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IN SICKNESS OR IN HEALTH: THE RIGHT TO MARRY 
AND THE CASE OF HIV ANTIBODY TESTING

Robert D. Goodman*

INTRODUCTION

Long before the current public health crisis associated with Acquired Immune Deficiency Syndrome (AIDS) and the sexual transmission of the virus believed to be its cause, an epidemic of a sexually transmitted disease instilled a similar sense of crisis in Americans. As a response, public health agencies implemented mandatory testing of those suspected of carrying infection and mandated quarantines. In addition, a majority of states imposed venereal disease screening as a prerequisite to the issuance of marriage licenses, and many states specified that licenses could not issue unless the test results were negative. When called upon to consider the constitutionality of any of these measures, including the requirement that males seeking marriage licenses submit to venereal disease screening, courts have invariably upheld these requirements.

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1. See supra notes 70-96 and accompanying text.


These cases preceded revolutions in both constitutional jurisprudence and medical and scientific knowledge. Some commentators have expressed the view that legislation conditioning the issuance of a marriage license on a negative test for exposure to the virus associated with AIDS would now be held unconstitutional. While the United States Supreme Court's protection of a constitutional "right to marry" suggests such a result, the ambiguities and contradictions in the caselaw surrounding that right counsel caution.

This Article uses the case of premarital HIV testing to explore the meaning and scope of the right to marry. Part I considers the development of the right to marry in the United States Supreme Court. Part II presents basic information concerning AIDS and the transmission of the virus associated with the disease. Part III considers the constitutionality of premarital testing statutes under the right to marry. The final section will explore three related questions: first, whether testing alone should trigger heightened constitutional scrutiny; second, whether such screening can be justified under heightened scrutiny, and; finally, whether those individuals, who have been determined to carry HIV infection, nonetheless qualify for protection under the right to marry.

I. THE DEVELOPMENT OF A RIGHT TO MARRY

The Supreme Court has declared that marriage is "one of the 'basic civil rights of man.'" Because of this, commentators have surmised that a wide range of statutory restrictions on the freedom to marry may be unconstitutional. This development is a striking one, challenging, at a fundamental level, the historical conception that societal interests, as well as the interests

8. See Parmet, supra note 7, at 54-55; Note, AIDS Carriers, supra note 7, at 1277. A number of more modern courts have continued, however, to apply these deferential public health precedents. See, e.g., Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973); City of New York v. New St. Mark's Baths, 130 Misc. 2d 911 (N.Y. Sup. Ct. 1986).
11. It has been observed that the Supreme Court's "right to marry" cases were "unlikely to be the final word of the Court or to present the definitive answers as to the parameters of the fundamental right to marry." Note, Califano v. Jobst, Zablocki v. Redhail, and the Fundamental Right to Marry, 18 J. FAM. L. 587, 613 (1979-80) [hereinafter Note, Fundamental Right].
14. For an argument that the development of a fundamental right to marry was a dramatic departure from the Court's prior domestic relations jurisprudence and an unwarranted extension of the right to privacy, see Zablocki, 434 U.S. at 397-99 (Powell, J., concurring).
of the individuals involved, should shape the status of marriage.\textsuperscript{15} In \textit{Zablocki v. Redhail},\textsuperscript{16} the Court held, for the first time, that statutes significantly interfering with the decision to marry required a high degree of justification to withstand constitutional scrutiny.\textsuperscript{17} The majority noted that "[l]ong ago, in \textit{Maynard v. Hill}, the Court characterized marriage as 'the most important relation in life,' and as 'the foundation of the family and society, without which there would be neither civilization nor progress.'"\textsuperscript{18} The reliance on \textit{Maynard}, an 1888 case which held that the granting of a divorce was a proper legislative function, was somewhat ironic\textsuperscript{19} as is clear when one of the quotations from \textit{Maynard} is returned to its context. Rather than indicating that regulation of marriage was ordinarily beyond the reach of legislative bodies, the Court suggested the reverse:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute a marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.\textsuperscript{20}

\textit{Zablocki} relied on the \textit{Maynard} Court's recognition of the importance of marriage to society in order to derive a fundamental right to marry. However, in holding that the fundamental nature of the right rendered statutory restrictions to some degree suspect, the \textit{Zablocki} Court ignored \textit{Maynard}'s obvious message that it is the importance of marriage itself that justifies state control over the decision to marry.\textsuperscript{21} Such a theory seems to have played a part in the Supreme Court's 1878 ruling in \textit{Reynolds v. United States},\textsuperscript{22} upholding the constitutionality of prosecutions for bigamy:\textsuperscript{23}

\begin{thebibliography}{99}
\bibitem{15} See Foster, \textit{supra} note 13, at 52-53. The author notes that in a wide variety of cultures, "marriage and divorce are major events seized upon for rituals, for the transfer of wealth, and for various social and legal consequences." \textit{Id.} at 52.
\bibitem{16} 434 U.S. 374 (1978).
\bibitem{17} See \textit{id.} at 388. Prior to \textit{Zablocki}, the Court had declared that the decision to marry could not be interfered with "on so insupportable a basis" as racial discrimination. \textit{Loving v. Virginia}, 388 U.S. 1, 12 (1967).
\bibitem{18} 434 U.S. at 384 (quoting \textit{Maynard v. Hill}, 125 U.S. 190, 205, 211 (1888)) (citations omitted).
\bibitem{19} In \textit{Loving}, the Court had cited \textit{Maynard} for the proposition that "marriage is a social relation subject to the State's police power." 388 U.S. at 7.
\bibitem{20} 125 U.S. at 205.
\bibitem{21} Stating the analysis more explicitly, the Washington Supreme Court observed that because marriage is "so closely and thoroughly related to the state," it "should be most carefully guarded." Thus, the court continued, "improvident and improper marriages should be prevented." \textit{In re McLaughlin's Estate}, 4 Wash. 570, 591, 30 P. 651, 658 (1892). \textit{See also Pry v. Pry}, 225 Ind. 458, 468, 75 N.E.2d 909, 913 (1947) (significance of the marital relationship itself makes it subject to legislative control).
\bibitem{22} 98 U.S. 145 (1878).
\bibitem{23} The narrow holding of \textit{Reynolds} was that while the free exercise clause protects religious
Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and is 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.2

The right to marry was not, however, "drawn from the blue."25 The common law doctrine of family privacy,26 dating back to the medieval period,27 held that courts should not "regulate by [their] processes the internal affairs of the home."28 The doctrine was marked by a reluctance to intermeddle in the relationship between parents or between parent and child.29 Courts typically refused to entertain tort actions by one spouse against another,30 to intervene between a battering husband and his wife,31 or to receive the testimony of one spouse offered against the other.32
When the Supreme Court began to expansively read the concept of "liberty" in the fourteenth amendment due process clause to impose substantive restraints on the content of state legislation, the Court relied on common law principles to include within "liberty" the rights of parents to control the education and upbringing of their children. Even after the Supreme Court rejected those cases which had invoked a due process "liberty of contract" to invalidate economic or industrial regulation, the Court continued to suggest that family decision-making involved "basic civil rights," and there was a "private realm of family life which the state cannot enter."

In 1965, the Court relied on the earlier substantive due process cases to invalidate a state statute prohibiting the use of contraceptives. That decision, *Griswold v. Connecticut,* extravagantly praised the marital relationship and declared that the relationship lay "within the zone of privacy created by several fundamental constitutional guarantees." The *Griswold* privacy

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33. See L. Tribe, AMERICAN CONSTITUTIONAL LAW ch. 8 (2d ed. 1988).
35. See Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parental authority over child rearing undermined by mandatory public education); Meyer v. Nebraska, 262 U.S. 390 (1923) (parental authority over child rearing undermined by prohibition against teaching of foreign language in school). In dicta, the *Meyer* Court also stated that due process liberty includes "the right of the individual . . . to marry." *Id.* at 399. It is probably to this language that the Court in *Loving v. Virginia,* 388 U.S. 1, 7 (1967) referred when it cited *Meyer* for the proposition that the state's power to regulate marriage is limited by the fourteenth amendment. See Drinan, *supra* note 13, at 361-62.
42. *Id.*
43. *See id.* at 486.
44. *Id.* at 485. Although the opinion of the Court in *Griswold* relies on a concept of "penumbras" and "emanations" of the Bill of the Rights to explain the derivation of a constitutional right to privacy, *see id.* at 484, it is clear from an examination of the concurring opinions in the case, *id.* at 486 (Goldberg, J., concurring, joined by Warren, C.J., & Brennan, J.), *id.* at 500 (Harlan, J., concurring), and *id.* at 502 (White, J., concurring), that a five justice majority in *Griswold* holds that the right to privacy is an aspect of substantive due process. See Garfield, Privacy, Abortion, and Judicial Review: Haunted by the Ghost of *Lohner,* 61 WASH. L. REV. 293, 308-09 (1986); Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich. L. REV. 235, 249-50 (1965). The substantive due process approach was adopted in majority opinions in post-*Griswold* cases developing the right to privacy. See Whalen v. Roe, 429 U.S. 589, 598-99 n.23 (1977). But cf. Mohr, Mr. Justice Douglas at Sodom: Gays and Privacy, 18 COLUM. HUM. RTS. L. REV. 43 (1987) (arguing against substantive due process approach and in favor of theory that the right to privacy exists by virtue of the interplay of the equal protection clause, the ninth amendment, and the Bill of Rights).
doctrine may be read in two ways: (1) to encompass a right to enter into the marriage relationship without governmental interference;45 (2) to apply only to the regulation of intimate decision-making within an already existing marriage.46 While the Zablocki Court used the first reading of Griswold as support for a “right to marry,”47 the latter reading is consistent with the fact that the common law family privacy doctrine and a range of state-imposed rules governing the formation and dissolution of marriage had long existed side by side.48

Soon after Griswold, the Supreme Court again considered the constitutional status of the marriage relationship. In the 1967 case of Loving v. Virginia,49 the Court struck down a state miscegenation statute. In Loving, the Court called marriage a “fundamental freedom,”50 which it said had “long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”51 The statements were arguably dicta52 because the racist motivation of Virginia’s statute alone could have sufficed to invalidate the law.53 However, the Court chose to rely on both the conclusion that this racist motivation violated the equal protection clause54 and the view that the statute’s interference with the right to marry was a violation of the due process clause.55 Nonetheless, it was the same racist purpose that the Court held was offensive to equal protection principles that the Court relied on to arrive at its holding that the petitioners’ due process

45. See H. CLARK, supra note 5, at § 2.2, at 83.
46. See id. See also Zablocki, 434 U.S. at 397 n.1 (Powell, J., concurring) (suggesting that cases cited in the majority opinion do not necessarily suggest that there is the same sphere of privacy for entering into and dissolving a marriage as there is for one that already exists). It bears noting that in Justice Harlan’s influential dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), which he “incorporated by reference” in his concurrence in Griswold, 381 U.S. at 500, Harlan drew just this distinction: “It is one thing when the state exerts its power . . . to say who may marry, but is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.” 367 U.S. at 553 (Harlan, J., dissenting).
47. See 434 U.S. at 384.
48. See E. RUTHERFORD, supra note 34, at 17.
49. 388 U.S. 1 (1967).
50. Id. at 12.
51. Id.
52. See Drinan, supra note 13, at 359; Note, Fundamental Right, supra note 11, at 592.
53. See Drinan, supra note 13, at 358-59. The Loving Court squarely met the argument that the equal protection clause did not demand the invalidation of the Virginia law because the statute treated blacks and whites identically, stating that “[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” 388 U.S. at 11. As Professor Tribe has noted, the Court had already disposed of the argument that “apparent symmetry in treatment” ensured anything more than “a shallow illusion of equality” in Brown v. Board of Educ., 347 U.S. 483 (1954). See L. TRIBE, supra note 33, § 16-15, at 1475.
54. See 388 U.S. at 11-12.
55. See id. at 12.
right to marry was infringed. The Court stated that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations" or "on so insupportable a basis as the racial classifications embodied in these statutes." The Court made no attempt to set forth any justifications, other than white supremacy, that would also fail to satisfy the demands of due process, and at least one state supreme court has subsequently read Loving as limited to racial discrimination. It is certainly true that Loving "does not speak to the level of judicial scrutiny of, or governmental justification for restrictions on, the 'fundamental freedom' of individuals to marry."

