals or deep-rooted social beliefs, then the actions of the thirties [the high-water mark of economic substantive due process] were thoroughly in accord with that function . . . . [T]he effect of the Court's decisions was precisely to impress upon the society the magnitude of the departure from received tradition entailed by acceptance of the view that there exist no principled checks on governmental economic actions . . . . Even on a less long-range view, it is apparent that the Court's 1930's decisions performed the task of legitimation that the cumbersomeness of the machinery for amending the Constitution has historically imposed upon the Court. Thus, the public consensus on the propriety of the economic legislation of the 1930's was ultimately strengthened, not weakened, as a result of the Court's intervention.

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.27

In short, the substantive due process doctrine symbolized by Lochner invited an extension of judicial power bordering on usurpation, and many felt the Court accepted the invitation in invalidating New Deal legislation in the 1930s.28

The modern Court’s problem, in light of Lochner and its kin, was to formulate a statement of the right of privacy (1) with a sturdy constitutional foundation and (2) expressed in language broad enough to dignify and secure a “fundamental” right but narrow enough to provide principled limits to the growth of the concept.29 The two requirements, of course, are interrelated. A sharp delineation of the constitutional authority for the right of privacy may furnish the necessary principles for controlling the right’s growth. And logic broad enough to appeal to our sense of the nation’s basic values but convincingly and safely limited may make the constitutional argument more persuasive.

Formulating any right from the doctrine of substantive due process would have been difficult, but formulating the right of privacy was especially so. The first criterion—constructing the sturdy constitutional foundation—had more than its usual perplexities, as we shall see. But especially, once the Court decided to describe the right to freedom from interference with the intimate affairs of one’s life (insofar, of course, as that is a “right”) under the deceptively simple and irresistibly appealing rubric “privacy,” it intensified its problems with the second criterion. First, the Court had chosen a word whose popular connotations did not always coincide with its legal denotations.30 Second, the Court had already used the word in several other contexts.31 Third, partly because of the two previous characteristics, “privacy becomes too greedy a legal concept,” as Paul Freund has

28. For background and citations to further material, see L. Tribe, supra note 16, at 427-55.
30. For an example of the consequences of this fact, see text at note 59 infra.
31. See, e.g., the categories analyzed in Bostwick, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision, 64 Calif. L. Rev. 1447 (1976).
written, one which "might give excessive protection to an interest in human dignity and sensitivity." 32 Whatever the difficulties of meeting the first requirement may commonly be, in the case of the right of privacy the search for broad yet safely limited language and logic—in short, for a limiting principle—has been the overriding task.

These ambiguities and complexities, then, make the contours of the right of privacy unusually obscure. This Note's quest is to learn whether a right of privacy meeting the two criteria described above would encompass nonmarital heterosexual activity.

B. A Discursive History of the Right

Justice Douglas's opinion for the Court in Griswold sought to exorcise the ghost of Lochner by explicitly declining any invitation to be guided by that case, 33 by explaining in non-Lochner terms precedents founded on Lochner principles, 34 and by concluding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," 35 in particular that the first, third, fourth, fifth, and (evidently) ninth amendments "create zones of privacy." 36 Justice Douglas's device may seem to anchor substantive due process cases more firmly in a constitutional text, but it may not offer the specific standards needed to provide plausible limits to the right of privacy: rights emerging from the shadowy peripheries of more specific rights often evade exact definition; vivid but vague expressions like "zones of privacy" are snares for the analytically unwary; 37 "privacy," as Justice Black complained, "is a broad, abstract and ambiguous concept which can... easily be interpreted as... many things...", 38 and two

34. 381 U.S. at 482-83.
35. 381 U.S. at 484.
36. 381 U.S. at 484.
37. Cf. text at notes 226-28 infra (criticizing analysis in Roe v. Wade, 410 U.S. 113 (1973)).

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.

381 U.S. at 509 (Black, J., dissenting.)

The privacy cases pose the Lochner problem poignantly for many justices and commentators who find the legislation under review particularly obnoxious. As Justice Black protested in his dissent in Griswold, "I like my privacy as well as the next one, but I am
of the leading components of privacy—the right to individual autonomy and the right to control the disclosure of information about one's self—would, sufficiently extended, foreclose government regulation of the individual altogether. Since Justice Douglas sought to justify an expansion of the Constitution's protection, he marshalled the grandest possible language, but the grander the language, the more irresistible becomes a limitless extension of the principles of the case.

The next major case in the sexual privacy sequence, *Eisenstadt v. Baird,* did little to clarify the ambiguities of *Griswold.* *Baird* affirmed the reversal of a proponent of contraception's conviction under a statute making it a crime to give away any drug or article for the prevention of conception except to a married person under the prescription of a physician. Applying the equal protection clause of the fourteenth amendment, the Court found that no "ground of difference . . . rationally explains the different treatment accorded married and unmarried persons" under the Massachusetts statute. Much of the opinion is addressed to demonstrating that the statute's purpose could not be to serve the state's interest in prohibiting fornication or preserving public health; the intriguing differences between the facts of *Griswold* and *Baird* were less thoroughly handled. First, emanations from the fourth amendment's guarantees against unreasonable searches had helped justify the decision in *Griswold,* where Justice Douglas, after stressing that amendment's protection "against all the governmental invasions 'of the sanctity of a man's home and the privacies of life,'" asked rhetorically, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"

But in *Baird* the arrest was made on a public platform at the close of a speech. Indeed, to Justice Douglas, it was "a simple First Amendment case" of protected speech.

nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." *381 U.S.* at 510.

40. *405 U.S.* at 447.
41. *381 U.S.* at 484 (quoting *Boyd v. United States,* 116 U.S. 616, 630 (1886)).
42. *381 U.S.* at 485.
43. *405 U.S.* at 457 (Douglas, J., concurring).
44. *405 U.S.* at 455 (Douglas, J., concurring). "Handing an article under discussion to a member of the audience is a technique known to all teachers . . . . I do not see how we can have a Society of the Dialogue, which the First Amendment envisages, if time-honored teaching techniques are barred to those who give educational lectures." *405 U.S.* at 460.
Second, *Griswold* concerned a law which, "in forbidding the 
use of contraceptives rather than regulating their manufacture or 
sale, seeks to achieve its goals" by overbroad means.\(^{45}\) The law in 
*Baird* regulated the sale of contraceptives.\(^{46}\) Finally, the opinion 
in *Griswold* relied greatly on the special qualities of the marital 
relationship, which Justice Douglas's encomium described as 
ancient, sacred, and noble.\(^{47}\) If these qualities are what place 
machine in the zone of protected privacy, are they not a "ground 
of difference" which might explain the disparate treatment 
accorded married and unmarried couples?\(^{48}\) The Court in *Baird* 
conceded the difficulty, but explained it away in a manner 
suggesting that the phrase "right of privacy" had ceased to be a mere 
collection of emanations and taken on independent life. As 
Justice Brennan wrote for the Court (in a passage to be quoted in 
almost every subsequent argument for an expanded right of sexual 
privacy):

> It is true that in *Griswold* the right of privacy in question inhere
in the marital relationship. Yet the marital couple is not an inde
pendent entity with a mind and heart of its own, but an association 
of two individuals each with a separate intellectual and emotional 
makeup. If the right of privacy means anything, it is the right of 
the *individual*, married or single, to be free from unwarranted 
governmental intrusion into matters so fundamentally affecting a 
person as the decision whether to bear or beget a child.\(^{49}\)

This last sentence introduced a tantalizing new element of the 
right to privacy, the right to autonomy in decisions about matters 
that fundamentally affect one's life. This is obviously a limited 
right, else there could be little scope for government, but the 
opinion did not identify those limits. In short, *Baird*'s detach-
ment from the rationale of *Griswold* and its emphasis on the right

\(^{45}\) 381 U.S. at 485 (emphasis original).

\(^{46}\) 405 U.S. at 440-41.

\(^{47}\) 381 U.S. at 486.


\(^{49}\) 405 U.S. at 453 (emphasis original). The Court reports that the appellants in a 
*Griswold* only considered a law governing use, and since *Eisenstadt* was decided under 
the equal protection clause, "neither case should be treated as reflecting upon the State's 
power to limit or prohibit distribution of contraceptives to any persons, married or unmar-
nied." 431 U.S. at 686. According to the *Carey* Court, "The fatal fallacy in this argu-
ment is that it overlooks the underlying premise of those decisions that the Constitution protects 
'the right of the individual . . . to be free from unwarranted governmental intrusion . . . into the decision whether to bear or beget a child.'" 431 U.S. at 678 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).
to make fundamental decisions clouded the constitutional origins of the privacy right and opened the door to considerable extensions of it.

In 1973 the Court in *Roe v. Wade*\(^6\) confronted the emotional and active political controversy over state abortion laws and, with a stroke of the pen, sought to resolve it. Whatever may be said of the almost statutorily detailed description of the state’s power to regulate abortions, and whatever may be said of the Court’s lengthy history of abortion legislation,\(^41\) it cannot be said that the Court’s definition of the privacy rights of a woman seeking an abortion clarified the dimensions of the right of privacy generally. After citing cases demonstrating that “the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution,”\(^52\) and after noting that “the right has some extension to activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education,”\(^53\) the Court abruptly held:

> This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.\(^54\)

The brief ensuing (and apparently explanatory) remarks emphasized the distress of the woman who bears an unwanted child. If this was meant to justify a privacy right, it was inadequate, since all social regulation imposes distress, if only by preventing people from doing as they wish. A privacy right exists not because people would suffer distress without it, but because the distress is a kind which the Constitution protects people from having to suffer.\(^55\)

\(^50\). 410 U.S. 113 (1973).
\(^51\). For criticisms of both of these aspects of the opinion, see, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973).
\(^52\). 410 U.S. at 152.
\(^53\). 410 U.S. at 152-53.
\(^54\). 410 U.S. at 153.
\(^55\). Roe has been widely criticized on this score. See, e.g., Ely, *supra* note 51, at 931-32: “[T]he Court provides neither an alternative definition nor an account of why it thinks privacy is involved. It simply announces that the right to privacy ‘is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.’” Nor is criticism confined to commentators. Justice White, dissenting in *Roe* and its companion case, Doe v. Bolton, 410 U.S. 179, 221-22 (1973), wrote: “I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers . . . .” Justice Rehnquist
Thus in Roe the Court identified the constitutional origin of the right of privacy as the fourteenth amendment without making the outlines of that right much plainer.

