The Right of Eccentricity

Nicholas Heldt
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Introduction

“Eccentricity” conjures up images of a dowager living in a house filled with cats or perhaps an old man who skips rope in the town square – examples of behavior that deviates from established patterns or accepted usage. Eccentricity implies characters that are harmless and able to care for themselves. This Note’s working definition of eccentricity is aberrant but harmless behavior.

No further definition of eccentricity appears in this Note. The remaining discussion considers whether eccentricity, aberrant but harmless behavior, is entitled to constitutional protection under its own name. This Note is about the right of eccentricity and the converse limit on the state’s power to control such behavior.

Justice Stewart stated the issue: “One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric.” Justice Stewart assumed that the answer was no. In search of the reasons for that answer, this Note explores the principles underlying the eighth amendment ban on cruel and unusual punishments, the principles underlying the first amendment freedoms of speech and assembly, and the principles underlying the equal protection clause and due process clause of the fourteenth amendment: the first amendment ideal of free and frequent dissent and expression of unpopular notions in whatever peculiar personal idioms; the fourteenth amendment struggle to treat all persons alike, even those most disliked; the eighth amendment goal to treat all with dignity even as society most righteously and indignantly condemns; and the often forgotten fourteenth amendment stricture that to act at all, government must have a reason, sometimes must even have a good one.

These principles, taken together, suggest that government may not control eccentric behavior. These principles, however, are not ordinarily taken together. They underlie independently operating amendments. Nonetheless, when presented with facts involving state control of aberrant but harmless behavior in O’Connor v. Donaldson, the United States Supreme Court borrowed principles

2. Id. “[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” Id. at 576.
underlying the first amendment as though incorporated in the due process clause, even though no first amendment interest was implicated in the case. The first amendment principles were embraced in the "right of liberty."³

When the liberty interests of schoolchildren were implicated by classroom spanking in *Ingraham v. Wright*,⁴ the Supreme Court borrowed principles underlying the eighth amendment as embraced in the "liberty interests" of the fourteenth amendment, while simultaneously holding that the eighth amendment did not directly apply to the classroom spanking.

Many instances when courts have applied principles borrowed from constitutional provisions not directly applicable to the case display a factual similarity. Each instance involved the control of aberrant but harmless behavior. Recognition of that consistency suggests the following rule: when the purpose of a governmental action or regulation is to circumscribe aberrant behavior, that behavior must endanger society to justify its control.

Before exploring what the borrowing in *O'Connor* and *Ingraham* might mean, this Note examines the principles of the eighth amendment. Although the eighth amendment is not always applicable to problems involving control of eccentricity, the concerns confronted under the eighth amendment also frequently arise under the fourteenth amendment. These concerns expressed by the Court during the arduous task of defining the power to punish are of equal concern whenever government seeks to control individual liberty.

**Traditional Eighth Amendment Protection**

Like the due process clause of the fourteenth amendment, the cruel and unusual punishment clause offers both substantive and procedural protections. The clause prohibits excessive punishments, limits the types of punishments that may be imposed, and limits what can be made criminal and punishable.⁵ The clause also guarantees that no punishment may be arbitrarily or capriciously applied.⁶ Each of these protections is discussed separately below.

**Excessive Punishments**

Early in this century a minor Philippine official was convicted

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3. Id. at 573.
of falsifying official documents in the amount of 616 pesos. He was sentenced to pay a fine of 4,000 pesetas and to serve fifteen years of Cadena Temporal. The Cadena consisted of hard, painful labor while the prisoner was chained at the ankles and wrists, loss of marital authority, and loss of parental and property rights for the term of confinement. After release, the offender was perpetually barred from public office and from voting and was subject to surveillance and reporting for life.

While expressing deference to the power of the legislature to define crimes and their punishment, the United States Supreme Court held in *Weems v. United States* that because even the minimum sentence prescribed for the offense, twelve years of Cadena, was so out of proportion to the crime, no sentence imposed under that law could ever be constitutional. The test the Court used to determine excessiveness was not precisely articulated in the case but was an amorphous application of humane justice aided by comparison with punishments imposed for similar offenses in other civilized jurisdictions.

**Prohibited Punishments**

In 1944 twenty-year-old private Albert Trop escaped from the Army stockade at Casablanca. He voluntarily returned the following day, cold and hungry. Trop was convicted by general court martial of wartime desertion and sentenced to three years hard labor, forfeiture of pay and allowances, and a dishonorable discharge. Eight years later, Trop applied for a passport which was denied on the grounds that he had lost his citizenship for wartime desertion. The Supreme Court held in *Trop v. Dulles* that the federal government may not punish a person by divesting his citizenship. Citizenship may be lost only by a voluntary renunciation. In the exercise of its power to act in the field of foreign affairs, Congress may recognize certain language or conduct as a voluntary renunciation when the language or conduct interferes with or impedes Congress’ solution of international problems.

*Trop* must be considered along with its companion case, *Perez*

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8. *Id.* at 366.
9. *Id.* at 382.
10. The test of excessiveness has been given considerable attention by the United States Supreme Court in *Coker v. Georgia*, 97 S. Ct. 2861 (1977), and by the California Supreme Court in *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
12. *Id.* at 91-93.
v. Brownell.\textsuperscript{13} In \textit{Perez}, the Court upheld the expatriation of a citizen for voting in a foreign election, basing its decision on Congress' power to control active participation in foreign political elections to prevent national embarassment. If necessary, the nation may disown one of its own. The issue in \textit{Perez} and \textit{Trop} was whether the expatriations were necessary in the furtherance of national foreign policy. If not, the effect is punitive, and loss of citizenship is a punishment forbidden by the eighth amendment. Any punitive measure imposing expatriation is unconstitutional;\textsuperscript{14} however, when a measure has a valid regulatory purpose, as in \textit{Perez}, it is constitutional despite the eighth amendment.