56. See Note, Fundamental Right, supra note 11, at 593-94.
57. 388 U.S. at 12.
58. Id.
59. See Note, Constitutional Law, supra note 13, at 686.
60. See In re Goalen, 30 Utah 2d 27, 29, 30 n.6, 512 P.2d 1028, 1029, 1030 n.6 (1973), appeal dismissed, 414 U.S. 1148 (1974). Goalen is noteworthy for its vituperative denunciation of a constitutionally protected right to marry:

When and if the Supreme Court of the United States says the Fourteenth Amendment guarantees an unrestricted right for two persons of any character or status to marry—the 50 states to take it lying down—simply because citizens or resident aliens or felons, or syphilitics, etc. profess to have unlimited civil rights, and that a felon has the same constitutional right to marry, and perhaps become a behind-bars father without any semblance of parental control,—which also would deny to the states a right to prevent a couple of homosexuals, for example, from marrying, or condone the switch of wives by swingers, this country then will have switched to legalized indiscriminate sex proclivities with a consequent rising incidence of disease, poverty, and indolence,—but worse, to subject unwary citizens to the whim and caprice of the federal establishment,—not states,—leading to a substitution of a bit of judicial legislation for plain ordinary, horse sense. It isn't difficult to conclude that this may be giving a warranted and undeniable kudo to the horse.

We agree that marriage is "fundamental." We believe that like motherhood and the Boy Scouts, it is an institution, a status, an entente, if you please, with reality, and with whatever man's own religion says it is,—because all of these are universal precepts. However, this does not mean that the Constitution of the United States, which in no uncertain terms says the states are supreme in this country and superior to the philosophy of federal protagonists who deign to suggest a coterie of 3 or 5 or even 9 federal persons immune from public intolerance, by use of a pair of scissors and the whorl of a 10 [cent] ball-point pen, and a false sense of last-minute confessional importance, can in one fell swoop, shakily clip phrases out of the Constitution, substitute their manufactured voids with Scotch-taped rhetoric, and thus reverse hundreds of cases dimmed only by time and nature, but whose impressions indestructibly already indelibly had been linotyped on the minds of kids and grandkids who vowed and now would or will vow to defend, not only the institution of marriage and motherhood, but to reserve to the states a full budget of legitimate, time-tested mores incident to that doctorate.

Id. at 29-30 (footnote omitted). The Goalen court apparently drew support for its narrow view of the federal judiciary's role in the protection of fundamental rights from the tenth amendment.

See id. at 28, 29, 31.

Even though Loving may arguably be restricted to cases of racial discrimination, the Court has repeatedly relied upon the case as support for decisions expanding the "right to privacy" announced in Griswold.\(^{62}\) By the time Zablocki v. Redhail was decided in 1978, the Supreme Court simply observed that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships."\(^{63}\) Having determined the right to marry to be "a fundamental right,"\(^{64}\) the Court found that a statute substantially interfering with the decision to marry "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."\(^{65}\) Undoubtedly cognizant of the potential reach of such a fundamental rights approach to marriage,\(^{66}\) the Court, however, insisted as follows:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.\(^{67}\)

\(^{62}\) See, e.g., Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Roe v. Wade, 410 U.S. 113, 152-53 (1973). The meaning of these cases' citations to Loving is not absolutely clear, however. As Professor Tribe has commented, "passing references to marginally relevant cases should not always be assumed to have been carefully examined by all the concurring Justices." L. Tribe, supra note 33, § 5-14, at 345 n.65.

\(^{63}\) 434 U.S. at 386.

\(^{64}\) See id. at 383.

\(^{65}\) Id. at 388 (citing Carey, 431 U.S. at 686; Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262-63 (1974); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Bullock v. Carter, 405 U.S. 134, 144 (1972)). Perhaps, because the Court was "understandably reluctant to rely on substantive due process," 434 U.S. at 395 (Stewart, J., concurring), Zablocki focused on the fact that the statute at issue, prohibiting residents under child support orders from marrying without a court determination that the support obligation had been met, created a "class of . . . residents [who] may not marry . . . without first obtaining a court order granting permission to marry," id. at 375 (emphasis added), and subjected that classification to analysis under the equal protection clause. Id. at 383. However, the Court's "equal protection" analysis was essentially identical to the inquiry under the due process clause, see id. at 395-96 (Stewart, J., concurring), and it is not apparent that by choosing to invoke equal protection rather than due process, the Zablocki Court narrowed the reach of its decision, since "almost any law . . . affects some people and does not affect others." Id. at 391 (Stewart, J., concurring). A premarital HIV testing statute, for instance, could be subject to equal protection scrutiny merely because it imposes testing only on those individuals who seek marriage licenses and not on others. For a criticism of the use of the equal protection clause to enforce substantive rights, see generally Lupu, Untangling the Strands of the Fourteenth Amendment, 77 Mich. L. Rev. 981 (1979).

\(^{66}\) See generally H. Clark, supra note 5, § 2.3 (description of the range of marriage licensing and solemnization requirements imposed by the states).

\(^{67}\) Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (citation omitted).
While the Court's distinction between "significant interference" and "reasonable regulation" is somewhat obscure, its failure to provide a persuasive theory of why the freedom to marry should be a fundamental right is even more dissatisfying. It is likely that application of the right to marry to statutes which impose premarital testing for exposure to the virus associated with AIDS would require grappling both with the meaning of this distinction and the meaning of the right to marry itself.

II. AIDS AND THE TRANSMISSION OF HIV

AIDS is regarded as the most advanced manifestation of a viral infection now carried by up to two million Americans. Human immunodeficiency virus (HIV), discovered in 1983, is believed to be the major, or sole, cause of AIDS.

68. Justice Powell stated that the Court did not provide "any principled means for distinguishing between the two types of regulations." Id. at 396 (concurring opinion). For an examination of the possible content of the distinction, see infra notes 113-82 and accompanying text.

69. The rationale the Court does provide consists mostly of the assertion that "a decision to marry and raise [a] child in a traditional family setting" must receive protection equivalent to that accorded the "fundamental right to seek an abortion" or the decision "to bring the child into life to suffer the myriad . . . disabilities that the status of illegitimacy brings," id. at 386, without, however, providing an analysis of why each of these decisions is of constitutional significance. Cf. Note, Roe and Paris: Does Privacy Have a Principle?, 26 STAN. L. REV. 1161, 1174 (1974) (criticizing the privacy cases' "catalog approach"). The Court also stated that if the right to procreate is to be meaningful, "it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." 434 U.S. at 386. This latter explanation strikes one as somewhat disingenuous, however, given that the author of the Zablocki opinion, Justice Marshall, apparently does not believe that such a limitation itself is constitutional. See Bowers v. Hardwick, 478 U.S. 186, 217-18 (1986) (Stevens, J., dissenting, joined by Brennan & Marshall, JJ.). Cf. Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting), denying cert. to 578 F.2d 1374 (3d Cir. 1978) (right of state library to dismiss employees for adulterous cohabitation).

70. The official surveillance definition of AIDS now runs to 15 pages. See Revision of the CDC Surveillance Case Definition for AIDS, 36 MORBIDITY & MORTALITY WEEKLY REP. (Supp. No. 1 Aug. 14, 1987). AIDS-associated disease short of this reporting definition is sometimes called AIDS-related complex or ARC, see, e.g., Redfield, Markham, Salahuddin, Wright, Sarngadharan & Gallo, Heterosexually Acquired HTLV-III/LAV Disease (AIDS-Related Complex and AIDS), 254 J. A.M.A. 2094, 2094 (Oct. 1985), although the Center for Disease Control has formulated a more complicated classification system for AIDS-related conditions in adults, Classification System for HTLV-III/LAV Infections, 35 MORBIDITY & MORTALITY WEEKLY REP. 334, 335-37 (1986), and in children, Classification System for Human Immunodeficiency Virus (HIV) Infection in Children Under 13 Years of Age, 36 MORBIDITY & MORTALITY WEEKLY REP. 225, 227-29 (1987).


72. The widespread adoption of the name HIV followed the resolution of a patent dispute between the National Cancer Institute in the United States and the Pasteur Institute in France.
cause of AIDS. HIV is transmitted perinatally, through the infusion or inoculation of blood, and through certain sexual activity. The period between exposure to the virus and the onset of clinical manifestations may be several years, with some infected individuals perhaps never developing the disease.

Although AIDS initially appeared in this country in homosexual men, the heterosexual partners of infected individuals have since been identified as being at risk of developing AIDS. It is now well-established that HIV can be transmitted from males to females through sexual intercourse. However, the risk of infection in any one, unprotected, sexual encounter with an infected male may be as low as one in 500.


77. It has been estimated that a significant number of HIV-infected individuals will develop AIDS within five to ten years, with another sizeable group developing a disease short of AIDS.


80. See Friedland & Klein, supra note 75, at 1128.

81. See Hearst & Hulley, Preventing the Heterosexual Spread of AIDS, 259 J. A.M.A. 2428, 2429 (1988) (assuming infected male is not using condoms). It may be, however, that
from females to males, HIV has been isolated from cervical secretions, and African test data is at least suggestive of efficient female-to-male transmission. American studies, however, indicate that female-to-male transmission in this country is very rare. The African statistics may be partially explainable by other factors, such as the African practice of female circumcision, which greatly increases the chance of laceration of the tissue surrounding the scarring, and the use of contaminated needles in the treatment of sexually transmitted diseases. Another possible explanation for the seemingly more common, bi-directional transmission of HIV in Africa is that homosexual acts have actually played a significant role in the transmission to males but, nonetheless, have been denied because of strong social taboos.

