COMMENTS

ALL IN THE "FAMILY:" LEGAL PROBLEMS OF COMMUNES

It has been stated that the word commune raises images in the average, middle class American mind of "wild sex-dope-rock-filth orgies."[1] Partly as a result, communes face serious legal problems.

The purpose of this Comment is threefold: to offer a preliminary sketch of the problems faced by communes; then to advance three constitutional arguments to protect their rights; and finally, to suggest how these arguments may be used in several instances where state action now imposes legal disabilities upon communes.

Communes[2] are groups of individuals, not necessarily related by blood, marriage or legal adoption, who live together as a single housekeeping unit. Generally, they share at least a common house and kitchen facilities, with sleeping arrangements depending on available space and the attitudes of members. They appear in both urban and rural settings. Urban communes tend to range in size from five to fifteen members, while rural groups may have as many as forty or fifty members. They usually pool resources, though sometimes a single wealthy member may carry most of the financial burden for the entire group. Some are united by nothing more than a desire to live together harmoniously in a satisfying and efficient alternative to the traditional way of life. Many, however, are further united by such factors as commitment to a common social or political cause (usually radical), cooperation in a joint business venture, or membership in a religious cult. Like most traditional families, they characteristically have both male and female members, and an increasing number of communes raise children.

---

[1] Avorn, *1971 B.C.: What the New Living is Like in a Boston Area Commune*, LOOK, Aug. 10, 1971, at 54 [hereinafter cited as *Avorn*].

[2] Though the modern communal movement is of relatively recent vintage, numerous books and articles have already appeared in print. The ensuing sketch is based on information drawn from the following sources: W. Hedgepeth, THE ALTERNATIVE: COMMUNAL LIFE IN NEW AMERICA (1970) [hereinafter cited as *Hedgepeth*]; R. Houriet, GETTING BACK TOGETHER (1971); Solnit, *Wear and Tear in the Communes*, THE NATION, Apr. 26, 1971, at 524 [hereinafter cited as *Solnit*]; Roberts, *Halfway Between Dropping Out and Dropping In*, N.Y. Times, Sept. 12, 1971, § 6 at 44 (Magazine) [hereinafter cited as *Roberts*]; *Avorn* 54; Haughey, *The Commune: Child of the 1970's*, AMERICA, Mar. 13, 1971, at 254 [hereinafter cited as *Haughey*]. Also relied upon was an Interview with Pat Wells of Project PLACE, the New Communities Project, Boston, Mass., Nov. 10, 1971.

Though lacking the permanence and state-imposed obligations of legal families, communal groups significantly differ from fraternities and other social clubs. They do not serve as temporary "homes away from home" for their members. For a member of a commune, the commune is his one and only home, and the communal group is his "family".[3]

Communal living groups have existed in the United States throughout our history. "The nineteenth century alone produced 130 communes of which we have clear records."[4] While both the numbers of adherents and diversity of group styles in the modern communal movement are largely unprecedented, the new wave of group experimentation has deep roots in American history and traditions.[5] It is becoming ever more clear that the rapidly growing communal movement[6] is a major American social phenomenon that cannot be dismissed as a mere aberration. According to a conservative estimate, there were over two thousand communes in thirty-four states at the beginning of 1971.[7]

Communal groups experience great difficulties with the American legal system, which is very heavily oriented toward the traditional family. Because legislators are ultimately responsible to the electorate, they tend to be very attentive to forcefully expressed views of their constituents, particularly on highly sensitive and visible issues. More and more members of the "straight" majority of society are coming to blame long-haired, "hippie" youth for a wide variety of social and economic ills.[8] There is mounting evidence that communes are becoming one of the most frequent targets of public hostility toward "hippies" and students.[9] While there is nothing illegal about antagonistic public *feelings*

[3] It is an important part of the communal "creed" that they "live together as famil[ies], treating themselves and treated by others as family unit[s]." Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 909 (N.D. Cal. 1970).

[4] *Haughey* 254.

[5] *See, e.g., Solnit* at 524–25, noting that "leaving home is an old American institution . . . . [N]one of this is really new. Some of the best American traditions and folklore are based on the pathfinders and pioneers who settled for a spell and then moved to greener pastures . . . . Nor is the ideal of living outside the mass production system a recent development."

[6] In the Boston area, for example, there are about 200 communes, most of which have been formed over the past year Interview with Pat Wells, *supra* note 2.

[7] *Haughey* 254. Because of the relative newness of the modern communal movement, its rapid rate of expansion, and its inherent tentative and experimental quality, accurate statistical data about communes are extremely difficult to find, and often become obsolete within a short time of their issuance. Thus, in contrast to the conservative estimate noted in the text above, a more recent estimate claims there are about a thousand communes at present in New York City alone. *See Commune Information*, THE NEW YORKER, Oct. 16, 1971, at 32. [hereinafter cited as *Commune Information*].

[8] *See Solnit* 527.

[9] *Id.*

toward communes, these feelings are now more often converted to *action* by sympathetic legislatures. Until very recently, legislation which disadvantaged communes usually could be ascribed to mere inadvertence rather than open hostility. However, some of the most pressing current legal problems of communes result from direct legislative discrimination against them.

Federal, state and local legislatures frequently use the traditional family as a unit of classification, particularly in welfare legislation.[10] As a result, communal groups often suffer legal disabilities under several classes of statutes.[11] An increasing number of municipalities have or are in the process of enacting ordinances which zone districts for "single-family residences" only, and then define "family" in a manner which effectively excludes communal groups.[12] In addition, many state statutes invoke criminal sanctions against cohabitation or fornication between unmarried persons.[13] Finally, communal groups encounter difficulties in qualifying for welfare benefits under certain federal and state programs. In at least one instance,[14] these difficulties in obtaining relief result from an express legislative effort to exclude communal groups. In other cases,[15] members of communal groups have been denied welfare benefits as a result of administrative interpretation of statutes which do not expressly include members of communes.[16]

At least three constitutional arguments may be advanced to support the rights of communal groups in such cases. First, legislation directed at communes creates a "suspect" classification and must be subjected

[10] *See, e.g.*, Federal Low Rent Housing Act, 42 U.S.C. § 1401 *et seq.* (Supp. 1972); Federal Needy Families with Children Aid and Services Act, 42 U.S.C. § 601 *et seq.* (1970).

[11] Considerations of time and space have necessitated the limitation of this discussion to legal problems faced by communes vis-a-vis the government and outside world, excluding such significant intra-communal legal problems as property rights and inheritance. This limitation focuses on those problems which are currently of greatest concern to communes. Interview with Pat Wells, *supra* note 2.

[12] *See, e.g.*, Palo Alto Municipal Code, § 18.04.210, defining "family" as "one person living alone, or two or more persons related by blood, marriage or legal adoption, or a group not exceeding four unrelated persons living as a single housekeeping unit."

[13] *See, e.g.*, Mass. Gen. Laws Ann. ch. 272, § § 16 (cohabitation) and 18 (fornication) (1970).

[14] *See* 7 U.S.C. S 2012(e)(Supp. 1972), amended by Pub. L. No. 91–671, § 2, (Jan. 11, 1971)(84 Stat. 2048)(defining households eligible to receive benefits under the Federal Food Stamp Act of 1964 as those consisting of "a group of *related* individuals . . . .")(emphasis added).

[15] For example, in at least two instances, the Massachusetts Department of Public Welfare attempted to deny welfare benefits to otherwise qualified applicants who became members of a commune. *See* Plaintiffs' Complaint at 1–2, Bedard v. Minter, Civil No. 71–2992-J (D. Mass., filed Dec. 17, 1971).

[16] Also beyond the scope of this Comment, though within the realm of legal problems of communes vis-a-vis the government, is the question of how communes should be treated

to strict review under the equal protection clause of the fourteenth amendment. Second, a fundamental rights-due process analysis protects the basic personal rights of those living in communes. Third, communal groups are entitled to first amendment freedom of association.

I. CONSTITUTIONAL ARGUMENTS

A. "Suspect" Classifications

In the areas of economic regulation and social welfare, courts have construed the equal protection clause of the fourteenth amendment to afford state legislatures broad discretion to enact laws which affect certain groups of citizens differently than others.[17] Such legislative classifications are ordinarily constitutional so long as they rationally relate to the accomplishment of a conceivable legitimate state objective.[18] Furthermore, the courts, following a policy of judicial restraint engendered by respect for separation of powers, "have sometimes taxed their imaginations in conjuring up legislative purposes".[19]

Over the years, however, the Supreme Court has engaged in closer and more critical analysis of classifications falling into two categories: those in which the legislative classification is found to be "suspect",[20] and those in which the classification affects what is termed a "fundamental interest".[21] Whereas under the ordinary rational basis test statutes enjoy an initial presumption of constitutionality, under "strict" or "active" review, the state bears the burden of establishing *both*—"that it has a

under the federal tax laws. An excellent discussion of this problem can be found in S. Koppel, Taxing Utopia, June, 1971 (unpublished thesis in Harvard Law School Library).

[17] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947). *See generally Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1076–87 (1969) [hereinafter cited as *Developments*].

[18] *See, e.g.*, Labine v. Vincent, 401 U.S. 532, 547–48, 551 (1971) (Brennan, J., dissenting); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[19] Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1650 n.38 (1971) [hereinafter cited as *Exclusionary Zoning*]. *See Developments* 1079–80.

[20] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971)(alienage); McLaughlin v. Florida, 379 U.S. 184 (1964)(race); Korematsu v. United States, 323 U.S. 214 (1944)(national origin). *See generally* Comment, *The Evolution of Equal Protection-Education, Municipal Services and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 130–38 (1972) [hereinafter cited as *Evolution-Equal Protection*]; *Developments* 1124–27.

[21] *See, e.g.*, Shapiro v. Thompson 394 U.S. 618 (1969) (interstate travel); Reynolds v. Sims, 377 U.S. 533 (1964)(voting); Skinner v. Oklahoma, 316 U.S. 535 (1942)(procreation). *See generally Evolution-Equal Protection* 115–22; *Developments* 1127–31.

compelling interest which justifies the law . . . [and] that the distinctions drawn by the law are *necessary* to further its purpose."[22]

Many legal problems encountered by communes result from legislation which differentiates them from traditional families. Despite some implications to the contrary in a recent Supreme Court decision,[23] under the ordinary "rational basis" test, communal groups would probably encounter great difficulty in challenging such legislative classifications, since courts could generally discover some shred of rationality sufficient to justify holding them constitutional. Only "strict" judicial review of such legislation assures effective protection of the rights of those living in communes. Statutory differentiation between communes and traditional families arguably creates a "suspect" classification which, unless justified by a showing of compelling state interest in the discriminatory classification, denies members of communes the equal protection of the law guaranteed by the fourteenth amendment.

Several rationales have been advanced for the Court's designation of certain legislative classifications as inherently "suspect" and therefore

[22] Westbrook v. Mihaly, 2 Cal. 3d 765, 785, 471 P.2d 487, 500–01, 87 Cal. Rptr. 839, 852–53 (1970), *vacated on other grounds*, 403 U.S. 915 (1971). *See also* Kramer v. Union Free School Dist., 395 U.S. 621, 626–27 (1969).

[23] In Reed v. Reed, 404 U.S. 71 (1971)(Idaho probate statute providing for preference of males over equally qualified females to administer estates violates the equal protection clause of the fourteenth amendment), the Court purported to be applying the traditional rational relationship test outlined above. Yet, it rejected the Idaho Supreme Court's reasoning that the statutory classification was rationally related to the state's legitimate interest in reducing the workload of its probate courts in that it served to eliminate a common source of controversy from probate cases. *Id.* at 76–77. This appears to be a significant departure from the Court's usual practice under rational basis review of accepting any conceivable legitimate state objective as adequate justification for challenged legislative classifications. *See supra* notes 17–19 and accompanying text. As a result, *Reed* may be seen as heralding a new approach by the Court to equal protection clause challenges to legislative classifications which the Court is not prepared to recognize as suspect. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing alienage, nationality and race as classifications viewed by the Court as inherently "suspect"). In these cases, the Court, though rejecting "strict" review, might apply an intermediate, more extensive rational basis review. The state would then be required to demonstrate something more than the minimal rational relationship to a legitimate state objective under any conceivable set of facts.