\textit{Trop} is important for two reasons. First, certain punishments, among them expatriation, are forbidden in all circumstances by the eighth amendment.\textsuperscript{15} Second, the eighth amendment applies to statutes enacted for punitive purposes even when denominated "civil" or "regulatory": the label does not matter; the purpose is determinative.\textsuperscript{16}

Status Offenses

In 1962 in \textit{Robinson v. California}\textsuperscript{17} the Supreme Court decided that a narcotics addict may not be punished simply for being an addict. Lawrence Robinson was arrested by two Los Angeles police officers who observed track marks on his arms. At trial the jury was instructed that it was a misdemeanor to be addicted to the use of narcotics. The Supreme Court held that any punishment imposed upon a mere status was cruel and unusual,\textsuperscript{18} stating, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."\textsuperscript{19}
The Robinson prohibition against status crimes does not apply whenever the crime requires an act, however slight. In Powell v. Texas, a chronic alcoholic was convicted of public drunkenness. The Supreme Court upheld the conviction against an argument that it punished a status, finding that an alcoholic need not be in public places and that his being there was a punishable act even though the alcoholic might have no control over his drunkenness.

Being in a specified place is an act for the purposes of the eighth amendment according to Powell. Being in a specified place is not an act for the purpose of the due process clause of the fourteenth amendment according to Lambert v. California. In Lambert, appellant was convicted of being in Los Angeles without registering as a felon. The Court noted that violation of the ordinance was "unaccompanied by any activity whatever, mere presence in the city being the test." Due process requires notice of the duty to register under such circumstances. Thus, both the eighth and fourteenth amendments afford protection against punishment of status offenses but differ in what each will recognize as a status.

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21. Powell v. Texas is a plurality decision. The Court divided into three camps: four justices, Marshall, Warren, Black, and Harlan in the plurality; four justices, Fortas, Douglas, Brennan, and Stewart in dissent; and Justice White the swing vote in the middle. An additional concurring opinion was filed by Justice Black of the plurality, joined by Harlan. At least eight justices found that an act was subject to punishment under the statute. The principal plurality opinion stated, "The state of Texas . . . has not sought to punish a mere status, as California did in Robinson . . . ." 392 U.S. 514, 532 (opinion by Marshall, J.). The dissenting opinion remarked, "The statute covers more than a mere status." 392 U.S. at 567 (Fortas, J., dissenting). In addition, the separate concurrence by Justice Black noted, "If an intoxicated person is actually carried into the street by someone else, 'he' does not do the act at all, and of course he is entitled to acquittal." 392 U.S. at 540 n.1 (Black, J., concurring). Only Justice White's position was unclear. Justice White said, "If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment . . . I would not trivialize that concept by drawing a nonexistent line between the man who appears in public drunk and that same man five minutes later who is then 'being' drunk in public." 392 U.S. at 550 n.2 (White, J., concurring).

The Court split over whether Robinson recognized a constitutional defense when the acts punished were done involuntarily or were done under the compulsion of a disease. On that issue the plurality of four justices concluded there was no constitutional defense, the dissent of four justices concluded there was a constitutional defense, and the swing opinion by Justice White concluded there might be a constitutional defense but that compulsion sufficient to raise the defense was not established by the record in the case.

23. Id. at 229.
24. Id.
Arbitrarily Imposed Punishment

In the 1972 death penalty case, *Furman v. Georgia*, the Supreme Court held that statutory schemes vesting the jury with the power to impose the death penalty in its discretion, without providing criteria to guide the jury in deciding which cases merit death, violate the eighth amendment. Arbitrary infliction of the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."27

The year before *Furman*, the Court had sustained the constitutionality of the death penalty in *McGautha v. California*, stating that use of the death penalty was not prevented by any provision of the Constitution.28 That *Furman* overruled *McGautha* is not entirely clear. Justice Stewart's concurring opinion in *Furman* noted that the grant of certiorari in *McGautha* had been limited to claims under the due process and equal protection clauses of the fourteenth amendment,29 implying that on those issues *McGautha* would still be followed. That conclusion was shared by Justice Rehnquist, who thought *McGautha* was not abandoned until the decision in *Woodson v. North Carolina*,30 which invalidated a mandatory death sentence because it did not permit consideration of individual factors in fixing the penalty.

The holding in *McGautha*, based on the fourteenth amendment alone, is distinguishable from that in *Furman*, based on the eighth and fourteenth amendments, but the result provokes thoughts of a separate equal protection standard contained in the eight amendment. The only consistent theme of the five opinions of the *Furman* majority is the arbitrariness and discrimination of unguided use of the death penalty.31 The equal protection clause was meant to cure the frailty of discrimination. Yet in *McGautha*, that frailty was not sufficiently offensive to the fourteenth amendment to require invalidation. In *Furman*, that frailty was found offensive to the eighth amendment. Justice Douglas, concurring in *Furman*, saw "increasing recognition of the fact that the basic theme of equal protection is

26. The Court's holding was presented in a one paragraph per curiam decision. Each of the nine Justices wrote a separate opinion, five concurring, four dissenting, totalling 232 pages. *Id.*
27. *Id.* at 309 (Stewart, J., concurring).
29. 408 U.S. 238, 310 n.12 (1972) (Stewart, J., concurring).
implicit in 'cruel and unusual' punishments.\textsuperscript{32} If the equal protection clause of the fourteenth amendment does not require invalidation of the statutes in \textit{McGautha} but the eighth amendment does require invalidation in the face of an assault similar to equal protection arguments, the question arises as to what the eighth amendment requires that the fourteenth does not? The difference may simply be the degree of scrutiny the Court is prepared to focus on the issue under each amendment.

These eighth amendment issues parallel and frequently arise upon the same facts as fourteenth amendment issues: the arbitrariness issue in \textit{Furman}, the regulatory-punitive distinction in \textit{Trop}, and the status crime issue in \textit{Robinson}. These issues arise again in \textit{O'Connor v. Donaldson} and \textit{Ingraham v. Wright}, both purportedly due process cases, where protection of liberty interests seemingly rests, in part, upon the principles applied under the eighth amendment.

