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City of Chicago v. Wilson and Constitutional Protection for Personal Appearance: Cross-Dressing as an Element of Sexual Identity

By LAURA RICHARDS CRAFT*
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Introduction

Dress and hairstyles are traditional avenues of self-expression. As such, they are representations of the individuality that a nation committed to the principle of diversity must, at least in theory, foster. Justice Marshall recognized that personal appearance "reflects, sustains and nourishes" individuality and therefore is more than just a matter of fashion. Toleration of eccentric or culturally shocking dress styles is consistent with these values; however, it is equally apparent that there may be a recognized state interest in controlling appearance if there is a danger posed to society. A clash between freedom and security in this context involves more than the danger that an individual will be deprived of a chosen dress or hair style. The existence of an appearance regulation in nearly any context may facilitate discriminatory or arbitrary enforcement or may simply be an excuse to keep persons with unconventional or "offensive" life styles out of the public view. The method for resolving these conflicting interests is in serious dispute.

Recently the Illinois Supreme Court confronted this issue in City of Chicago v. Wilson. In Wilson the court examined the constitutionality of a local ordinance prohibiting any individual from appearing in public clothed as a member of the opposite sex with intent to conceal his or her gender. Two male transsexuals, who were required to wear women's clothing and adopt a feminine life style as part of psychiatric

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2. No. 49229 (Ill. May 1978). At the time of this Note's printing, official publication of the Wilson opinion was still awaiting the filing of a dissenting opinion from Chief Justice Ward, and Justices Underwood and Ryan.

[1151]
therapy in preparation for sex-reassignment operations, were arrested under this provision. They asserted as a defense that the ordinance was unconstitutional since it deprived them of the right to exercise control over their personal appearance. The Wilson court found the ordinance invalid only as it applied to the particular defendants. Its decision was based upon the recognition that the defendants' interest in exercising choices over their appearance was an ingredient of the personal liberty protected by the due process clause of the fourteenth amendment and upon the city's failure to show that cross-dressing, when done as part of preoperative therapy, was likely to result in criminal acts or harm to public morals.

Wilson is an important addition to a confused and controversial area of constitutional law: protection of choices in personal appearance. Formerly, this struggle had been primarily restricted to public employees, military personnel, prison inmates and students challenging grooming regulations. Wilson adds to the fray private citizens, specifically transsexuals, who exercise personal appearance choices contrary to statutory restrictions. Approximately ten thousand Americans are transsexuals, and the existence of statutes in at least ten states that could be used to prohibit cross-dressing assures this group, and others who engage in similar conduct, such as transvestites, or persons who dress in "drag," a place in the present controversy.

This Note examines Wilson and its contribution to the appearance question. Part One treats the decisional law prior to the United States Supreme Court decision in Kelley v. Johnson. It describes the confusion and lack of consensus the issue engendered in the lower courts, with particular emphasis on the Seventh Circuit. Part Two analyzes Kelley, the major Supreme Court decision involving personal appearance rights. This second section will discuss the standard announced by the Court, the limitations of the decision and the attempts by the lower courts to apply the Kelley test. Part Three explains the history and rationale of the Wilson decision. The authors analyze the standard of review utilized by the Illinois Supreme Court and discuss the rationale underlying its holding. Part Four concludes that Wilson represents a definite affirmation of the individual's right to control personal ap-

appearance and is a significant step towards a more adequate standard of review. It is suggested, however, that the court failed to sufficiently explain its reasoning and delineate the scope of its holding. Therefore, it is anticipated that the controversy over constitutional protection for personal appearance choices will continue to demand significant judicial attention.

State of the Law Before Kelley

A Legacy of Confusion

During the 1960's, long hair and unconventional dress became recognized symbols of protest. They represented not only specific political objections, but the stylistic independence of the wearer: an unwillingness to be blindly classed with the rest of society. Schools, public employers, and various institutions often responded with vigorous enforcement of dress code regulations, which naturally generated a series of constitutional challenges. Appearance-based litigation became common; well over one hundred hair-length cases were decided in federal courts between 1969 and 1975.8 The disposition of these cases was often confused and resulted not in consensus but in fragmentation. Cases concerning the right to control personal appearance before Kelley v. Johnson9 were divided in their approaches to virtually every significant issue,10 most importantly: 1) the constitutional source of protection for freedom of appearance; 2) the extent of the protectable interest; and 3) the appropriate standard to apply in determining the constitutionality of an infringement of this interest.