A further recent indication of the Court's resort to a more extensive rational basis review is Eisenstadt v. Baird, 40 U.S.L.W. 4303 (U.S. Mar. 22, 1972). In *Baird*, the Court refused to invoke strict review on grounds that the statute allegedly impinged upon fundamental freedoms, finding instead that the statute failed "to satisfy even the more lenient equal protection standard" outlined in *Reed*. *Id.* at 4306 n.7. It reached this finding, however, only after an extensive inquiry into the asserted state rationales and their relationship to the statutory provisions. In addition, Justice Brennan cited approvingly the concurring opinion in Railway Express Agency v. New York, 336 U.S. 106, 112–13 (1949), where Mr. Justice Jackson eschewed the majority's minimum rationality test of an economic regulation in favor of a more intensive analysis of asserted state rationales.

subject to stricter scrutiny under the equal protection clause.[24] First, minority groups' interests are all too frequently neglected by legislatures and thus require special protection by the courts.[25] Second, unalterable traits over which individuals have no control provide no rational justification for attributing merit or discredit.[26] Third, such a classification is generally perceived as "a stigma of inferiority and a badge of opprobrium."[27]

Statutory differentiations between communes and traditional families should qualify as "suspect" classifications. There is no question that communal groups are still a distinct political and social minority. Furthermore, the majority in power perceives itself as having a "clear interest in preserving the integrity of the biological and/or legal family,"[28] and may disregard the interest of groups seeking to develop an alternative to the traditional family.

For communal adults, the communal life-style is not an unalterable characteristic. Their association with a commune is purely voluntary. They are free to leave the commune and adopt a life-style sanctioned by the state. They cannot contend, as has been forcefully argued with respect to poverty as a "suspect" classification,[29] that at least in certain cases governmental action has served to effectively seal them into their disadvantaged status. On the contrary, the state's desire is to force them to abandon the communal life-style and return to more traditional modes of living.

For communal children, however, the situation is quite different. Whether born into a commune or brought there by his parents, the communal child has no choice in where he lives. The trait of communal association is of course not permanently unalterable, since the child will ultimately be free to leave his commune. But it does remain substantially

[24] It has been suggested that in view of the signal importance of the race issue to the framers of the fourteenth amendment, the language of the amendment in and of itself might justify stricter judicial scrutiny of racial classifications. *See Evolution-Equal Protection* 131, citing, *inter alia*, Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting) (". . .for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race."). But alienage and national origin have also been expressly recognized by the Court as inherently "suspect" classifications, and it would therefore appear that some further rationale is necessary to account for the extension of strict judicial scrutiny to these categories as well. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971); *Evolution-Equal Protection* 131–32.

[25] *See Developments* 1125.

[26] *Id.* at 1126–27.

[27] *Id.* at 1127.

[28] Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 912 (N.D. Cal. 1970).

[29] *See Exclusionary Zoning* 1660: "When the government acts in such a way as to severely inhibit the upward mobility of the poor it is, in effect, creating a class of permanently poor persons."

unalterable by the child for a significant period of years until he is emotionally and economically ready to leave home and make an independent choice of life styles.

The factor of stigmatization is probably the most important in the case of communes.[30] The Supreme Court of California recognized this in a recent decision[31] overturning a municipal anti-loitering ordinance directed at "hippies."

> [W]e cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the statute in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of racial prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitude rather than by color.[32]

Though the California court was dealing with a statute aimed at hippies rather than communes, these two subcultures have been closely associated in fact and in the minds of the "straight" majority of society. Both are viewed as perpetrators of "wild sex-dope-rock-filth orgies."[33] Particularly in the case of communal children, who are often illegitimate, it is difficult to see how legislative use of the communal life-style as a basis of statutory classification will fail to be perceived as "a stigma of inferiority and a badge of opprobrium."[34]

The damage inflicted upon communal groups by such legislative classifications extends far beyond their immediate impact. In the words of the California Supreme Court,[35] we must also be "mindful of the private discrimination . . . which the ordinance will likely foster." Legislative resort to such classifications aggravates a vicious cycle of discrimination by supporting and reinforcing middle-class hostility toward communes, giving added incentive to citizens to press for further legislative as well as social exclusion of communes from the mainstream

[30] "An analysis of the Court's opinions demonstrates that it has rarely if ever talked in terms of the first [unalterable trait] rationale, and while the second [minorities' political impotence] has played a significant role in justifying imposition of a stricter standard of review when suspect categories have been present, *the element of stigma has been the major determinant in the definition of those classifications that are in fact suspect.*" *Evolution-Equal Protection* 132.

[31] Parr v. Municipal Court, 3 Cal. 3d 861, 479 P.2d 353, 92 Cal. Rptr. 153, *cert. denied*, 404 U.S. 869 (1971).

[32] 3 Cal. 3d at 870, 479 P.2d at 360, 92 Cal. Rptr. at 160.

[33] *See Avorn* 54.

[34] *See Developments* 1127.

[35] Parr v. Municipal Court, 3 Cal. 3d at 869, 479 P.2d at 359, 92 Cal. Rptr. at 159.

of American life. In addition, they encourage the type of private harassment of communes[36] for which there may be no legal remedy available, and which has forced some communes to disband or move.[37]

Thus, there would appear to be a strong argument that legislative classifications based on the communal life style are "suspect". There is, however, a discernible trend in recent Supreme Court decisions away from finding "suspect" classifications. In *Dandridge v. Williams*,[38] the court intimated that in the future, the category of "suspect" classifications might be narrowly limited to racial classifications.[39] In *Dandridge* itself the Court refused to hold family size a "suspect" classification. In both *Dandridge* and *James v. Valtierra*,[40] the Court rejected wealth as a "suspect" classification. Finally, in *Labine v. Vincent*,[41] the Court rejected a similar argument with respect to illegitimacy. After these cases, it appears highly doubtful that the Court will extend the category of "suspect" classifications to protect the communal group.[42]

[36] *See, e.g., Avorn* 54; *Solnit* 525.

[37] *See Hedgepeth* 185.

[38] 397 U.S. 471, 485 n.17 (1970).

[39] *But cf.* the forceful argument of Justice Marshall, dissenting in James v. Valtierra, 402 U.S. 137, 145 (1971), that "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination." The Court has since conceded that the category of "suspect" classifications encompasses alienage and national origin as well as race. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

[40] 402 U.S. 137 (1971) (upholding the validity of a state constitutional provision requiring approval of majority of qualified voters for any low rent housing project).

[41] 401 U.S. 532 (1971) (upholding state statute precluding acknowledged illegitimate children from claiming rights of inheritance as legitimate children).

[42] Despite the Court's apparent ideological shift toward greater restraint on civil rights issues, and despite its seeming reluctance to explore new avenues of equal protection adjudication, the Court has evidenced a willingness to invoke "strict" review in certain classes of cases. *See* Dienes, *The Progeny of Comstockery-Birth Control Laws Return to Court*, 21 AM. U.L. REV. 1, 107, 108 n.332 (1971). Whereas racial classifications are almost automatically held to be "suspect", "strict" review of other allegedly "suspect" traits appears to hinge on the establishment of two factors: first, whether "the classification discriminates against the minority as such . . . or only disadvantages them in its impact;" and second, whether a "fundamental" interest is involved. *Id.* 108. *See also Evolution-Equal Protection* 105–07. Thus, communal groups' equal protection claims are stronger if they additionally assert a fundamental constitutional right to live communally. *Evolution-Equal Protection* 115–130. While this assertion lies beyond the scope of this Comment, it is possible that the fundamental rights argument developed *infra* in the context of a *Griswold*-type substantive due process analysis could provide the basis for the assertion of an equal protection "fundamental interest" to live communally. *See Developments* 1330, suggesting that all interests found fundamental under a due process analysis would also be deemed fundamental in an equal protection context.

Recent developments also suggest that some state courts may be more receptive to an expansion of the judicially recognized categories of "suspect" classifications than the present Supreme Court. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (finding wealth a suspect classification); Sailer Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (finding sex a suspect classification). Much will hinge on whether these decisions will be read as resting on adequate and independent state grounds, thereby depriving the Supreme Court of jurisdiction to review even federal questions additionally dealt with therein. *See* Minnesota v. National Tea Co., 309 U.S. 557 (1940). Neither of the California cases are clear on this point, since in both the court viewed the state and federal tests for equal protection as being substantially the same. 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 601 n.11; 5 Cal. 3d at 15 n.13, 485 P.2d at 538 n.13, 95 Cal. Rptr. at 338 n.13. But, an "examination of California cases indicates that the California equal protection doctrine has been interpreted significantly more broadly than the federal equal protection clause," facilitating a conclusion that these cases rest on independent and adequate state grounds. *Evolution-Equal Protection* 107–08 n.9.

B. Fundamental Rights-Due Process

During the first third of the twentieth century, courts frequently invoked the due process clause to protect the assertedly "fundamental" rights of contract and property from state attempts to regulate the economy.[43] At the same time, the Supreme Court extended the protection of the due process clause to a cluster of rights surrounding the family and the marital relationship,[44] as well as to certain first amendment freedoms.[45] Conflict over New Deal legislation,[46] and confrontation between the Court, Congress and President,[47] however, left the due process "reasonableness" test "dead on the battle field,"[48] at least in the

[43] *See* New State Ice Co. v. Liebman, 285 U.S. 262 (1929) (restriction on business entry); Williams v. Standard Oil Co., 278 U.S. 235 (1929) (price regulation); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (minimum wage laws); Coppage v. Kansas, 236 U.S. 1 (1915) (prohibitions of "yellow dog" contracts); Lochner v. New York, 198 U.S. 45 (1905) (maximum hours legislation). *See also* 84 HARV. L. REV. 1525, 1529–31 (1971); G. Gunther & N. Dowling, CONSTITUTIONAL LAW 962–967 (8th ed. 1970) [hereinafter cited as *Gunther & Dowling*].

[44] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (asserting that the right "to marry, establish a home and bring up children" is a part of the liberty guaranteed by the fourteenth amendment); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925), (extending fourteenth amendment protection to the "liberty of parents and guardians to direct the upbringing and education of children under their control"). *See also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[45] *See, e.g.*, Fiske v. Kansas, 274 U.S. 380 (1927) (overturning state criminal syndicalism act as violative of due process). *See also* Whitney v. California, 274 U.S. 355, 373 (1927) (overturning California criminal syndicalism act), where Justice Brandeis, a frequent dissenter in substantive due process cases, conceded: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights compressed within the term liberty are protected by the Federal Constitution from invasion by the States."

[46] *See, e.g.*, Railroad Retirement Bd. v. Alton Railroad Co., 295 U.S. 330 (1935).

[47] *See generally* R. Jackson, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); J. Alsop & T. Catledge, THE 168 DAYS (1938).

[48] Tinker v. Des Moines Ind. School Dist., 393 U.S. 503, 519 (1969) (Black, J., dissenting).

area of economic regulation.[49] But "it does not appear that the 'fundamental rights' doctrine itself was ever specifically repudiated by a majority of the Court."[50] Although the Court, in the ensuing two decades, appeared to narrow the scope of liberties encompassed by the due process clause to substantive and procedural rights specifically enumerated in the Bill of Rights, decisions under other constitutional provisions evidence its continuing willingness to afford constitutional protection to "fundamental" *unenumerated* rights.[51]

In *Griswold v. Connecticut*,[52] the dormant fundamental rights-due process mode of review was explicitly revived by a majority of the Supreme Court. Though Justice Douglas, speaking for the Court with concurrence of four other Justices,[53] discovered the right of marital privacy in the "penumbras" and "emanations" of several specific Bill of Rights guarantees,[54] five Justices also lent their support to a theory of fundamental unenumerated rights derived from the fourteenth amendment, either alone or in conjunction with the ninth amendment.[55] Since *Griswold*, the Court has utilized the fundamental rights approach to overturn a state miscegenation statute, on the grounds that it violated

[49] *See, e.g.*, West Coast Hotel v. Parish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). Since 1937, the Court has never upheld a challenge to economic regulation on substantive due process grounds. *See* Gunther & Dowling 981.