However, in the same term in which the Court enlarged "privacy" in Roe, it was staking limits to the concept in an obscenity case, Paris Adult Theatre I v. Slaton. The Court held that there is no privacy right to watch obscene movies in a public theater, though the Court did not overrule its announcement in Stanley v. Georgia of a right to have such movies in one's home. The Court in Paris analyzed the privacy right as encompassing "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing." The Court allowed the nonconstitutional connotations of "privacy" to affect constitutional interpretation when it rationalized the refusal "to compare a theater open to the public for a fee, with the private home of Stanley . . . and the marital bedroom of Griswold . . ." by noting that the Court "has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are 'private' for the purpose of civil rights litigation and civil rights statutes." The classification of theaters under civil rights laws, however, tells us little about the usefulness of the comparison with the home or bedroom. In a subsequent footnote, the Court deprecated the importance of places in determining the range of constitutional privacy which, the Court said, "is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right of intimacy involved." But if Paris represented the Court's unwillingness to develop analogies to the zones of privacy surrounding the home and the marital bedroom and its willingness to confine the right of privacy to "personal intimacies" or "intimate relationships," the case provided the Court no opportunity to comment on what might constitute a personal intimacy or an intimate relationship, or the degree to which either might be protected.

Such an opportunity was presented and declined in Doe v.
Commonwealth's Attorney. Doe was an action by homosexuals for a declaratory judgment that Virginia's sodomy law was unconstitutional. A three-judge federal district court denied relief, and the Supreme Court affirmed without opinion. Both the Justices and the commentators have disputed precisely what that summary affirmance means. Some commentators have proposed that the case was decided solely on standing or ripeness grounds, a suggestion perhaps made plausible by the Court's observation in Carey v. Population Services International that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." But in his dissent in Carey, Justice Rehnquist responded, "While we have not ruled on every conceivable regulation affecting such conduct, the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been definitively established. Doe v. Commonwealth's Attorney . . . ."

Even if we knew that the Doe Court was directly affirming the lower court's opinion, we would know little, since that opinion is singularly uninformative. It quoted at length Justice Harlan's dissent in 1961 in Poe v. Ullman, especially those passages contrasting "the intimacy of husband and wife" with homosexuality and other sexual "intimacies which the law has always forbidden and which can have no claim to social protection." The court's

62. "It may well be argued, in future discussions of Doe, that the plaintiffs' relatively weak showing of ripeness and standing—none of the plaintiffs was indicted or convicted—prompted the Supreme Court majority to affirm without hearing arguments or handing down an opinion." Gerety, supra note 29, at 280 n.172. See generally Note, Doe v. Commonwealth's Attorney, 15 Duq. L. Rev. 123 (1976); Comment, supra note 20.
64. 431 U.S. at 678 n.2 (Rehnquist, J., dissenting).
65. 367 U.S. at 522.

Justice Harlan's words are nonetheless commanding merely because they were written in dissent. To begin with . . . they were authentically approved in Griswold [where part of the quotation used by the court was approvingly cited in Justice Goldberg's concurring opinion]. Moreover, [Justice Harlan] was not differing with the majority [in Poe] on the merits of the substantive case but only as to the procedural reason of its dismissal. At all events, the Justice's exegesis is that of a
The opinion did not ask whether the development of the right of privacy in *Griswold*, *Baird*, and *Roe v. Wade* might cause one to reconsider the dicta of a superseded dissent, however prescient and distinguished. The court's flat assertion that homosexuality "is obviously no portion of marriage, home or family life" ignored possible analogies with "marriage, home or family life" and the other aspects of privacy the Supreme Court has identified. In sum, given the many uncertainties surrounding the summary affirmance in *Doe v. Commonwealth's Attorney*, it establishes no clear, reliable, limiting principles to the right of privacy.

The Court, we have seen, has associated concerns such as marriage, the family, and procreation with the right of privacy. But the Court has found no definition of privacy which might guide an inquiry into whether a particular activity is so related to those concerns that it comes within a constitutionally protected zone of privacy.

II. PRIVACY AND FUNDAMENTAL RIGHTS

A. The Test for Fundamental Rights

The foregoing discussion of the Court's attempts to define "privacy" illustrates the difficulties in identifying limiting principles of Freund's "greedy" concept. The device on which constitutional analysis primarily relies to separate the trivial from the protected is a device required by the principles commonly used to interpret the fourteenth amendment. The device is in the form of an argument, spelled out with some precision in Justice Harlan's dissent in *Poe v. Ullman*. It runs as follows. The fourteenth amendment speaks in terms of process and might therefore require only procedural fairness. But the Court has not interpreted the amendment so narrowly:

"Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the

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67. See Comment, supra note 20.
68. See Part II.B.4 infra.
69. See Parts II.B.3 & II.B.5 infra.
70. Freund, supra note 32, at 192.
72. 367 U.S. at 540.
future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. 73

But the fourteenth amendment is not just “a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights.” 74 The reach of fourteenth amendment due process is spelled out by “those concepts which are considered to embrace those rights ‘which are . . . fundamental; which belong . . . to the citizens of all free governments,’ for ‘the purposes [of securing] which men enter into society.’” 75 But “[d]ue process has not been reduced to any formula.” 76

The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. 77

Another influential statement of the mechanism for identifying rights protected by the due process clause is found in Justice Goldberg’s concurring opinion in Griswold v. Connecticut. 78

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] . . . as to be ranked as fundamental.” The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ . . . .” 79

A final, frequently cited formulation of the test is Justice Harlan’s in his concurring opinion in Griswold: “[T]he proper constitutional inquiry . . . is whether this . . . statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty’ . . . .” 80

73. 367 U.S. at 541.
74. 367 U.S. at 541.
75. 367 U.S. at 541 (emphasis original) (citations omitted).
76. 367 U.S. at 542.
77. 367 U.S. at 542.
78. 381 U.S. 479, 486 (1965).
79. 381 U.S. at 493 (citations omitted).
80. 381 U.S. at 500 (citations omitted).
This admonition to consult history and a Jungian collective conscience is a conjuration against one of the hobgoblins of *Lochner*-judicial subjectivism—-but its efficacy is dubious. There is a long and honorable American tradition of invoking history to justify social and legal programs, and the Court must, of course, rationalize past principles and present policies. But for identifying aspects of privacy worthy of constitutional protection, nothing in "history" is so precise or uncontroverted as to provide reliable guidance. As Justice Black mordantly com-

Justice Douglas's opinion for the Court in *Griswold* apparently relies not on the theory outlined above, but on the proposition that the Bill of Rights is made applicable to the states by the fourteenth amendment and that the emanations of the Bill of Rights are likewise applicable. Justice Harlan interpreted and criticized the opinion by Justice Douglas:

> What I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them.
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. . . While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

381 U.S. at 500 (emphasis original). The question whether the fourteenth amendment incorporates the entire Bill of Rights has not been finally resolved, but the fundamental rights approach outlined in the text has become the means by which the Court typically discovers protected privacy rights. This seems to be what the Court was suggesting in *Roe v. Wade*:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

410 U.S. at 153. Thus while the Court may use portions of the Bill of Rights to help identify values "implicit in the concept of ordered liberty," it follows the process outlined by Justice Harlan to discover liberties protected by the due process clause. *Moore v. City of East Cleveland*, 431 U.S. 494, 501-02 (1977) (plurality opinion).

It is worth noting that even Justice Douglas's opinion in *Griswold* implicitly embraced the proposition that tradition, history, and our collective conscience help define the due process clause: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage . . . is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. 479, 486 (1965).

81. Thus Justice Harlan wrote, "If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting). Similarly, we have seen that Justice Goldberg's concurring opinion in *Griswold* noted: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions." 381 U.S. 479, 493 (1965).


83. See id. at 193.

84. Even leaving aside all the modern doubts about whether history has any discover-
mented, "[T]he scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the [collective] conscience of our people." 85 In fact, the most common "historical" technique is simply to list the major privacy cases with brief notations of the rights they are thought to recognize. 84 The most extensive and purely historical inquiry is Justice Blackmun's excursion in Roe v. Wade, 87 an application of the "history and collective conscience" test that suggests some reasons for the Court's restrained enthusiasm for it. One imponderable, when seeking to divine the collective conscience and traditions of our people, is which conscience, which traditions? Justice Blackmun's opinion in Roe devotes approximately fourteen pages to demonstrating that abortion laws "are of relatively recent vintage . . . deriv[ing] from statutory changes effected, for the most part, in the latter half of the 19th century." 88 To Justice Blackmun, the significance of this was, apparently, that "at the time of the adoption of our Constitution . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today." 89 To Justice Rehnquist:

The fact that a majority of the states reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." 90 To Justice Blackmun, the relative novelty of abortion legislation made irrelevant the passage of laws regulating abortion in each of the fifty states. But to Justice Rehnquist, "the very existence of the debate [over abortion] is evidence that the 'right' to an

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86. E.g., Carey v. Population Servs. Intl., 431 U.S. 678, 685 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion). An exception is Justice Brennan's concurring opinion in Moore, which was written to underscore the "cultural myopia" of the statute in question and which explored the history and sociology of the extended family in America. 431 U.S. at 606.
88. 410 U.S. at 129.
89. 410 U.S. at 140.
90. 410 U.S. at 174 (Rehnquist, J., dissenting).
abortion is not so universally accepted as the appellant would have us believe."

Justice Rehnquist surely has the better of the argument as framed by Justice Blackmun—if we ask what the traditions and conscience of our people, as expressed in our laws, say about abortion, is not the most recent century the most relevant, and is not a century of clear legislation enough? But if we ask whether our traditions and conscience include a sense of the inviolability of one's person, or the conviction that people ought to be free to choose whether to have children, the holding in Roe v. Wade is easier to defend. In other words, we must consult general underlying values rather than the specific legislation which provoked the constitutional challenge. This of course requires a disturbingly problematic search for nonlegislative evidence of our tradition and conscience, but without such a flexible, multi-faceted inquiry, the dimensions of constitutionally protected privacy would be far more cramped than the cases permit, and the "living Constitution" would have a tenuous hold on life. The need for sensitive, wide-ranging inquiry into traditions is especially pressing in privacy cases, since perceptions about what is private and intimate change with the era and the culture.