It is clear, however, that not all forms of sexual activity carry a significant risk of transmission of HIV. While only a "mutually monogamous relationship" between uninfected partners is "absolutely safe," it appears that "noninsertive sexual relations," such as mutual masturbation, can be regarded as "extremely safe." Because it is generally believed that the exchange of saliva is not a means of transmitting the virus, intimate kissing is anal intercourse more efficiently transmits HIV from men to women than does vaginal intercourse. See id.; Friedland & Klein, supra note 75, at 1129. It may also be that there are some HIV-infected individuals with an infectivity much higher than average. See Peterman, Stoneburner, Allen, Jaffe & Curran, Risk of HIV Transmission from Heterosexual Adults with Transfusion-Associated Infections, 259 J. A.M.A. 35 (Jan. 1988).


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not a high risk activity. Even oral sex practiced without a condom appears to be a much less efficient mode of transmission of HIV than either rectal or vaginal intercourse, perhaps because saliva itself may contain substances that prevent the virus from infecting white blood cells.

There is somewhat more uncertainty as to the safety of vaginal or rectal intercourse when a latex condom is used. While some in the medical community are willing to call such sexual activity "very safe," others would sharply dispute this characterization. Since HIV cannot penetrate latex, proper use of undamaged condoms will prevent transmission of the virus. In addition, nonoxynol-9, a spermicide used as a coating on some condoms, has been shown to destroy HIV. Nevertheless, the improper or intermittent use of condoms, as well as the possibility of breakage, make condom use less than 100 percent safe. It is generally estimated that such problems lead to the failure of condoms as a birth control device at a rate of approximately 10 percent per year.


92. See Francis & Chin, supra note 88, at 1360.

93. See, e.g., Hearst & Hurley, supra note 81, at 2431.


95. See Hicks, Martin, Gretschell, Heath, Francis, McDougal, Curran & Voeller, Inactivation of 2HTLV-III/LAV-infected cultures of normal human lymphocytes by nonoxynol-9 in vitro, II THE LANCET 1422 (Dec. 21, 1985).

96. See CONTRACEPTIVE TECHNOLOGY 1986-1987 36 (N. Williams ed. 1986). Some studies have shown better results. See, e.g., Peel, The Hull Family Survey: II; Family Planning in the First Five Years of Marriage, 4 J. BIOSOCIAL SCI. 333 (1972). Some medical writers have assumed a "condom failure rate" for the purposes of preventing HIV infection of 10 percent per encounter, see, e.g., Hearst & Hulley, supra note 81, at 2431, leading to the conclusion that a woman who engages in sexual intercourse with a seropositive male 500 times, using condoms,
III. THE CONSTITUTIONALITY OF MANDATORY PREMARITAL HIV ANTIBODY TESTING

Often manifesting itself in irrational and ugly forms,97 fear of AIDS is widespread and powerful.98 The need to respond to that fear has led to a wide variety of proposals for changes in the law.99 In addition to those measures specifically regulating the marriage relation, other proposals have included: 1) calls for the quarantine of infected individuals;100 2) mass testing for infection;101 3) registries of those individuals testing positive;102 4) the

nonetheless has a 1 in 11 chance of becoming infected. For a discussion of opposition to the concept of “safe sex” within the medical community, see generally Patton, Resistance and the Erotic, 20 RADICAL AM. 68, 69-72 (1987).

97. See, e.g., Cronon v. New Eng. Tel. and Tel. Co., 41 Fair Empl. Prac. Cas. (BNA) 1268 (D. Mass. Apr. 11, 1986) (coworkers of man diagnosed with ARC threatened to lynch him if he returned to work). See also Winship, Nimby [Not In My Backyard] Views on People with AIDS, N.Y. Times, Apr. 5, 1988, at B1 (residents and leaders gathered on Good Friday to stop the state from moving 120 AIDS patients to a nursing home in Wanague, New Jersey); Nordheimer, To Neighbors of Shunned Family, AIDS Fear Outweighs Sympathy, N.Y. Times, Aug. 31, 1987, at A1, col. 1 (townspeople fought to keep three boys with AIDS from attending school; family’s house was suspiciously burned down and family was forced to leave town); AIDS Fear Forced Pupils Out, N.Y. Times, Oct. 4, 1985, at B1, col. 4 (three children were removed from school by community school district superintendents because of suspicions that their mother’s boyfriend had AIDS).

Public fears concerning AIDS have also taken the form of high levels of support for the quarantine of people with AIDS, see Growing Concern, Greater Precautions, Newsweek, Nov. 24, 1986, at 32 (54 percent of those surveyed favored quarantine); Poll Indicates Majority Favor Quarantine of AIDS Victims, N.Y. Times, Dec. 20, 1985, at A24, col. 1. See also Comment, The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome—AIDS, 37 EMORY L.J. 217, 228-29 (1988) [hereinafter Comment, Constitutional Implications] (concerning November 1986 referendum in California on an AIDS quarantine measure proposed by right-wing activist Lyndon LaRouche). This is despite the strong medical consensus that HIV cannot be spread through casual contact with people with AIDS or HIV infection. See sources collected in Sullivan & Field, AIDS and the Coercive Power of the State, 23 HARV. C.R.-C.L. L. REV. 139, 141 n.3 (1988).

98. It has been observed that AIDS now rivals cancer as the most feared disease in America. See Fear of AIDS Rivals Worry Over Cancer, N.Y. Times, May 12, 1987, at C3.

99. At times, political figures have candidly admitted that even unsubstantiated public fear may motivate such proposals. See Note, AIDS Carriers, supra note 6, at 1274 n.6 (Newark, New Jersey city council president stated that although there is no proof that AIDS can be transmitted by food workers, screening food workers for infection would give “some people a psychological lift”). A number of commentators have observed that it is likely that irrational fears will influence AIDS policy. See Brandt, Four Lessons, supra note 2, at 367-68; Dolgin, AIDS: Social Meanings and Legal Ramifications, 14 HOFSTRA L. REV. 191 (1985).


102. See Closen, Testing Democracy, supra note 9, at 910-12.
tracing of sexual contacts of infected individuals;\textsuperscript{103} and 5) imposition of criminal liability on infected individuals who continue to engage in sexual activity.\textsuperscript{104}

This section will consider the constitutionality of proposals for mandatory premarital testing for exposure to HIV under the fundamental right to marry.\textsuperscript{105} Such proposals are currently pending before a large majority of

\textsuperscript{103} See id. at 917-18 n.365.

\textsuperscript{104} See Sullivan & Field, supra note 97, at 139 n.1. Enacted and pending state legislation criminalizing such sexual activity is collected in id. at 158-59 n.64.

Prior to the onset of the AIDS epidemic, nearly half of the states had statutes imposing criminal penalties for the knowing transmission of venereal diseases. See Prentice & Murray, Liability for Transmission of Herpes: Using Traditional Tort Principles to Encourage Honesty in Sexual Relationships, 11 J. CONTEMP. L. 67, 100 n.215 (1984). Some of these statutes are sufficiently broad to make possible their application to HIV transmission. See Sullivan & Field, supra note 97, at 170-71.

Infected individuals who engage in sexual activity may also face civil liability. See Baruch, AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome, 22 TORT & INS. L.J. 165 (1987); Closen, Testing Democracy, supra note 9, at 916-18; Comment, You Never Told Me . . . You Never Asked; Tort Liability for the Sexual Transmission of AIDS, 91 DICK. L. REV. 529 (1986). Legislation has been proposed to extend such civil liability by eliminating the defense that one did not know that one was infectious. See id. at 917.

\textsuperscript{105} There are a number of other possible challenges to the constitutionality of these proposals. Insofar as premarital testing is enacted in response to unsubstantiated fear, see supra notes 97-99 and accompanying text, it is likely to be held to embody an illegitimate legislative purpose under City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). See Note, AIDS Carriers, supra note 7, at 1280-81. For a discussion of Cleburne and other cases invalidating governmental actions based on illegitimate purposes, see generally Note, Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term, 53 U. CHI. L. REV. 1454 (1986).

It might also be argued that apart from any burden it might impose on the right to marry, see infra notes 173-82 and accompanying text, being compelled to learn of one's HIV antibody status might be an unjustified abridgement of one's liberty interest "in independence in making certain kinds of important decisions," Whalen v. Roe, 429 U.S. 589, 599-600 (1977), and thus a separate substantive due process violation. At least one court appears to have rejected such an argument, however, see Local 1812, Am. Fed'n of Gov't Employees v. United States Dept. of State, 662 F. Supp. 50, 53 (D.D.C. 1987), stating that the "psychological concerns" of a person informed of HIV infection "do not themselves raise constitutional privacy issues." Id.

The possibility that premarital testing statutes do not adequately ensure the confidentiality of test results, see, e.g., Brune, Group Rips AIDS Report on Marriage Applicant, Chicago Tribune, Feb. 21, 1988, at 26, may also implicate the constitutional "interest in avoiding disclosure of personal matters." Whalen, 429 U.S. at 599.

The actual physical intrusion that coerced testing imposes would probably require analysis under the fourth amendment, cf. Schmerber v. California, 384 U.S. 757, 766-72 (1966) (withdrawal of blood to determine alcohol content in connection with drunk driving arrest a "search" and "seizure" within the fourth amendment), although it seems likely that, because of the regulatory, non-criminal context of the testing, the statute would be subject to a general reasonableness test. Cf. Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967) ("probable cause" exists for building inspections if reasonable standards for conducting area inspections are satisfied). It might also be argued that, because of the long history of state regulation of marriage and premarital physical examinations for venereal disease, see supra notes 5 & 7 and
state legislatures106 and were given the imprimatur of the editor of the *Journal of the American Medical Association* in 1985.107 Separate consideration will be given to the constitutionality of statutes, such as those enacted in Illinois108 and Louisiana,109 which do not prohibit marriage by individuals with positive test results,110 and to measures which would bar such marriages.111

A. Testing

1. Mandatory testing as a burden on the right to marry

The Zablocki Court stressed that not every regulation relating to marriage should be subjected to heightened scrutiny.112 In analyzing the constitution-


In addition to invoking various federal constitutional theories, it might be possible to argue that premarital testing statutes violate rights embodied in state constitutions. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) (numerous state courts have extended to their citizens, via state constitutions, greater protections than Supreme Court has held are applicable under the Bill of Rights); McGrath, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982) (state constitutions have significant role to play as protectors of individual rights and liberties); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707 (1983) (for the balance of this century, state constitutions will play increasingly important role in guaranteeing fundamental rights); Note, *Toward a Right to Privacy as a Matter of State Constitutional Law*, 5 Fla. St. U.L. Rev. 631 (1977) (many states now provide explicit right to privacy in their constitutions); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 110 Ga. L. Rev. 533 (1976) (growing number of state courts are extending individual rights guarantees embodied in their state constitutions beyond analogous federal guarantees). *Cf.* Note, *The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. Rev. L. & Soc. Change 973 (1986) (methods for which sodomy law can be challenged as violative of state constitutions based on right to privacy grounds).