[50] 84 HARV. L. REV. 1525, 1529 (1971).

[51] *Id.* at 1529–30. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964) (travel abroad held fundamental under the fifth amendment due process clause); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association found fundamental under the first amendment). *See also* equal protection clause cases cited *supra* note 21.

[52] 381 U.S. 479 (1965).

[53] Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, concurred in the opinion of the Court, but went on to find alternative grounds for the decision under the ninth and fourteenth amendments. Justice Clark neither wrote nor joined in a separate opinion, and thus joined *sub silentio* in the opinion of the Court.

[54] In so doing, Justice Douglas explicitly rejected the "temptation" to resort to a substantive due process analysis. 381 U.S. at 481–82: "Overtones of some arguments suggest that Lochner v. New York, 198 U.S. 45, should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *But see* Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 92 S. Ct. 703, 704–05 (1972) (Douglas, J., dissenting) ("The word liberty . . . as we held in Griswold v. Connecticut . . . includes at least the fundamental rights 'retained by the people' under the Ninth Amendment."), suggesting that Justice Douglas now reads *Griswold* as representing a fundamental rights-due process approach.

[55] Justice Goldberg, with whom Chief Justice Warren and Justice Brennan concurred, argued that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the necessary meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States." 381 U.S. at 499. Justices Harlan and White, concurring separately, each subscribed to the view that the right of marital privacy is a fundamental right protected by the due process clause, though not specifically enumerated in the Bill of Rights. 381 U.S. at 499–502 (Harlan, J., concurring); *id.* at 502–507 (White, J., concurring). *See also* Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 92 S. Ct. 703, 704–05 (1972) (Douglas, J., dissenting).

the fundamental "freedom to marry."[56] This in turn has spurred the reawakening of interest in substantive due process in several lower courts.[57]

Nevertheless, even an expansive reading of the line of cases dealing with fundamental rights surrounding the family culminating in *Griswold* appears to limit the constitutional protection they afford to the marital relationship. This limit is by no means indisputable, however. Although Mr. Justice Douglas, speaking for the Court in *Griswold*, referred to a marital zone of privacy,[58] he never explicitly restricted his concept of a constitutionally protected zone of privacy to marital relationships. On the other hand, Justices Goldberg, Harlan, and White, concurring, did so.[59] The ambiguity of the Court's position is reflected in conflicting opinions of lower courts attempting to construe *Griswold*.[60] The Court's

[56] Loving v. Virginia, 388 U.S. 1, 12 (1967) (alternative ground). The *Loving* Court also cited approvingly Meyer v. Nebraska, 262 U.S. 390 (1923), as indicating that state power to regulate marriage is limited by the dictates of the fourteenth amendment. *Id.* at 7. *See also* Tinker v. Des Moines Ind. School Dist., 393 U.S. 503, 518–21 (Black, J., dissenting), where it is suggested that the Court, in relying upon *Meyer* and Bartels v. Iowa, 262 U.S. 404 (1923), for the proposition that neither teachers nor students shed their constitutional rights to freedom of speech upon entering a public school, had reverted to the old substantive due process reasonableness doctrine.

[57] *See* 84 HARV. L. REV. 1525, 1530–31.

[58] 381 U.S. 479, 485–86 (1965): "The present case, then, concerns a relationship lying within the zone of privacy created by several constitutional guarantees. . . . We deal with a right of privacy older than the Bill of Rights . . . Marriage . . . ."

[59] 381 U.S. at 498–99 (Goldberg, J., concurring)(citing approvingly Justice Harlan's dissenting argument in Poe v. Ullman, 367 U.S. 497, 553 (1961), that the state could regulate extra-marital sexuality, but could not do the same within the context of the marital relationship, which it had long sanctioned and supported); *id.* at 499–502 (Harlan, J., concurring); *id.* at 505–07 (White, J., concurring).

[60] For cases limiting *Griswold* to the marital relation *see, e.g.*, State v. Lutz, 57 N.J. 314, 272 A.2d 753 (1971) (upholding constitutionality of state fornication statute); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1971) (upholding constitutionality of state sodomy statute); Felber v. Foote, 321 F. Supp. 85, 88–89 (D.Conn. 1970)(holding, *inter alia*, that the constitution does not protect the privacy of the doctor-patient relationship, asserting: "There is not the slightest indication in the *Griswold* opinion that by its protection of the sanctity of the family, the Court intended to constitutionalize the privacy of other relationships . . . ."); Sturgis v. Attorney General, — Mass. —, 260 N.E.2d 687, 690 (1970)(upholding constitutionality, *inter alia*, of state law permitting registered physicians to administer contraceptive devices to married persons, but totally proscribing the delivery of such items to unmarried persons, arguing that "the *Griswold* case is based on the right of privacy 'surrounding the marriage relationship' . . . . [It] affirmed 'beyond doubt' the right of the state . . . to . . . regulat[e] the private sexual lives of single persons

recent opinion in *Eisenstadt v. Baird*[61] has failed to resolve this issue.[62]

There is no satisfactory justification for carving out a constitutional zone of privacy prohibiting state interference "with a person's marriage, home, children and day-to-day living habits,"[63] without extending it to the "home, children and day-to-day living habits" of a member of a commune.[64] Justice Brennan conceded in *Baird* that

> in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. 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.[65]

It is no great extension of this reasoning to assert that the *Griswold* right of privacy derives not merely from "an association of *two* individuals," but from an association of any number of individuals, which is the essence of a commune. The state will assert, however, that valid interests justify distinctions between traditional families and communes. But, as shown below, the state can accomplish its legitimate objectives for supporting the traditional family through communal groups. Why, then, does the state sanction only traditional families? Because it has a moral preference for their way of life.

It has been contended that conventional morality—including sexual morality and traditional family values—"is the mortar which binds a society together, and consequently must be enforced by law."[66] But this contention conflicts with the basic pluralistic philosophy of our society. As one commentator has asserted, "To compel adherence to a set moral pattern does not accord with notions of a free society nor with the notions of privacy. Freedom for moral experimentation should be encouraged."[67]

It has recently been suggested[68] that a mode of analysis developed in judicial review of obscenity legislation, calling for careful distinction between statutes imposing "moral" standards and those having purely "utilitarian" or secular objectives, should be broadly applied in judicial review of legislation affecting important personal rights. Not that *any* legislation advancing a moral interest is invalid. Concededly, constitutional legislation against murder and robbery is nonetheless deeply rooted in Judaeo-Christian morality. The key distinction is that permissible "moral" legislation, in addition to purely moral content, serves other substantial state interests like protection of innocent victims.

. . . ."); Travers v. Paton, 261 F. Supp. 110, 113 (D. Conn. 1966) (dismissing action under civil rights statute for invasion of privacy on grounds, *inter alia*, that there is no broad constitutional right of privacy, contending that the majority opinions in *Griswold* "emphasize and re-emphasize that it is the special nature of the marriage bond that makes so patently offensive state intrusion into the area").

For cases construing *Griswold* more broadly *see, e.g.*, Rumler v. Board of School Trustees, 327 F. Supp. 729, 742 (D.S. Car. 1971)(upholding constitutionality of local school board regulations governing appearance of students, conceding that the *Griswold* right of privacy was a "fundamental right . . . not limited to marital affairs"); *In re* Labady, 326 F. Supp. 924, 929, n.4 (S.D.N.Y. 1971) (engaging in purely consensual, private homosexual relations does not provide sufficient grounds for refusal to make a finding of "good moral character" essential to approval of an application for naturalization, noting, in dictum, that in the light of *Griswold*, criminal statutes "seek[ing] to prohibit and punish private homosexual behavior between consenting adults would probably be invalid"); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. postponed for hearing on merits*, 402 U.S. 941 (1971)(holding, *inter alia*, that Texas abortion laws unconstitutionally deprive single women as well as married couples of their fundamental right to choose whether to have children); Mindel v. United States Civil Service Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970)(termination of postal clerk's employment because of his private, extra-marital sexual activities violated his constitutional right to privacy). *See also* Roberts v. Clement, 252 F. Supp. 835, 848–50 (E.D. Tenn. 1966)(Darr, J., concurring)(arguing, *inter alia*, that private nudist colonies are protected by the *Griswold* right of privacy).

[61] 40 U.S.L.W. 4303 (U.S. Mar. 22, 1972)(state statute proscribing distribution of contraceptives to unmarried persons violates the equal protection clause).

[62] *Id.* at 4306 n.7: "[I]f we were to conclude that the Massachusetts statute impinges on fundamental freedoms under *Griswold*, the statutory classification would have to be . . . *necessary* to the achievement of a *compelling* state interest. . . . But . . . we do not have to . . . [use] that test because the law fails to satisfy even the more lenient equal protection standard." The First Circuit had concluded that the prohibition of distribution of contraceptives to unmarried persons conflicted with "fundamental human rights" outlined in *Griswold*. Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970). Justice Brennan purported to avoid deciding this question. Nevertheless, the language of his opinion strongly suggests approval of the First Circuit's approach. 40 U.S.L.W. at 4308: "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet *the marital couple is not an independent entity* with a mind and heart of its own, but *an association of two individuals* . . . . If the right of privacy means anything, *it is the right of the individual* . . . ." (emphasis added).

[63] Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 LOYOLA U.L. REV. 1, 8 (1969).

[64] The argument advanced in Poe v. Ullman, 367 U.S. 497, 553 (1961)(Harlan, J., dissenting), that while the state may prohibit certain types of relationships *entirely*, it may not regulate the intimacies of the marriage relationship which it sanctions and supports, is not persuasive. For, the state can and often does regulate the details of numerous types of relationships which it licenses. *See* 84 HARV. L. REV. 1525, 1533 (1971).

[65] 40 U.S.L.W. at 4308 (U.S. Mar. 22, 1972).

[66] 84 HARV. L. REV. 1525, 1534 (1971), *citing* P. Devlin, THE ENFORCEMENT OF MORALS 9–13 (1965).

[67] Katin, *Griswold v. Connecticut: The Justices and Connecticut's Uncommonly Silly Law*, 40 N.D. LAW. 689, 703 (1967).

[68] *See* Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1885–88 (1971) [hereinafter cited as *Population Control*].

This distinction argues that whereas the state may legitimately regulate *public* morality, where the interests of the public *as a whole* are at stake, it has no business regulating purely consensual *private* conduct, where the only interests at stake are those of the voluntary participants.[69]

The state's authority to regulate the marital relationship, however, has long been recognized and respected by the courts.[70] A broad range of state laws defining the marital relationship and limiting access to it remain intact.[71] Prohibitions against polygamy and bigamy still stand.[72] Minors' freedom to marry is curtained by age limits.[73] Some persons are

[69] *See generally* E. Schur, CRIMES WITHOUT VICTIMS (1965). It must be conceded at this point that despite the asserted fundamentality of this principle to our pluralistic society, while some courts have drawn this distinction, many others have refused to draw it and have upheld legislation affecting private as well as public morals. *See, e.g.*, cases cited *supra* note 60.