Further, a simple majoritarian, count-the-statutes solution is a particularly inapt gauge of the legitimacy of a privacy right, since constitutional privacy guards the right to make choices in the protected area without the knowledge, or at least without the supervision, of the majority—that the majority wishes to intervene should not be dispositive, nor has it been in cases like Roe v. Wade.

The problems sketched in the preceding paragraph suggest the extreme difficulties of any attempt to locate in our national conscience or tradition some strain that would constitutionally discredit laws regulating consensual, adult, private, heterosexual activity. There have been laws making fornication criminal since our national memory runneth not to the contrary. Yet, by the end of the colonial period, even jurisdictions like Massachusetts, which had prosecuted fornicators with single-minded vigor, had substantially abandoned such prosecutions. One doubts that Bay Staters had become chaste: Professor Shorter reports

91. 410 U.S. at 174 (Rehnquist, J., dissenting).
92. See, inter alia, D. Flaherty, Privacy in Colonial America 19 (1972).
93. See text at notes 1-3 supra.
94. See note 3 supra.
that from 1750-1850 "the number of out-of-wedlock pregnancies . . . skyrocket[ed]" throughout the Western world, indicating a pervasive increase in nonmarital sex and constituting "one of the central phenomena of modern demographic history." If a law is more honored in the breach than in the observance, what is the tradition? On the other hand, if these laws genuinely have lapsed into desuetude and disrepute, why are they not repealed? An investigation of the traditions respecting fornication and cohabitation laws thus reveals only inarticulate traditions and an ambivalent conscience.

B. Possible Rationales for "Sexual Privacy" as a Fundamental Right

We have seen that if there is a right to engage in nonmarital, heterosexual activity, it is a peculiarly Court-created right whose dimensions cannot profitably be sought in either the constitutional text or in history. Consequently, the most reliable way to establish whether it "exists" may be to compare the kinds of personal interests in such behavior with the kinds of interests already protected by the Court. The Court's own technique, after all, has usually been to leap from historical speculations to a recitation of the privacy cases, to an estimate of whether the right sought is in some sense proportionate or proximate to the listed rights. Occasionally the Court generalizes briefly.

97. The law against fornication, when it has not been repealed, has fallen into decline, withering away under the impact of mass open defiance, lack of prosecution and enforcement, a complete absence of public support, and apathy toward the law (including ignorance of it) on the part of the violators.
98. Which is not to say, of course, that such a right does not exist. For a critical review of other possible methods of "discovering" a constitutional right; see Ely, The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 1 (1978).
but as it conceded in *Paul v. Davis*, privacy cases defy categorical description. This Note will, nevertheless, next attempt to isolate and examine the several arguments which might be made to justify the proposition that private, consensual, adult, heterosexual behavior is protected by the Constitution.

1. **Emanations of the Fourth Amendment**

_Hypothesis:_ It may be inferred from *Griswold v. Connecticut* that some acts are so intimate and personal that they could be discovered (and thus regulated) by the government only through means offensive to the principles underlying the fourth amendment, and that those acts therefore fall within a zone of privacy.

"Secluded from the sight, presence, or intrusion of others"—this phrase defines the colloquial meaning of "private," a meaning that is constitutionally acknowledged by a line of cases emanating from the fourth amendment's prohibition of "unreasonable searches and seizures." The most sweeping language in these cases is among the earliest. It is from Justice Brandeis's dissent in *Olmstead v. United States*, where, in deprecating "an unduly literal construction" of the fourth amendment, he wrote:

> The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

The Court's opinion in *Griswold* depended heavily upon fourth

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101. 424 U.S. 693, 713 (1976). "Even reading the cases cited [in Roe] 'for all they are worth,' it is difficult to isolate the 'privacy' factor (or any other factor that seems constitutionally relevant) that unites them with each other and with Roe." Ely, *supra* note 51, at 932.


103. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

104. 277 U.S. 438, 471 (1928). The unduly literal interpretation was that wire-tapping was not a search or seizure. The government had conceded that were wire-tapping a search or seizure, the instance in *Olmstead* would have been unreasonable.

105. 277 U.S. at 476.

106. 277 U.S. at 478.
amendment cases and language. But there were other possible grounds for the decision in *Griswold*, and as the Court has expanded the right of privacy it has increasingly relied on (to the point of ignoring) emanations of the fourth amendment. For instance, the Court can now suggest that a ban on sales of contraceptives (which could presumably be enforced without injuring fourth amendment principles) "since more easily and less offensively enforced [than a ban on their use], might have an even more devastating effect upon the freedom to choose contraception." And even in cases which fall more precisely within the ambit of the right to prevent disclosure of information about one’s life and behavior, the Court seems reluctant to read the cases and law expansively. Thus, in upholding a New York statute which required that the state receive a copy of every prescription for certain drugs, the Court discounted a claim that “a constitutional privacy right emanates from the Fourth Amendment” by commenting that “those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations.”

Several considerations probably account for the Court's reluctance to develop *Griswold*'s fourth amendment aspects and for the irrelevance of those aspects to our problem of laws prohibiting fornication and cohabitation. The distastefulness of any search

108. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" 381 U.S. at 486.
109. See, e.g., *Carey v. Population Servs. Intl.*, 431 U.S. 678, 684-87 (1977). In his dissent in *Poe*, Justice Harlan foresaw the limitations inherent in tying the right of privacy closely to the fourth amendment: "It would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy comprehends only physical invasions by the police." 367 U.S. 497, 551 (1961). That *Griswold* is not so limited is argued by Judge Winter:

The marital right of privacy has a base broader than the Fourth Amendment alone and the cases recognizing the right pitch it on grounds that belie that secrecy is a necessary element... In *Griswold*, patients were admitting an outsider into their marital intimacies by seeking counseling and advice about contraception.

113. *Paul v. Davis*, 424 U.S. 693 (1976) (no constitutional violation in the circulation to merchants for a flyer listing respondent as a shoplifter where charges against him had been dismissed).
for evidence of a violation of fornication laws is, of course, plain. The image of police bursting into a room to catch a couple in flagrante delicto and then relating the episode in open court smacks of a sordid divorce, not enlightened law enforcement. That is surely what Justice Douglas had in mind when he asked in *Griswold* whether we would have police search the sacred precincts of the marital bedroom.\(^{113}\) But much of what made that search seem unreasonable in *Griswold* was the availability of better means of serving the proffered state interest, the “policy against all forms of promiscuous or illicit sexual relationships. . . .”\(^{114}\) Even if a prohibition against contraceptives actually promotes that end, a ban on sales could be more easily and less offensively enforced.\(^{115}\) No such alternatives present themselves as means of enforcing fornication laws. Further, the searches foreseen in *Griswold* were only tenuously related to the law’s purpose. Fornication statutes and the statute in *Griswold* attack the same harm—nonmarital sexual activity. But a conviction following a search for contraceptives would only result in the removal of the enticement to sexual promiscuity contraceptives were thought to present. In contrast, a search for evidence of fornication would be a search for evidence of precisely the behavior the law ultimately seeks to prevent.

Finally, the Court’s desertion of the fourth amendment argument is probably due to the indirectness with which that argument speaks to society’s basic, genuine concerns in privacy cases. The crucial feature of privacy cases is the special quality of the protected behavior. The fourth amendment does little to identify any special qualities of sexual activity which call for constitutional protection—they must be inferred from other constitutional sources. Once its special qualities are identified, freedom to engage in sexual activity can be protected solely on the basis of those qualities and without relying on the fourth amendment’s emanations. If anything, courts now seem to take this aspect of privacy more as the *terminus ad quem* than *a quo*, as a limit on the right of privacy rather than a source of it. For instance, in *Lovisi v. Slayton*\(^{116}\) a married couple which had invited a third

\(^{113}\) 381 U.S. 479, 485 (1965).
\(^{114}\) 381 U.S. at 505 (White, J., concurring in the judgment).
\(^{115}\) “A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness . . . .” 381 U.S. at 507 (White, J., concurring in the judgment).
\(^{116}\) 539 F.2d 349 (4th Cir. 1976).
person to share the intimacies of their bedroom were held to have waived their right to privacy, since, "[i]f the couple performs sexual acts for the excitation or gratification of welcome onlookers, they cannot selectively claim that the state is an intruder." 117

2. The Home as Sanctuary

_Hypothesis:_ It may be inferred from _Stanley v. Georgia_ that the home is a sanctuary within which the individual may pursue his intellectual and emotional needs without interference from the government except where there is demonstrable external harm.

Related to the colloquial definition of privacy, and drawing constitutional legitimacy from many of the sources discussed in the preceding Part, is the proposition that some acts are protected when performed within the sanctuary of the home. This seemed in the early days of the privacy doctrine a promising line of reasoning, as Justice Harlan implied while analyzing the Connecticut statute which banned the use of contraceptives: "This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.' " 118 The promise gleamed brightly after the Court held in _Stanley v. Georgia_ 119 that while "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession [of obscene films] by the individual in the privacy of his own home." 120 The attraction of _Stanley_ lay in its generous language 121 and in its conclusion that while the state could normally regulate obscenity without proving "that exposure to obscene material would create a clear and present danger of anti-social conduct," 122 the state could not, given the paucity of knowledge about obscenity's harmfulness, prohibit its possession in the home. 123 Some judges and commentators thus interpreted _Stanley_ as saying that "socially condemned activity, 117. 539 F.2d at 351.
120. 394 U.S. at 566.
121. "[A]ppellant is...asserting the right...to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U.S. at 565 (emphasis added).
122. 394 U.S. at 567.
123. 394 U.S. at 566-67.
excepting that of demonstrable external effect, is and was intended by the Constitution to be beyond the scope of state regulation when conducted within the privacy of the home.” 124 The Court, however, has refused to extend Stanley, which it deprecated in 1973 as “hardly more than a reaffirmation that ‘a man’s home is his castle’ ”; 125 in obscenity cases it has confined Stanley strictly to its facts. 126

Is the adage that a man’s home is his castle as trivial as the Court implied? If we are to gauge the fundamentality of a right by the “traditions and conscience of our people,” 127 the facility with which the phrase comes to mind may be evidence to the contrary. Indeed, the phrase evokes Professor Reich’s modern formulation of the centuries-old belief that

[p]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner . . . . [P]roperty affords day-to-day protection in the ordinary affairs of life. 128

Justice Stewart recently cited the classic and august authority for the proposition that “rights in property are basic civil rights . . . J. Locke . . . ; J. Adams . . . ; [and] W. Blackstone . . . .” 129 And Justice Stevens seemed to be hearkening to this tradition in his concurring opinion in Moore v. City of East Cleveland: “In my judgment the critical question presented by this case is whether East Cleveland’s housing ordinance is a permissible restriction on appellant’s right to use her own property as she sees fit.” 130 In the light of this tradition, Stanley gains strength: the home becomes a sanctuary in which the individual may explore and express his intellectual and emotional nature, undeterred by society’s notions of propriety and orthodoxy, wherever there is no “demonstrable external effect.”