106. See Brandt, *Four Lessons*, supra note 2, at 369.


111. Utah prohibits marriage "with a person afflicted with acquired immune deficiency syndrome," *Utah Code Ann.* § 30-1-2(1) (Supp. 1987), but does not require premarital tests for HIV infection.

112. *See supra* note 67 and accompanying text.
ality of premarital testing statutes which do not directly prohibit marriage by infected individuals, the threshold determination must be whether such legislation demands "critical examination" under Zablocki.\textsuperscript{113}

In drawing a distinction between statutes triggering such heightened scrutiny and those "reasonable regulations" which could "legitimately be imposed" without special constitutional justification, the Court attempted to reconcile the result in Zablocki with that reached in a case decided earlier the same term, Califano v. Jobst.\textsuperscript{114} Jobst upheld a section of the Social Security Act which reduced certain individuals' benefits upon their marriage, rejecting the proposition that classifications based on marital status are "suspect."\textsuperscript{115} Although the Court recognized that the provision at issue might "have an impact on . . . a beneficiary's desire to marry and make some suitors less welcome than others,"\textsuperscript{116} the Court also declared that Congress could permissibly enact such a rule "in the course of constructing a complex social welfare system that necessarily deals with the intimacies of family life."\textsuperscript{117}

In dealing with the right to marry issue, Jobst seemed to indicate that only statutes which have the effect of purposefully burdening the decision to marry should trigger heightened constitutional scrutiny.\textsuperscript{118} The Court emphasized that Jobst was not, unlike Loving, "a case in which government seeks to foist orthodoxy on the unwilling by banning . . . nonconforming marriages,"\textsuperscript{119} or "an attempt to interfere with the individual's freedom to make a decision as important as marriage."\textsuperscript{120}

Zablocki is distinguishable from Jobst based on the purposefulness of the interference with the marriage decision.\textsuperscript{121} This is because the statute considered in Zablocki expressly prohibited marriage by individuals under child support orders without a judicial determination that the obligation had been met. The Court in Zablocki, however, instead relied on "the directness and substantiality of the interference with the freedom to marry" to strike the statute and distinguish the case from Jobst.\textsuperscript{122} While the Zablocki Court quoted language from Jobst which indicated that there was no intent on the part of the legislature to interfere with the freedom to marry,\textsuperscript{123} it did so


\textsuperscript{114} 434 U.S. 47 (1977).

\textsuperscript{115} Jobst held that classifications based on marital status are "of a different character from racial classifications," \textit{id.} at 53, because they are not "an unthinking response to stereotyped generalizations about a traditionally disadvantaged group." \textit{id.} at 54.

\textsuperscript{116} \textit{Id.} at 58.

\textsuperscript{117} \textit{Id.} at 54 n.11.


\textsuperscript{119} 434 U.S. at 54 n.11.

\textsuperscript{120} \textit{Id.} at 54.

\textsuperscript{121} See Note, \textit{Constitutional Law}, supra note 13, at 689-90.

\textsuperscript{122} 434 U.S. at 387 n.12.

\textsuperscript{123} See \textit{id.}
only after identifying "directness" and "substantiality" as the relevant inquiries. Moreover, the Zablocki Court never directly commented upon the obvious purposeful effect of the statute before it.\(^{124}\) It thus appears that, after Zablocki, intent is only relevant when reached as a conclusion based on an examination of directness and substantiality, and not as the subject of a separate inquiry.\(^{123}\)

Because the statute in Zablocki both directly and substantially interfered with the right to marry,\(^{126}\) the Court did not discuss whether interference which is either solely direct or solely substantial would be sufficient to trigger heightened scrutiny. In Lyng v. Castillo,\(^{127}\) however, the Supreme Court quoted Zablocki to explain that heightened scrutiny was not necessary because the statute at issue in the case\(^{128}\) did not "directly and substantially" interfere with family living arrangements and thereby burden a fundamental right.\(^{129}\) This formulation may suggest that a statute would have to both "directly" and "substantially" interfere with the right to marry in order to trigger heightened scrutiny under Zablocki.

This two-pronged requirement has, in fact, been adopted by a number of lower federal courts\(^{130}\) which have disposed of challenges to government anti-nepotism policies\(^{131}\) and differential treatment under the Internal Revenue Code based on marital status.\(^{132}\) These courts simply noted that the interference with the marriage decision was "indirect" and ended their inquiry on that basis.\(^{133}\) On closer examination, however, it appears that the result reached in several of these cases would have been the same if the substantiality of the burden had also been weighed.\(^{134}\) Their language on the application of Zablocki, therefore, can be considered dicta.

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124. See Note, Developments, supra note 118, at 1252 n.23.
125. See id. Like a tortfeasor who is "presumed to intend the natural consequences of his acts . . . the legislature can be presumed to have intended that significant interferences will in fact have an impact on the marriage decision." Id.
126. 434 U.S. at 387.
128. Castillo involved a challenge to the definition of "household" in the Food Stamp Act, 7 U.S.C. § 2012(i) (1982 & Supp. III 1985), which treats parents, siblings, and children who live together, but not more distant relatives or unrelated persons who do so, as a single household for purposes of defining eligibility for food stamps.
129. 477 U.S. at 638. See also Lyng v. International Union, United Auto., Aerospace, and Agric. Implement Workers, 108 S. Ct. 1184, 1189 (1988) (quoting Zablocki to explain that strict scrutiny was not appropriate).
130. See cases cited in Note, Developments, supra note 118, at 1252 n.24. See also Cutts v. Fowler, 692 F.2d 138, 141 (D.C. Cir. 1982) (burden on right to marry "attenuated and indirect").
133. Mapes, 576 F.2d at 901; Southwestern Community Action Council, 462 F. Supp. at 298.
134. See Note, Developments, supra note 118, at 1252-53 n.24; see also Sebetic v. Hagerty,
More importantly, despite the Supreme Court's own confusing recitation of the "direct and substantial" language, the Court does not appear to actually require that both be present before applying heightened scrutiny. In *Castillo*, for example, the Court considered whether the section of the Food Stamp Act which defines households for purposes of eligibility for food stamps burdened the right to determine one's "family living arrangements." The Court began its analysis by noting that "[t]he 'household' definition does not order or prevent any group of persons from dining together." If a finding that direct interference—in the sense of a substitution of the government's decision-making apparatus for the individual's—was necessary to apply heightened scrutiny, this observation would have ended the inquiry. Moreover, if the concept of direct interference was interpreted to mean regulation placed directly on the family relationship, the regulation in *Castillo* was still clearly indirect. The *Castillo* Court did not end its analysis with indirectness, however, and proceeded to consider the insubstantiality of the burden as well:

[In the overwhelming majority of cases it probably has no effect at all. It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps.]

The Court subsequently used the *Castillo* approach to determine whether fundamental rights were burdened in *Lyng v. International Union, United Automobile, Aerospace & Agricultural Implement Workers*. The UAW
case concerned an amendment to the Food Stamp Act that precluded households from becoming eligible for food stamps when the decrease in household income resulted from a member being on strike. Although this regulation of "family living arrangements" was even less direct than the one considered in *Castillo*, the Court repeated its *Castillo* analysis, and found that the statute "certainly does not 'order' any individuals not to dine together; nor does it in any other way 'directly and substantially' interfere with family living arrangements." The Court again, therefore, went beyond a finding of indirectness to consider insubstantiality as well.

There is a final reason for concluding that application of heightened scrutiny under *Zablocki* does not require direct interference with the right to marry. Although it may have initially appeared that in *Zablocki* the Court was carving out a unique test for the application of heightened scrutiny under the fundamental right to marry, it specifically invoked the *Zablocki-Jobst* distinction to hold that legislation having only "incidental effect" on the right to travel should be upheld unless "wholly irrational." *Aznavorian*, therefore, clarified that the fundamental right to marry is to be treated no differently from other fundamental rights. Yet it is clearly the case that fundamental rights other than marriage have been held to have been burdened by merely indirect government action.

Further, the application of *Zablocki-Jobst* to areas other than marriage and family was reaffirmed as recently as the *UAW* case, where the "direct and substantial" test was again applied. In that case, after the Court determined that the strikers' rights concerning their family living arrangements were not burdened, it then applied the same "direct and substantial" test to address the separate question of whether the effect of the statute was to burden the fundamental associational rights of the workers to organize in unions. Moreover, in applying the test, the Court again went beyond an initial finding of indirectness to find that the statute did not burden the workers' rights to associate "in any significant manner."

If both the "directness" and "substantiality" of the interference with the right to marry are weighed, premarital HIV testing statutes should trigger heightened scrutiny. By placing an additional "legal obstacle in the path of persons desiring to get married," the interference produced by these sta-
tutes is clearly more direct than the statute considered in *Jobst*, although it is less direct than the outright ban in *Loving* or the requirement of judicial authorization in *Zablocki*.

Judging from the experience in Illinois and Louisiana, states which have adopted premarital HIV screening, the interference also appears to be substantial. In Illinois, the number of individuals seeking marriage licenses dropped sharply following the imposition of mandatory testing, as "hundreds of Illinois couples" decided to marry "in other states or not to marry at all." According to the chair of the Human Services Committee of the Louisiana House of Representatives, a similar number of couples residing in his state have chosen to marry in Arkansas, Mississippi, or Texas to avoid the testing law.

It is likely that one of the reasons for the decision not to marry in a state imposing HIV antibody testing is the cost of the test. The cost, reported to be as high as $200 in Louisiana and $300 in Illinois, is due to the necessity of a more specific, confirmatory test should the initial screening test result be positive. Such costs may literally prevent some indigent individuals from marrying. If such is the case, there is strong reason to believe that heightened scrutiny should be applied in determining of whether the testing statutes should be upheld, at least as applied to indigents.