The arguments developed above draw some of their inspiration from the anti-paternalistic philosophy of the relationship between the individual and the state developed in the nineteenth century by John Stuart Mill. *See* Mill, *On Liberty*, in J. Mill, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 95–96 (Am. ed. 1951): "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." For an evaluation of the impact of Mills' philosophy on the American judiciary, and suggestions as to its future utility in limiting state police power legislation, see Note, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 CHI. L. REV. 605 (1970). *See also* State v. Kantner, 40 U.S.L.W. 2511 (Hawaii Sup. Ct. Jan. 20, 1972), where a divided court upheld convictions for possession of marijuana, because appellants had conceded that the state may regulate marijuana under its police power. A majority of the court, however, indicated that it was of the opinion that the state law was unconstitutional, with both Abe, J., concurring, and Levinson, J., dissenting, basing their finding of a fundamental constitutionally protected right to smoke marijuana on an essentially Millsian analysis. *Id.* at 2512; Rosen v. La. State Bd. of Medical Examiners, 318 F. Supp. 1217, 1240 n.25 (E.D. La. 1970) (three-judge court)(Cassibry, J., dissenting), *appeal docketed*, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970)(No. 1010, 1970 Term, renumbered No. 70–42, 1971 Term).

[70] *See, e.g.*, Maynard v. Hill, 125 U.S. 190, 205 (1888): "Marriage . . . has always been subject to the control of the legislature." *See also* Labine v. Vincent, 401 U.S. 532, 538 (1971): "But the power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State."

[71] *See Population Control* 1882–83.

[72] For Supreme Court decisions upholding such statutes *see* Cleveland v. United States, 329 U.S. 14 (1946); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). The polygamy decisions in particular have drawn sharp criticism from recent commentators. *See, e.g.*, Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958), and Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308 (1964). Under our theory, unless the state could show that polygamous marriages do some real harm to children born from them, *Reynolds* would have to be overturned. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 363 (1969).

[73] *See generally* H. Clark, LAW OF DOMESTIC RELATIONS 77–80 (1968).

forbidden to marry,[74] while others, though allowed to marry, are found unfit to reproduce and are sterilized.[75] Thus, the theory that the state cannot regulate the marital relationship on purely moral grounds, while supported by some commentary, has not yet been explicitly embraced by the courts.[76] Nevertheless, it is grounded on principles fundamental to pluralistic society. Furthermore, the argument is gaining acceptance in other areas of the law dealing with fundamental personal rights,[77] and there is no reason why it should not be extended to regulation of the "family" relationship. To demonstrate that the state distinguishes between communes and traditional families primarily because of its purely moral preference for the traditional life-style, it is necessary to explore the state's asserted interests in sanctioning marriage.

Several significant state interests can be identified. First, the state has a long recognized, substantial interest in ensuring the welfare of children. "The helplessness of the human infant for a prolonged period following birth, [and] the child's need for protection and affection during a protracted period of immaturity,"[78] underlie state sanction of the traditional family, which is argued to be particularly suited for the nurture of children.[79] Legal obligations are imposed upon parents to provide an economic framework within which the child's needs can be met. Juvenile courts are given jurisdiction to intervene in the interest of the child, and even to remove it from parental control, upon a showing that the child is either improperly cared for or abused. Restrictions are imposed upon the right to dissolve a legal marriage, at least in part to provide a more stable environment for growing children.

Communes serve this state interest in the wellbeing of children as well as do traditional families. Concededly, the communal movement in general strenuously rejects legally-imposed obligations of support. "More often than not, the goal of the commune is to replace the ties and obligations of the traditional family with something freely given and centered in the group . . . ."[80] But this goal does not render the communal life-style economically inadequate for raising children. On the

[74] *See Population Control* 1883 n.127. Under our theory, the state would have no trouble defending prohibitions grounded on valid genetic theories, but serious doubts would be raised about the validity of purely moral prohibitions.

[75] *Id.* at 1883 n.128.

[76] The Supreme Court has, however, reached similar results in at least two cases through a somewhat different line of reasoning. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (alternative ground); Griswold v. Connecticut, 381 U.S. 479 (1965).

[77] *See, e.g.*, Stanley v. Georgia; 394 U.S. 557 (1969) (overturning a state law prohibiting the possession of obscene material). *See also Population Control* 1885–88.

[78] Foote, Levy and Sander, CASES AND MATERIALS ON FAMILY LAW 3 (1966).

[79] *Id.* at 1, 3.

[80] *Solnit* 525.

contrary, pooling of resources may often give communes an economic advantage over traditional families,[81] one which states have been quick to recognize when asked to justify exclusion of communes from single-family residential districts.

Communal children may differ from children raised in nuclear families,[82] largely because of conscious effort by communal parents to inculcate their own newly developed values upon their children. But parental molding of children's attitudes and personalities should not concern the state as long as their physical needs are met and they obey the law. In individual cases where the state fears that communal children receive improper care, it can still invoke the jurisdiction of juvenile courts[83] to protect their interest.

Finally, there is no evidence that the state's interest in the education of children is frustrated by communes.[84] Thus, the interest of the state in the well-being of children, as a basis for legislative classification, reduces to the purely moral judgment that it is "healthier" to raise a child in a traditional family than in a commune.

2. Another state interest often asserted to justify legislative discrimination against communes is the prevention of illegitimacy. But there is a circularity in the state's argument here. The stigma of illegitimacy includes both a complex of legal disabilities and deeply ingrained social prejudice. To the extent the disadvantaged status of illegititimate children derives from state-imposed legal disabilities, it seems specious for the state to claim an interest in preventing illegitimacy because of them.

It is often contended that the disadvantaged legal status of illegitimates serves valid utilitarian state interests. State discouragement of illegitimacy helps protect the public fisc from the heavy welfare burden assertedly imposed on it by illegitimate births. Whatever merit this argument may have with respect to most illegitimate births,[85] it has

[81] *See* Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 912–13 (N.D. Cal. 1970).

[82] One commune member has asserted that "The kids from communes are used to a looser, more fluid environment, and they're less dependent on their parents." *Roberts* at 56.

[83] *See, e.g.*, ABA UNIFORM JUVENILE COURT ACT (1968).

[84] At least in the Boston area, the evidence is that communal children are being sent to public schools. Interview with Pat Wells, *supra* note 2. Though communal groups in California have established their own "radical" nursery, there is as yet no indication of their ability or intention to set up a separate communal school system. *See Roberts* at 58. This issue may arise in the future, though, and much may hinge on the success of the Amish in their present suit before the Supreme Court contending that they have a constitutional right (freedom of religion) to establish their own schools without state certification. *See* State v. Yoder, 49 Wisc. 2d 430, 182 N.W.2d 539, *cert. granted*, 402 U.S. 994 (1971) (No. 1536, 1970 Term, renumbered No. 70–110, 1971 Term).

[85] Such an argument can only prevail so long as a majority of the Supreme Court continues to refuse to treat illegitimacy as a "suspect" classification. *See* Labine v. Vincent, 401 U.S. 532 (1971); Shapiro v. Thompson, 394 U.S. 618, 633–34 (1969) (The state "must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious discrimination."). Moreover, at least four Justices of the Court are of the opinion that state discrimination against acknowledged illegitimates cannot be justified even under the ordinary rational basis test. See Labine v. Vincent, 401 U.S. at 541–59 (Brennan, J., joined by Douglas, White and Marshall, JJ., dissenting). Furthermore, the cogency of the "protecting the public fisc" argument is somewhat undermined by President Nixon's recent veto of legislation to provide federal funds for the establishment of day care centers which would enable mothers, particularly poor mothers with illegitimate children, to take full-time jobs. The President's veto message, though recognizing the desirability of encouraging welfare mothers to "leave the welfare rolls to go on the payrolls of the nation," is pervaded with suggestions that such legislation "would lead toward altering the family relationship," and therefore concludes that it would be undesirable "to plunge headlong financially into supporting child development . . . [and thereby] commit the vast moral authority of the National Government to the side of *communal* approaches to child rearing over against the family-centered approach." *See* WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 7, Dec. 13, 1971, at 1635–36 (emphasis added).

[86] *See* Mitchell v. Mitchell, 445 F.2d 722, 725 n.2 (D.C. Cir. 1971) (dictum), where the court suggests that had the father been living together with the mother and the child as an "illegitimate family unit", it might have been less ready to sanction legal discrimination against illegitimates as rationally related to the state's interest in preserving and strengthening family life. This, of course, is the case when a child is born to two unmarried members of a commune.

[87] *Id.* at 725 (emphasis added). *But cf.* Labine v. Vincent, 401 U.S. 532, 551 n.18 (1971) (Brennan, J., dissenting): "I agree that Louisiana has an interest in promoting family life. . . . I do not understand how . . . [this] provides any basis for Louisiana's discrimination against the acknowledged illegitimate . . . ."

[88] Many states have substantially eliminated long-standing legal disabilities for illegitimates. But many jurisdictions still retain some vestiges of discriminatory legislation against illegitimates, and in a few states, illegitimates continue to suffer substantial legal

substantially less validity when applied to children born to unmarried members of a commune. Such children are born into a "family" unit[86] which can provide an adequate economic setting for their growth and development. This asserted rationale aside, the most frequently advanced justification for discrimination against illegitimates is the state's interest "in promoting the family life sanctioned by law and the *mores*."[87] But as the emphasized language suggests, legal sanction of the traditional family essentially represents a codification of the state's moral preference for that style of life.

To the extent the disadvantaged status of illegitimate children derives from social stigma it results from age-old socio-religious prejudices which are difficult to eradicate. But though the state did not create the stigma, it adheres to and supports the stigma by superimposing legal disabilities.[88] Arguably, were the state to sweep away all the legal disabilities, the stigma of illegitimacy might well follow similar age-old

prejudices, and either disappear or substantially subside over time. Here again, the state's interest in legislative discrimination against communes appears to reduce to the essentially moral preference—or bias—that it is "healthier" to rear a child in a traditional family than in a commune.

Another frequently asserted state interest in regulation of the marital relationship is to protect women. It has recently been noted that paternalistic state attitudes toward married women have been justified on two basic policy grounds: first, "to protect the wife from the [legal] disabilities she incurs in assuming the status of married woman";[89] and second, to support her in following the socially-accepted norm of foregoing her economic potentialities in favor of fulfilling the traditional woman's role of housewife and mother.[90] But these policies bear no relevance to the commune woman. She neither demands nor expects legal obligations of support from fellow communards, and she fervently rejects societal expectations that she sacrifice her freedom to fulfill her traditional role. She is accepted in the commune as an equal. If there are no children in the commune, she is as likely as the male members to be employed and to contribute financially to the upkeep of the commune. Even when she has a child, the nature of communal organization and the tenor of communal attitudes do not relegate her to a position of total dependency centered in the home. Since there is generally some other member of the commune at home to take care of the child, communal women are free from "the constant necessity of having to spend all their time at home."[91] The communal woman enters the relationship on a basis of independence rather than dependence; there is no need for the state to surround her with elaborate protections against termination of dependency should the relationship be dissolved. By rejecting both the legal status and social role of a married woman and embracing instead a life-style designed for both legal and social equality, the communal woman obviates the need for paternalistic state regulation

disadvantages vis-a-vis legitimate children. *See* Labine v. Vincent, 401 U.S. 532, 556–57 (1971) (Brennan, J., dissenting). Moreover, illegitimates throughout the nation suffer uniformly from legal disadvantages imposed by federal legislation. *See, e.g.*, 42 U.S.C. § 403(a)(1970) (provision of Social Security Act requiring that legitimate children of deceased wage earner receive full benefits prior to payment of any benefits to eligible illegitimate children, even if this leaves illegitimate with no benefits at all), recently upheld in Parker v. Secretary of HEW, 40 U.S.L.W. 2464 (5th Cir. Jan. 10, 1972). *See also* Mitchell v. Mitchell, 445 F.2d 722 (D.C.Cir. 1971) (upholding constitutionality of rule adopted by District of Columbia courts that a father's legitimate children are entitled to his support in preference to his illegitimate issue).

[89] *See* N. Ingram, *Does Public Policy Require Interference with Marital Breakdown Agreements Between Spouses?*, May 11, 1971 (unpublished thesis in the Harvard Law School Library) at 7–8.

[90] *Id.* at 8.