Source of Constitutional Protection

To some extent, the degree of constitutional protection afforded freedom of appearance depends upon the specific source of that interest in the United States Constitution. The courts have recognized a wide variety of possible sources. Some courts have characterized dress as expressive conduct and therefore have found the source of protection in the first amendment; however, in the overwhelming majority of cases, this rationale has been unavailing.11

8. Long Hair and the Law, supra note 4, at 143. For a collection of the hair length cases, see 84 HARV. L. REV. 1702 (1971).
11. E.g., Karr v. Schmidt, 460 F.2d 609, 614-15 (5th Cir.), cert. denied, 409 U.S. 989 (1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Freeman v. Flake, 448 F.2d 258, 260 (10th Cir.), cert. denied, 405 U.S. 1032 (1971); King v. Saddleback Junior College Dist., 445
The Supreme Court addressed the question of appearance as expressive conduct for the first time in *Tinker v. Des Moines Independent Community School District*, a case involving school children who wore black armbands to protest the Vietnam War. The Court described a spectrum with "pure speech" at one end and unexpressive conduct at the other and found that because the symbolic quality of a black armband was akin to speech, it was protected by the first amendment. *Tinker* was in some respects an easy case for the Court to decide since the communicative nature of the armband was commonly understood. The Court, however, established no specific guidelines for determining what constitutes expressive conduct, and it avoided the question of borderline behavior when it refused to hear numerous hair-length cases in which the plaintiffs had claimed first amendment protection. There is a general consensus that *Tinker* would be inapplicable to persons dressing solely for their own pleasure with no intention of communicating a particular idea, but beyond this, first amendment protection for personal appearance is an undecided issue.

Since the right to make one's own appearance choices without government interference is not specified anywhere in the United States Constitution, plaintiffs have commonly looked to the fourteenth amendment due process clause for protection. The fourteenth amendment specifically provides that no one shall be deprived of liberty without due process of law, and the argument has been repeatedly made that freedom of appearance is part of this "liberty." Several lines of case law give content to the word liberty and establish at least a few of the interests that it protects. One such line of cases establishes a right to privacy protected by the fourteenth amendment, and some courts have protected freedom of appearance on the theory that it is part of this.

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14. 393 U.S. 503, 507-08 (1969). The Court in *Tinker* strictly limited its holding by stating, "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment . . . . Our problem involves direct, primary First Amendment rights akin to 'pure speech'". *Id.*
right.\(^\text{16}\)

The right to privacy recognized by the Supreme Court in *Griswold v. Connecticut*\(^\text{17}\) and *Roe v. Wade*\(^\text{18}\) is perhaps more clearly expressed as a right to personal autonomy. *Griswold* struck down a Connecticut statute that prohibited the use of contraceptive devices by married and unmarried persons alike. The Court reasoned that a married couple’s choice about birth control is part of the fundamental right to privacy, which the state cannot invade without a showing of overriding need.\(^\text{19}\) *Roe* expanded the term *privacy* to include a woman’s right to terminate her pregnancy. Although both cases concerned choices in the control of one’s body, they dealt with matters normally not exposed to public scrutiny. Herein lies one distinction between the traditional privacy cases and the appearance cases dealt with in this Note. As the First Circuit expressed it, most courts\(^\text{20}\) do not “see the logic of expanding the right of marital privacy identified in *Griswold v. Connecticut* . . . into a right to go public as one pleases.”\(^\text{21}\)

A second rationale commonly advanced and occasionally accepted is based on the ninth amendment. Until Justice Goldberg’s concurring opinion in *Griswold*,\(^\text{22}\) the ninth amendment had been largely discounted as stating a truism also expressed by the tenth amendment.\(^\text{23}\) Justice Goldberg reasoned that the ninth amendment gives the fourteenth content, indicating that the due process clause should be read to

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\(^{17}\) 381 U.S. 479 (1965). Although *Griswold* recognized a right of privacy, the Justices disagreed about the source of that right. Justice Douglas, writing for the majority, found the privacy right in the penumbras of the first, fourth, fifth, and ninth amendments. *Id.* at 482-84. Justice Goldberg argued that the ninth amendment signifies a broad range of personal rights to be protected by the fourteenth, *id.* at 486-87, while Justice Harlan argued that the right was a basic part of the due process guaranteed by the fourteenth amendment and applied the *Palko* test, stating that privacy is “implicit in the concept of ordered liberty,” *id.* at 500. See Palko v. Connecticut, 302 U.S. 319, 325 (1937). For an understanding of the right to privacy in terms of personal autonomy, see Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957 (1979).

\(^{18}\) 410 U.S. 113 (1973).

\(^{19}\) 381 U.S. 479, 485 (1965); *id.* at 488 (Goldberg, J., concurring).


\(^{21}\) Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970).