The Right to Treatment and \textit{O'Connor v. Donaldson}

Prior to 1975 a few lower court decisions relying on the eighth amendment and \textit{Robinson v. California}\textsuperscript{33} had ruled that the mentally ill could not be held for long periods of time without treatment. The prohibition against punishing status offenses established by \textit{Robinson}, however, does not strictly apply in cases of civil commitment because no conviction or punishment for any crime is involved. By an implicit analysis along the lines used in \textit{Trop v. Dulles}, finding a punitive purpose underlying the civil commitment when that commitment was unaccompanied by any treatment, courts applied the eighth amendment and held \textit{Robinson} forbade the incarceration because it was punishment for a status offense.\textsuperscript{34}

Through the application of \textit{Trop} and \textit{Robinson}, the eighth amendment simply forbids the incarceration, \textit{sub nomine} commitment. Under the \textit{Trop} analysis, if treatment is provided the effect of the incarceration is no longer punitive. In that case, the state does not seek to punish the individual but to aid him. Therefore, there is no punitive purpose, the eighth amendment does not apply at all, and

\textsuperscript{32} 408 U.S. 238, 249 (Douglas, J., concurring).
the incarceration is permissible.\textsuperscript{35} The logical result is a rule permitting commitment with treatment and forbidding commitment without treatment.\textsuperscript{36}

Advocates of the right to treatment take one further step in this analysis, urging that courts order treatment instead of ordering release from confinement. Under \textit{Trop} and \textit{Robinson}, it is commitment which is forbidden. Lack of treatment is merely the factor under \textit{Trop} that causes the \textit{Robinson} rule to apply. Because the real factual distinction between permissible and impermissible commitment for mental illness is treatment, the state can remedy an impermissible commitment by offering treatment. Therefore, advocates of the right to treatment have asserted the court can also cure the constitutional infirmity by ordering treatment.\textsuperscript{37} The power of courts to provide remedies, however, is not coextensive with the remedial power of state executive or legislative authorities. Even when the court has the power to remedy an intolerable confinement by ordering treatment, there is yet a great chasm to cross before reaching the proposition that treatment rather than release is the constitutionally mandated remedy. The Bill of Rights is ordinarily understood as a document telling government what it may not do, not what it must do.

The analysis that forbids commitment without treatment under the eighth amendment and \textit{Robinson} bears a striking resemblance to due process analysis.\textsuperscript{38} The essential hurdle in the eighth amendment approach is whether the amendment applies at all. Applicability of the eighth amendment depends on whether a punitive purpose is ascribed to the commitment. Whether a punitive purpose is found depends on whether the state acted to achieve a legitimate purpose and whether the means chosen operated to achieve that purpose.\textsuperscript{39} This analysis also is used under the due process clause to determine the proper sweep of the state’s police power.

Most cases that discuss the state’s police power generally accord it an all pervasive expanse limited only when palpably invading fundamental rights. The general contours of the police power were de-

\begin{itemize}
  \item \textsuperscript{36} See, Note, \textit{O’Connor} v. \textit{Donaldson}: The Supreme Court Sidesteps the Right to Treatment, 13 CAL. WESTERN L. REV. 168 (1976).
  \item \textsuperscript{37} See Birnbaum, \textit{The Right to Treatment}, 46 A.B.A.J. 499 (1960).
  \item \textsuperscript{39} For an application and discussion of this type of analysis in another context, see, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Clark, \textit{Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis}, 60 MINN. L. REV. 379 (1976).
\end{itemize}
scribed in *Goldblatt v. Hempstead*, which listed three factors that must appear before a state is justified in interposing its authority: (1) the interests of the public must require such interference, (2) the means must be reasonably necessary to accomplish the purpose, and (3) the requirements must not be unduly oppressive.

When the Supreme Court was asked to consider commitment for mental illness in *O'Connor v. Donaldson*, it approached the problem in terms of due process rather than in terms of cruel and unusual punishment. In *O'Connor*, an inmate of a state mental facility sued for damages for his wrongful detention, alleging that he was able to function in society, was harmless, and had been given no treatment. The Court held that under such circumstances the state was powerless to confine him. No specific constitutional provision was relied on by the Court; instead it noted the “Right to Liberty.” Justice Stewart’s opinion for the Court asked:

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.

The question left unanswered by that explanation is: Why not? The answer could lie in *Robinson*, confinement of nondangerous, nonhelpless, nontreated mentally ill is punishment imposed upon the status of being different. The eighth amendment, however, was not raised or considered in *O'Connor*. Apparently the *O'Connor* right to liberty finds its source in the due process clause. Under the *O'Connor* right to liberty the incarceration is not in itself intolerable; persons are incarcerated every day without offending the Constitution. It is the purpose for the incarceration that is impermissible. In terms

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41. 422 U.S. 563 (1975).
42. The facts of *O'Connor v. Donaldson* are startling. At age 48 Kenneth Donaldson was placed under civil arrest and three days later committed pursuant to his father’s request for a sanity hearing. For a description of the hospital conditions see Donaldson v. O’Connor, 493 F.2d 507, 510-12 (5th Cir. 1974). Donaldson’s confinement lasted fifteen years. During that time, “Donaldson made fourteen separate attempts before various Florida and federal courts, and four before the United States Supreme Court to obtain release on the grounds that he was not dangerous, did not require institutionalization, and was receiving inadequate treatment. All eighteen attempts failed.” Note, *Donaldson, Dangerousness, and the Right to Treatment*, 3 Hastings Con. L.Q. 599, 601 (1976) (footnotes omitted).
43. 422 U.S. 563, 573 (1975).
44. *Id.* at 575.
of due process analysis, the state had no legitimate purpose for acting under the facts of the case.

In other due process cases, a general state purpose to promote aesthetics, the tone of the community, or the quality of life is sufficient to sustain state activity. Surely, such purposes are served by regulation of the "physically unattractive or socially eccentric;" yet the Court finds those justifications inadequate in O'Connor. The close scrutiny of the commitment in O'Connor ordinarily is reserved for cases presenting an invasion of some fundamental interest. The difference between due process cases in which general purposes to promote the tone of the community are an adequate justification for government activity and a case such as O'Connor in which these general purposes are inadequate justification cannot be the right to liberty expressed in the due process clause. That right applies equally in both types of cases and therefore explains neither the different degrees of scrutiny nor the different results. The right to liberty referred to in O'Connor must embrace more than the liberty expressed in the due process clause to justify the strict scrutiny.

As authority for the proposition that "mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," O'Connor cited several cases, among them a case involving freedom of expression, a case involving freedom of association, and a case involving equal protection of the law. The first case, Cohen v. California, reversed a conviction for disturbing the peace for wearing a jacket bearing the words "Fuck the Draft." The United States Supreme Court found the conviction an invasion of first amendment freedom of expression, remarking:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in

46. See, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). These cases involved regulation of adult movie theatres displaying expression protected by the first amendment. Even with the added weight of the first amendment on the side of the regulated individuals, a general purpose to promote the tone of the community was enough to tip the due process scales in favor of the state.

47. At least one other writer has noted the strict scrutiny and what looks like a fundamental interest's being protected but suggests that this scrutiny derives from the equal protection clause. Note, Donaldson, Dangerousness, and the Right to Treatment, 3 Hastings Con. L.Q. 599, 611 (1976).


other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.  