In *Boddie v. Connecticut*, the Court held that due process demanded extraordinary justification before a state could deny indigents access to its courts for the purpose of divorce. It is difficult to see, therefore, how

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152. See *supra* note 140.
153. *In Cook County, where nearly half of all Illinois marriages take place, the number of marriage applications in the first three weeks of January dropped from 1,500 last year to 600 now.* Wilkerson, *Pre-Nuptial AIDS Screening Taxes Illinois Health System*, N.Y. Times, Jan. 26, 1988, at A12, col. 3.
157. See *Couples' Test, supra* note 155, at A22, col. 1.
158. See Wilkerson, *supra* note 153, at col. 4.
159. See *id*. For a discussion of the accuracy of HIV antibody tests, see *infra* notes 178-82 and accompanying text.
162. The court in *Boddie* held that "a cost requirement, valid on its face, may offend due process" because of a particular party's "circumstances." 401 U.S. at 379-80.
164. In reaching this conclusion, *Boddie* had stated that because of the "state monopolization of the means" for dissolving a marriage, *id*. at 374, no individual could remarry without first "invoking the State's judicial machinery." *Id*. at 376. However, *United States v. Kras*, 409 U.S. 434 (1973), which held that indigents' rights were not violated by non-waivable filing fees
statutes mandating that hundreds of dollars in testing costs be absorbed by marriage license applicants could be constitutionally applied to indigents without requiring the state to demonstrate a compelling justification. One distinction between the premarital testing case and *Boddie* is that the latter involved access to the "machinery for dispute settlement" provided by the court system.\(^6\) *Boddie* did not hold, however, "that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause"\(^{166}\) but noted, rather, that "in the case before us" such access was "the exclusive precondition to the adjustment of a fundamental human relationship."\(^{167}\) In light of the Court's subsequent limitation of *Boddie*, in *United States v. Kras*,\(^{168}\) to the divorce context, it certainly appears that *Boddie* was substantially more concerned with the right to marry than the right of court access.\(^{169}\)

It appears unlikely that the imposition of a $200 or $300 cost would in and of itself constitute substantial interference with a non-indigent's right to marry. *Jobst* involved a loss of social security benefits,\(^{170}\) but the Court held that this change was less significant than the "changes in economic status" that "normally" attend marriage.\(^{171}\) While *Zablocki* involved an enforced change in economic status via the mechanism of child support obligations,\(^{172}\) it was a potentially more drastic change than could have been produced by the loss of the social security benefits in *Jobst*.\(^{173}\)

The economic impact of the test requirement, however, may not be the most significant burden. Although individuals at high risk for HIV infection are likely to know this fact,\(^{174}\) being forced to receive confirmation of one's infection carries potentially devastating psychological effects.\(^{175}\) Moreover, the possibility of disclosure of that information might make one the target

\(^{165}\) See *Boddie*, 401 U.S. at 375.

\(^{166}\) Id. at 382.

\(^{167}\) Id. at 383.


\(^{169}\) See supra note 164.

\(^{170}\) Because the Jobsts had become eligible to receive benefits under other provisions of the statute, the total decrease in benefits only amounted to $20 per month. See Califano v. Jobst, 434 U.S. 47, 48-49 n.4, 57 n.17.

\(^{171}\) Id. at 53-54. For a useful discussion of the importance of economic considerations in substantiality analysis, see Note, *Developments*, supra note 118, at 1254.

\(^{172}\) See Note, *Developments*, supra note 118, at 1254 n.29.

\(^{173}\) It should be noted, however, that in the case of some recipients of the benefits at issue in *Jobst*, the cancellation of those benefits might have had far more dramatic consequences than it had for Jobst himself. See Note, *Fundamental Right*, supra note 11, at 611-12.


\(^{175}\) See id. at 1287; Closen, *Testing Democracy*, supra note 9, at 875-77.
of panic,\textsuperscript{176} and the disclosure itself may lead to discrimination.\textsuperscript{177}

These effects, moreover, would not be limited to those individuals actually carrying HIV infection, since premarital testing can be expected to produce a significant number of "false positives." The most widely used test for the presence of HIV antibodies, the enzyme-linked immunoassay ("ELISA") test, is far more "sensitive" than it is "specific." This means that the ELISA will produce significantly more falsely positive results than falsely negative ones in a population where the prevalence of the virus is low.\textsuperscript{178} The precise percentage of false positives for ELISA tests appears to vary widely depending on the commercial laboratory performing the test,\textsuperscript{179} with one study finding 55\% of positive ELISA results to be false positives.\textsuperscript{180} Because of the specificity problem encountered in the use of the ELISA alone, a second test, called the Western blot test, is commonly used as a confirmatory test.\textsuperscript{181} However, the question of what constitutes a "positive" Western blot result has proven controversial, with performance procedures varying considerably.\textsuperscript{182}

Because of the uncertainty associated with HIV testing, and the common perception that a large percentage of positive results will be false positives,\textsuperscript{183} as well as the extreme consequences which even a \textit{false} positive result can have for one's life, many couples can be expected to simply not take the risk. Given that likelihood, heightened scrutiny of mandatory premarital HIV testing seems appropriate. The next section considers whether HIV testing could survive such scrutiny.

2. \textit{Premarital HIV antibody testing under heightened constitutional scrutiny}

Although first imposed well before the Supreme Court's articulation of a right to marry, premarital testing for syphilis and other sexually transmitted diseases seems, superficially at least, to provide a compelling retort to the suggestion that premarital HIV testing could somehow be unconstitutional. If testing for less serious sexually transmitted diseases is apparently not

\textsuperscript{176} See \textit{supra} note 97.


\textsuperscript{179} See Burke & Redfield, 256 J. A.M.A. 347 (1986) (3 laboratories produced 85-100 percent accuracy).


\textsuperscript{181} See Schwartz, \textit{HIV Test}, supra note 178, at 2575.

\textsuperscript{182} Id.

\textsuperscript{183} In its editorial opposing premarital HIV testing, the \textit{New York Times} warned that "perhaps a third" of marriage license applicants "who test positive by both AIDS tests" will have received false positives. Editorial, \textit{supra} note 154, at A30.
subject to serious objection, how could premarital HIV screening be objectionable? Indeed, the view that past public health efforts against venereal disease should provide a model for conducting the fight against AIDS is an influential one.

The argument is, nonetheless, only superficially persuasive. As has been suggested, the governmental interest in testing for syphilis is much clearer; after all, those who test positive can be cured and transmission to their sex partners can be prevented. While this difference in governmental interest is important, in terms of analysis of the testing programs under the right to marry, it is not the most critical one. Although the government may have more reason to want to know whether an individual has syphilis than whether she or he has HIV infection, the information that one tests positive for HIV is far more devastating for the seropositive individual than is a positive result for syphilis. As discussed in the previous section, these devastating consequences support the conclusion that mandatory HIV testing actually burdens the decision to marry, thereby triggering the requirement for a heightened constitutional scrutiny that is not necessarily applicable to statutes requiring testing for other sexually transmitted diseases.

Further, if constitutional scrutiny more searching than the Supreme Court’s traditional, deferential review of public health statutes were applied to premarital venereal disease testing, it is not clear that the testing could be upheld. The cost of premarital syphilis screening has been estimated at $80 million a year or $240,000 per case of syphilis actually detected. Those test results constitute only a tiny percentage of all syphilis cases reported, suggesting that the money spent on such testing could be spent far more effectively in combatting the disease in some other manner. The enormous waste of pre-marital screening for venereal disease has led to the repeal of the test requirements in a number of states.

If, unlike routine premarital screening for syphilis, premarital HIV testing does "directly and substantially" interfere with the right to marry, under

184. Brandt, Four Lessons, supra note 2, at 369.
186. See Brandt, Four Lesson, supra note 2, at 370.
187. See id. at 369.
188. See Note, AIDS Carriers, supra note 7, at 1287 n.78.
189. See supra note 7.
192. See Brandt, Four Lessons, supra note 2, at 369.
193. See Monahan, State Legislation and Control of Marriage, 2 J. FAM. L. 30, 33-35 (1962). Monahan argues that the money spent on premarital sexually transmitted disease screening could be better used to educate individuals about sexually transmitted diseases.
194. See Gostin, supra note 100, at 56; Brandt, Four Lessons, supra note 2, at 369-70.
the reasoning set forth in Zablocki v. Redhail, the testing must be subject to "critical examination." That critical examination imposes two requirements: the testing program must: (1) advance "sufficiently important state interests," and (2) be "closely tailored to effectuate only these interests." HIV testing can only be upheld if it satisfies both of these requirements.

Commentators have disagreed as to whether the the Zablocki two-part test is as rigorous as the "strict scrutiny" the Court has applied in reviewing racially discriminatory laws under the equal protection clause and in some substantive due process cases. The confusion is understandable, given that Zablocki avoided using either the phrase "strict scrutiny" or the precise verbal formulation which has previously been used to describe this test. This ambiguity is arguably intentional, both because the majority opinion may have sought to accommodate disagreements on the Court concerning the appropriate standard of review, and because the author of the Zablocki opinion, Justice Marshall, has repeatedly indicated his impatience with conclusory descriptions of the "level" of judicial scrutiny.

For the purpose of analysis of premarital HIV testing, however, the ambiguity does not produce a significant problem. While there may indeed

196. 434 U.S. at 388.
197. Id.
198. Compare Recent Cases, 47 U. CI. L. REV. 334, 337 (1978) with Note, Constitutional Law, supra note 13, at 691-92 ("critical examination" discussed as less than strict scrutiny and as "functionally equivalent" to strict scrutiny).
199. The phrase was apparently used for the first time in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
202. The choice of the phrase "critical examination," however, may have been intended to signal that strict scrutiny was at play. In using the phrase, Zablocki cited the following passage from Murgia, 427 U.S. 307 (1976), a case refusing to apply strict scrutiny: "Under the circumstances, it is unnecessary to subject the State's resolution of competing interests in this case to the degree of critical examination that our cases under the Equal Protection Clause recently have characterized as 'strict judicial scrutiny.'" Id. at 314. It is possible to read this language as equating the term "critical examination" with "strict scrutiny." See Note, Constitutional Law, supra note 13, at 691 n.64.
203. In Palmore, the Court expressed the test as follows: "[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment of their legitimate purpose." Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).
204. The contemporary Court has been marked by considerable division concerning the appropriateness of expanding strict scrutiny beyond the area of racial discrimination. For another example of an attempt to accommodate such disagreement, compare Reed v. Reed, 404 U.S. 71 (1971) with Frontiero v. Richardson, 411 U.S. 677 (1973) and Craig v. Boren, 429 U.S. 190 (1976) (disagreement over standard of scrutiny for gender discrimination).
be some difference between "a compelling state interest," 206 required under strict scrutiny,207 and an interest which is merely "important,"208 one can safely assume that the state purpose of preventing the spread of AIDS would qualify as either "important" or "compelling."209 As for the closeness of the fit between the state's purpose and the means selected to advance that purpose, it is very difficult to discern any difference between Zablocki's requirement that the means be "closely tailored" and "effectuate only" the governmental objective and strict scrutiny's demand that "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."210

Both Zablocki and the strict scrutiny cases appear to demand that legislation be neither "overinclusive," by infringing on protected rights more broadly than necessary to effectuate the governmental purpose, nor "underinclusive," by failing to truly advance the asserted objective.211 Because premarital HIV testing is both overinclusive and underinclusive, it should not withstand constitutional analysis under the right to marry regardless of which standard is used.