\(^{22}\) 381 U.S. 479, 486-87 (1965).

cover a broad range of personal freedoms "retained by the people." 24
In the years following Griswold, Justice Goldberg's reasoning has not achieved wide acceptance, but a number of scholars continue to urge that the ninth amendment be used to protect personal rights unspecified in the Constitution, but emanating from a "natural law." 25 Several courts found this reasoning persuasive and have applied it to the right to control one's personal appearance. 26

Third, although the privacy right has been termed fundamental and is thus entitled to the highest degree of judicial scrutiny, the fourteenth amendment also encompasses lesser rights commonly referred to as liberty interests. 27 Although a liberty interest enjoys some constitutional protection, it may usually be infringed by the state with only a very minimal showing of justification. A variety of standards of review have been applied in such cases, as will be discussed later, but for now it is important to note that many courts have recognized a hierarchy within the category of liberty interests and have accorded greater protection to some than to others. 28 The hierarchy is generally based on the court's assessment of the importance of the interest, but there is no accepted system to use in making such determinations and the result has been increased inconsistency among the lower courts. There is no way of clearly defining what constitutes a liberty interest, but large numbers of courts have included the right to control personal appearance within this category. 29 This view has gained wide acceptance since the Supreme Court decision in Kelley. 30

Fourth, the equal protection clause of the fourteenth amendment has also frequently been invoked in appearance cases, but with varying degrees of success. The approaches taken have differed greatly; some plaintiffs claimed that the regulations as applied resulted in racial or

25. See B. Patterson, The Forgotten Ninth Amendment 4 (1955); Redich, Are There "Certain Rights... Retained by the People"?, 37 N.Y.U.L. Rev. 787 (1962).
27. But cf. Karr v. Schmidt, 460 F.2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972) (holding that only fundamental rights requiring strict scrutiny are encompassed within the substantive aspect of the fourteenth amendment and that there is no category of lesser liberty interests).
28. See notes 56-57 & accompanying text infra.
sexual discrimination, while others contended that arbitrary and inconsistent enforcement within the affected class had denied them equal protection. In the early case of Ho Ah Kow v. Nunan, a prison rule requiring inmates to wear short hair was found to deny equal protection to a Chinese inmate who was forced to cut off his traditional queue. More recently, Crews v. Clonces held that a school hair-length regulation discriminated on its face against male students since it was not applied to their female classmates. Other courts have been unpersuaded by Crews and have held that as long as the rule is applied consistently to males there is no denial of equal protection. Such courts have refused to recognize the suspect nature of sex-based classifications and it is likely their analysis, if not their holdings, would be altered by recent sex discrimination cases. In other school hair-length cases, plaintiffs have unsuccessfully claimed that expulsion of offenders arbitrarily creates a class of long-haired males.

Extent of the Right

Freedom of appearance has been variously categorized as a fundamental right, an important liberty interest, a liberty interest but "not of the first magnitude," and an interest unprotected by the United States Constitution. The significance of these labels is immediately apparent since they influence the degree of constitutional protection to be afforded, and in fact the application of a particular label is generally outcome determinative because of the standard of review that it triggers. This gives a deceptively clear picture of the constitutional review process since the labeling of an interest as a fundamental right, a liberty interest, or an unprotected interest is in itself a value judgment affected by a variety of factors. Also, within the area of liberty interests, courts

31. E.g., Crews v. Clonces, 432 F.2d 1259 (7th Cir. 1970).
33. 12 Fed. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546).
34. 432 F.2d 1259, 1266 (7th Cir. 1970).
36. Craig v. Boren, 429 U.S. 190 (1976), and Reed v. Reed, 404 U.S. 71 (1971) are notable for their increased concern about sex discrimination although still falling somewhat short of the strict scrutiny engaged in when a suspect classification is involved.
38. See notes 50-52 & accompanying text infra.
39. See notes 53-54 & accompanying text infra.
40. See notes 55-59 & accompanying text infra.
41. See note 60 & accompanying text infra.
have applied a number of standards of review,\textsuperscript{42} often without any explanation of the differentiating factors. With these added complications in mind it is possible to engage in a general discussion of the various labels applied to the right to control personal appearance.

A fundamental right is one that is so integral to our society as to require heightened protection, even though it may not be specifically enumerated in the Constitution.\textsuperscript{43} The tautological nature of this definition explains the difficulty that courts have in determining what belongs in the category of fundamental rights. At bottom, the determination is based on a value judgment: a finding that the right is one of exceptional importance in our society. In part because of this lack of a clear standard most courts have deferred to Supreme Court judgment in determining what constitutes a fundamental right. Freedom of association,\textsuperscript{44} the right to vote,\textsuperscript{45} the right to travel,\textsuperscript{46} and the right to privacy and control in certain basic matters of marriage,\textsuperscript{47} child bearing,\textsuperscript{48} and child rearing\textsuperscript{49} have all been so categorized by the United States Supreme Court.