This version of Stanley, however, has several drawbacks as the source of a right to sexual activity. First, the essential preliminary question is whether the right to privacy in the home is so fundamental that state interests must be strictly scrutinized.

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126. See United States v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 123 (1973) and cases cited in Gerety, supra note 29, at 276 n.154.
130. 431 U.S. 494, 513 (1977) (Stevens, J., concurring).
Stanley's answer seems to be that if the state interest is weak, the right of privacy in the home is fundamental. Since the determinant of the strength of the state interest has largely been the kind of scrutiny to which it is subjected, one hardly knows where in this circle to begin.

Second, the exception to the right of privacy where there is external harm could easily swallow the right; in this case, ironically, it is difficult to identify principled limits to the limits on the right. In Stanley, external harm could only have been caused by the corrupting effects of the literature read in the home. The Stanley Court's understanding of "harm" was probably influenced by the case's first amendment aspects and by the assumption common in first amendment cases that the operation of the marketplace adequately combats pernicious ideas. But the possible external harms from even the most sequestered sexual behavior are quite evident—illegitimate children and venereal disease. If external harm includes offense to the public's sensibilities or damage to society's "moral fiber," the exception would be virtually unconfinable. The dimensions of the exception are blurred by the Court's willingness in Paris Adult Theatre I v. Slaton to concede the legislature the right to act on "various unprovable assumptions" about what is necessary to protect society's interest in order and morality.
Finally, the frailty of the "home/sanctuary" argument is similar to that of the "fourth amendment emanations" argument: both fail to identify the special qualities of an activity which mandate constitutional protection; neither standing alone accounts for the importance accorded "privacy" by the Court. As the Court suggested in *Paris*:

The protection afforded by *Stanley* . . . is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.¹³⁴

Is the right to private sexual relations in the home a fundamental right, on a par with family, marriage, motherhood, procreation, and child-rearing, and part of our traditions and national conscience? Probably not.

3. The Right of Associational Privacy

*Hypothesis:* It may be inferred from *Griswold v. Connecticut* and from dissents in *Department of Agriculture v. Moreno* and *Belle Terre v. Boraas* that freedom of association, which is a necessary concomitant to the rights guaranteed by the first amendment, encompasses the fundamental right to choose and live with one's most intimate associates, one's sexual partners.

A constitutionally assured "right of association" has been inferred by the Court from the first amendment protection of speech and assembly.¹³⁵ While in ordinary speech "association" has broad connotations, "the scope of the associational right . . . has been limited to the constitutional need that created it; obviously not every ‘association’ is for First Amendment purposes or serves to promote the ideological freedom that the First Amendment was designed to protect."¹³⁶ However, Justice Douglas and Justice Marshall have, usually in dissent, interpreted the right more generously, essentially by liberal use of the first amendment emanations discerned by Justice Douglas (writing for the Court) in *Griswold*. There Justice Douglas cited the Court's protection of "forms of ‘association’ that are not political in the

¹³⁴ 413 U.S. at 66 n.13.
customary sense but pertain to the social, legal, and economic benefit of the members”137 as evidence that some penumbral rights are necessary to make the express guarantees of the first amendment “fully meaningful.”138 He noted that the right of association is one of the constitutional guarantees which create “zones of privacy.”139 He concluded by describing marriage as “an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”140 Thus in Griswold Justice Douglas described a right of associational privacy resting on a broad reading of the first amendment’s aims and securing freedom from governmental interference with human relationships serving basic social and personal ends.

The Court’s present willingness to apply traditional equal protection standards with “bite”141 allowed the Court in Department of Agriculture v. Moreno142 to postpone deciding whether this associational right of privacy is fundamental. In that case the Court held that a provision of the Food Stamp Act of 1964 excluding households containing unrelated members violated the equal protection guarantee of the due process clause of the fifth amendment by creating an irrational classification. The Court noted, “Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest,”143 and it found that the classification was not rationally related to the interest in minimizing fraud.144 But Justice Douglas’s concurring opinion suggested that while the provision “might well be sustained simply as a rational means to prevent fraud,”145 preventing fraud was not so compelling a governmental interest as to support
an invasion of the fundamental right of association: that right protects the poor who wish to band together "in households where they can better meet the adversities of poverty."\(^{146}\) He compared that right to other peripheral first amendment rights:

the right to send one's child to a religious school, the right to study the German language in a private school, the protection of the entire spectrum of learning, teaching, and communicating ideas, the marital right of privacy.

. . . [T]hese peripheral constitutional rights are exercised not necessarily in assemblies that congregate in halls or auditoriums but in discrete individual actions such as parents placing a child in the school of their choice. Taking a person into one's home because he is poor or needs help or brings happiness to the household is of the same dignity.\(^{147}\)

Despite the considerable potential of this language, Douglas wrote the majority opinion in *Village of Belle Terre v. Boraas*,\(^{148}\) which sustained a zoning ordinance limiting land use to one-family dwellings and defining "family" to exclude households with more than two unrelated persons.\(^{149}\) In one laconic sentence, Douglas denied that any fundamental right, including the right to privacy, was implicated. The opinion recounted the contention that the ordinance reflected animosity to unmarried cohabiting couples,\(^{150}\) found no evidence for the charge, and said in a footnote, "Moreno . . . is therefore inapt as there a household containing anyone unrelated to the rest was denied food stamps."\(^{151}\) Finally, Justice Douglas detected no interference with "other forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it likes."\(^{152}\)

146. 413 U.S. at 541.
147. 413 U.S. at 542.
149. The action was brought by a group of students and a landlord who had rented them a house in an area subject to the ordinance. By the time the case reached the Court, the students had moved out and the case was moot as to them. 416 U.S. at 10 (Brennan, J., dissenting). The Court heard and decided the case, however, because the landlord was a party to the action; he had standing to challenge the ordinance because the rent he could charge for the house depended on how large a group could live there. 416 U.S. at 9. Justice Douglas's opinion does not make clear whether the landlord could assert the rights of his ex-tenants, or only his own. In any event, Justice Marshall in dissent believed that the associational rights of the tenants were still in the case. 416 U.S. at 13 (Marshall, J., dissenting).
150. Because the ordinance only barred households with three or more unrelated persons, unmarried couples were not directly affected.
151. 416 U.S. at 8 n.6.
152. 416 U.S. at 9.
Justice Marshall wrote a dissenting opinion which is the clearest judicial statement of an associational privacy right to choose one’s household companions. He began by arguing that the first amendment limits even zoning laws (which the Court has traditionally been hesitant to review), since an ordinance confining an area to adherents of a particular political or religious persuasion would be unconstitutional. “Our decisions establish,” he continued, “that the First and Fourteenth Amendments protect the freedom to choose one’s associates,” and he cited cases extending protection to “modes of association . . . that pertain to the social and economic benefit of the [union] members.” He reasoned, “The selection of one’s living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.”

He cited privacy decisions displaying a special concern with the right to establish and be free in a home (Meyer v. Nebraska, Griswold, and Stanley), and he added Roe v. Wade, Eisenstadt, Olmstead, and Moreno to support his conclusion that

[the choice of household companions—of whether a person’s “intellectual and emotional needs” are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.]

Finally, Justice Marshall invoked Justice Douglas’s arguments in Moreno in dismissing the proposition that the right of association is satisfied by the freedom to invite guests into the home.

The Court again rejected an opportunity to expatiate on the fundamentality of an associational right of privacy in Moore v. City of East Cleveland. The facts of that case evoke almost irresistible sympathy for the appellant. Mrs. Moore was a grandmother living with her son, his son, and another grandson by a different child. This second grandson had come to live with his grandmother, uncle, and cousin after his mother’s death when

155. 416 U.S. at 15.
156. 262 U.S. 390 (1923).
157. 416 U.S. at 16.
158. 416 U.S. at 17-18.
159. 431 U.S. 494 (1977) (plurality opinion).
160. 431 U.S. at 497.
he was less than a year old. East Cleveland's housing ordinance limited occupancy of a dwelling unit to single families and defined family in such a way as to forbid the Moores' arrangement. When Mrs. Moore failed to comply with a notice of violation, she was convicted on a criminal charge, fined $25, and sentenced to five days in jail. Although the appellant based her claim in part on the right of association, the Court's opinion relied on the long procession of privacy cases stating the family's privacy rights. Justice Stewart, in a dissent in which Justice Rehnquist joined, did evaluate the associational privacy argument. Stressing the first amendment origins of that right, he put Justice Douglas's "penumbra" argument in its most restrictive form: "Freedom of association has been constitutionally recognized because it is often indispensable to effectuation of explicit First Amendment guarantees." He could find no relationship between the situation in Moore and the first amendment concern for speech, assembly, press, and religion. He disagreed that "the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons," and he argued that in any event,

[w]herever the outer boundaries of constitutional protection of freedom of association may eventually turn out to be, they surely do not extend to those who assert no interest other than the gratification, convenience, and economy of sharing the same residence.