Perhaps it is the wildly overinclusive nature of premarital HIV testing that is the program's most obvious constitutional failing. Dr. Louise McFarland, a physician with the Louisiana Department of Health and Hospitals, conceded in an interview with the New York Times, that "couples planning marriage [are] not generally members of groups with high risk for infection with the virus."212 The prevalence of HIV infection among heterosexuals who are not in any high-risk group has been estimated at 1 in every 10,000 individuals.213 Although statistics are not available for Louisiana, in Illinois premarital testing apparently uncovered only 1 case of infection for every 4,000 people tested.214

Moreover, because the demographics of the epidemic are generally known, those applicants who are in high risk groups are not likely to need the

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207. See, e.g., Palmore, 466 U.S. at 429; Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
208. In Roe v. Wade, 410 U.S. 113 (1973), the Court accepted the premise that a state interest in protecting "the potentiality of life" was "important," id. at 162, while holding that the interest became "compelling" only after viability. Id. at 163.
209. Even in purely economic terms, the toll of the AIDS epidemic is truly catastrophic, with the costs for medical care for people with AIDS having been projected at between $8 and $16 billion by 1991. See Confronting AIDS, supra note 74, at 159.
212. Couples' Test, supra note 155, at A22, col. 1. The New York Times has observed that "[p]eople getting married ... are unlikely to be homosexual or particularly prone to drug abuse." Editorial, supra note 154.
213. See Hearst & Hulley, supra note 81, at 2428.
214. See Couples' Test, supra note 155. Obviously, some individuals seeking marriage licenses are in "high risk groups," accounting for the higher incidence of infection than would be expected if only low-risk individuals married.
additional information supplied by an antibody test result to be aware of their increased risk of infection. While providing these individuals with information concerning alternatives to high-risk sexual behavior can be effective in preventing HIV transmission, providing them with an antibody test result does not necessarily encourage the selection of lower-risk sexual activity. Thus, it appears that a less burdensome means of achieving the goal that premarital testing seeks to achieve is merely to require that marriage license applicants receive educational materials concerning AIDS and HIV, as do the states of California, Hawaii, and Virginia.

Some of the factors that render premarital testing overinclusive also contribute to its being simultaneously unconstitutionally underinclusive. By requiring the diversion of tremendous resources to identify only a tiny handful of new cases of HIV infection, premarital testing “robs funds” from effective programs designed to combat AIDS. The result of this actually impedes the accomplishment of the goal of AIDS prevention.

Premarital HIV screening is underinclusive in another important way as well: a negative test result does not mean that an individual is free of infection. The failure of HIV testing to identify all infectious individuals is the result of several factors, including the occasional use of improper test performance procedures at commercial laboratories. Even when conducted

215. See Note, AIDS Carriers, supra note 7, at 1287-88.
218. See Wilkerson, supra note 153, at A12, cols. 5-6.
220. One critic of premarital testing in Illinois has remarked: “This is the most expensive public health program going.” Wilkerson, supra note 153, at A12, col. 2.
221. It has been estimated that a national premarital testing requirement would identify only about 1200 new “true positives.” Cleary, Barry, Mayer, Brandt, Gostin, & Fineberg, Compulsory Premarital Screening For The Human Immunodeficiency Virus, 258 J. A.M.A. 1757, 1769 (1987). This is less than one percent of all those infected with HIV. See Wilkerson, supra note 153, at A12, col. 3.
222. Editorial, supra note 154.
223. Critics of premarital screening have commented that the program “divert[s] already overworked AIDS specialists” from focusing on “the people most at risk for the disease—drug users and homosexual men.” Wilkerson, supra note 153, at A12, col. 2.
224. See supra note 179 and accompanying text.
properly, however, HIV screening fails to detect about one in 100 individuals who have developed antibody for the virus, as well as all of those whose infection is still in a latent period before antibodies have been produced. Some researchers believe that seroconversion takes much longer when HIV is sexually transmitted. In any case, there may be a small percentage of HIV-infected individuals who take a significantly longer time period than average to produce antibodies.

As important as the inefficacy of the antibody test and the inefficiency of testing low-risk individuals, premarital HIV testing is not "closely tailored" to the goal of AIDS prevention because couples seeking a marriage license are likely to have engaged in a significant period of sexual intimacy before marriage. This practice, while commonplace in American society today, is radically discordant with the view of sexual conduct that motivated and justified the earlier venereal disease testing statutes. One of the most powerful images in the crusade against venereal disease was that of the young man who, having engaged in sex with prostitutes or other "unchaste" women before marriage, would then marry—and infect—an innocent woman. In fact, a major decision concerning the constitutionality of VD testing, Peterson v. Widule, upheld the statute's requirement that men—but not women—

225. See Hearst & Hulley, supra note 81, at 2429. See also Transfusion-Associated T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection From A Seronegative Donor, 35 MORBIDITY & MORTALITY WEEKLY REP. 389 (1986) (currently available screening tests fail to detect HTLV-III/LAV antibody in a minority of infected persons); Salahuddin, Markham, Redfield, Essex, Groopman, Sarangadharan, McLane, Sliski & Gallo, HTLV-III In Symptom-Free Seronegative Persons, II THE LANCET 1418 (Dec. 22, 1984) (of 96 patients with AIDS or AIDS-related complex and healthy individuals at risk for AIDS, four had no detectable antibodies).

226. See Hearst & Hulley, supra note 81, at 2429.


229. Illustrative of the matter-of-fact manner in which premarital sexual activity is now treated is an interview appearing in the New York Times with a Chicago couple seeking a marriage license under Illinois' mandatory HIV testing law. The couple, whose names, ages, and photograph appeared in the story, told the newspaper that "they figured that if they did test positive they would get married anyway" because, as the woman explained, "if he was positive that would mean I had it too." Wilkerson, supra note 153, at A12, cols. 3-4.

230. These events were dramatized in a popular 1913 Broadway play. See Brandt, Historical Perspective, supra note 2, at 38, 305 (citing E. BREIEUX, DAMAGED GOODS (J. Pollak trans. 1913)). For a discussion of the play as representative of social attitudes, see A. BRANDT, supra note 2 at 38, 305 n.5.

231. 157 Wis. 641, 147 N.W. 966 (1914).
submit to testing. The Court cited both "medical evidence" and "what we suppose to be common knowledge" that "the great majority of women who marry are pure, while a considerable percentage of men have had illicit sexual relations before marriage." Therefore, the Court reasoned that "the number of cases where newly married men transmit a venereal disease to their wives is vastly greater than the number of cases where women transmit the disease to their new husbands."

The view that venereal disease was transmitted from husbands to wives (and not from wives to husbands) was connected to two powerful social conceptions: 1) the sexual "double standard" in which premarital sexuality was vehemently condemned for women but tacitly accepted for men; and 2) the rigidly enforced division of women into the "virtuous," who did not engage in sex before marriage, and the "debased," whose sexual activity outside of marriage made them unmarriageable.

However close to (or far from) reality these images may have been at the time that premarital venereal disease testing measures were enacted, they do not depict the social mores of the United States today. Premarital sexual activity, especially by women, has increased significantly in recent decades. This sexual activity often takes place between individuals who plan or hope to marry one another, and often lead to periods of unmarried cohabitation.

If men and women engage in repeated sexual contact before marriage, forcing them to submit to testing for a sexually transmitted disease upon their application for a marriage license does not exhibit a constitutionally close fit with the goal of preventing disease transmission. Moreover, if, as the statistics from Illinois and Louisiana suggest, such testing may discourage the entrance into an officially sanctified, legally monogamous re-

232. Id. at 648, 147 N.W. at 968.

233. Id.


235. One of the primary reasons venereal disease evoked dread and opprobrium was that it was seen as "link[ing] the debased harlot and the virtuous wife in the kinship of a common disease." A. BRANDT, supra note 2, at 32 (quoting P. MORROW, SOCIAL DISEASES AND MARRIAGE vi (1904)).


237. See id. at 168.

238. For support for the proposition that more unmarried couples are living together, see United States Census Bureau, Marital Status and Living Arrangements 2 (1988) (cited in A.P., May 13, 1988); Macklin, Nonmarital Heterosexual Cohabitation, 1:2 MARRIAGE & FAM. REV. I (March/April 1978). Many of these couples view their relationships as possibly or probably leading to marriage. See T. CAPLOW, supra note 236, at 168.

239. See supra notes 154-55 and accompanying text.
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lationship, the intended statutory cure may actually contribute to the spread of the disease.240

B. Prohibition

It has been asserted that a prohibition of marriage, where one spouse “might communicate a serious infectious disease to his marital partner or to a child of the marriage,” would survive even heightened constitutional scrutiny.241 As discussed in the preceding section, the constitutionality of a forced testing program is, in the case of HIV infection, open to substantial doubt. If, however, it is assumed that the testing requirement itself might be constitutional (were HIV infection to increase dramatically among heterosexuals, for instance),242 a separate question is raised by the prohibition of marriages involving individuals testing positive. One state, in fact, has avoided the testing issues discussed above by enacting legislation that simply prohibits marriage by people with AIDS without requiring premarital screening for HIV.243

Prohibition is the most “direct” and “substantial” form of interference with marriage; it would seem, therefore, that heightened scrutiny under Zablocki v. Redhail must apply. Assuming the state’s “sufficiently important” interest in preventing the transmission of HIV, it might well be concluded that a prohibition statute, nonetheless, lacks the required “close tailoring” between means and ends because risk reduction education appears more likely to prevent unprotected sexual activity244 than the absence of a marriage license.245

This analysis, however, ignores the argument that the right to marry should not attach at all when one of the parties is seropositive. Adherence to this argument would render moot any analysis of the extent of the burden or the level of justification. Professor Bruce Hafen, in an influential article concerning family issues and substantive due process,246 has provided a persuasive justification for such an approach. He has argued that courts should consider the social interests served by a relationship whose participants

240. Dr. Renslow Sherer, the chair of the Illinois Governor’s task force that advised against the premarital screening requirement, has said: “One of the chief ways to limit AIDS is faithful monogamy, and here we have a system that discourages that very thing.” Wilkerson, supra note 153, at A12, col. 3.
244. See supra note 216.
245. See supra notes 229, 236 & 238 and accompanying text.
seek enhanced due process protection "as part of the process of determining whether a 'liberty' interest is present in the first place." 247

Under Hafen's approach, the only families "deserving constitutional protection" are those that promote such "ends of a democratic society" as (1) "maximizing the interest of children and society in a stable family environment" and (2) "ensuring a socialization process and an attitude toward personal obligation that maximizes democracy's interest in the voluntary 'public virtue' of its citizens." 248 In effect, this model seeks to reconcile the Supreme Court's more recent cases protecting the individual decision to marry with the earlier cases stressing the importance of marriage to the social order. 249 According to this view, there is a constitutional right to marry, but only for marriages which promote "[t]he basic process of cultural transmission, without which the traditions and fundamental values of the society are not passed on. . . ." 250

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247. Id. at 510. It is not unusual for courts to avoid the consequences of more exacting constitutional scrutiny through the device of determining that, on the particular facts of the case, the analysis is not called for. In the context of the right to marry, the court in Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981), aff'd, 669 F.2d 67 (2d Cir.), cert. denied, 459 U.S. 827 (1982), upheld New York's requirement of parental consent for marriages of persons between 14 and 18 years old, determining that a "rational relation" test was all that was required, 522 F. Supp. at 629, because of the "power to adjust minors' constitutional rights." 533 F. Supp. at 628. In the related area of sexual privacy, in a case upholding the Navy's policy of discharging homosexuals, then-circuit court Judge Anthony Kennedy was willing to assume that the right to homosexual intimacy might be an aspect of the right to privacy, Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980), but concluded that homosexual conduct was entitled to less protection in the context of military service.