Only one circuit went so far as to apply the fundamental-right classification to freedom of personal appearance. The Seventh Circuit, in its 1969 decision of \textit{Breen v. Kahl},\textsuperscript{50} applied this characterization to a child’s right to wear long hair in contravention of school grooming policies.\textsuperscript{51} Because the Supreme Court has limited the category of funda-

\textsuperscript{42} For a discussion of these various standards and their implications, see \textit{Kelley v. Johnson} and \textit{Tonsorial Tastes}, supra note 10, at 440-46.

\textsuperscript{43} Cf. \textit{Nowak, Rotunda & Young, Constitutional Law} 416. “These are rights which the Court recognizes as having a value so essential to individual liberty in our society that they justify the justices reviewing the acts of other branches of government in a manner quite similar to the substantive due process approach of the pre-1937 period. Little more can be said to accurately describe the nature of a fundamental right, because fundamental rights analysis is simply no more than the modern recognition of the natural law concepts . . . .” Ronald Dworkin suggests in his rights thesis that individual rights are trump cards which outweigh utilitarian considerations. \textit{See}, Richards, \textit{supra} note 17, at 703.

\textsuperscript{44} Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958).


\textsuperscript{46} Shapiro v. Thompson, 394 U.S. 618 (1969).


\textsuperscript{50} 419 F.2d 1034 (7th Cir. 1969).

mental rights very strictly in the past, Breen represented a surprising expansion of this doctrine by a circuit court. It should be noted that Breen was not followed by any other circuit courts, at least insofar as it labeled appearance a fundamental right; indeed, the Seventh Circuit itself backed off from this holding in several subsequent cases.\(^{52}\)

As was discussed earlier, freedom of appearance is more commonly classified as a liberty interest, a term derived from the due process clauses of the fifth and fourteenth amendments. A number of courts have expressly applied this term to the appearance right,\(^{53}\) indicating that it is entitled to some protection but less than that due a fundamental right, even though both may find their source in the fourteenth amendment. Some courts have recognized a hierarchical scale within the liberty interest classification\(^{54}\) and it is often unclear what factors affect the valuation of a particular interest within this scale. One important factor appears to be the context in which the right is asserted.

The Seventh Circuit in \textit{Miller v. School District Number 167}\(^{55}\) termed the appearance right a liberty interest but "not of the first magnitude"\(^{56}\) and proceeded to deny it any sort of constitutional protection in the public employment context.\(^{57}\) It did not, however, overrule its earlier decision in Breen which termed the appearance rights of a school child fundamental.\(^{58}\) Justice Stevens, then a circuit court judge writing the \textit{Miller} opinion, reasoned that the different contexts justified the dramatically different characterizations of the right at stake. In so doing, Stevens involved himself in the basic question of whether the context affects the nature of the right or merely the standard of review to be applied. Stevens did not directly address this question, but the \textit{Miller} decision seems to take the unpopular position that the right itself is affected.\(^{59}\) The logical conclusion of such a position is that pub-

\(^{52}\) See \textit{Miller v. School Dist. No. 167}, 495 F.2d 658 (7th Cir. 1974). While other Seventh Circuit cases did not reject the fundamental rights label, they began to incorporate language indicative of a lesser standard of review. See \textit{Arnold v. Carpenter}, 459 F.2d 939, 943 (7th Cir. 1972).

\(^{53}\) E.g., \textit{Bishop v. Colaw}, 450 F.2d 1069, 1075 (8th Cir. 1971); \textit{Richards v. Thurston}, 424 F.2d 1281, 1285 (1st Cir. 1970).

\(^{54}\) For a discussion of these hierarchical evaluations and their implications, see \textit{Kelley v. Johnson and Tonsorial Tastes}, supra note 10, at 440-46.

\(^{55}\) 495 F.2d 658 (7th Cir. 1974).

\(^{56}\) \textit{Id.} at 665.

\(^{57}\) \textit{Id.} at 668.

\(^{58}\) For a discussion of how the inconsistency between Breen and Miller was resolved, see notes 120-24 & accompanying text infra.

\(^{59}\) Justice Stevens reasoned that the loss of a teaching position was not as serious as a student's expulsion from school since a new job might be found in a more liberal school district. Stevens thus justified calling the appearance right fundamental in cases involving students, but only a liberty interest not of the first magnitude in public employment cases.
lic employment could be conditioned on the surrender of constitutionally protected rights.