Described in Justice Stewart's disparaging language, and at its least sympathetic extreme, the right of association does seem irrelevant to Belle Terre and Moore and does fail to rise to the dignity of a fundamental right. Nevertheless, fornication and cohabitation statutes ought at least sometimes to be unconstitutional even in terms of a right of association tied closely to the first amendment that right emanates from. The proper ordering of people's most intimate relationships is a social and political, and often religious, issue of the first importance. The development and propagation of ideas about such social ordering may require an association of the like-minded, experimenting

161. 431 U.S. at 505 n.16.
162. 431 U.S. at 496.
163. 431 U.S. at 497. The Ohio Court of Appeals affirmed and the Ohio Supreme Court denied review. 431 U.S. at 497-98.
164. See text at note 136 supra.
165. 431 U.S. at 535 (emphasis added).
166. 431 U.S. at 535.
167. 431 U.S. at 535-36.
and setting an example, practicing and preaching. The city that is set on a hill is an American tradition, one exemplified by communities of social and religious reformers associated for mutual support in redesigning society and recruiting adherents. Unorthodox marital arrangements, from the continence of the Shakers,\(^{168}\) to the polygamy of the Mormons,\(^{169}\) to the remarkable sexual cavalcade of Oneida, typify these communities.\(^{170}\) (It is worth remarking that each of those was organized according to and as an expression of profound religious beliefs.\(^{171}\) ) In their more articulate moments, the communes of the 1960s and 1970s often followed the tradition.\(^{172}\) This line of argument, of course, applies best to self-consciously political, social, and religious groups.\(^{173}\) Any extension of the argument to individual couples would depend on the extent to which the relationship sustained an essay in social ordering and expressed social or religious beliefs. Such extensions would be hampered by the likelihood that few cohabitating couples have thought about themselves in these terms. While this analysis suggests that Justice Stewart’s language may go too far in denying any relationship between associational privacy and the choice of domiciliary and sexual partners, it also suggests that associational privacy does not go far enough to support a fundamental right to choose such companions.

Is our initial hypothesis thus incorrect? Despite the eloquence of Justice Douglas and Justice Marshall, the Court has declined Griswold’s offer to enhance the scope of the right of association, implicitly in Moreno and Moore, explicitly in Belle

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169. Id. at 86-107.
170. John Humphrey Noyes, the guru of Oneida wrote a pamphlet called Slavery and Marriage: “Marriage is not an institution of the Kingdom of Heaven, and must give place to Communism . . . . The abolishment of exclusiveness is involved in the love-relation required between all believers in Christ.” To this end the community instituted complex marriage. Under this system every member had sexual access to every other with his or her consent . . . . but always under “strict regulation and governed by spiritual considerations.” . . . As there was a general feeling that the young should learn from the older, more spiritual members, who had reached a higher level of “fellowship,” sexual contacts usually proceeded along those lines.
R. Kantor, Commitment and Community 12 (1972).
171. In keeping with America’s role as a refuge for unorthodox opinion, many of these utopian communities had come to America from Europe to live and preach. See, e.g., A. Tyler, supra note 168, at 140-45.
172. E.g., Twin Oaks, described in R. Kantor, supra note 170, at 18-21.
Terre. The limiting principle of the right of association, and what spares the Court the task of applying the compelling-state-interest test to every government regulation of an “association,” is the right’s first amendment rationale. To accept Griswold’s invitation would probably have been to divorce the right from any convincing first amendment logic and thus to remove the right’s limiting principle. Given the Court’s sensible aversion to rights without limiting principles and given the precedents in associational privacy cases, the hypothesis standing alone is constitutionally unconvincing.

4. The Right of Familial Privacy

Hypothesis: It may be inferred from Moore v. City of East Cleveland that the right of familial privacy established by the due process clause of the fourteenth amendment and cases interpreting it extends to functional equivalents of the family, including unmarried heterosexual couples.174

The rights of familial and marital privacy also draw constitutional authority from the right of association, but they are bolstered by other constitutional language and a tradition of constitutional interpretation of the due process clause of the fourteenth amendment. As Justice Goldberg wrote in Griswold, the entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.175

Familial privacy assures more than the unadorned right to raise a family; that right is accompanied by the right to autonomy in making decisions about the family.176 Before we can determine whether these rights imply a right of unrelated individuals to organize a non-traditional “family,” we must examine the kinds of behavior the Court has insulated from governmental supervision.

Familial-privacy cases essentially concern “the parents’ claim to authority in their own household to direct the rearing of their children.”177 As one seminal opinion put it:

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174. Because of its emphasis on functional equivalents of the family, this hypothesis could probably apply only to laws prohibiting cohabitation. But see note 216 infra.
175. 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).
It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.\textsuperscript{178}

Thus the classic familial-privacy cases have buttressed the right of parents to control their children’s education by invalidating laws prohibiting the teaching of foreign languages to young children\textsuperscript{179} and laws requiring children to attend public schools.\textsuperscript{180}

The Court slightly broadened the scope of familial privacy in \textit{Moore v. City of East Cleveland},\textsuperscript{181} where the Court, emphasizing the “sanctity” of the family and its deep roots in our national history and mores, announced, “The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition [as those of the nuclear family].”\textsuperscript{182} Governmental interference with “choices concerning family living arrangements” therefore must be strictly scrutinized.\textsuperscript{183} The legitimacy of this constitutional recognition of the extended family becomes apparent when we recall that one reason we guard the family is because it is the institution through which “we inculcate and pass down many of our most cherished values, moral and cultural”\textsuperscript{184} and that decisions concerning rearing children and transmitting values to them have customarily been shared by the parents with other relatives. A grandmother’s right to live with her two grandchildren is protected because she serves the parental function of bringing up and socializing the children.

\textit{Moore’s} slight extension of familial privacy was not made easily, however. Only four Justices joined in the plurality opinion; the concurring opinion, written by Justice Stevens, reasoned that the ordinance impermissibly interfered with the appellant’s right to control her own property and that it therefore was a taking without due process or just compensation.\textsuperscript{185} Chief Justice Burger dissented because the appellant had not exhausted her administr-
trative remedies, but he thought the constitutional question difficult. Justice Stewart's dissent, to which Justice Rehnquist subscribed, contended that the zoning power approved by the Court in *Euclid v. Ambler Realty Co.* and affirmed as to single-family zoning plans by *Belle Terre* carried with it the power to define "family." Recalling that the standard for measuring the "limited substantive contours" of a due process claim was that the interest be "implicit in the concept of ordered liberty," Justice Stewart wrote, "The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level." He reviewed cases protecting the family's autonomy and found little similarity to the appellant's interest: "The ordinance . . . did not impede her choice to have or not to have children, and it did not dictate to her how her own children were to be nurtured and reared." Justice White's dissent likewise saw no reason why the "interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause."

Could Moore's extension of "family" be stretched any further? Laurence Tribe argues that decisions denying parents and husbands the right to veto a woman's decision to have an abortion, when seen in the combined light of the family and marital privacy cases, the holding in *Moreno,* and decisions forbidding disadvantaging of illegitimate children and unwed parents suggest that one cannot avoid the conclusion that the stereotypical "family unit" that is so much a part of our constitutional rhetoric is becoming increasingly central to our constitutional reality. Such

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186. 431 U.S. at 521.
188. 431 U.S. at 537 (1977).
189. 431 U.S. at 537 (citing Roe v. Wade's quotation of Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
190. 431 U.S. at 537.
191. 431 U.S. at 536.
192. 431 U.S. at 549.
194. See text at notes 142-44 supra.
“exercises of familial rights and responsibilities” as remain prove to be individual powers to resist governmental determination of who shall be born, with whom one shall live, and what values shall be transmitted. 196

Even two of the earliest “privacy” cases proclaim the right of parents to transmit heterodox values to their children 197 and can be seen as protecting a sanctuary for the preservation of individual and cultural independence and autonomy. A similar interest may also be inferred from the comment in Moore that the “Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns” 198 and from the concurring opinion in Moore, which was written

to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in the light of the tradition of the American home that has been a feature of our society since our beginning as a Nation—[the extended family especially common in black and ethnic groups]. 199

From this perspective, the implication of Moore may be that the Constitution protects the family because it functions as a sanctuary in which intimate and important relationships are developed and expressed. If the Constitution’s concern is the family’s function, functional equivalents of the family, including unmarried couples, ought also to be protected. And the Court in dictum intimated a willingness to recognize functional equivalents of the family in Smith v. Organization of Foster Families, 200 where it noted that

the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promoting a way of life” through the instruction of children . . . as well as from the fact of blood relationship. 201

Nevertheless, is there something about the fact of relatedness which justifies drawing the constitutional line at the

196. Id. 987 (quoting Runyon v. McCrary, 427 U.S. 160, 178 (1976) (emphasis original)).
197. Meyer v. Nebraska, 262 U.S. 390 (1923), protects the parents’ right to have the child taught a language (German) which society has decided represents a tradition inimical to its interests. Pierce v. Society of Sisters, 268 U.S. 510 (1925), preserves the parents’ right not to educate their children in that traditional transmitter of our national values, the public school.
199. 431 U.S. at 507.
201. 431 U.S. at 844 (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)).
“traditional” family? The appellant in Moore, after all, was not only in loco parentis, but was so closely related by blood that it has been traditional for her to occupy that position.

Little in the history of the nation or the cases decided by the Court is precedent for extending the protection of the family to individuals not related by blood or marriage. Thus Smith, whose dicta tentatively equated the traditional family and the foster family, held that, as against the right of the biological parents, foster parents lacked the kind of interest which would require heightened scrutiny of statutory arrangements for returning a child from foster to biological parents. As the Court noted in Smith, “the usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.” And even Moore, for all its expansive language, contrasted the situation in Moore with that in Belle Terre and identified the overriding distinguishing factor as the regulation of the family in Moore and “only unrelated individuals” in Belle Terre. Nor is the emphasis on blood relationships wholly irrelevant to the underlying reasons for protecting the family. Whichever familial function we single out—the family’s responsibility for feeding, clothing, and educating society’s young or the family’s provision of a sanctuary in which intimate relationships may be developed and expressed without undue interference by the state—it will be best performed by a stable, identifiable agency. Society’s experience is generally thought to have been that such an agency is most likely to flourish when its members are bound by sentiments and beliefs about the ties of blood.

In summary, while our hypothesis about familial privacy has attractive features, it is, standing alone, unpersuasive.

5. The Right of Marital Privacy

Hypothesis: It may be inferred from the recognition of marital privacy in Griswold v. Connecticut and from the explicit attribution of privacy rights to the individual in Eisenstadt v. Baird that the Constitution guarantees both married and unmarried couples

202. It is quite another [thing] to say that one may acquire such an interest in the face of another’s constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset.