A similar approach has been taken, in fact, with respect to the marital rights of persons with AIDS. In Doe v. Coughlin, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987), reconsideration denied, 70 N.Y.2d 1002, 521 N.E.2d 446, 526 N.Y.S.2d 438 (1988), the New York Court of Appeals ruled that the state's corrections department could deny conjugal visits to prisoners with AIDS, even though such visits are permitted other prisoners. Despite the Supreme Court's decision recognizing inmates' right to marry, see Turner v. SaIefy, 107 S. Ct. 2254 (1987), the court of appeals reasoned that the restriction was constitutional under the relaxed protection accorded prisoners' constitutional rights. See Coughlin, 71 N.Y.2d at 52-54, 518 N.E.2d at 539-40, 523 N.Y.S.2d at 786-87. The court did not consider the question of whether the right to marry might be inapplicable because of the prisoner's condition.

249. Hafen, supra note 246, at 558-59.

250. Hafen, supra note 246, at 478.
Implicit within this model is the assumption that procreation and the raising of children are the elements essential to marriage that support its special constitutional status. Thus, according to the procreational model, relationships which would be inappropriate social arrangements for the rearing of children or which, by their very nature, must remain childless, cannot call upon the protection that the Constitution affords marriages.\textsuperscript{251} According to this model, a relationship involving one or more individuals infected with HIV would necessarily fall outside the right to marry. Such a relationship must either find physical expression in sexual activity which is nonprocreative,\textsuperscript{252} or risk the transmission of a life-threatening virus to the couple's offspring.\textsuperscript{253} In either event, the relationship cannot promote the goal of socialization of children.

In like measure, this model permits states to continue to deny marriage licenses to homosexuals\textsuperscript{254} and transsexuals.\textsuperscript{255} It might also preserve the result in \textit{Reynolds v. United States}, if non-monogamous relationships were deemed to be “unstable social patterns that threatened children's developmental environments.”\textsuperscript{256} Such a limitation of the right to marry is also consistent with the earliest cases that applied substantive due process protection to family decision-making.\textsuperscript{257} Those cases explicitly linked the right

\textsuperscript{251} See, e.g., id. at 559. “The extent to which an asserted legal interest may further the ends of a democratic society should be weighed, in the process of constitutional analysis, at the time the Court is determining whether the nature of the interest qualifies it for the protection of heightened scrutiny.” Id. (emphasis added).

\textsuperscript{252} See supra notes 88-96 and accompanying text.

\textsuperscript{253} For a discussion of the perinatal transmission of HIV, see Friedland & Klein, supra note 75, at 1130-31.


\textsuperscript{257} See Hafen, \textit{supra} note 246, at 475; Note, \textit{Developments}, \textit{supra} note 118, at 1281; notes 172-73 and accompanying text.
of parents to direct their children's upbringing to "the high duty to recognize and prepare [them] for additional obligations."\textsuperscript{258}

This limitation of the right to marry permits the Court to withhold analogous due process protection from other living arrangements that do not encompass the attributes deemed essential to constitutionally protected relationships. Thus, a group of college students who decide to live together as a domestic unit have no liberty interest sufficient to overcome the police power of communities to zone for family residential areas,\textsuperscript{259} and the Court is correct in finding "[n]o connection" between the right to marital privacy and a right to engage in homosexual intimacy.\textsuperscript{260} Simply put, the Hafen model asserts that the right to marry is not grounded in some larger concept of "freedom of choice," in personal relationships\textsuperscript{261} but in the function of marriage in the bearing and raising of children; an individual "has a right to marry and establish a home \textit{in order to} bring up children."\textsuperscript{262}

It should be stated at the outset, however, that even if the procreational model provides a valid rationale for encouraging marriage by granting it a preferential status, it does not necessarily follow that the model should also be used to limit the substantive scope of the right to marry. Professor Hafen


\textsuperscript{261.} A number of commentators have assumed this to be the basis of the right to marry. See, e.g., Karst, \textit{The Freedom of Intimate Association}, 89 \textit{YALE L.J.} 624, 625 (1980); Note, \textit{Developments}, supra note 118, at 1311. However, the Supreme Court's privacy cases have continued to emphasize the theme of "family privacy," see generally Eichbaum, \textit{Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy}, 14 \textit{HARV. C.R.-C.L. L. REV.} 361 (1979) (Court favors concept of family privacy over that of autonomy privacy), with the Court giving "almost no encouragement" to those who would read a broader libertarian tradition into the right to privacy. Grey, \textit{Eros, Civilization, and the Burger Court}, 43 \textit{LAW & CONTEMP. PROBS.} 83, 98 (Summer 1980).

\textsuperscript{262.} E. Rubin, supra note 34, at 18 (emphasis added). On a somewhat more extreme view, a real marriage can not exist without the capacity for childbirth. Thus, in Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926), the court dismissed a woman's action for abandonment and spousal support, accepting the defense that the woman had refused to consummate the marriage. The court reasoned that "the mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself a sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring." \textit{Id.} at 81, 150 N.E. at 607.
argues persuasively that the family is "an integral part" of the constitutional system and thereby justifies the special status that the state continues to accord marriage. Jobst, for example, certainly relied on the traditionally important social functions of marriage to conclude that marital status should not be regarded as a suspect classification for equal protection purposes.

To accept Jobst and its reaffirmance in Zablocki, however, is quite different from concluding that the right to marry, which Zablocki read out of the Court's previous privacy decisions, should be limited to only those marriages which advance the procreational model.

Professor Hafen correctly recognized that the preferential treatment of marriage implicates a privacy-based right to marry, since governmental favoring of marriage in some measure interferes with the freedom to decide whether to marry. In distinguishing Jobst, however, Zablocki concluded that such interference simply does not burden the right sufficiently to warrant an application of heightened scrutiny. Nowhere does the Zablocki Court so much as suggest that government regulations that truly do burden the decision to marry might escape heightened constitutional scrutiny if the marriage contemplated was not "traditional" or "procreational."

It should also be noted that the result in Zablocki itself might have been different under a right to marry grounded in a procreational model of marriage. Zablocki overturned a Wisconsin statute that prohibited a marriage license applicant from acquiring a license without court approval if he or she was behind in child support payments. Thus, the statute was arguably aimed at making sure that those entering marriage—with its potential for procreation—had lived up to earlier procreational obligations to provide support.

It should also not be assumed that grounding the right to marry in a rationale different than the procreational model would necessarily demand constitutional protection for homosexual or polygamous marriages. In the view of some courts, the right to marry is not implicated at all when homosexual marriages are legally recognized, since marriage, by

264. See Califano v. Jobst, 434 U.S. 47, 53 (1977). After noting that classifications based on race or religion are highly suspect because they could not rationally justify a difference in social security benefits, the Court stated that "a distinction between married persons and unmarried persons is of a different character." Id. The Court reasoned as follows:

Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families.

265. See supra notes 63-67 and accompanying text.
266. See, e.g., Hafen, supra note 246, at 485.
267. See Drinan, supra note 13, at 364.
268. Hafen, supra note 246, at 509-10.
269. See Zablocki, 434 U.S. at 388-91.
definition, can exist only between a man and a woman. If the definition of marriage is thought to necessarily include the element of "the union of one man and one woman," polygamous arrangements are similarly unprotected. Moreover, even if same-sex or multiple-partner arrangements are conceded to fall within the right to marry, it may be possible to construct an "important state interest" argument for allowing prohibitions on those alternative forms to stand.


272. Reynolds v. United States, 98 U.S. 145 (1878), may be read to support the proposition that "the family in our law is the monogamous family." E. Rubin, supra note 34, at 16. How legitimate or realistic such a definition of marriage is, however, may be open to dispute. See, e.g., Cleveland v. United States, 329 U.S. 14, 25-26 (1946) (Murphy, J., dissenting). In Cleveland, the majority held that the prohibition in the Mann Act, 18 U.S.C. § 398, prohibited the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." Id. at 16. The Act was violated by the transporting of a woman to live in a polygamous marriage. Id. at 18. In a dissenting opinion, Justice Murphy argued that, rather than being in the same category with prostitution or "debauchery," polygamous marriages were nonetheless marriages and therefore qualitatively different:

There are four fundamental forms of marriage: (1) monogamy; (2) polygyny, or one man with several wives; (3) polyandry, or one woman with several husbands; and (4) group marriage. The term "polygamy" covers both polygyny and polyandry. Thus we are dealing here with polygyny, one of the basic forms of marriage. Historically, its use has far exceeded that of any other form. It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.

329 U.S. 14, 25-26 (1946) (Murphy, J., dissenting).

273. The Supreme Court has tended to assume polygamy to be "per se disruptive of the social order." Drinan, supra note 13, at 361 (emphasis added). The Court has even gone so far as to assert that the promotion of polygamy "is, in a measure, a return to barbarism . . . ." Mormon Church v. United States, 136 U.S. 1, 49 (1890). The Court in Reynolds stated the argument as follows:

"According as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a great or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that
If presumably undesirable hypothetical results, such as constitutionally protected polygamy, are not to be given much weight in support of a model for the right to marry based on procreation and childrearing, perhaps it is also unfair to accord too much weight on the other side to the "parade of horribles" such a model might permit. Although the Constitution clearly does not impose the requirement that states may only grant marriage licenses to couples that "have a proved capacity or declared willingness to procreate," it is, nonetheless, unsettling to conclude that a state legislature could decide, with only the deferential rational basis test as a limitation, to proscribe marriage between octogenarians.

Certainly, it would be unfair to dismiss the Hafen model merely on the slim possibility that some legislature would decide to enact such a prohibition; judicial review is not a necessary safeguard when majoritarian sentiment can swiftly extract a remedy from the popularly elected branch. What may be a much more important difficulty with the Hafen model of the "right to marry," however, is that it fails to comport with the way in which a great many individuals, apparently including the Justices of the Supreme Court, view "the essence and purpose of modern marriage."

The fact that most marriages produce children does not make it an essential element to marriage. Most observers would certainly not view the octogenarian couple as being incapable of a real marriage. For many Americans, the chief purpose of marriage is not procreation and childrearing, but the opportunity for sustained affection, companionship, and sexual intimacy.
Childrearing is an important function of many marriages, but the parental role in raising children diminishes markedly after they reach school-age.\textsuperscript{281}

Although courts at times have employed language suggesting otherwise,\textsuperscript{282} the caselaw occasionally has embraced a view of marriage encompassing even necessarily non-procreative relationships. For example, in \textit{M.T. v. J.T.},\textsuperscript{283} a New Jersey appeals court considered whether a postoperative male-to-female transsexual "should be considered a member of the female sex for marital purposes."\textsuperscript{284} In an opinion written by Judge Alan Handler, later appointed to the New Jersey Supreme Court, \textit{M.T.} rejected the view that, "for purposes of marriage, sex is somehow irrevocably cast at the moment of birth,"\textsuperscript{285} asserting instead that, "it is the sexual capacity of the individual which must be scrutinized."\textsuperscript{286} Because the plaintiff in \textit{M.T.} had become "fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy," she "should be considered a member of the

\textsuperscript{281} H. CLARK, \textit{supra} note 5, § 2.1, at 74. The parental role "may diminish further if the current demand for day care centers succeeds in providing an alternative method of caring for small children." \textit{Id.}

\textsuperscript{282} The court in \textit{Baker} stated that the institution of marriage "uniquely involving the procreation and rearing of children" was "as old as the Book of Genesis." \textit{Baker v. Nelson}, 291 Minn. 310, 312, 191 N.W.2d 185, 186 (1971), \textit{appeal dismissed}, 409 U.S. 810 (1972). "The mere fact that the law provides that physical incapacity for sexual relationship shall be grounds for annulling a marriage is of itself a sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring." \textit{Mirizio v. Mirizio}, 242 N.Y. 74, 81, 150 N.E. 605, 607 (1926).