As appearance litigation became more common in the late 1960's, a number of courts went so far as to deny that personal appearance was sufficiently important to justify any constitutional protection. As will be discussed in a later section, Kelley would seem by implication to overrule this determination.

The Appropriate Standard of Review

Once a court has decided that freedom of appearance is constitutionally protected, it must determine under what circumstances the state may curtail this right. Roughly speaking, appearance cases before Kelley applied four different standards. Some courts placed upon the plaintiff the burden of showing that there was no conceivable, rational relationship between the regulation or statute and a permissible state objective. Under this test, formulated in Williamson v. Lee Optical Co., the challenger's burden is very difficult to meet, and application of the test amounts to a virtual assurance that the restriction will be upheld. Williamson involved state regulation of dispensing opticians, and the Court's choice of standard was prompted in large part by its unwillingness to meddle in what it viewed as essentially legislative de-
terminations of economic policy. The state was not even required to articulate a purpose; the Court was willing to conceive of one on its own.

A derivative of the *Williamson* test utilizes essentially the same standard but requires the state to articulate an acceptable legislative purpose. This slight shift in burden is little help to the challenger when the court continues to require only a conceptual rather than real connection between the regulation and its stated purpose. A few courts have reversed the classic *Williamson* formulation in appearance cases, requiring the state to show that a rational connection between the regulation and an acceptable governmental purpose in fact does exist, thus shifting some of the burden and increasing the chance that the restriction may be found unconstitutional. This standard of review has also come under the rubric of the “rationality test” although it bears little resemblance to the standard announced in *Williamson*.

Another common test in appearance cases has involved judicial weighing of the parties’ interests. The individual’s interest in choice of dress is balanced against the state’s need to compel uniformity in the circumstances affected by the regulation. One important factor in the weighing process is the severity of infringement on the individual’s rights. For example, a rule requiring students to have short hair is a

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66. More commonly, this is formulated as a requirement for the state to show a “genuine need” for the restriction. At least one commentator feels that the genuine need test provides a much needed, workable middle level of review. *Kelley v. Johnson and Tonsorial Tastes*, supra note 10, at 443. Kamerling v. O’Hagan, 512 F.2d 443 (2d Cir. 1975); Romano v. Kirwan, 391 F. Supp. 643 (W.D. N.Y. 1975), vacated sub nom, Kirwan v. Romano, 425 U.S. 929 (1976); Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973), rev’d sub nom, *Kelley v. Johnson*, 425 U.S. 238 (1976). These cases are good examples of the genuine need test but their rationale has met Supreme Court rebuff. See text accompanying note 85 infra.

67. *E.g.*, Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971). These cases voiced the balancing test in terms of necessity but reached very different results. In *Bishop* the court rejected pure opinion testimony that long hair had deleterious effects on school performance and social adjustment and required the defendant to show actual disruptions at the school resulting from a student’s long hair. In *Gfell* the defendant prevailed on a showing that some threats had been made to long-haired students and that long hair was forbidden in sports and shop classes. Cf. Richards v. Thurston, 424 F.2d 1231 (1st Cir. 1970), which finds that a type of weighing test is necessary when an individual’s interest in possession and control of his or her own person is at issue. The *Richards* court strikes the balance in favor of the plaintiff, requiring the defendant to show a strong countervailing interest once the plaintiff has established the curtailment of the liberty.

68. There is no clear line between a minor and a major infringement, but courts have
more serious infringement than a rule requiring their teachers to wear ties; a tie can be removed at the end of the work day whereas the student must take his short haircut home with him. Another important factor bearing on the state's interest is the context in which the restriction operates. For this reason, the state is allowed to require greater uniformity of appearance from prison inmates and military reservists than from school children and public employees working in a typical office situation.

The criticism most commonly leveled at the balancing test is that the final decision rests more upon the judge's personal values than upon an established rule of law. Although the weighing test lacks a mechanical device with which to strike a balance, it has the advantage of bringing value judgments to the forefront where they are subject to review and analysis. The test gives the court an opportunity to openly discuss the factors that it considers important and, perhaps because of this flexibility, balancing has received wide application in appearance cases, although it has not always gone by its proper name. Weighing is most commonly engaged in when there is a liberty interest involved that the court finds particularly deserving of protection.

A different test is employed when the court has determined that a fundamental right is involved. In such cases the court applies strict scrutiny to the legislation and requires the state to demonstrate a compelling interest in and overriding need for the restriction. The regulation must be drawn as narrowly as possible to avoid any unnecessary infringement of the individual's rights. These two requirements of course make it virtually certain that the challenger will prevail. Characterization as a fundamental right would have changed the results of

made it clear that they think such a distinction is cogent. E.g., Karr v. Schmidt, 460 F.2d 609, 615 n.12 (5th Cir. 1972), cert. denied, 409 U.S. 989 (1972).