The second case cited by O'Connor was Coates v. City of Cincinnati, which reversed a conviction of student demonstrators for an "annoying" public assembly. Finding an invasion of the first amendment right of assembly because "annoying" was not sufficiently defined, the Court stated:

The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

What either of these cases has to do with the O'Connor right to liberty is difficult to see, but they do suggest that the Court was concerned with protecting eccentricity from the intolerance of the majority. This concern is clearer in a third case cited by O'Connor. In United States Department of Agriculture v. Moreno, the Court declared unconstitutional a provision of the Food Stamp Program that made households containing unrelated persons ineligible under the program. The Court stated:

[If the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group can-

50. Id. at 21. Street v. New York, 394 U.S. 576 (1969), also cited by O'Connor, is to the same effect as Cohen. Street was convicted of publicly defying or casting contempt upon an American flag by words. The Supreme Court enumerated four conceivable governmental interests which might have justified punishment, among them, "an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag . . .

52. Id. at 615-16.
53. 413 U.S. 528 (1973).
not constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."54

These cases indicate that the thrust of O'Connor's right to liberty was state meddling for a specifically illicit purpose — to stifle social deviations offensive to the majority. In these cases, mere offensiveness was no concern of the state. In *Cohen* and *Coates* the offensiveness was no concern of the state because of the specific proscriptions of the first amendment. In *Moreno*, a purpose specially to affect an offensive group prompted the Court to invalidate a facially nondiscriminatory statute under the equal protection clause because lifestyles are not a legitimate governmental concern. In *O'Connor*, social eccentricity was no concern of the state, wholly apart from the more specific constitutional prohibitions presumably necessary to the results in the cases upon which *O'Connor* relied.

This Note's explanation of the result reached in *O'Connor* is that the Constitution protects the fundamental interest of every individual to be let alone: when a court finds that the purpose of state regulation is to stifle or interfere with an individual because he is different, because he is eccentric, or because his behavior is offensive to the community, the state must show a compelling or overriding interest, apart from the offensiveness itself, to sustain the regulation. *O'Connor* called this fundamental interest the "Right to Liberty." To avoid confusion with the liberty expressed in the due process clause of the fourteenth amendment, which is not the same, in this Note this fundamental interest is called "the right of eccentricity."55

The right of eccentricity springs from various constitutional provisions or exists within the penumbra of various constitutional provisions, as did the right of privacy recognized by *Griswold v. Connecticut*56 and its progeny. The right of eccentricity is rooted in freedom of expression, freedom of association, equal protection of the law, due process of law, freedom from cruel and unusual punishment, and the ninth amendment's reservation of rights to the people. Explicit recognition of the right would be a first step toward principled decisionmaking when these interests are asserted.

To illustrate how the right of eccentricity can draw vitality from such diverse constitutional provisions, this Note presents a series of haircut and shave cases, involving similar factual settings contested under diverse constitutional provisions.

54. *Id.* at 534-35.

55. For discussion of the historical meaning of "liberty" appearing in the due process clause of the fourteenth amendment, see text accompanying notes 98-104 *infra*.

56. 381 U.S. 479 (1965).
Haircut and Shave Cases

A series of cases dealing with haircut and shaving rules illustrates an evolution in the analysis that various lower courts have given to the same type of facts involving an individual’s right to be different, even though the regulations were attacked under a diversity of constitutional provisions — the first amendment, eighth amendment, or fourteenth amendment. In many of the cases the courts recognized something like a right of eccentricity, though it travelled incognito. The sum of these cases demonstrates that explicit recognition of a right of eccentricity would aid in consistent decisionmaking.

In Brown v. Wainwright, George Brown, a convict in a Florida state prison, asserted that he is a “demi-god, ‘an offspring of a God and Mortal,’ and that his mustache is a gift from his creator. He states that he is an established religion, and to require him to shave is an infringement upon his religious liberties as guaranteed by the Constitution.” The Fifth Circuit Court of Appeals ignored the assertion of religious freedom and summarily dismissed the appeal, stating, “For personal cleanliness and for personal identification under prison conditions, the rule appears to be neither unreasonable nor arbitrary.”

In Brooks v. Wainwright, another Florida prisoner asserted that he had a “divine revelation” in which the “Lord God of Israel” commanded him to follow the laws of Moses, among which were Leviticus 19:27 and Numbers 6:5, and that therefore he should not be made to shave or cut his hair. The district court rejected his claim as frivolous. The Fifth Circuit was not much more generous: “Here, as in Brown, the haircut and shave regulations promote ‘cleanliness and . . . personal identification,’ so that, regardless of the source of the religious belief, the state has not enforced an unreasonable and arbitrary regulation.”

In Blake v. Pryse, John Blake, appearing pro se, made the gen-

58. 419 F.2d 1376 (5th Cir. 1970).
59. Id. at 1376.
60. Id. at 1377.
61. 428 F.2d 652 (5th Cir. 1970).
62. “Ye shall not round the corners of your heads, neither shalt thou mar the corners of thy beard.” Leviticus 19:27 (King James). “All the days of the vow of the separation there shall no razor come upon his head: until the days be fulfilled, in the which he separateh himself unto the Lord, he shall be holy, and shall let the locks of the hair of his head grow.” Numbers 6:5 (King James).
63. 428 F.2d 652, 653 (5th Cir. 1970).
64. 315 F. Supp. 625 (D. Minn. 1970).
eral assertion that hair and beard rules subjected him to "personal value judgments" of prison officials and that forcible shaving was cruel and unusual corporal punishment. The government argued that "[w]here many men live together in close proximity, unusual hairstyle is offensive to some of the inmate population . . . ." Against both the eighth and fourteenth amendment assaults, the court held that the rules were reasonably related to hygiene and identification and were within the discretion of the prison officials.

In Brown and Brooks, both of which raised a recognized fundamental interest under the first amendment, and in Blake, which raised an interest almost precisely in terms of eccentricity, the courts deferred to the judgment of the prison authorities that legitimate interests were promoted. This deference may be attributable to what has sometimes been called the "hands-off doctrine," whereby courts hesitate to interfere with the conduct of prisons. Yet the hands-off doctrine does not always prevent an intrusion by the courts.