[91] *See Avorn* at 55.

of her "family" relationships.

A fourth public policy often asserted in support of state regulation of the marital relationship is to protect the state's financial integrity.[92] Support obligations upon both spouses protect the state from having one on the relief rolls when the other can provide support. Allowing people to live communally without state-imposed, reciprocal obligations of support would drain public coffers. To keep welfare costs at a minimum, the state has a substantial interest in favoring marriage over communes.

The argument fails, however, largely because it assumes a need for state paternalism toward women, which as argued previously does not apply to the communal situation. Moreover, it is not clear that the mere fact adults live in communes creates a greater risk of their going on welfare.[93] Even if there were such a risk, it is surely beyond the bounds of state power to compel people to marry in order to protect its financial integrity. Neither are communal children *a priori* more likely to be on welfare. If the communal child's parents are married, the state can still enforce its legal obligations of support. Similarly, in those states where legal obligations of support are imposed upon the father of a child born out of wedlock where legal paternity can be established, the state is no less able to protect the public fisc by establishing legal paternity where the child and one or both of its parents are members of a commune. In short, it is the decision to financially underwrite unwed motherhood, and not the existence of the communal life style, which creates the great financial burden for the state. And there is a troublesome absence of logic in the state's decision to support unwed mothers living alone or even living with another man without the benefit of marriage,[94] while refusing to sanction the communal life-style, which may often provide a more emotionally satisfying and more economically stable environment for the parents and their children. The illogic is compounded when the state asserts as a reason for discrimination the need to protect its own financial

[92] *See, e.g.*, Laleman v. Crombez, 6 Ill. 2d 194, 199, 127 N.E.2d 489, 491 (1955): "The rule of law which makes a wife's waiver of her right to support unenforceable is designed in part for her protection, and in part for the protection of the public, upon whom the necessity of supporting her might fall if the husband failed to discharge his obligation."

[93] It has been asserted by one writer that the "counterculture feeds off the straight world, particularly through food stamps and unemployment compensation. Independence only goes so far. *But the counterculture embodies a different set of values.* It stresses cooperation, not competition, which is one of the reasons it needs help from the outside." *Roberts* at 44 (emphasis added). It must be emphasized, however, that it is the values and attitudes of some members of communes, not the communal life-style itself, which may lead to the greater likelihood of reliance on welfare. Thus, members of the "counterculture," whether married, single, living in a commune, or simply "shacking up," would equally feel it their "patriotic duty to exploit The Man when they can." *Id.* at 66.

[94] *See* King v. Smith, 392 U.S. 309 (1968).

integrity. The alleged state financial interest seems merely a screen for its moral preference for the traditional family environment.

5 Finally, it is commonly asserted that the family is the basic social organism of Western civilization, and the foundation of American democracy.[95] The traditional family furthers two prerequisites of our socio-political scheme: stability and independence. The family provides a stable unit for the raising and socialization of children and promotes the development of individual, rather than state, oriented economic and social attitudes.

The state's interest in stable interpersonal relationships only has validity as a function of its interest in protecting children. While government provides certain incentives for adults to marry, it does not proscribe living singly, and few would argue it could constitutionally do so. Various statutes reflect state efforts to limit child-rearing to the marital context, but in a very haphazard fashion. Unwed and widowed mothers are not forced to marry; indeed, state welfare schemes often create substantial financial disincentives for them to do so. Divorce rates continue to rise, in the wake of increasing liberalization of state divorce laws. In short, the family is no longer the stable social institution—firmly grounded in religious doctrine, economic necessity, and views of the social and legal supremacy of the dominant husband and father—that it once was.[96]

Nevertheless, at least at this stage in their development, communal groups may be less stable than traditional families. But the stability of interpersonal relationships among communal adults is of no concern to the state. Communal children, particularly if their parents are married, suffer no greater instability than they would in a traditional family environment. If the commune disbands or moves, the children will simply go with their parents, as is the case when a traditional family moves from one home to another. If, however, their parents are either

[95] In support of state prohibition of polygamous marriages, the Court asserted that: "Marriage . . . is . . . a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests." Reynolds v. United States, 98 U.S. 145, 165–66 (1878).

Similarly, the state's interest in preventing illegitimacy has been defended on the grounds that: "the function of reproduction can be carried out in a socially useful manner only if it is performed in conformity with institutional patterns, because only by means of an institutional system can individuals be organized and taught to cooperate in the performance of this long-range function, and the function be integrated with other social functions." Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215, 219 (1939).

[96] *See* W. Friedmann, LAW IN A CHANGING SOCIETY 224–25 (1959).

unmarried or divorced, they will ordinarily go with their mothers, as usually happens when a traditional family dissolves. The point is that parents who are devoted to raising children, whether in a traditional family or in a commune, will not abandon those children when the family or commune breaks up or moves.

American society also places a high value on independence. As against the Chinese communal system, in which each individual's role is seen as working for the good of the state as a whole, the American socio-economic system favors individual initiative and self-support. The family fosters this goal because it is a relatively small, efficient and independent economic unit capable of supporting itself. But American communes, though they have collective aspects, equally foster this goal. While many communes pool resources, they do so in much the same way a traditional family does. Indeed, many communes are formed just for this purpose: because in the light of modern economic conditions, the pooling of income from several breadwinners and economies of scale often make communal living more efficient. The key distinction from the Chinese scheme is that every member of an American commune works to support himself and other members of the commune, and not for the good of the state as a whole. The communal group maintains complete control over its resources, which it allocates among its members as it sees fit. In this manner, the ideal of individual initiative is preserved, but in what is for many a more efficient manner. In sum, communes as well as traditional families serve the state interest in fostering social order and democracy.

Thus, the "utilitarian" state interests in denying sanction and support to communes reduce to a purely moral preference for the traditional family. This bias is evident in the persistent moral-religious tone which pervades court decisions upholding asserted state interests.[97] If courts adopt the theory that legislation advancing purely moral interests cannot stand, the state interest in traditional family values cannot in and of itself justify regulation of otherwise harmless private conduct. And communes as well as traditional families should be accorded the constitutional protection from such legislation outlined in *Griswold*.

[97] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. S. Ct. 1971) (constitutional rights of two men not violated by denial of marriage license under Minnesota statute construed as failing to authorize homosexual marriage): "The institution of marriage as a union between men and women, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis . . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend."

C. Freedom of Association

Mr. Justice Harlan, speaking for the Court in *N.A.A.C.P. v. Alabama*,[98] first established freedom of association as an independent constitutional right protected by the first amendment.[99] "State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[100] Though the right originated as an outgrowth of the freedoms of speech and assembly,[101] the Court soon made clear that associational activity need not be "subsume[d] under a narrow, literal conception of freedom of speech, petition or assembly"[102] to qualify for constitutional protection. Despite this apparently broad scope given the right by the Court, most association cases "have typically involved highly political organizations whose members' rights to associate were bound up with their ability to 'speak' in a very conventional sense."[103]

There is no clear precedent for extension of the right of free association to communal groups. However, communes fuse elements that characterize two different types of groups accorded constitutional protection by the Court. First, communes are similar in their goals to traditional families,[104] whose associational rights were accorded constitutional recognition in *Griswold*.[105] Second, communes espouse a

[98] 357 U.S. 449 (1958).

[99] *Id.* at 460–61: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process clause of the Fourteenth Amendment . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."

[100] *Id.* at 461.

[101] *Id.* at 460.

[102] N.A.A.C.P. v. Button, 371 U.S. 415, 430 (1965): "For there is no longer any doubt that the First and Fourteenth Amendments protect certain kinds of orderly group activity."

[103] *See* Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 460, 464 (1970).

[104] Indeed, it is an important part of the communal "creed" that they "live together as famil[ies], treating themselves and treated by others as family unit[s]." Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 909 (N.D. Cal. 1970).

[105] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965): "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the point of being sacred. It is 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." *But see* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 252 (1965): "For example, the right to associate for the purpose of expressing views on political, economic, and social matters seems fairly to be implied by the first amendment. It is another thing, however, to suggest that because marriage is a form of association, it comes within the protection afforded freedom of association."

cause,[106] as do associations for advancement of beliefs and ideas which have been protected by freedom of association. Just as legislation was an effective way for the N.A.A.C.P. to express its message of black equality,[107] the existence of communes as living examples of their beliefs is an effective means to promote their legitimate objective, the advocacy of an alternative to traditional family life.

Once the first amendment right to associate in communes is established, inquiry turns to its scope. Whereas in *N.A.A.C.P. v. Alabama*,[108] association was protected because it facilitated communication of a message, here the association itself is the message. Yet, "[v]irtually all voluntary actions reflect the weighing of personal values and making of personal choices which can be said to 'express' the actor's point of view."[109] It is inconceivable that courts would protect all such actions under the first amendment merely because they occur in an associational context. The Supreme Court has rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[110] The Court has, however, expanded the concept of "orderly group activity" protected by the first amendment well beyond the narrower bounds of "speech" in a series of cases extending first amendment protection to "collective activity undertaken to obtain meaningful access to the courts."[111] As refined in one opinion, the concept includes "the freedom of action which utilizes the beliefs and ideas for the assemblies, *if such action is compatible with the freedom of others*."[112] Not that any illegal action undertaken in an associational context would enjoy first amendment protection. But aside from mere association, the sole illegal conduct engaged in by communes is "victimless crimes," which neither

[106] *See Hedgepeth* 186: "The communes are conceived, at least in part, both as social examples, as well as studies for the future . . . . [T]hey believe that communal existence —in whatever form it is shaped through their efforts—may be the prototype of a pattern by which large numbers of people can live and relate together on a limited amount of space."

[107] *See* N.A.A.C.P. v. Button, 371 U.S. 415, 424 (1963): "the litigation it [the N.A.A.C.P.] assists . . . perhaps more importantly makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society."

[108] 357 U.S. 449 (1958).

[109] Note, *Association, Privacy, and the Private Club, supra* note 104, at n.82.

[110] United States v. O'Brien, 391 U.S. 367 (1968).

[111] United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971). *See also* Mine Workers v. Illinois State Bar Ass'n, 289 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

[112] Roberts v. Clement, 252 F. Supp. 835, 849 (E.D. Tenn. 1966) (Darr, J., concurring) (arguing, *inter alia*, that private nudist colonies are protected by the freedom of association).

burden nor violate the freedom of nonconsenting others. So analyzed, first amendment freedom of association embraces the communal lifestyle within the scope of its protection.

II. LEGAL PROBLEMS

These constitutional arguments apply to remedy several legal disabilities currently suffered by communes. Since the "communal movement" discussed in this Comment is of recent vintage, specific legislative response to it is as yet sparse. It is therefore difficult to list definitively all the legal problems communal groups will face in coming years. The problems discussed here are those of most immediate concern to the movement. Yet the constitutional arguments discussed here may serve to relieve additional communal legal problems as they arise in the future.

A. Zoning Regulations

One of the most common provisions in municipal zoning ordinances designates certain areas for "single-family" residences only. Where such an ordinance leaves the definition of "family" to judicial construction, it generally does not threaten communal groups. Courts construing such ordinances have tended to emphasize the single housekeeping unit aspect of the statutory term rather than the relationship of the cohabitants.[113] But many such ordinances define "family" as one person living alone, or two or more persons related by blood, marriage or legal adoption, or a group not exceeding two to five persons living as a single housekeeping unit. Any of these statutory definitions effectively exclude communes.[114]

In the first case to test the validity of ordinances excluding communes from single-family residence zones, *Palo Alto Tenants Union v. Morgan*,[115] the court rejected a communal group's argument for strict

[113] *See, e.g.*, Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962); Boston-Edison Protective Ass'n v. Paulist Fathers, 306 Mich. 253, 10 N.W. 2d 847 (1943).