71. For the suggestion that a weighing test should be adopted in all personal appearance cases, see Kelley v. Johnson and Tonsorial Tastes, supra note 10, at 453-54; Craven, Personhood: The Right to be Let Alone, 1976 DUKE L.J. 699, 719-20. See also Kelley v. Johnson, 425 U.S. 238, 249 (1976) (Powell, J., concurring); notes 99-106 & accompanying text infra.

72. Courts which engage in this process are implicitly dividing liberty interests into less and more important rights, and are according them different degrees of protection. This distinction creates another possible area for inconsistency between various districts.

many cases decided under the rationality or weighing tests.\footnote{See Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976) (indicating that strict scrutiny would change the result of the case but refusing to apply it).}

Because strict scrutiny and the \textit{Williamson} rationality test are outcome determinative in most cases, courts have struggled to develop an intermediate standard of review that will take into account more factors and will allow the court greater flexibility. When faced with a case that cries out for a remedy, but where the fundamental right label is probably not appropriate with its implications of strict scrutiny in subsequent cases, there has been a tendency to manipulate the characterization of the right and the standard of review to reach the desired result.\footnote{See note 73 & accompanying text \textit{supra}.} This has left the courts in a precarious position with respect to precedent and the Supreme Court has not resolved the difficulty by sanctioning an intermediate form of review in appearance cases.

Confusion over the appropriate standard of review and the source and characterization of the right in appearance cases has given rise to massive inconsistency. In a country that prides itself on equal treatment of its citizens, the right to dress as one chooses has varied from state to state and from district to district. The Seventh Circuit is a prime example of this confusion. It began by terming appearance a fundamental right and applying a form of strict scrutiny.\footnote{See note 73 & accompanying text \textit{supra}.} In decisions subsequent to \textit{Breen}, language of a rationality test began to appear, albeit in dicta, indicating some uncertainty about the appropriate standard of review.\footnote{See \textit{Arnold v. Carpenter}, 459 F.2d 939, 943 (7th Cir. 1972). See also note 52 & accompanying text \textit{supra}.} \textit{Miller} complicated the situation by applying one standard to public employees while allowing the very different standard established for students to stand.\footnote{See notes 120-24 \textit{infra}.} In short there was a great need for Supreme Court leadership in this field, but in case after case \textit{certiorari} was denied.\footnote{See note 13 \textit{supra}.} Finally, the Supreme Court decided the case of \textit{Kelley v. Johnson},\footnote{425 U.S. 238 (1976).} which involved a police department’s dress code limiting hair length and forbidding beards and mustaches on its officers. When the case was heard in 1975, the question of freedom of appearance was ripe for decision.
Kelley and the Right to Control One's Appearance

Factual Background

Kelley v. Johnson\(^8\) is the first Supreme Court case to actually determine the constitutionality of a governmental regulation of personal appearance.\(^2\) A New York policeman asserted that a departmental hair regulation\(^3\) infringed his constitutional rights.\(^4\) The Second Circuit recognized the patrolman's choice in appearance as an ingredient of general personal liberty and required the department to show a "genuine public need" for the regulation.\(^5\) It set aside the district court's dismissal of the patrolman's claim and ordered it to reconsider the case in light of this standard. On remand, the district court found the department failed to meet this burden\(^6\) and sustained the patrol-
man's challenge. After the court of appeals affirmed the judgment, the Supreme Court granted certiorari.

Justice Rehnquist delivered the majority opinion and ruled that the patrolman's right to control appearance was not fundamental; his interests were distinguishable from interests in "certain basic matters of procreation, marriage and family life" which warrant the highest degree of judicial scrutiny. Instead the court "assumed" for the purposes of the decision that the patrolman's right found protection as a less vital fourteenth amendment liberty interest.

In addressing the merits, the Court stressed the fact that the policeman brought the action not as a private citizen but as a public employee. Public entities are traditionally entitled to great judicial deference in the making of organizational choices which affect their employees. By analogizing to a number of recent cases sustaining otherwise impermissible restrictions on federal and state employee first amendment activities, the Court was able to conclude: "There is


88. 508 F.2d 836 (2d Cir. 1975).

89. 421 U.S. 987 (1975).


91. The opinion explicitly distinguished the present controversy from earlier Supreme Court cases in which a fundamental right to privacy had been established. See notes 46-48 & accompanying text supra.

92. 425 U.S. at 244. The Court admitted that its prior decisions offered little precedent on the question of whether there is a liberty interest, protected by the fourteenth amendment, in matters of personal appearance. Id.