In 1971, Bobby Seale and Ericka Huggins were held in a Connecticut facility in lieu of bail. Neither had been convicted of any offense. While being held, Seale was placed in "administrative segregation" for refusing to shave off his beard. The court held that there was a federally protected right to wear a beard under the fourteenth amendment and used a balancing test to determine the validity of the purported regulation. "A test of this type permits the court to balance the need for the regulation against the claimed constitutional right asserted by the inmate and the degree to which it has been infringed by the regulation in question." The only justification for the regulation asserted by the prison authorities in Seale v. Manson was the control of vermin. The court found that there was no vermin problem at the facility at the time and therefore concluded that the regulation was unreasonable. One factor influencing the result was the fact that Seale was being held only in lieu of bail, was therefore presumed not guilty, and was not subject to the same degree of intrusion as those convicted.

Determining the reasonableness of the intrusion by whether the person contesting it had been convicted can find little support in reason and implies an additional punishment not authorized under the sentence. Thus when Michael Rinehart, an inmate in an Iowa facility, asserted that the haircut rules invaded his constitutional

65. Id. at 626.
68. Id. at 1379.
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rights, the court in Rinehart v. Brewer\(^69\) was prompt to recognize his right to govern his own appearance but held that the right could be infringed "to the degree necessary to effectuate legitimate and pressing state concerns."\(^70\) Like the court in Seale, the court in Rinehart noted: "The true constitutional balance leaves the state free to deal effectively with any contingency. The only restraint is that it may not choose means which too broadly stifle fundamental rights when less restrictive alternatives are reasonably available."\(^71\) Unlike the court in Seale, the court in Rinehart sustained the regulation in part because prison authorities had asserted the need for the measure to aid in identification of inmates.\(^72\)

These last two cases are unlike the ordinary fourteenth amendment case. In Seale and Rinehart, the court independently examined the purported justification for the regulations, rather than deferring to the prison authorities. Although prison authorities claimed the need to control vermin in Seale, the court independently found no vermin problem at the jail and discarded that as a justification. The authority promulgating the regulation apparently has the burden of justifying it. Failure to raise the need for prisoner identification in Seale prevented the court’s sustaining the rule on that justification. Furthermore, unlike the ordinary due process case, even when the regulation is imposed for a real and legitimate reason and is formulated so as to achieve the purpose, the regulation may yet fail if it is unnecessarily broad or unduly intrusive upon the individual.\(^73\)

70. Id. at 111.
71. Id.
72. Id. at 113.
73. There is a remarkable similarity between recognition in Rinehart of the fundamental right to govern one’s own appearance and the limitation in O’Connor upon government’s power to control based on physical appearance. Rinehart builds upon a series of cases arising under the first, eighth, and fourteenth amendments to reach its due process result. O’Connor relies on the first and fourteenth amendments, and there was an eighth amendment approach available to reach its due process result. O’Connor called the protection it applied the “right of liberty.” When a haircut and shave case was presented to the United States Supreme Court in the term following O’Connor, the Court referred to the “liberty interests” of the individuals.

In Kelley v. Johnson, 425 U.S. 238 (1976), New York police officers contested the police department’s haircut and shaving rules. The action was first dismissed in the district court but was reversed and remanded by the Court of Appeals for the Second Circuit for findings upon the relationship between the regulation and the legitimate interest it sought to promote. On remand, the district court ruled that the department failed to carry its burden and found for the policemen. Without a justifying public need, the regulations imposed “[u]nfornity for uniformity’s sake.” The court of appeals affirmed without opinion. The United States Supreme Court reversed, based upon the special circumstance of the government’s relationship to its own employees. In dicta, the Court, per Justice Rehnquist, remarked, “[T]he due process
This degree of scrutiny comports with that exercised in *O'Connor*. Yet the incarceration itself does not impinge a fundamental right and prompt the closer scrutiny. The closer scrutiny is prompted by the subject matter of the regulation, personal liberty, just as in *O'Connor* it was not the incarceration, but the reason for the incarceration, to confine those whose ways were different, that prompted the close scrutiny. Just as in *O'Connor* there was an alternate route through the eighth amendment to the result reached, there is an alternate approach to the haircut cases through the eighth amendment. This approach was used in *Ho Ah Kow v. Nunan*.

In 1879 a California statute declared that any person found sleeping or lodging in a room or an apartment containing less than five hundred cubic feet of space for each person occupying it was guilty of a misdemeanor. *Ho Ah Kow* was convicted and sentenced to pay a ten dollar fine or spend five days in the county jail. A San Francisco ordinance provided that all males admitted to the county jail were to have their hair cut within an inch of the scalp. After his queue was cut off under this regulation, *Ho Ah Kow* sued the jailer for damages, asserting that he was subjected to the additional punishment of disgrace. The court agreed: “[T]he ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as 'a cruel and unusual punishment.'”

The court looked behind any hygiene purpose to find that the statute was notoriously intended to act with special force upon Chinese.

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(cursor)
The court also found that the degree of intrusion upon the individual outweighed any valid regulatory purpose. Being unjustifiable as a regulation, it was treated as a punishment, and as a punishment it was impermissible because it was not authorized for any offense committed and because it was excessive.

Ho Ah Kow disregarded the regulatory arguments asserted on behalf of the haircut ordinance and examined the motive behind it much as Trop examined the regulation working the forfeiture of citizenship.76 In a note to Ho Ah Kow, Judge Cooley said:

There is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may the wearing of curls by a lady or of a mustache by a beau, and the state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with what is no concern of the state, and therefore invades private right.77

Nearly 100 years after Ho Ah Kow, a case reached the Supreme Court presenting an eighth amendment attack on a regulatory measure that permitted invasion of personal liberty. In Ingraham v. Wright,78 the Court did not declare what state concerns might justify spanking school children. The Court did not discuss whether the spankings were punishment or were only regulatory invasion of personal liberty. Instead, “spankings” were less offensively labelled “impositions.” The Court then declared that “impositions outside the criminal process” enjoyed no eighth amendment protection. According to Ingraham, “impositions” must be analyzed under a constitutional “liberty interest.” As in O’Connor, that liberty interest seems to draw its substance and meaning from many constitutional sources.