[114] Aside from the zoning problems considered at length *infra*, such classifications may give rise to additional adverse consequences for communes. For example, since commune houses cannot qualify under such zoning ordinances as single-family residences, local authorities tend to classify them as boarding houses, and threaten legal action if communal groups fail to apply for a license to operate such an establishment. This places communes at a disadvantage, for boarding houses are often excluded from the coverage of local rent-control legislation, and are frequently subjected to more stringent building code standards. Similarly, the Cambridge Power and Light Co. has established a special rate category for "community housing," in order to charge communal groups commercial rather than family rates. Conversation with Allen Caplan of Project PLACE, Boston, Mass., Feb. 16, 1972.

[115] 321 F. Supp. 908 (N.D. Cal. 1970).

review. While noting that a "zoning law which divided or totally excluded traditional families would indeed be suspect,"[116] the court distinguished traditional families from communes on several grounds. Traditional families, it reasoned, have a long recognized value, are reinforced by strong biological and legal ties, and play an often compulsory role in educating and nourishing the young. In contrast, the court found communal groups to be purely voluntary associations with fluctuating memberships, free of any legal ties. Applying the rationality test, the court found three conceivable rational bases for the ordinance.[117] It might have been designed to control population density, moderate noise and traffic problems, or avoid changes in the rent and property value structure of a neighborhood which would cause traditional families to leave.

Such ordinances unconstitutionally infringe communal groups' right of free association. The court in *Morgan* summarily conceded this right, but denied that it entitled communes to live in all parts of the city zoned for residential purposes.[118] Yet, the court unhesitatingly granted a traditional family such a right. The distinctions drawn by the court between traditional families and communal groups fail to adequately explain why either can be constitutionally excluded from single-family residential districts. The mere fact that the state perceives "a long recognized value in the traditional family relationship which does not attach to the 'voluntary family'"[119] is an insufficient ground for infringing upon first amendment rights of communes.

It is true that these ordinances do not act directly to proscribe communal associations, and in fact allow unrelated groups of four or more persons to live together in other zones of the city "designated for lodging houses, hotels, apartment houses, boarding houses, duplexes, triplexes and so on."[120] But they impose a substantial restraint upon communal members' rights of association in two ways. First, they are likely to produce a substantial deterrent effect upon communal groups' ability to attract and keep members,[121] as such ordinances, particularly in those communities where they have been enacted in direct response to the clamor of local residents for the exclusion of communal groups

[116] *Id.* at 911.

[117] *Id.* at 912–13.

[118] *Id.* at 911–12.

[119] *Id.* at 911.

[120] *Id.* at 912.

[121] *See* NAACP v. Alabama, 357 U.S. 449, 462–63 (1957): "compelled disclosure . . . is likely to affect adversely the ability of petitioner and its members to pursue their collective effort . . . in that it may induce members to withdraw from the Association and dissuade others from joining it. . . ."

from their neighborhoods, are likely to be seen as supporting and legitimizing already existent local hostility toward communes. Furthermore, they may well encourage private citizens to resort to such tactics as economic reprisal and general harassment which have already succeeded in forcing some communes to disband or move.[122] This "crucial . . . interplay of governmental and private action"[123] serves as a substantial barrier to commune menbers' exercise of their right of free association.

The extent to which such ordinances deter communal association may be further illustrated by the *Morgan* court's discussion of the third possible rationale for the zoning provisions under the minimum rationality test. According to the court, the state might legitimately exclude communal groups from single family districts on the theory that opening these districts to communes would produce a change in the rent and property value structure of the area sufficient to drive away traditional families, thereby producing an undesirable alteration in the "character" of the area.[124] As the court notes, communal groups are often able, by pooling the resources of groups of persons with independent sources of income, to pay "far more in rent than can traditional families with one, or at best two, wage earners."[125] But the fact that the communal life-style is often more economically efficient than the traditional family way of life is only one of the distinct advantages which communal groups feel they offer, and one of the reasons they have chosen this new mode of living.[126] If, however, the government is permitted to intercede on behalf of traditional families, and deny communal groups access to the kind of "large, once-distinguished town houses which are not owner occupied,"[127] and which are in many ways uniquely suited to the needs of communal groups,[128] then it can substantially limit their ability to associate—to keep present members and attract new ones. The asserted inherent advantages of communal life-style over the traditional family are the raison d'etre for communal associations. They are communal groups' sole means of keeping and attracting members. If these advantages can be constitutionally destroyed, then any asserted extension of freedom of association to communal groups is a mere sham.

But the first and fourteenth amendments do not simply protect the right to form associations, and keep and attract members. They also

[122] *See supra* notes 36–37.
[123] NAACP v. Alabama, 357 U.S. 449, 463 (1957).
[124] 321 F. Supp. at 912–13.
[125] *Id.*
[126] *See Solnit* 524–25.
[127] 321 F. Supp. at 912.
[128] *See Solnit* 924; *Commune Information* 32.

protect the "freedom to engage in association for the *advancement* of beliefs and ideas."[129] An important element of the right of association is the freedom to communicate the group's "message" to non-members. In the case of communal groups, the communal life-style is both the "message" and the mode of communication. By generally excluding communes from single family districts the state significantly limits their ability to communicate their message of an alternative to traditional families living in these districts.[130] Such state action does not simply deter communal association—it substantially destroys communal groups' "message." Communes are deprived of the "freedom to engage in association for the advancement of beliefs and ideas"[131] when the state is permitted to stifle their "message."

Rather than summarily dismissing communal groups' first amendment claims, the *Morgan* court should have proceeded to subject the ordinances to the constitutional test applied by the Supreme Court in cases of infringement of the freedom of association. In these cases the Court has generally applied one of two tests: whether there was a subordinating state interest sufficient to justify the infringement of first amendment freedoms; and whether the statute was overly broad in its sweep.

The subordinating state interest test, as applied by the Court, is really a two-part analysis. First, the state must demonstrate "so cogent an interest . . . as to justify the substantial abridgement of associational freedom."[132] Second, the state must show that its "action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification."[133] It does not seem that the state's desires

[129] NAACP v. Alabama, 357 U.S. 449, 460 (1957)(emphasis added).
[130] Admittedly, communal groups would be able to propagate their message in the other districts of the city where they would still be permitted to reside. *See supra* note 120 and accompanying text. However, this factor of isolation takes on further relevance, when, as is frequently the case, such ordinances prohibit large unrelated groups from residing in areas closely adjoining colleges or universities. This appears to have been true with respect to the Palo Alto ordinance at issue in *Morgan*, since Palo Alto is also the home of Stanford University. *See Communes Go to Court*, TIME, Feb. 16, 1971 at 44. The communal message is also significantly directed at university youth, most of whom are living away from their traditional family homes for the first time and thus are facing or will soon face the necessity of choosing their own life-style for the future. By removing communal groups from the immediate area, the state substantially inhibits their ability to propagate their message. In addition, it makes the communal alternative less attractive, thereby making it more difficult for communal groups to keep and attract members.
[131] NAACP v. Alabama, 357 U.S. 449, 460 (1957).
[132] Bates v. Little Rock, 361 U.S. 516, 524 (1960).
[133] *Id.* at 525. *See also* Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 225 (1967); NAACP v. Button, 371 U.S. 415, 438, 444 (1963); NAACP v. Alabama, 357 U.S. 449, 464–66 (1957).

to control population density, moderate noise, traffic and parking problems, and maintain the rent and property value structure of certain areas amount to substantial state interests. Although such interests have sometimes been allowed to prevail when the statute imposed only a minimal burden on first amendment rights,[134] the zoning ordinances under consideration substantially impair communes' associational rights. On the other hand, the state interest in preventing fire, health, and safety hazards[135] is quite substantial. However, such zoning provisions bear no substantial relationship to the effectuation of these asserted state interests.[136] The exclusion of communes from single-family districts is not *necessary* to the accomplishment of the substantial state interest in avoiding fire, health, and safety hazards. This interest could be effectuated as well, if not better, by strict enforcement of existing building codes proscribing such hazardous conditions, or by a limitation on the number of occupants per unit of floor space, regardless of family ties. Under this test, then, the ordinance in *Morgan* could not stand.

In applying the overbreadth doctrine,[137] the Court has held that even a legitimate and substantial government interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."[138] Under this standard, zoning ordinances like that in *Morgan* must fall. By failing to strike directly at evils allegedly sought to be remedied, and resorting instead to exclusion of communal groups from single family districts, municipalities seek to accomplish their legitimate objectives by means which broadly stifle communal groups' freedom of association.

All the state interests asserted to support this exclusionary zoning can be served equally well by means less restrictive of communes' constitutional rights. The state can attack problems of population density by imposing limits *of general application* on the maximum

[134]. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (state interests in controlling noise and preventing traffic hazards sufficient to justify prohibition of use of sound trucks making "loud and raucous noises," *since numerous alternative easy means of communicating ideas were available*).

[135] Though these interests were not explicitly advanced by counsel for the city in *Morgan*, they are frequently asserted as grounds for excluding communal groups from single-family districts. *See Solnit* 524–25.

[136] *See* NAACP v. Alabama, 357 U.S. 449, 464 (1957).

[137] *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[138] Shelton v. Tucker, 364 U.S. 479, 488 (1960); *see also* NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307 (1964); NAACP v. Button, 371 U.S. 415, 438 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296–97 (1961).

allowable number of occupants "in reasonable relation to available sleeping and bathroom facilities, or [by] requiring a minimum amount of habitable floor area per occupant."[139] Problems of noise or other anti-social behavior can be remedied by vigorous enforcement of existing general police power ordinances or criminal statutes against all families, related or not, who create them.[140] Fire, safety, and health hazards can be eliminated by strict enforcement of building code regulations against all violators. Since *people in general*, related or not, create these problems, *people in general* must be regulated by the ordinances. Similarly, the state can accomplish its objective of preserving the rent and property value structure of an area at a level accessible to the average traditional family more directly by imposing rent control standards which make housing available at reasonable rentals to both traditional families and communes. Clearly, then, these zoning provisions too "broadly stifle fundamental personal liberties . . . in the light of less drastic means for achieving the same basic purpose."[141]

The ordinances may also violate the equal protection clause of the fourteenth amendment. Under the strict standard of review applied to "suspect" classifications[142] "the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."[143] Even if such state interests as preventing serious fire, health, and safety hazards were "compelling," the zoning ordinances would still fail because the exclusionary classifications are not necessary to the purpose

[139] Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513, 520 (1971). In *Kirsch*, the New Jersey Supreme Court overturned a local zoning ordinance aimed at prohibiting seasonal group rentals by groups of unrelated people in a summer resort area on the grounds that it was "sweepingly excessive, and therefore, legally unreasonable." The court did not rely, however, on the first amendment overbreadth doctrine, but based its findings of overbreadth on a general doctrine of substantive due process, defined as follows: "substantive due process demands that zoning regulations . . . must be reasonably exercised—the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the subject sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need and substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated." *Id.* 281 A.2d at 518.

[140] *Id.* 281 A.2d at 515, 520.

[141] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[142] Alternatively, communes could base an argument for strict equal protection clause review on their first amendment right of freedom of association, a concededly "fundamental" interest. *See* Dandridge v. Williams, 397 U.S. 471, 484 n.16 (1970); Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring).