203. 431 U.S. at 843 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

the right to express "the most intimate concerns of an individual's personal life" unhindered by governmental regulation.

Marriage is, of course, the paradigm "privacy" relationship. Not only did the first modern privacy opinions—Griswold and Justice Harlan's dissent in Poe—involvemarried couples, but that fact was central to the several rationales for the privacy right in those cases. Both the "unreasonable search" and the "association" arguments were enhanced by invocations of society's special regard for marriage, most memorably in Justice Douglas's rhetorical question about "the sacred precincts of marital bedrooms."

Why does society shield the married couple from the government's supervision, and is there any reason unmarried couples should not also be shielded? Of course, marriage is a stable, identifiable institution responsible for raising and socializing children. But society protects married couples who have not had children, who will not have children, or whose children have left home. Society does so because marriage is also the institution within which a couple can conduct "the most intimate concerns of an individual's personal life." Intimate emotional ties, cemented by and expressed through sexual relations, are widely thought overridingly important and especially vulnerable when exposed to the public's gaze. Of course, society has traditionally sought to promote and preserve these intimate relationships through marriage, as the Court's celebrated pronouncement in Eisenstadt v. Baird concedes: "It is true that in Griswold the right of privacy in question inhered in the marital relationship." However, that pronouncement continued:

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into

206. Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting). In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court reaffirmed the centrality of marriage and the fundamental importance of the freedom to enter into it. In that case, the Court declared unconstitutional a Wisconsin statute forbidding any Wisconsin resident to marry without court permission if he was obligated by a court order to support any minor issue not in his custody. 434 U.S. at 375. The Court cited with approval "the leading decision of this Court on the right to marry," Loving v. Virginia, 388 U.S. 1, 12 (1967): "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 434 U.S. at 383.
matters so fundamentally affecting a person as the decision whether to bear or beget a child.207

Though that pronouncement's logical relationship to the holding in the case was questionable when the case was decided,208 the proposition has now been so widely cited as to live a life of its own.209 And though Eisenstadt speaks of privacy in the decision whether to bear a child, a similarly strong interest in privacy in sexual matters has been acknowledged by lower courts.210 Thus, in Cotner v. Henry,211 which overturned a husband's conviction on a sodomy charge, the Court of Appeals for the Seventh Circuit wrote: "The import of the Griswold decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty."212 The constitutional significance of the right to express fully one's personality and individuality was detailed by Justice Marshall in his dissent in Kelley v. Johnson:213

An individual's personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle . . . . To say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect.214

Taking the cases preserving the right of privacy in sexual matters together with Eisenstadt, it can be proposed, as the Arizona Court of Appeals has, that

no sound argument can be made that the right of privacy in sexual conduct between consenting adults is "fundamental" only when the consenting adults are married to each other. The right of pri-

207. 405 U.S. 438, 453 (1972) (emphasis original).
208. See text at notes 45-49 supra.
210. This Note does not treat judicial attitudes toward the regulation of homosexuality. For a brief attempt to establish a possible distinction between state regulation of homosexuality and nonmarital heterosexual activity, see note 225 infra and accompanying text.
211. 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968).
212. 394 F.2d at 875 (footnote omitted).
214. 425 U.S. at 250-51. These comments were made in dissent, but the decision of the Court may be at least partly explained in terms of the special difficulties of the case, which held that the state has a right to regulate the length of policemen's hair. Given the rigidities of the two-tier approach, the Court may have been afraid it would become involved in detailed examination of endless minor infringements of a right to regulate personal appearance.
vacy is deemed fundamental because it is basic to the concept of the individual in our American culture and because it is a necessary prerequisite to the effective enjoyment of all our other fundamental rights. As Eisenstadt and its progeny have recognized, these reasons are wholly unrelated to the existence vel non of a marriage relationship. 215

The argument, then, is this: Marriage exists to facilitate the expression of emotional and sexual intimacy. That intimacy is so fundamental to individual liberty that it demands constitutional protection. Nothing is different about the psychological and emotional needs of unmarried couples which would justify denying them the same protection. 216

But if society genuinely recognizes the centrality to personal liberty of the right to nonmarital sexual relations, would not our traditions reflect that recognition? In other words, does this argument flunk the "traditions and collective conscience" test? 217 It does not. First, even when laws confining sex to marriage were enforced, they were widely broken, 218 and they have not been systematically enforced for years. 219 This nonenforcement may well amount to the state's tacit concession that its citizens believe privacy and autonomy in sexual relations are of paramount importance. 220 In other words, there is a traditional regard for the

216. One could respond to this argument by saying that, while the argument might justify overturning laws against cohabitation, it cannot justify overturning fornication laws, since while living together might be analogous to marriage, a one-night relationship hardly is. However, that argument has more formal logic than practical utility. For instance, what would prevent a couple accused of fornication from claiming that, but for their arrest, they were beginning a long-term, and therefore protected, relationship. Nor does it seem likely that any sensible, workable line could be drawn specifying the number of days a couple had to spend together to establish a "marriage-like" relationship. Of course, none of this brings into question the permissibility of laws against prostitution, since prostitution's commercial element, we societally have assumed, makes the intimacy we wish to protect impossible.
217. See text at notes 71-84 supra.
218. See notes 2-3 supra.
219. See note 97 supra.
220. A national survey commissioned by Time and conducted by Yankelovich, Skelly & White found:

In general, 70% [of the sample] subscribed to the statement that "there should be no laws, either federal or state, regulating sexual practice." The majority included all categories, Catholic and Protestant alike, old as well as young. Later in the survey, when asked whether they favored eliminating or maintaining "laws which regulate what kinds of sexual practices are acceptable and legal," a solid 45%-to-42% plurality wanted them eliminated.

The one apparent exception is pornography ... . No less than 74% supported the view that "the Government should crack down more on pornography in movies,
importance of sexual relations which has simply not been expressed in legislation, probably because no cohesive group has a powerful motive to work for the repeal of laws which are rarely enforced and because there are cohesive groups (often religious) which would vehemently oppose repeal. In fact some states have repealed fornication and cohabitation statutes, and that barometer of enlightened legal opinion, the Model Penal Code, omitted such provisions. Second, while nonmarital sexual activity has always been with us, in this century sex has begun to be thought the pervasive, underlying human motivation. However professional psychologists may have revised the original Freudian analysis, its essential elements, at least in a vulgarized form, have altered our social perspective and elevated the pursuit of individual fulfillment through sexual activity to a new dignity. Finally, society may have always recognized the fundamental importance of the right to sexual expression but believed there were reasons for channelling it in marriage. Whether state interests justify regulation of sexual expression outside of marriage is discussed in detail below.

Several of the “rights” discussed in earlier sections lack limiting principles. The right to sexual relations outside of marriage suffers only slightly from this defect. Such a right does not inevitably imply a right to whatever “lifestyle” one chooses, since sex is a uniquely potent and intimate expression of personality. A policeman forbidden to wear long hair has not suffered a diminution of his ability to express profound emotional needs in a degree remotely approaching that of a person barred from sexual expression. Nor would a right of sexual expression outside marriage necessarily conflict with Doe v. Commonwealth’s Attorney, even assuming that that case approves laws prohibiting sodomy, since homosexuality can be distinguished from heterosexuality in terms of the very societal traditions which necessitate a right to sexual freedom. In other words, homosexuality may fail the “traditions and collective conscience” test, since, however

books and nightclubs. Of these, 54% said they felt this strongly.

TIME, Nov. 21, 1977, at 115.


223. Parts III.B. -III.C. infra.

224. See notes 61-69 supra and accompanying text.
wrongly, Americans have long regarded (and still do regard) homosexuality with special reprobation.225

We have hypothesized that the right of marital privacy logically extends to unmarried couples. That hypothesis, this Note proposes, is valid.

6. The Right of Decisional Privacy

Hypothesis: It may be inferred from *Roe v. Wade* that individuals have a right to make without governmental interference important and intimately personal decisions, including the decision to have sexual relations outside marriage.

*Roe v. Wade,*226 which established the right to terminate a pregnancy, rests on a singularly hazy rationale.227 The Court, citing the usual privacy cases, concluded,

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.228 From the discussion following that quotation, one might infer that the right grows out of the woman's right to control her own body or out of her right to escape the mental and physical distress of bearing an unwanted child.

The familial and marital privacy cases have already been discussed.229 A right to control one's person dates from *Union Pacific Railway v. Botsford,*230 which spoke movingly of common-law limits on the power of courts to order medical examinations of plaintiffs in civil suits.231 In *Roe,* however, the Court noted that it has refused to recognize an unlimited right to control one's own

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225. This is not to deny that there is a tension between, on one hand, establishing a right to full sexual expression for most members of society on the grounds that they need it to fulfill their individuality, and, on the other, barring the rest from any kind of sexual expression which appeals to them. It is to say that, however unjustifiably, homosexuality is still widely regarded as a threat to social stability and to psychological health in a way that even heterosexual misconduct is not. Homosexuality thus is more difficult to regard as cherished by our national traditions and collective conscience.

229. *Parts II.B.4-5 supra.*
body and doubted that such a right "bears a close relationship to the right of privacy previously articulated in the Court's decisions." Roe may nevertheless imply a limited right to bodily privacy where intimate decisions concerning important aspects of one's personality are affected. Thus the decision whether to have an abortion may be distinguished, one commentator writes, from "a forced needle in the arm, [which,] while undoubtedly requiring some public justification, may interfere with my autonomy, but [which] hardly offends the intimacy of my personal identity . . . ." This limiting principle provides a sensible if somewhat imprecise stopping place for what would otherwise be an illimitable and implausible right.