**Ingraham v. Wright**

In Ingraham, the Supreme Court was asked to apply the protec-

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77. 12 F. Cas. at 254 n.2. The opinion in Ho Ah Kow was written by Stephen J. Field, Justice of the United States Supreme Court, while riding circuit. According to one contemporary, John Norton Pomeroy, Jr., it was “largely as a result of the unpopularity of the decision in the Chinese Queue Case” that Justice Field failed to receive the Democratic presidential nomination. Pomeroy, Stephen Johnson Field, in VII GREAT AMERICAN LAWYERS 36 (W. D. Lewis ed. 1909). Ranked with Ho Ah Kow on the scale of unpopularity was Field’s opinion in the test oath case, Cummings v. Missouri, 71 U.S. 277 (1866), quoted in text accompanying note 98 infra.
tion of the eighth amendment to the spanking of school children. The Court refused, holding per Justice Powell, that the cruel and unusual punishment clause does not apply to "impositions" imposed outside the criminal process. The Court did not expressly overrule any previous decision. Instead, the Court stated that no Supreme Court decision had ever applied the eighth amendment outside the criminal process. In an opinion written by Justice White, four members of the Court vigorously dissented from this confinement of the eighth amendment. The dissenter argued that whether the eighth amendment applies to a given punishment should not depend on the label under which it is imposed but should depend on the purpose for which it was imposed. This analysis was employed in Trop and was an essential step in the argument for a right to treatment under the eighth amendment.

To this approach the majority responded, "Putting history aside as irrelevant, the dissenting opinion of Mr. Justice White argues that a 'purposive analysis' should control the reach of the eighth amendment. There is no support whatever for this approach in the decisions of this Court."

Not only must this statement by the majority rely on a distorted reading of Trop, but it also ignores the Court's previous recognition in United States v. O'Brien of the "purposive analysis" used in Trop. In O'Brien a draft card burner asked the Court to examine the purpose of the draft regulation. The Court declined but recognized that inquiry into purpose was appropriate to determine if a statute imposed a punishment. The Court noted that inquiry into purpose was employed chiefly in bill of attainder cases but also observed:

Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive... The spankings of James Ingraham and Roosevelt Andrews were not the instructive sort in which the pain rapidly fades leaving only an eloquent and remembered lesson concerning the seriousness of the children's particular wrongdoings. "Because he was slow to respond to his teacher's instruction, Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for 11 days. Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week." Id. at 1405 (footnotes omitted).

"In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable." Id. at 1410.

79. The spankings of James Ingraham and Roosevelt Andrews were not the instructive sort in which the pain rapidly fades leaving only an eloquent and remembered lesson concerning the seriousness of the children's particular wrongdoings. "Because he was slow to respond to his teacher's instruction, Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for 11 days. Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week." Id. at 1405 (footnotes omitted).
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81. Id. at 1419 (White, J., dissenting).
83. See text accompanying notes 33-36 supra.
84. 97 S. Ct. at 1412 n.39 (citation omitted).
inquiry into legislative purpose or motive in *Kennedy* and *Trop*, however, was for the same limited purpose as in the bill of attainder decisions — *i.e.*, to determine whether the statutes under review were punitive in nature.86

The majority position in *Ingraham* is unsound. The Court declares that the basis of the decision was the established scope of the eighth amendment. As the dissent argued, as *Trop* reasoned, and as *O'Brien* recognized, this limitation does not exist. In fact, the Court constricted the boundaries of eighth amendment protection while declaring it was standing pat.

What effect does the eighth amendment result in *Ingraham* have on the right of eccentricity? *O'Connor* grounded its holding on the fourteenth amendment and a right to liberty.87 This fourteenth amendment result is undamaged by the eighth amendment holding in *Ingraham*. In the only apparent reservation from its eighth amendment result, *Ingraham* left room for an eighth amendment contribution to the “liberty” or eccentricity result reached in *O'Connor*, stating:

> Some punishments, though not labeled “criminal” by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.88

After disposing of the eighth amendment issue, *Ingraham* next considered whether the procedure for imposing the spankings was consistent with due process. This issue was raised because the fourteenth amendment “liberty interests” were implicated. About these liberty interests, the Court said: “While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.”89 This meaning of “liberty interests” is very much like the meaning of liberty interests involved in *O'Connor*. As was the case in *O'Connor*, these liberty interests abut or overlap the protection of the eighth

86. *Id.* at 383-84 n.30. Subsequent to *Ingraham* v. *Wright*, the Supreme Court again cited *Trop* v. *Dulles* as an example of “purposive” analysis: “The Court . . . often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes . . . . *Trop* v. *Dulles* . . . .” *Nixon* v. Administrator of Gen. Serv., 97 S. Ct. 2777, 2807 (emphasis added) (footnote omitted).
87. See text accompanying notes 43-55 supra.
88. 97 S. Ct. at 1411 n.37 (citation omitted).
89. *Id.* at 1413-14 (footnote omitted).
amendment. The overlapping was explicitly recognized by White's dissent: “By finding that bodily punishment invades a constitutionally protected liberty interest within the meaning of the Due Process Clause, the majority suggests that the Clause might also afford a remedy for excessive spanking independently of the Eighth Amendment.”

Although *Ingraham* considered only procedural due process issues, the petition for certiorari had also presented a substantive due process issue: “Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?”

Certiorari was denied on that issue. Because Justice White, in dissent, believed that the liberty interest as defined by the majority encompassed just such protection as raised by the substantive due process issue in the petition for certiorari, he would have amended the grant of certiorari and set the case for reargument. This issue, as framed in the petition for certiorari, resembles the “purposive analysis” employed under the due process clause in *O'Connor*, though now rejected by *Ingraham* as inappropriate under the eighth amendment. Civil incarceration gave rise to consideration of the state's purpose under the substantive due process issue presented, but not resolved, in *Ingraham*. Logically, such an issue should be treated as the issue was treated in *O'Connor*, under the hybrid concept which the Court again refers to as a “right of liberty.”

*Ingraham* reinforces the conception of a right of eccentricity. The circumstances of its application suggest that part of the substance of the right derives from principles that underlie the eighth amendment or that emanate from the penumbra of the eighth amendment.

Reviewing the Court's treatment of the due process issue, Justice Stevens felt that the majority's definition of “liberty interest” in *Ingraham* embraced protection of reputation. In a brief separate dissent, he reflected that “the Court's analysis today gives rise to the thought that *Paul v. Davis* . . . may have been correctly decided on an incorrect rationale.”