\textsuperscript{284} 140 N.J. Super. at 90, 355 A.2d at 211. The court accepted "as the fundamental premise in this case that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female," \textit{id.} at 83, 355 A.2d at 207, and that "only persons who can become 'man and wife' have the capacity to enter marriage," \textit{id.} at 84, 355 A.2d at 208. The cases invalidating transsexual marriages have done so on the basis that the union in question did not truly involve individuals of the opposite sex. \textit{See, e.g.}, B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974); Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

Perhaps the leading decision is the British case of \textit{Corbett v. Corbett}, 2 All E.R. 33 (P.D.A. 1970). \textit{Corbett} held that "the biological sexual constitution of an individual is fixed at birth (at the latest) and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means." 2 All E.R. at 47. A similar view of transsexuality appears to be dominant in cases outside the marital area. \textit{See, e.g.}, \textit{In re Hartin v. Director of the Bureau of Recs.}, 75 Misc. 2d 229, 232, 347 N.Y.S.2d 515, 518 (Sup. Ct. 1973) (rejecting request of transsexual to amend a birth certificate because sex-reassignment surgery "does not change the body cells governing sexuality"); Anonymous v. Weiner, 50 Misc. 2d 380, 382, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) (refusing to order change in birth certificate because "male-to-female transsexuals are still chromosomally males"). \textit{But see In re Anonymous}, 57 Misc. 2d 813, 817, 293 N.Y.S.2d 834, 838 (Civ. Ct. 1968) (ordering change to a female name for postoperative transsexual).


\textsuperscript{286} \textit{Id.} at 87, 355 A.2d at 209.
female sex" who has "the capacity to enter a valid marriage relationship with a person of the opposite sex." 287

M.T. was not a constitutional decision, but an interpretation of New Jersey's own domestic relations law. 288 It is hard to believe, however, that the logic of Griswold v. Connecticut would permit an inquiry into a couple's "procreative intent or potential." 289 Certainly, Griswold must now stand for at least the proposition that married couples may choose to sometimes engage in sex without intending procreation. 290 Indeed, some commentators have read the case for the broader proposition that procreation and childrearing are no longer regarded as essential attributes of marriage. 291 The opinion's closing language clearly suggests that the intimacy of the marital bond, rather than only its relation to childbirth, underlies the protected status of marriage:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree 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. 292

This language might have initially seemed merely an "afterthought," 293 when Griswold could be read as doing no more than protecting intimate decision-making within an already existing marital relationship. 294 However,

287. Id. at 90, 355 A.2d at 211.
288. See 140 N.J. Super. at 84 n.1, 255 A.2d at 208 n.1. At least one commentator, however, has read the case as supporting the proposition that "the right to marry is not constitutionally conditionable on the procreative ability or intention of the marital partners." See Sheppard, Private Passion, Public Outrage: Thoughts on Bowers v. Hardwick, 40 Rutgers L. Rev. 521, 535 & n.61 (1988).
289. See Note, Developments, supra note 118, at 1282 n.175; see also Baker v. Nelson, 291 Minn. 310, 314, 191 N.W.2d 185, 187 (1971), appeal dismissed, 409 U.S. 810 (1972) (conditioning marriage on procreative capacity or willingness may be "offensive under the Griswold rationale").
290. See Sheppard, supra note 288, at 536 & n.62. In invalidating a statute that forbade the use of contraceptives, Griswold implied that a law "regulating their manufacture or sale" might be constitutional because it would have less "destructive impact" on the privacy of the marital relationship. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). Similarly, the Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), striking down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried couples, purported not to decide whether the right to privacy protected the dissemination of contraceptives. See id. at 452-53. Instead, the case held that, whether or not the right to privacy protected such distribution, access "must be the same for the unmarried and the married alike." Id. at 453. However, in Carey v. Population Services Int'l, 431 U.S. 678 (1977), the court read Griswold "in light of its progeny," including Eisenstadt and Roe v. Wade, to prohibit unjustified "[r]estrictions on the distribution of contraceptives," as well as on their use. Id. at 687.
292. Griswold, 381 U.S. at 486.
293. Karst, supra note 261, at 624.
294. See supra note 47 and accompanying text.
the "afterthought" seems more significant when read in the light of Zablocki's holding that family privacy includes the right to enter a marriage. Rather than surplusage, the closing lines in Griswold seem to point toward a conception of the right to marry as part of a general right of association. According to this view, marriage would be constitutionally protected not because it assists in the inculcation of the society's values into new generations, but because it is an association necessary to the independence and integrity of individuals.

The Supreme Court's refusal in 1986 to strike down state sodomy laws makes it impossible to conclude that all activity which might support or lead to "intimate friendship and love" is protected as an exercise of a "fundamental right." Nevertheless, the Court has made it clear that decisions to enter into and maintain certain intimate human relationships are protected "because of the role of such relationships in safeguarding . . . individual freedom." By including marriage as one such relationship, the Court has given neither an express indication nor a principled basis for concluding that only those marriages capable of procreation should receive such special constitutional recognition.

In fact, one recent Supreme Court case concerning the right to marry suggests the opposite. In Turner v. Safley, the Court rejected the argument

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295. Such an understanding would not be entirely new. As Professor David Richards has observed, one of the Founders, Reverend John Witherspoon, described "a right to associate, if he so incline, with any person or persons, whom he can persuade (not force)—under this is contained the right to marriage." Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. Rev. 800, 844 n.253 (1986) (citing J. WITHERSPOON, LECTURES ON MORAL PHILOSOPHY 123 (J. Scott ed. 1982) (1800)).

296. Richards, supra note 295, at 844-45. In his dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), a case refusing to reach the merits of the same Connecticut statute invalidated in Griswold, Justice Douglas stated that "[o]ne of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State." Id. at 521-22 (Douglas, J., dissenting) (quoting Calhoun, DemocRacy and Natural Law, 5 NAT'L. L.F. 31, 36 (1960)). Thus, allowing the state to intrude upon "the intimacies of the marriage relation" could be "congenial only to a totalitarian regime." Id. at 522.


298. Richards, supra note 295, at 844.

299. Any attempt to afford heightened due process protection to intimate relationships outside of marriage encounters difficult definitional and logistical problems. See Mohr, supra note 44, at 58-59; Hafen, supra note 246, at 486-87.

300. Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984); see also Board of Dirs. of Rotary Int'l v. Rotary Club, 107 S. Ct. 1940, 1945-46 (1987) (certain intimate relationships, including marriage, bearing and raising children, education and cohabitation with relatives, are protected as an aspect of liberty). Even Professor Hafen believes that one of the justifications for protecting marital relationships is their role in "mediat[ing] between the individual and the State, thereby limiting governmental power." Hafen, supra note 246, at 559.

that prison inmates do not have a constitutionally protected right to marry. While recognizing that a prisoner's right to marry, "like many other rights, is subject to substantial restriction as a result of incarceration," the Court stated that "important attributes of marriage remain, however, [even] after taking into account the limitations imposed by prison life." While one of the attributes listed by the Court was that most inmate marriages "are formed in the expectation that they ultimately will be fully consummated," the Court also recognized such elements as "expressions of emotional support and public commitment."

Although the "expectation" that inmate marriages will be consummated upon the prisoners' release from incarceration differentiates these relationships from those of HIV-positive individuals, for whom procreative sexual activity is not a reasonable possibility, this distinction is not persuasive in light of Turner's rationale. Turner seems to imply that the right to marry cannot be constitutionally withdrawn merely because a marriage will not possess all the attributes that mark most marriages as important. In this respect, the Turner decision supports the application of heightened scrutiny to prohibitions on marriage involving HIV-infected individuals.

Finally, when the procreational model is evaluated as it would apply to HIV-infected individuals, the denial of the right that would necessarily result distinctly implies that such a marriage would serve no important social interests. To state this proposition, however, is to discover its absurdity. HIV infection admittedly makes procreative sexual activity unacceptably risky for both the sexual partners and their possible offspring. Moreover, as the disease progresses, the physical devastation that full-blown AIDS may bring can also make all sexual expressions of intimacy difficult. Nonetheless, the experience of a person with AIDS or HIV infection and his or her partner being cared for and giving care, in itself, can be profoundly intimate. To assert that such a relationship does not partake of what is essential in marriage is to lose sight of the nature of a commitment to another for better or for worse and in sickness or in health.

IV. CONCLUSION

In his concurring opinion in Zablocki v. Redhail, Justice Powell warned that heightened constitutional protection of the right to marry would "cast doubt on the network of restrictions that the states have fashioned to govern marriage and divorce." Justice Powell was uncomfortable with such "doubt"
for precisely the same reason that his brethren were moved to inject it into the domestic relations law of the states: the fundamental importance of the marriage relationship.

Marriage is fundamentally important both for society, in fulfilling the function of "cultural transmission," and for individuals, in providing a place of refuge and freedom from society. In Zablocki and Jobst, the Supreme Court sought to safeguard the importance of marriage for both society and individuals. Thus, the Court permitted society to recognize and generalize from the way marriage tends to effect change in the lives of those who marry, as well as to enact reasonable regulations as to the "incidents of or prerequisites for marriage." However, the Court also prohibited society from unduly interfering with an individual's decision of whether and whom to marry.

There are tensions in this framework for a right to marry, and the case of premarital HIV screening puts the framework to the test. The case of HIV testing also helps to clarify the meaning of the elements in the framework: what constitutes a burden on the right to marry, when is such a burden justified, and, most fundamentally, why such justification should be demanded. Should HIV screening programs ever be subjected to judicial review, the meaning and scope of the right to marry will become much clearer.

308. Compare id. at 399 (Powell, J., concurring) (quoting Maynard v. Hill, 125 U.S. 190, 205 (1888)) with id. at 384 (majority opinion) (quoting Maynard, 125 U.S. at 205).
309. See H. CLARK, supra note 5, § 2.1, at 74.
312. See id. at 52-54.
313. Zablocki, 434 U.S. at 386.
314. See supra notes 112-82 and accompanying text.
315. Both Illinois and Louisiana are currently considering repeal of the testing statutes. See supra source cited in note 154.