That a woman to whom an abortion is forbidden suffers cannot by itself justify the decision in Roe—even wise laws may cause distress. The relevance of the hardships listed by the Court is that they are so great and so intimately personal that they bring abortion within that category of privacy defined by the Court in Whalen v. Roe as "the interest in independence in making certain kinds of important decisions." The Court reiterated the centrality of the freedom to make a decision in private matters in Carey v. Population Services International. As the dissenting member of the three-judge panel in Doe v. Commonwealth's Attorney wrote,

The Supreme Court has consistently held that the Due Process Clause . . . protects the right of individuals to make personal choices, unfettered by arbitrary and purposeless restraints, in the private matters of marriage and procreation. Roe v. Wade . . . Doe v. Bolton . . . Griswold v. Connecticut . . . . I view those cases as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. A mature indivi-

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232. 410 U.S. at 155 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination); Buck v. Bell, 274 U.S. 200 (1927) (sterilization)).
233. 410 U.S. at 155.
235. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.
410 U.S. at 153.
ual’s choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern.\textsuperscript{238}

Like the woman’s decision in \textit{Roe}, the decision to engage in non-marital sexual relations “pertain[s] to . . . one’s deepest nature”;\textsuperscript{239} may, if improperly resolved, inflict significant psychological damage; involves complex circumstantial and ethical problems perhaps best evaluated by the individual rather than the state;\textsuperscript{240} and implicates the kinds of basic human relationships of which the Court has been solicitous.

Given these similarities, the hypothesis is plausible. Nevertheless, as the vagueness and frailty of the rationale in \textit{Roe} suggest, the absence of precise criteria for identifying protected decisions might discourage the Court from developing this right and should cause us to doubt that this hypothesis creates a \textit{fundamental} right.

There remains the logical inference from the decisions banning state interference with the use of contraceptives and abortion: What is the point of a right to use contraceptives and have abortions without the right to sexual intercourse? Members of the Court have denied that their decisions have settled the question.\textsuperscript{241} However, a persuasive resolution of any conflict may be inferred from the Court’s comment in a somewhat different context in \textit{Carey v. Population Services International}:

"It would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication.” We remain reluctant to attribute any such “scheme of values” to the state.\textsuperscript{242}

To put it another way, we may say that (with some qualifications) the Court has forbidden states to prevent citizens from using contraceptives or having abortions, not because the Court approves of using contraceptives or abortions or because it approves

\begin{itemize}
  \item \textsuperscript{239} Definition \#2 of intimate, \textit{THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE} 686 (1969).
  \item \textsuperscript{240} \textit{Cf.} L. Tribe, \textit{supra} note 16, at 933:
  Regarded therefore as part of a series of decisions allocating to the woman the essentially unfettered choice of whether to bear a child, \textit{Roe v. Wade} represents less of a decision in favor of abortion than a decision in favor of leaving the matter . . . to women rather than to legislative majorities . . . . So understood, the abortion decision again seems less problematic than it might otherwise appear.
  \item \textsuperscript{241} \textit{See} text at note 62 \textit{supra}.
  \item \textsuperscript{242} 431 U.S. 678, 695 (1977) (quoting Eisenstadt v. Baird, 405 U.S. 438, 448 (1972)).
\end{itemize}
of the act which makes them necessary, but because such laws intrude harshly on personal autonomy by increasing the likelihood that the female partner would have to bear, and the couple raise, a child. However, the physical, emotional, and financial imposition of laws prohibiting fornication and cohabitation are so much milder than those of laws prohibiting contraception and abortion that it is not possible to say that the Court's disapproval of the latter requires it to disapprove the former.

C. "Sexual Privacy" as a Fundamental Right

The preceding pages have argued that a fundamental right of sexual privacy may be inferred from the right of marital privacy. They have also argued that several other lines of reasoning support a right to sexual privacy, but not convincingly enough to persuade us that such a right is fundamental. The presence of these other lines of reasoning, however, reinforces the inference from marital privacy cases of a fundamental right to sexual privacy. For while we have examined each line of argument separately, we must never forget that it is a whole constitution we are expounding. The recurring concern in constitutional interpretation for individual autonomy in intimate and personal decisions reinforces our conclusion that the right of sexual privacy is among the "basic values 'implicit in the concept of ordered liberty'" and is therefore fundamental.

Indeed, for the Justice who has, outside of dictum, spoken most directly on our problem, it is this general, recurring pattern which apparently dictated his conclusion that, in a state which had no law against fornication or cohabitation, a public library could not fire an employee for living with a man to whom she was not married and their illegitimate child. In dissenting from a denial of certiorari in *Hollenbaugh v. Carnegie Free Library*, Justice Marshall wrote: "Although we have never demarcated the precise boundaries of [the right to privacy], we have held that it broadly encompasses 'freedom of personal choice in matters of marriage and family life.'" He then cited privacy cases from most of the categories this Note has analyzed.

245. 99 S.Ct. at 736.
III. “SEXUAL PRIVACY” AND THE STATE INTERESTS

A. The Proper Measure of the State Interests

Where certain “fundamental rights” are involved, the Court has held that regulation limiting these rights may be justified only by a “compelling state interest” . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.247

The Court has generally accepted this measure of the governmental interest necessary to sustain an infringement of a “fundamental right,” but it is common learning that the formula has meant something slightly different than the words denote, since almost without exception, where the Court has judged a right fundamental, it has judged the governmental interest not to be compelling.248 Roe v. Wade is an exception: in the later stages of pregnancy compelling state interests override a woman’s fundamental right to choose an abortion. The legitimacy of the interests in Roe—the state’s interest in “potential life” and in the mother’s health—was well established. State interests have typically been found noncompelling not because the interest is impermissible, but because the means chosen do not narrowly, or even genuinely, promote that interest.249 The outcome-determinative quality of the procedure has been widely criticized as excessively rigid and an impediment to sensitive decisions; in equal protection cases, where the Court has traditionally used an analogous formula, the Court may have become more flexible.250 At present,
however, the elements of a "compelling" state interest are ill defined, and classifying state interests is a hazardous enterprise.

B. The State Interests

This Part first examines the state interests fornication and cohabitation statutes may serve and asks whether those interests are "compelling." The Part then scrutinizes the statutes in light of the constitutional requirement that they actually further a compelling interest.

1. Prevention of Illegitimacy

The state has what must surely be a compelling interest in preventing the birth of illegitimate children as a means of protecting children from the disadvantages which often accompany illegitimacy. These disadvantages include the stigma which society has, however unjustly, assigned to illegitimate children. But what is more important is that illegitimate children are probably more frequently than legitimate children deprived of the stable emotional and financial support which the state-supervised family is supposed to provide. That this interest is appropriate seems clear, since these children cannot protect themselves. That the interest is compelling also seems clear, since no other entity than the state can be relied on to protect them.

Of course, children born out of wedlock may be well cared for by their parents, and of course states could attempt to promote this interest by passing and enforcing laws strictly requiring all parents to assume complete responsibility for the well-being of their children. But when those who are responsible for a child are identified before the child is born, when that identification is made without the necessity of legal action (as in a bastardy proceeding), and when there are no social pressures on the parents not to acknowledge the child, the state is far better situated to ensure proper care for the child, and the child is far more likely to receive it. For example, the interests of children of unmarried couples are not protected by a court when the parents separate. In addition, it is a reasonable hypothesis that many couples who do not marry decide not to do so because they doubt they will want to live together permanently, and that children born to such couples would be more likely than the children of married parents

251. But see Comment, All in the "Family": Legal Problems of Communes, 7 Harv. C.R.-C.L. L. Rev. 393, 408-10 (1972).
to suffer the unhappiness of having only one parent. Finally, if these suppositions about the relative vulnerability of illegitimate children to social and financial distress are correct, such children are more likely than legitimate offspring to burden the state fisc.

2. Preservation of the Family

The importance of the family is conceded, even glorified, by the cases holding that familial privacy is a fundamental right. If the family is as crucial a social institution as those cases and the arguments in Parts II. B. 4-5 suggest, the state has a compelling interest in preserving it. In view of these cases, and as the discussion above of the problems of illegitimate children illustrates, the family performs several basic societal functions, most notably raising children. The state's interest in protecting its "agent" is plain.

3. Health

The present high incidence of venereal disease obviously and seriously threatens health, especially the health of the adolescent. If enforced, laws prohibiting nonmarital sexual activity would, by reducing the number and promiscuity of sexual encounters, presumably decrease the incidence of the disease. The legitimacy of the state interest is attested to (though that legitimacy seems clear enough) by the common conditioning of the fundamental right to marry on blood tests for venereal disease. The state's interest is compounded by the danger to children of parents who have a venereal disease. Preserving the public's health is among the classic police powers, was recognized as compelling in Roe v. Wade, and should be compelling in this context.

4. Morality

The state's interest in promoting "morality," including sex-

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252. This does seem a reasonable hypothesis. But neither is it an unreasonable hypothesis that children also suffer whose parents stay together only because of pressures the state imposes on them. In other words, we are again reminded how intractable the Court must find the task of asaying the state's interests.

253. "The state's interest in fostering marriage as a device for record-keeping and for establishing and enforcing domestic and financial responsibilities is not insignificant. The interest in preserving the traditional family unit as the basic functioning unit of society has also been lauded . . . ." Note, supra note 22, at 739.


ual morality, is another classic police power. As Justice Harlan wrote in his dissent in *Poe v. Ullman*:

> the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. 256

The Court recently confirmed in an obscenity case that “a legislature could legitimately act . . . to protect ‘the social interest in order and morality.’” 257 However, the Court discerned no fundamental rights in that case, so it did not need to decide whether the state interest in morality is compelling.

Given the Court’s disposition not to find an interest compelling in the face of a fundamental right, and given the arguments that follow in this paragraph, the state interest in “morality” should not be found compelling in the context of sexual privacy. First, even the most ardent modern advocate of “the enforcement of morals,” 258 Lord Devlin, limited the state’s scope:

> It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation . . . . [I]t can be argued that if [intolerance, indignation, and disgust] or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice. 259

That depth of feeling as to fornication and cohabitation has apparently been lost. 260 Second, if the fundamental right to sexual privacy is based on the individual’s right to determine the propriety of a sexual relationship, is not the state excluded from the decision at least as to morality *ex hypothesi*? That is, does not the right of sexual privacy (as we have defined it) necessarily imply that the morality of an adult heterosexual relationship is a question which may be decided by the parties themselves? Is not the purport of the fundamental right that when the opinion

259. P. DEVLIN, supra note 258, at 17.
260. *See* notes 97 & 220-21 *supra.*
of a legislature and the individual conflict on an issue of (hetero-)sexual privacy, the decision and its moral consequences are the individual's to choose? Could there be a fundamental right to make what in the eyes of the state is an immoral choice? Would not a right which permitted such a choice fail the "traditions and collective conscience" test? 261 Third, despite the far more troubling moral aspects of the decision to have an abortion, the Court in Roe v. Wade did not mention any state interest in regulating morality. May we not infer that the Court saw no compelling interest in morality to be weighed against the woman's privacy right, and that, a fortiori, no such interest outweighs the right to sexual privacy?