*Paul v. Davis* was an action against police officials who had circulated a flyer designating the plaintiff as an active shoplifter. The plaintiff claimed that circulation of the flyer invaded his “lib-

90. *Id.* at 1422 n.5 (White, J., dissenting).
91. *Id.* at 1406 n.12.
92. *Id.* at 1422 n.5 (White, J., dissenting) (citation omitted).
93. *Id.* at 1428 (Stevens, J., dissenting).
The Court, per Justice Rehnquist, rejected this contention and rejected the contention that the plaintiff had protectable privacy interests at stake. Justice Brennan, joined by Justices White and Marshall, dissented because “the Court by mere fiat and with no analysis wholly excludes personal interest in reputation from the ambit of ‘life, liberty, or property . . . .’” Brennan’s dissenting opinion also remarked that “privacy notions appear to be inextricably interwoven with the considerations which require that a State not single an individual out for punishment outside the judicial process.” Justice Stevens thought these concerns, rejected by the majority in *Paul v. Davis*, were revived by the majority opinion in *Ingraham*.

Justice Stevens’ dissent provokes speculation concerning the proper constitutional treatment of cases presenting invasions of reputation, regardless of whether the court concludes that reputation is entitled to constitutional protection. In *Paul v. Davis*, reputation was asserted as an element of privacy. The right of privacy, however, was not at issue in *Ingraham*. There, the majority’s definition of liberty interests stimulated Justice Stevens’ remark. If, as is this Note’s theory, the liberty interest in *Ingraham*, like the right of liberty in *O’Connor*, embraces protection of eccentricity, perhaps Justice Stevens’ remark is well taken. Reputation, based upon public acceptance or rejection of an individual’s behavior or demeanor, is closely akin to the notions of public intolerance or animosity underlying the result in *O’Connor*. Unlike *O’Connor*, *Ingraham* rests its liberty interest directly upon the liberty expressed in the due process clause of the fourteenth amendment. In fact, including reputation interests within the protection of the due process clause is not a new concept. In *Cummings v. Missouri*, involving a bill of attainder, the Court discussed generally what deprivations could be punishments:

> We do not agree with the counsel of Missouri that “to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.” The learned counsel does not use these terms — life, liberty, and property — as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political,  

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95. *Id.* at 697.
96. *Id.* at 721 (Brennan, J., dissenting).
97. *Id.* at 735 n.18 (Brennan, J., dissenting).
98. 71 U.S. 277 (1866).
previously enjoyed, may be punishment, the attending circum-
stances and the causes of the deprivation determining this fact.99

Outrage upon the feelings, an invasion of fourteenth amendment
liberty according to Cummings, and taints upon reputation, an inva-
sion of fourteenth amendment liberty according to three justices
dissenting in Paul v. Davis and one justice dissenting in Ingraham,
have the same historical stature as elements of liberty as does the
freedom from bodily restraint and punishment recognized as an ele-
ment of liberty by the majority in Ingraham. "[C]ertainly where the
State attaches 'a badge of infamy' to the citizen, due process comes
into play. . . . Where a person's good name, reputation, honor, or
integrity is at stake because of what the government is doing to him,
otice and an opportunity to be heard are essential."100

The fourteenth amendment provision that no person shall be de-
prived of "liberty" without due process of law was borrowed from
the thirty-ninth article of the Great Charter (Magna Carta), declar-
ing that no free man be taken, or imprisoned, or disseised, or out-
lawed, or banished; the words corresponding to "liberty" are "taken,"
"imprisoned," "outrawed," and "banished;" they are not confined to
mere freedom from incarceration or imprisonment.101

"Outlawry" at common law was akin to attainder, which is spe-
cifically condemned by Article I, section 9 and Article I, section 10 of
the United States Constitution. At one stroke, "outlawry" convicted,
denied the protection of law, and heaped the opprobrium and special
notoriety of the label "outlaw" upon its victim.102 Outlawry was
equally obnoxious for its lack of procedural protections as for the op-
probrium it selectively applied, beyond the needs of society when

99. Id. at 320 (emphasis added).
100. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Goss v. Lopez, 419
U.S. 565, 574 (1975) (quoting id.).
101. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 500 (7th ed.
1906); in Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97, 107 (1909), plaintiff's
likeness was used in the commercial exploitation of defendant's Auto Coats of Fine
Quality Silk Mohair; the court found that the "right to be let alone" of the Warren
and Brandeis article, The Right of Privacy, 4 HARV. L. REV. 193 (1890), embraced
only freedom from physical invasions, relying in part upon COOLEY ON TORTS 29
(1879). On page 30, however, Judge Cooley noted, "The law also gives to every
man a right to security in his reputation." This is the same Judge Cooley who wrote
the note discussing grooming regulations in Ho Ah Kow v. Nunan, see text accompany-
ing note 77 supra.
102. See, III BLACKSTONE'S COMMENTARIES 324, and IV BLACKSTONE'S COMMENT-
ARIES 320: "antiently an outlawed felon was said to have caput lupinum, and might
be knocked on the head like a wolf, by any one that should meet him. . . ." See also
one of the dissents in Wisconsin v. Constantineau, in which Justice Black compared
the due process considerations to those forbidding bills of attainder, 400 U.S. 433, 444
(Black, J., dissenting).
punishing. Attacks upon private reputation by means of outlawry, attainder, the flyers used in *Paul v. Davis*, or the " postings" used in *Wisconsin v. Constantineau*, betoken a generalized governmental malice in the form of routine disregard for individual dignity. *Constantineau* involved posted notices that prohibited the sale of alcoholic beverages to named individuals. One reason underlying the need for due process safeguards in *Constantineau* was that the "posted" person "may have been the victim of an official's caprice."

"Liberty" comprehends freedom from invasions upon reputation, and therefore such invasions implicate the fourteenth amendment. Furthermore, when governmental action is taken for the purpose of invading private reputation, the long discarded practice of outlawry and attainder is raised, and such purposeful action should be condemned as a per se violation of the fourteenth amendment. No amount of labyrinthine procedural safeguards will legalize the trampling of individual dignity to satisfy the casual ire of government. Such a purpose is illegitimate and action in furtherance of an illegitimate purpose is substantively forbidden, just as a purpose to attain is forbidden.

This history and analysis of the treatment of reputation within the "liberty" of the fourteenth amendment suggests that the purpose behind governmental action may trigger strict scrutiny and substantive due process analysis. This approach was triggered in *O'Connor v. Donaldson*, when by process of elimination, the Court determined that the purpose of the commitment was to protect the public "from exposure to those whose ways are different."