[143] Westbrook v. Mihaly, 2 Cal. 3d 765, 785, 471 P.2d 487, 500–01, 87 Cal. Rptr. 839, 852–53 (1970), vacated on other grounds, 403 U.S. 915 (1971). *See also* Kramer v. Union Free School Dist., 395 U.S. 621, 626–27 (1969).

of eliminating fire, health, and safety hazards, which can be equally well accomplished by less restrictive methods.[144]

A further problem with such ordinances is that the very nature of the exclusionary procedure, whereby enforcement is virtually impossible except "when the neighbors complain,"[145] involves the state and the local citizenry in a vicious cycle of discrimination. By passing such ordinances, the state encourages citizens' suspicions of and hostility toward communal groups. Such public attitudes toward communes are analogous to the class biases harbored by many middle and upper class whites against blacks and the poor.[146] While the state may have no affirmative duty to act against such public biases, it should at least be required to refrain from classifications which reinforce and encourage private discrimination.[147]

Finally, a fundamental rights-due process analysis may also strike down the exclusionary ordinances. If the aforementioned state interests are found insufficient to justify infringement of communal groups' first and fourteenth amendment rights, the state may seek to ground the legislative classification upon its perception of "a long recognized value in the traditional family relationship which does not attach to the 'voluntary family.'"[148]

The Justices making up the majority in *Griswold* subjected the Connecticut statute at issue to much the same subordinating interest/overbreadth analysis as was discussed previously in the context of first amendment rights. Justice Douglas found the anti-contraceptive statute unconstitutionally overbroad.[149] On the other hand, the concurring Justices overturned the statute because of the state's failure to show that regulation of marital privacy was necessary to the

[144] *See supra* notes 139–41 and accompanying text.

[145] *Solnit* 525.

[146] *See Exclusionary Zoning* 1357.

[147] *See* Reitman v. Mulkey, 387 U.S. 369 (1967). The force of this argument may have been seriously undermined by the Supreme Court's decision in James v. Valtierra, 402 U.S. 137 (1971) (upholding the validity of a state constitutional provision requiring approval of a majority of qualified voters for any low rent housing project). However, the Court did not expressly reject this argument in *James*, and *James* may even be distinguishable, because of the Court's heavy emphasis therein that "referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice." *Id.* at 141. Since the same cannot be said of exclusionary zoning ordinances, it may be that courts would be more receptive to this argument in the zoning context. In any event, at least one state supreme court has made it clear that it still recognizes the *Reitman* principle as having continued vitality even in non-racial areas. *See* Parr v. Municipal Court, 3 Cal. 3d 861, 869, 479 P.2d 353, 360, 92 Cal. Rptr. 153, 159 (1971), *cert. denied*, 404 U.S. 869 (1971).

[148] 321 F. Supp. at 911.

[149] 381 U.S. 479, 485 (1965).

accomplishment of a subordinating state interest.[150]

Under either test, the state's interest in promoting and supporting traditional family life is an insufficient ground for infringing upon such important personal rights as that of communal groups to live together as "families" in a single dwelling place. Many courts have referred approvingly to the state interest in traditional families,[151] but it is questionable whether this interest can be viewed as overriding or substantial.[152] In any event, such zoning regulations are not necessary to the accomplishment of the state objective, for the state could promote family life equally well without excluding communal groups from single-family districts. If communes actually do create noise and traffic problems, or pose an economic threat to traditional families, the state has available or can enact less restrictive ordinances which deal directly with these problems.[153] Such zoning ordinances should be found overbroad.

B. Cohabitation and Fornication Statutes

Many state statutes invoke criminal sanctions against cohabitation[154] and fornication[155] by unmarried persons. A forceful argument has recently been made[156] that legislative regulation of consensual private sexual relations among unmarried adults is not constitutionally justifiable.[157] It is contended that no adequate justification has been advanced for the Supreme Court's failure to extend the constitutional protection accorded the privacy of the marital relationship to extra-marital consensual sexual relations. Such privacy is no less important to unmarried than to married persons, and any asserted state interests relating solely to extra-marital relations "are generally so flimsy and so

[150] *Id.* at 497 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring); 504 (White, J., concurring).

[151] *See, e.g.*, Labine v. Vincent, 401 U.S. 532, 536 n. 6 (1971); Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

[152] In Labine v. Vincent, 401 U.S. 532, 536 n.6 (1971), the Court indicated that the state's interest in promoting family life would be sufficient to sustain a state law, barring illegitimate children from sharing equally with legitimate children in the father's estate, under a rational basis test. It is not clear, however, that the same result would have been reached had the Court invoked strict review and required the showing of a compelling state interest.

[153] *See supra* notes 139–41 and accompanying text.

[154] *E.g.*, Mass. Gen. Laws Ann. ch. 272, S 16 (1970); Kans. Stat. Ann. ch. 23, § 118 (1971).

[155] *E.g.*, Mass. Gen. Laws Ann. ch. 272, S 18 (1970); N.J. Stat. Ann. ch. 110, § 1 (1970).

[156] 84 HARV. L. REV. 1525 (1971).

[157] *Contra*, State v. Lutz, 57 N.J. 314, 272 A.2d 753 (1971) (upholding constitutionality of state fornication statute).

easily served by less restrictive means that the basic purpose of statutes regulating nonmarital sex must be seen as an enforcement of morality."[158] Under a fundamental rights-due process analysis, legislative proscription of fornication and cohabitation by members of communal groups is unconstitutional because it reflects solely the state's moral preference for intercourse in a two-member marriage. No valid state interest justifies such legislation. *Public* morality is not at issue here; concededly states can legitimately proscribe such conduct in public places. The public health interest in curbing venerial disease can be protected by less restrictive means—for example, by requiring adult communards (or all adults) to undergo blood tests just as applicants for marriage licenses are presently tested.[159] The often-asserted argument of the state's interest in preventing illegitimacy has little force in this area. Even conceding the interest, rapid improvement in contraceptive devices and abortion techniques, increased dissemination of information about them, and gradual crumbling of legal barriers to their use make the risk of unwanted births from communal relations fairly slight. And this purported state interest against children deliberately given birth and raised in a communal setting itself is questionable.[160]

Cohabitation and fornication statutes are also unconstitutional under an equal protection analysis. The state interest in preventing illegitimacy is, as just argued, slight and questionable. The asserted state interest in enforcing public morality is similarly questionable. The public health interest in curbing veneral disease, while probably compelling, can be served by less restrictive means. Thus, none of these interests should sustain fornication and cohabitation convictions of communal members under strict equal protection review, whether founded on a suspect classification or fundamental interest.

Even if the statute on its face were found not to unconstitutionally discriminate against members of communes, its enforcement might well deny them equal protection. Fornication statutes are notoriously difficult to enforce. Since the essence of the crime is *private* sexual activity, it is virtually impossible to gather legally admissible evidence unless the participants are caught in the act.[161] Similar difficulties impede enforcement of cohabitation statutes, although it may be easier to prove that a couple openly and notoriously live together without benefit of marriage than to prove their illicit sexual relations.[162] Nevertheless, such statutes invite harassment by "straight" neighbors anxious to make life uncomfortable for communes by frequently requesting local police to have them investigate alleged immoral and illegal activity in communal homes. Whether arrests ensue or not, communes can argue that they are denied equal protection of the laws because these statutes are used only against their members.[163] Admittedly, however, this claim will be difficult to prove.[164]

[158] 84 HARV. L. REV. 1525, 1533 (1971). The Court, in its recent opinion in Eisenstadt v. Baird, 40 U.S.L.W. 4303 (U.S. Mar. 22, 1972)(overturning a state statute proscribing the distribution of contraceptives to unmarried persons), expressed no opinion on the continued validity of the state's interest in deterring extra-marital sex.

[159] *Id.* 1533 n.45.

[160] *See supra* notes 86–89 and accompanying text.

[161] Many states do not require that a conviction for fornication be sustained by direct testimony. *See, e.g.*, State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954)(the occurrence of an act of sexual intercourse, an essential element of the crime of fornication, may be inferred from circumstantial evidence). Nevertheless, prosecutions for fornication are rare. *See* State v. Clark, 58 N.J. 72, 75, 275 A.2d 137, 139 (1971). When they do occur, it is often "in response to circumstances unrelated to the elements of the proscribed offense." State v. Lutz, 57 N.J. at 316, 272 A.2d at 754. Thus frequently such proceedings will be initiated as a result of evidence gathered in the course of a prosecution for illegal abortion or a bastardy proceeding entered into as a result of an unwed mother's application for AFDC benefits. *See, e.g.*, Commonwealth v. Carrera, 424 Pa. 551, 227 A.2d 627 (1967) (abortion prosecution); State v. Clark, 58 N.J. 72, 77–81, 275 A.2d 137, 139–42 (bastardy proceeding). The threat of such prosecutions has recently been substantially minimized, in light of Miranda v. Arizona, 384 U.S. 436 (1966), by several court decisions protecting persons in such situations from self-incrimination by either allowing them to remain silent or prohibiting subsequent prosecutions based on evidence procured under these circumstances. *See* United States *ex rel.* Berberian v. Cliff, 300 F. Supp. 8, 12–13 (E.D. Pa. 1969) (privilege against self-incrimination invoked); State v. Clark, 58 N.J. at 91, 275 A.2d at 147–48 (subsequent prosecution prohibited).

[162] In most states where cohabitation is criminally proscribed, the performance of at least one act of sexual intercourse is made an element of the crime either by express statutory language or judicial interpretation. *See, e.g.*, State v. Marvin, 12 Iowa 499 (1861). However, this issue has not been litigated in all states having cohabitation statutes, and in at least one state, Massachusetts, there is some authority that sexual intercourse need not be proved. *See* Commonwealth v. Lucas, 158 Mass. 81, 84 32 N.E. 1033 (1893)(the statutory term 'cohabit'," according to the weight of authority . . . do[es] not necessarily imply actual sexual intercourse."). In any event, a real danger exists that the communal life-style in and of itself might be relied upon as substantial circumstantial evidence of engagement in illicit sexual intercourse, and coupled with the easily-provable fact of open and notorious living together, might be sufficient to obtain a conviction for cohabitation.

[163] *See, e.g.*, People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 17–18, 225 N.Y.S.2d 128, 133 (1962): "The question is . . . whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or some other illegitimate reason . . . . To allow such arbitrary and discriminatory enforcement of a generally disregarded law is . . . wholly out of harmony with the principle of equal justice under law. . . ."

[164] Communes might offer as evidence surveys of American sexual mores to establish that extra-marital sexual activities are the rule rather than the exception in American life. They could probably demonstrate that prosecutions under such statutes are rare, and that in those few instances, criminal sanctions are often invoked to further objectives unrelated to asserted purposes of the statutes. *See* State v. Lutz, 57 N.J. 314, 315–6, 272 A.2d 753,

C. Welfare Benefits

A recent amendment of the Food Stamp Act of 1964[165] changed the statutory definition of eligible households to "a group of *related* individuals."[166] The Conference Report of the joint Senate-House committee which produced the final version of the amendments indicated that this change was "designed to prohibit food stamp assistance to communal 'families' of unrelated individuals."[167] This amendment is unconstitutional under each of the constitutional arguments.

The statute, as amended, invidiously discriminates against communal groups and therefore violates the due process clause of the fifth amendment.[168] While the change may save public money, under strict review the government cannot justify an otherwise arbitrary exclusion of a class of people from a general welfare program on this ground.[169] Furthermore, the statutory classification is likely to encourage private hostility toward and discrimination against communes. The amendment legitimizes the views of many Americans that members of communes are societal outcasts, unworthy of government support on equal terms

754 (1971): ("We note, however, our concern with the problem of uneven enforcement of the fornication statute. . . . [T]otal enforcement of a criminal code is impossible . . . . Nonetheless the problem may be different if a statute is consciously ignored and is invoked only in response to circumstances unrelated to the elements of the proscribed offense.").

Their case would be strengthened by evidence of prior harrassment by neighbors and local police. Despite courts' reluctance to accept this defense and evidentiary difficulties, members of communes might successfully defend on these grounds. In *Utica Daw's* the issue was raised in application for dismissal of a prosecution for violation of the statute. Were communes to assert this argument in a suit to enjoin police from harassment falling short of arrest and prosecution, they would have to seek a remedy in a federal court under 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[165] 7 U.S.C. § 2011 *et. seq.* (Supp. 1972).

[166] 7 U.S.C. § 2012(e) (Supp. 1972), as amended by Pub. L. No. 91–671 § 2 (Jan. 11, 1971)(84 Stat. 2048) (emphasis added).

[167] U.S. CODE CONG. AND AD. NEWS, 91st Congress, 2d Sess., 1970, at 6052.