93. IMPLIED in the Court's reliance on Pickering v. Board of Educ., 391 U.S. 563 (1968), is the theory that the circumstances surrounding a claim (such as an employee-employer relationship) do not alter the individual's constitutional rights, but instead affect the standard of review a court will use when considering an infringement of those rights. *Pickering* held that a person accepting employment as a school teacher did not give up constitutional rights he would otherwise enjoy as a public citizen; however, since the state did have a significantly different interest in regulating the free speech of its employees than it did in regulating similar activities by the public in general, the problem was one of balancing the interests of the teacher, as a citizen, against the state interest in promoting efficient public service. *Id.* at 568. *Contra* Kelley v. Johnson and Tonsorial Tastes, supra note 10, at 419 (suggesting that the Supreme Court reasoning in *Kelley* alters the right and not just the standard of review); Kelley v. Johnson, 425 U.S. 238, 254 n.5 (Marshall, J., dissenting) (expressing the same fear of limitation of rights rather than shift of standard). The decision, however, textually does not bear out this inference. Justice Rehnquist, in addition to analogizing to *Pickering*, simply criticized the court of appeals for making the distinction between right and standard and then failing to apply it. 425 U.S. at 245.

surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.95

The Court then discussed the governing standard of review. It rejected the approach taken by the Second Circuit which had required the department to demonstrate a “genuine public need” for the regulation.96 Additionally, the Court noted that the function of the judiciary does not include weighing the conflicting policy arguments presented.97 According to the majority, the role of the judiciary when a public employee complains of interference with matters of personal appearance is only to inquire whether the regulation bears a rational connection to a legitimate governmental goal such that the enactment is neither arbitrary nor capricious.98

This analysis essentially was a formulation of the classic rationality test enumerated in *Williamson*.99 If the Court held true to *Williamson*, the department would not have been required to articulate any justification for the regulation, but whether this aspect of the test was applied in *Kelley* is not apparent since the trial court, under directions from the court of appeals, had required the department to offer substantial justification.100 The reasons offered at trial were then considered by the Supreme Court on appeal. It is clear, however, that the burden was on the patrolman to demonstrate the lack of any conceptual basis for the restriction, rather than the absence of an actual or practical connection to a legitimate goal.101 Under this type of review the challenged regulation easily passed muster; desirability of uniform appearance was rationally related to either of the justifications offered by the department: recognition of the officers among the general public and instillation of esprit de corps within the police force itself.102

In his dissent,103 Justice Marshall specifically disagreed with the finding of a rational connection. He argued that a policeman in uni-

95. 425 U.S. at 245.
96. Id. at 247.
97. Id. at 248.
98. Id. at 247-48 (citing *Williamson* v. Lee Optical Co., 348 U.S. 483, 487-88 (1955) (application of the rational-connection test to uphold an Oklahoma statute restricting opticians from fitting and duplicating eyeglasses)). The Court’s decision to apply a rationality test in *Kelley* signifies a deference to legislative judgment typically, but not exclusively, restricted to economic and social welfare cases. See generally B.F. Wright, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 227-31 (1942). See also notes 62-65 & accompanying text supra for a discussion of the rationality test in pre-*Kelley* appearance cases.
100. 425 U.S. at 241-42. Specifically, the court of appeals required the department to show a genuine need for the regulation. Dwen v. Barry, 483 F.2d 1126, 1131 (2d Cir. 1973).
101. 425 U.S. at 247.
102. Id. at 248.
103. Id. at 249-56.
form was not made any more identifiable to the public by virtue of a short haircut. In rebutting the contention that short hair builds esprit de corps, he pointed to the police union's support of the patrolman's challenge as an indication that the grooming restriction contributed to discontent rather than pride and spirit. This approach suggests a closer examination of the legitimacy of the regulation in effectuating the departmental organizational needs. Although Justice Marshall also described his test in terms of rationality, his course reflects the flexible, evidentiary inquiry avoided in the majority opinion. In essence, he would require a real rather than merely conceptual relationship. In character with this less restrained treatment, Justice Marshall concluded that because, in his view, the regulation failed to pass minimal scrutiny, there was no need to consider the propriety of a higher standard of review.

In his concurring opinion, Justice Powell impliedly rejected the minimal scrutiny approach by advocating a balancing test: "When the state has an interest in regulating one's personal appearance . . . there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation."