C. An Evaluation of the State Interests

The above paragraphs suggest that three governmental interests are "compelling"—the interests in deterring illegitimacy, preventing disease, and preserving the family. Do fornication and cohabitation statutes actually serve these interests? The answer depends on an analysis of the statutes' effectiveness which a court is ill-equipped to make. These laws are intended to deter conduct already discouraged by societal, nonlegal sanctions and pressures, and it must always be difficult to discern whether that behavior which is deterred is deterred by the law or by mores. A legislature might commission studies gauging the laws' effectiveness or the effectiveness of alternative, less offensive laws; a court cannot. Were the privacy right not fundamental, surely the Court would defer in so uncertain a field to the superior facilities of the state legislature and to its sense, politically informed, of the wisest balance of the competing interests. However, the right is fundamental, and the Court must, in the absence of unusually wealthy, industrious, and ingenious litigants, speculate on several difficult empirical problems.

It might be first argued that, while the functions the family is thought to serve must be performed in some way, the family

261. Against this reasoning it might be said that it collapses the fundamental right and compelling state interest tests. It does so, however, only as to the state interest in morality, for while the state can acknowledge that some kinds of decisions so intimately affect an individual that only he can make moral choices about them, it is not conceivable that the state could be asked to ignore its obligations to protect the young, to prevent the spread of disease, and to maintain social stability. Thus it will always be proper to ask if a fundamental right conflicts with those obligations.

262. It is a fortiori because the issues of when life begins and what constitutes ending it are societally and personally more serious than issues of sexual morality.
may not be needed to perform them (and hence that fornication statutes are not necessary to serve that compelling purpose). Some of those who break cohabitation and fornication laws have done and will do so because they believe that the family should be replaced as the primary unit of social organization. Nevertheless, our societal esteem for the family is so deeply engrained, the Court's cases are so thoroughly agreed in approving that esteem, and, especially, the empirical questions are so recalcitrant, that the Court should affirm that protecting the family is a compelling state interest.

Nevertheless, precisely how fornication laws further that state interest is rarely explained. The theory is apparently this: The importance of marriage and the family is recognized symbolically, and those institutions are made more attractive, by restricting the privileges of sexual relations and raising a family to them. The accuracy of this theory is unclear—making the privilege of sexual relations contingent upon marriage may only encourage people to marry when their primary motive is not to produce a stable family but to enjoy the privilege; making trial marriages impossible might only keep single those who would be excellent parents and spouses. And if fornication and cohabitation laws are truly part of a system of legislation regarding the family and sexual conduct which symbolically and practically nurtures marriage and the family, why do states typically fail to take such laws seriously? Further, the state has constitutionally inoffensive, and possibly more effective, ways of furthering this interest, as through tax incentives. Thus the state interest in the family offers scant justification for retracting the conclusion in the preceding Part that laws criminalizing fornication and cohabitation are constitutionally impermissible.

The state interests in preventing illegitimacy and venereal disease can be discussed together, since they raise substantially the same problems of enforcement. If laws prohibiting sex between unmarried people were effectively enforced they would, of course, prevent the birth of illegitimate children and decrease venereal disease. If, however, legislation less violative of privacy rights could be contrived, it would be constitutionally preferable. But the possible alternatives are likely to be ineffective, offensive, or both. The least offensive alternative would be an educational

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263. See, e.g., text at notes 168-73 supra.
264. See note 97 supra. For a somewhat fuller treatment of this question, see text at notes 271-73 infra.
program, but even the most vigorous education would probably be ineffectual, unless we are to credit the theory that most illegitimate births and instances of venereal disease result from ignorance of contraceptives and prophylactics or of how to obtain them. (Given the psychological reasons people do not use contraceptives, the exigencies of passion, and the perennial optimism of human nature, this seems unlikely.) If the cogent, insistent, and frightening arguments of the Surgeon General and the American Cancer Society cannot dissuade us from tobacco, what hope is there for governmental preaching about an even more compelling vice? (Many schools already have sex education courses. If illegitimacy and venereal disease are now rife, how effectively do these courses discourage illicit, or at least incautious, sexual activity?) The Court might also wonder about the side effects of such a program and about society's willingness to adopt it. Might an active public campaign offend the many members of the public to whom public discussions of sex, illegitimacy, and venereal disease are vulgar and disturbing?

And in this especially sensitive area, might a parent be able to object that sex-education programs in schools violate their familial-privacy right to control their children's education?

Other alternatives are also offensive or constitutionally impermissible. States have hitherto relied on fear of nature's own sanctions—disease and children—to deter sexual carelessness. But the Court's decisions in the abortion and contraceptives cases have prohibited the state from strengthening those sanctions by denying its citizens contraceptives and abortions. States have also disadvantaged illegitimate children in the hope of encouraging couples to reproduce only within marriage, but the Court has also disapproved this tawdry device. Constitutional difficulties aside, programs to punish parents of illegitimate children or victims of venereal disease could only be counterproductive. Punishing parents would defeat the purpose of deterring illegitimacy (that is, insuring psychologically and financially secure homes for children). Punishing those with venereal disease would cripple programs to find and treat victims.

If there are no acceptable alternatives to fornication and cohabitation statutes as means of preventing disease and illegitimacy, we must confront the question whether these laws them-

265. Compare this with the state's legitimate interest in "the quality of life and the total community environment." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973).
selves work in fact, not just in theory. The Court, we have seen, cannot reliably answer that question, but it should be able to make a shrewd guess that these laws are simply unenforceable. Even in Colonial America, where laws forbidding fornication had far more public support, they were not successfully enforced. As Bentham expressed the difficulty: “With what chance of success . . . would a legislator go about to extirpate drunkenness and fornication, by dint of legal punishment? Not all the tortures which ingenuity could invent would compass it . . . .”

Even in sexually repressive Victorian England, even the leading spokesman for law as an expression of morality conceded in speaking of fornication statutes:

A law which enters into a direct contest with a fierce imperious passion, which the person who feels it does not admit to be bad, and which is not directly injurious to others, will generally do more harm than good; and this is perhaps the principal reason why it is impossible to legislate directly against unchastity, unless it takes forms which every one regards as monstrous and horrible.

Modern scholars share this skepticism. Finally, may not the Court look to the behavior of the states which pass and would have to defend such laws to see how much faith they have in and how much they rely on these laws? Fornication and cohabitation statutes are rarely enforced; when they are, it is often for reasons other than to accomplish the ends by which the state defends them. Apparently the states themselves doubt either the efficacy or the necessity of these laws.

This is not to say, of course, that states have chosen not to enforce these laws explicitly because of that doubt. The decision not to enforce is more likely to be made by local officials and for many reasons. The police have limited resources and may wish to spend those resources enforcing the many more serious crimes which have more clearly harmful effects and which there is more popular sentiment and even agitation for enforcing. Police may also be influenced by the general respectability of many of the

267. Flaherty, Law and Morals in Early America, in 5 Perspectives in American History 244 (1971).
268. Quoted in id. at 250.
270. E.g., H. Packer, The Limits of the Criminal Sanction 312 (1968 paperback ed.).
271. See note 97 supra. The drafters of the Model Penal Code reached a similar conclusion. Schwartz, Morals Offenses and the Model Penal Code, 63 Colum. L. Rev. 669, 674 (1963). Of course, if a state did choose to enforce these laws systematically, it would be possible to study more productively their effectiveness, and these inferences from the state’s inaction would not have to be relied on.
people who break fornication and cohabitation laws, by the feeling that when a law has fallen so thoroughly into desuetude it would be unfair to enforce it (especially with the selectivity which would presumably be necessary in some jurisdictions), and, possibly, by some sense that only he who is without guilt should be casting stones. But what these reasons have in common is the assumption that the need to enforce these laws is exceedingly mild and that, given the usual choice of enforcing these laws or serving one of the many competing interests, the competing interest prevails. That result hardly comports with the contention that these laws effectively serve a compelling state interest.

One might respond that those laws also serve which stand and wait—that these laws by their presence on the books are a symbolic expression of society's attitude toward nonmarital sexual activity. But what citizen could take as a serious statement of community sentiment a law the community allowed to be so often flouted? Further, the chance that these laws serve as any such statement is diminished by the fact that a number of people do not even know such laws exist.

In sum, since a fundamental right is diminished by laws forbidding fornication and cohabitation, and since the states themselves, who are in a position to know, tacitly concede the inefficacy of such laws, the Court would be justified in finding that they do not serve a compelling state interest, and declaring them unconstitutional.

CONCLUSION

Over these complexities broods the specter of *Lochner* and the problems of constitutional interpretation it represents. Those problems are more than usually perplexing for this Note’s topic. Each of the steps in the argument that laws prohibiting fornication and cohabitation are unconstitutional is uncertain. In discussing whether the privacy right includes what we have called sexual privacy, the Court is trapped between the Scylla of a definition of privacy too narrow to protect important rights and the Charybdis of a definition too broad to be meaningful or wise.

To ward off judicial subjectivity, the Court has devised several tests to be used in evaluating a privacy right. But each of

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272. While the privacy in which the crime is customarily committed and the scarcity of complainants may partly account for the nonenforcement of fornication laws, neither problem would hinder enforcement of cohabitation statutes.

273. See note 97 supra.
these tests, at least when applied to the right of sexual privacy, presents difficulties, for essentially each asks the Court to identify and gauge society's temper and values. This is an enterprise which, while inescapable in this and many other areas of constitutional jurisprudence, requires the Court to ask empirical questions it has neither the tools nor the training to answer. These questions arise in applying the national conscience and traditions test, in deciding why society accords privacy rights to certain kinds of relationships and decisions, in determining whether sexual privacy is sufficiently analogous to other kinds of privacy that it too should be a right, and in assessing whether fornication and cohabitation statutes or some drastic alternative to them work. It was, one may suppose, the failure to perceive correctly society's temper and values that eventually caused the Lochner Court to founder.