[168] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' Bolling v. Sharpe, 347 U.S. 497, 499 [1954]." Schneider v. Rusk, 377 U.S. 163, 168 (1964). *See also* Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969).

[169] *See* Shapiro v. Thompson, 394 U.S. 618, 633 (1969). Indeed, the Supreme Court has recently intimated that even under ordinary equal protection review, the state's interest in protecting the public fisc is insufficient to justify arbitrary exclusion of a class of otherwise qualified potential beneficiaries from a general welfare scheme. *See* Townsend

with traditional families. Since the equal protection clause forbids state involvement in or significant encouragement of private discrimination,[170] and this prohibition is extended to the federal government by the due process clause of the fifth amendment, the amended eligibility requirement is impermissible.

In addition, under the *Griswold*-fundamental rights analysis, no valid utilitarian state interest appears for differentiating between communes and traditional families in distribution of food stamps. Absent some other utilitarian rationale, the true purpose of the food stamp amendment is to strike a financial blow at the existence of communes, and thereby express the government's strong moral disapproval of the communal way of life. It is far from clear that the often asserted interest in encouraging traditional family life is "substantial" or "overriding".[171] Moreover, it has been demonstrated that this interest reduces to a purely moral preference which cannot justify discrimination in favor of traditional families and against communes.

The amended eligibility requirement also infringes upon communal groups' freedom of association. It creates a financial disincentive for the poor to remain in communal association.[172] Because the explicit statutory discrimination encourages discrimination against communes, it results in a "crucial . . . interplay of governmental and private action"[173] which may be an even greater barrier to communal members' free association.[174]

Administrative rulings and interpretations which discriminate against communes in the distribution of welfare are more difficult to pinpoint than express statutory provisions, but several cases have arisen. In two instances the Massachusetts Department of Public Welfare recently attempted to deny benefits under the Aid to Families with Dependent Children (AFDC) program to otherwise qualified mothers and their children, simply because they became members of a

v. Swank, 404 U.S. 282, 291–92 (1971) (dictum): "We doubt the rationality of the classification . . . . [A] State's interest in preserving the fiscal integrity of its welfare program . . . may not be protected by the device of adopting *eligibility* requirements restricting the class . . . made eligible [to receive benefits] . . . . That interest may be protected by the State's 'undisputed power to set the *level* of benefits . . . .'" (emphasis added), citing King v. Smith, 392 U.S. 309, 334 (1968); Dandridge v. Williams, 397 U.S. 471 (1970).

[170] Reitman v. Mulkey, 387 U.S. 369 (1967). *See also* Bulluck v. Washington, 40 U.S.L.W. 2463, 2464 (D.C. Cir. Jan 19, 1972)(Robinson, J., dissenting), Lee v. Nykuist, 318 F. Supp. 710 (W.D.N.Y. 1970); Parr v. Municipal Court, 3 Cal. 3d 861, 869, 479 P.2d 353, 359, 92 Cal. Rptr. 153, 159, *cert. denied*, 404 U.S. 869 (1971).

[171] *See supra* note 152 and accompanying text.

[172] *See supra* notes 124–28 and accompanying text.

[173] NAACP v. Alabama, 357 U.S. 449, 463 (1957).

[174] *See supra* notes 121–23 and accompanying text.

commune.[175] The reason given for the denial was that the claimants were allegedly "living in an unlicensed lodging house."[176] A federal class action on behalf of these two mothers and persons similarly situated has been filed to challenge such discriminatory denials.[177]

When no express statutory language excludes communes from the class of potential beneficiaries of a state welfare scheme, administrative denials of benefits can be attacked on several grounds. Given the traditional judicial preference to avoid constitutional grounds where possible,[178] the first argument a commune should press against such actions is that the administrative rulings violate statutory standards.

Discriminatory administration of AFDC benefits is a prime example. The Supreme Court recently reaffirmed that absent express congressional authorization "clearly evidenced from the Social Security Act or its legislative history," states are powerless to adopt additional eligibility standards.[179] Similarly, the Court has summarily affirmed a series of recent decisions by three-judge district courts overturning state regulations which terminated AFDC benefits when mothers refused to cooperate with efforts to obtain financial support from absent fathers. The decisions hold that the Social Security Act conditions eligibility for benefits on two factors alone, need and dependency, and the states are

[175] In each case, AFDC benefits were actually denied or cut off for a period of several months. *See* Plaintiffs' Complaint at 3–5, Bedard v. Minter, Civil No. 71–2992-J (D. Mass, filed Dec. 17, 1971). Subsequent to the filing of a class action complaint against these actions in federal district court, however, the Welfare Department relented and resumed the payment of benefits to the two named complainants.

[176] Letter of Anne R. Halligan, Social Welfare Service, to Mrs. Elizabeth Speltz, Nov. 5, 1971, on file with The Harvard Civil Rights-Civil Liberties Law Review.

[177] Since the Welfare Department has now resumed the payment of benefits to the two named plaintiffs, the suit faces serious problems of mootness. The likelihood is that this dispute will be settled out of court, hopefully with the issuance of a firm policy statement by the department that membership in a commune will not be considered grounds for the denial or suspension of benefits. Telephone conversation with Gene Schreve, attorney for the Boston Legal Aid Society, Brighton, Mass., Feb. 7, 1972.

[178] *See, e.g.*, United States v. Five Gambling Devices, 346 U.S. 441, 448 (1953): "The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative."

[179] *See* Townsend v. Swank, 404 U.S. 282, 286 (1971). *See also*, King v. Smith, 392 U.S. 309 (1968), in which the Court overturned regulations of the Alabama Department of Pensions and Security which rendered an otherwise qualified child ineligible to receive AFDC benefits if its mother was found to be cohabiting with a man inside or outside the home. The Court asserted that the Alabama regulation defined the statutory term "parent" in a manner inconsistent with § 406(a) of the Social Security Act, and that Alabama had therefore breached its federally-imposed duty to furnish AFDC benefits to all individuals eligible under federal standards.

powerless to impose further requirements.[180]

Thus, members of communes who are denied AFDC benefits, either directly because of their association with a commune, or through indirect means (such as ruling that they live in an "unlicensed lodging house") have strong statutory grounds to challenge such denials. Neither the Social Security Act nor its legislative history authorize state refusal of AFDC benefits to needy and dependent communal children because of the way their parents choose to live.[181] *King v. Smith*,[182] where the Court overturned Alabama regulations terminating AFDC benefits to mothers cohabiting with a man in or outside the home, forcefully asserts "that

[180] *See* Doe v. Swank, 332 F. Supp. 61 (N.D. Ill.) (three-judge court), *aff'd mem.*, 404 U.S. 987 (1971); Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal.) (three-judge court), *aff'd mem.*, 404 U.S. 980 (1971); Meyers v. Juras, 327 F. Supp. 759 (D. Ore.) (three-judge court), *aff'd mem.*, 404 U.S. 803 (1971). *Accord* Saddler v. Winstead, 332 F. Supp. 130 (N.D. Miss. 1971) (three-judge court); Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970) (three-judge court); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) (three-judge court), *appeal dismissed for failure to docket within the time prescribed*, 396 U.S. 488, *reh. denied*, 397 U.S. 970 (1970). *Contra* Saiz v. Goodwin, 325 F. Supp. 23 (D.N. Mex. 1971). *See also* Doe v. Hursh, 328 F. Supp. 1360 (D. Minn. 1970) (state regulations establishing irrebuttable presumption that parental absence for less than three months is not "continued absence" within the meaning of 42 U.S.C. S 606(a) are invalid as inconsistent with Social Security Act); Cooper v. Laupheimer, 316 F. Supp. 624 (E.D. Pa. 1970) (state regulations compelling reduction in AFDC payments to effect restitution of alleged duplicate payments invalid as inconsistent with Social Security Act).

[181] The Act does require participating states to develop program and furnish social services designed to strengthen "family" life and prevent or reduce the incidence of births out of wedlock. *See* 42 U.S.C.§§602(a)(14) and (15)(A)(ii) (1970). But it does not authorize states to terminate benefits in pursuit of these ends. On the contrary, it expressly provides that if the state agency has reason to believe that the home in which a relative and child receiving benefits is "unsuitable for the child because of the *neglect, abuse or exploitation* of such child," it must report this to the appropriate state authorities, and may only terminate benefits "if provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child." 42 U.S.C. § § 602(a)(16) and 604(b) (1970) (emphasis added).

[182] 392 U.S. 309 (1968). Some judges have read Wyman v. James, 400 U.S. 309 (1971) (holding that denial of AFDC benefits to children whose mothers refused to comply with state regulations and admit welfare workers into their homes for interviews did not violate the fourth amendment) as standing for the proposition that at least in some cases, termination of AFDC benefits to children because of their parents' noncompliance with state regulations may be permitted. *See, e.g.*, Saiz v. Goodwin, 325 F. Supp. 23, 25–27 (D.N. Mex. 1971). But even this broad reading of *Wyman* must be taken in the light of the court's finding therein that the challenged state regulation implemented important governmental policies and was necessary to the effective administration of the AFDC program. *See* Taylor v. Martin, 330 F. Supp. 85, 89 n.5 (N.D. Cal.) (three-judge court), *aff'd mem.*, 404 U.S. 980 (1971). But it is highly doubtful, especially in view of *King v. Smith*, that the state welfare department's moral disapproval of communal living arrangements reflects a significant congressional and state policy; and it certainly is not necessary to the effective administration of the AFDC program.

immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC."[183] Indeed, the Massachusetts welfare department, which denied benefits to members of communes because they were living in an "unlicensed lodging house," had held several months earlier in an appeal regarding denial of disability benefits that "we cannot discontinue or not aid a person who is in financial need *because of their [sic] living arrangements*."[184] Thus, federal court and state administrative decisions hold that a caseworker's moral disapproval of the communal life style does not justify a denial of AFDC benefits.

If the statutory attack fails, however, commune members can still mount a substantial constitutional challenge. In *King v. Smith*, Justice Douglas, reaching the constitutional questions, asserted that "the immorality of the mother has no rational connection with the need of her children under any welfare program."[185] Therefore, where eligibility for welfare benefits was found to hinge on the "so-called immorality of the mother," he would find a violation of the equal protection clause.[186] Benefit denials to members of communes should fall under the same analysis. The welfare department's moral disapproval of a communal mother's living arrangements bears no rational relation to her child's need for welfare. From a constitutional perspective, a welfare statute which authorizes the welfare department to prescribe regulations excluding members of communes from benefits is no different than a statute which expressly excludes communes. Therefore, all the constitutional arguments advanced against express statutory exclusion of communes from welfare benefits apply equally to strike down administrative exclusions not found to violate controlling statutes.

III. CONCLUSION

This Comment has traced the major legal problems faced by communal groups focusing on disabilities imposed by various zoning, cohabitation, and welfare provisions. Three constitutional arguments, based upon rights to equal protection, due process, and freedom of association and expression, have been advanced in support of judicial relief for communes from the legal disabilities they currently suffer. Concededly, some of these constitutional arguments, at least in their

[183] 392 U.S. 309, 325 (1968).

[184] Massachusetts Dep't of Pub. Welfare App. Dec. No. DA 8118 (Jan. 19, 1971)(emphasis added).

[185] 392 U.S. 309, 334–36 (1968)(Douglas, J., concurring).

[186] *Id.* at 336.

application to communal groups, are novel. Courts may well be reluctant to accept them. But they are of sufficient cogency that they cannot calmly be ignored by counsel for legislative or administrative bodies defending suits filed by communal groups. Particularly in the most egregious cases, fear of suffering damaging judicial precedent with wider implications may impel officials to reach settlements with communal groups and to proceed more cautiously in structuring legislation disadvantaging them. If such is the case, communes may at least be afforded the opportunity to continue their experimentation with minimal state interference, until they reach a position of greater stability and recognition, convincing courts to consider more seriously their constitutional claims.

—Jonathan Shor