The thesis of this Note, that eccentricity is a fundamental right deserving protection under the fourteenth amendment, may be no more than a postulate of the rule that government may not act solely to satisfy a malicious urge, and when the purpose of an action is to stifle eccentricity, malice is presumed.

Apart from the narrow question of the protection appropriate for reputation under the "liberty" of the due process clause, *Paul v. Davis* also suggests an overlapping of the privacy interests and liberty interests at stake. Whether this overlapping is always the case is not clear. In *Moreno*, the Food Stamp case, the government's intrusion into the individual's liberty interest took the form of a regulatory disincentive for his lifestyle. An intrusion upon his lifestyle may not have been enough to implicate a right of privacy. Perhaps in *Paul v. Davis*, the Court would not have confronted the procrustean effort at fitting reputation into the pattern of privacy notions if a separately

103. 400 U.S. 433 (1971).
104. *Id.* at 437.
formulated notion of eccentricity were available. In any event, proper definition of the orbit of the right of eccentricity in relation to that of the right of privacy must await the future of the right of eccentricity in the Court.

Regardless of the interplay with the right of privacy, *Ingraham* through its use of "liberty interests" that seem broader than the liberty expressed in the fourteenth amendment and that seem to include some protections of the eighth amendment again seems to alloy the same constitutional ores that O'Connor forged into its right to liberty and that protect eccentricity.

**The Right of Eccentricity**

The Supreme Court and commentators speak of the Bill of Rights and the fourteenth amendment in terms of rights, interests, and safeguards. Such terminology provokes an unnecessary compartmentalization of the individual freedom at the heart of the amendments. By rejecting this compartmentalization, the Court was able to identify and dignify individual privacy as partaking of the essence of the constitutional system. A central concern of the Bill of Rights is the freedom to be let alone.

Once before, the Supreme Court induced that many prohibitions of the Bill of Rights derived from a single concept and sought to protect a single freedom. The right of privacy was then given explicit recognition and protection under the fourteenth amendment. About the constitutional guarantee of privacy, Justice Brandeis noted in dissent in *Olmstead v. United States*:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.106

The right of privacy generally applies to governmental intrusion at moments when the individual may reasonably expect to exclude the prying eyes and ears of the state. Cannot the "right to be let alone" apply in public as well as private moments? In a world become increasingly crowded, when individuals may reasonably expect privacy at fewer moments, when each person's tics and idiosyncracies are thrust upon his neighbors in the traffic of daily commerce, in the interdependency of industrial society when few individuals can

106. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
afford seclusion and avoid daily public exposure, is it reasonable that the individual may expect to be let alone only in private?

Americans may expect the freedom to be “physically unattractive or socially eccentric” even in public. In O’Connor, Donaldson’s mental illness could not be considered a form of expression or association, a lifestyle, a status unaccompanied by any activity; any one might confer the freedom to be publicly annoying. In any of these situations the court requires an overriding and compelling state justification to sustain the regulation of aberrant but harmless behavior. In O’Connor the court applied the same rule even though none of these specific constitutional provisions was touched upon, demanding that the state offer an overriding justification for state action undertaken solely for the purpose of control and confinement of aberrant behavior.

The right of eccentricity, to behave as one pleases, free of government control even when public animosity is aroused, has found protection through two distinct rules. First, when a government purpose to control eccentricity can be shown, the state action is subject to strict scrutiny and must be justified by an overriding state interest. Second, when a regulation stifles harmless eccentric behavior, a simple need for uniformity or standardization is not a legitimate state concern.

The materials discussed in this Note seem elements of a single encompassing freedom, the right of eccentricity, fragmented but enjoying particular protections under many constitutional provisions. The eighth amendment guarantees that punishments be no more severe than the need of society to impose them and circumscribes the power of the state to declare a status criminal. According to Justice Brennan, preservation of human dignity is the essence of the eighth amendment.107

Traditionally, the need of society to impose a punishment has been considered a legislative prerogative, beyond judicial cognizance. An examination of the need for a punishment would require a court to ascertain for what purpose it is imposed and whether it reasonably accomplishes that purpose. At least in the case of expatriation, where the purposes for which Congress might act were limited, the Supreme Court was prepared to examine Congress’ purpose and the usefulness of expatriation to its achievement.

107. “The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.” Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). For this proposition, Justice Brennan relied on the remark of the plurality opinion in Trop v. Dulles, 356 U.S. 86, 100 (1958): “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”
The first amendment precludes state regulation of expression or assembly for the purpose of stifling minority views or manners of expression. Speech or assembly may not be punished simply because it is offensive. The equal protection clause of the fourteenth amendment prevents governmental regulation for the purpose of suppressing an undesirable lifestyle. The due process clause of the fourteenth amendment protects against arbitrariness or unnecessary regulation. Many cases dealing with haircut and shave regulations hold that personal appearance is not a legitimate concern of the state.

Viewed in the light of a broader notion of constitutional liberty, the principles examined in this Note seem to derive from the same source. These principles converged in O'Connor, where the court termed the interest, the right of liberty. The same right of liberty arose once more in Ingraham and again seemed to involve a broader notion of freedom than the compartmentalized protection of the fourteenth amendment alone. In the haircut and shave cases, there is an evolving recognition of an interest protected regardless of whether the regulation is contested under the first, eighth, or fourteenth amendments. Freedom to act as one chooses, though not absolute, contemplates no unnecessary intrusion. When the purpose of a governmental action or regulation is to circumscribe aberrant behavior, that behavior must endanger society to justify its control.

Governmental action that intrudes upon aberrant but harmless behavior may occur more often than the name "eccentricity" suggests. Eccentricity depends not upon the degree of aberration but upon harmlessness or nondangerousness. The definition of "eccentricity" applies to a broad spectrum of activity, beyond matters of physical appearance or reputation. Perhaps the ultimate impact of this right lies in the area of "victimless" crimes or "regulatory" measures: victimless crimes such as prostitution, homosexuality, gambling, and marijuana use or regulatory measures such as involuntary commitment of juveniles or the mentally ill or involuntary sterilization of the feeble minded. Some of these activities or statuses may present real dangers to society. Perhaps some do not. Whether or not, would it be improper for the courts to loosen the tight belt of self-restraint they have long worn and ask whether the control or punishment of such eccentricities is any legitimate concern of the state?

Nicholas Heldt*

108. See SMITH & POLLACK, SOME SINS ARE NOT CRIMES (1975).

* B.A., 1975, University of Santa Clara. Member, Third Year Class.