Private Citizens Under Kelley

The scope of the Kelley decision was carefully limited to government employees alleging infringement of nonfundamental fourteenth amendment liberty interests. The majority failed to specify the degree of protection that would be afforded a private citizen whose control over personal appearance is restricted. While the Court only assumed that such an interest was protected for the purposes of its decision, language in the majority and concurring opinions seems to sup-

104. Id. at 254-55.
105. Id. at 255.
106. Although Justice Marshall agreed with the majority that structuring of the police force and uniform and equipment requirements might rationally relate to the state goal of an identifiable and well-motivated police force, he felt the same could not be said of the hair regulation. 425 U.S. at 256.
107. Id. at 256 n.8.
108. This is surprising in that Justice Powell claimed to be writing only to emphasize that the majority opinion should not be construed to disparage recognition of the right to control appearance. Id. at 249.
109. Id. Perplexingly enough, Justice Powell's reasoning is similar to that employed by the Second Circuit and expressly rejected by the majority opinion in Kelley. The circuit court had required the police department to show the right was outweighed by a legitimate state interest. Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973). Kelley expressly rejects such an approach by stating that courts are not in a position to weigh the policy considerations involved. 425 U.S. at 248.
110. Subsequent cases, however, do not adhere to the limitation. See note 116 & accompanying text infra.
port a greater degree of protection when the plaintiff is a private citizen. Justice Rehnquist, for instance, was unconvinced that a similar claim of infringement by a member of the public would be subject to the same test.\textsuperscript{111} Justice Powell also noted that application of the regulation might be an impermissible intrusion upon liberty in another context.\textsuperscript{112} Moreover, he made it clear that the decision contained no negative implication with respect to judicial recognition of the right.\textsuperscript{113}

The dissenting Justices in \textit{Kelley} were less inclined to restrict their treatment of the issue. Justice Marshall found it beyond question that the fourteenth amendment protects against comprehensive regulation of what citizens may or may not wear.\textsuperscript{114} He argued that throughout history the interest in personal appearance has been a reflection of the more encompassing individual right to self-governance and personal choice.\textsuperscript{115} He reasoned that the framers of the constitution had failed to enumerate a right to control one’s appearance only because they considered it too obvious to need any specification.

\textbf{Subsequent Treatment}

Following \textit{Kelley}, the question of constitutional safeguards for an individual’s choice in matters of personal appearance remains unresolved, at least when state regulation of uniformed civilian forces is not involved.\textsuperscript{116} Although judicial deference to state and local organi-

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\textsuperscript{111.} 425 U.S. at 249. \\
\textsuperscript{112.} Id. \\
\textsuperscript{113.} Id. \\
\textsuperscript{114.} Id. at 250. Marshall added, “It seems to me manifest that that ‘full range of conduct’ which an individual is free to pursue must encompass one’s interest in dressing according to his own taste. An individual’s personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle. . . . [T]o say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, and personal integrity that I have always assumed the Constitution was designed to protect.” \textit{Id.} at 250-51 (citations omitted).
\textsuperscript{115.} \textit{Id.} at 253 (citing Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Judge Craven of the Fourth Circuit has suggested in \textit{Personhood: The Right to be Let Alone}, 1976 DUKE L.J. 699, 699-702, that personal appearance should be included in a new category of judicially recognized, nonfundamental rights “which, considered separately, may seem trivial, but together make up what most individuals think of as freedom.” \textit{Id.} at 699. Along these same lines, see \textit{Note}, \textit{The Right of Eccentricity}, 29 HASTINGS L.J. 519 (1978).
\textsuperscript{116.} Whatever the intended scope of \textit{Kelley}, subsequent cases demonstrate a willingness to apply the rational connection test in a surprisingly wide range of contexts. \textit{See}, e.g., Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (hair length of privately employed bus driver); Saal v. Middendorf, 427 F. Supp. 192, 199 (N.D. Cal. 1977) (Navy policy mandating discharge and exclusion from reenlistment of person engaging in homosexual conduct); Forts v. Malcom, 426 F. Supp. 464 (S.D.N.Y. 1977) (city jail policy prohibiting female pretrial detainees from wearing slacks); Loughran v. Codd,
zational decisions continues, the constitutional characterization the courts will ultimately ascribe to this area of an individual's life is more elusive. The struggle with this particular definitional uncertainty goes on whether the status of the complaining individual is that of a public employee or a member of the public in general.\(^\text{119}\)

*Kelley* has been uniformly interpreted to mandate some form of judicial review where appearance rights are restricted. On this basis, the Seventh Circuit in *Pence v. Rosenquist*\(^\text{120}\) overruled its pre-*Kelley* decision, *Miller v. School District Number 167*.\(^\text{121}\) In *Pence*, a school bus driver challenged the validity of a prohibition on beards and mustaches. The district court granted summary judgment for the school officials, relying upon the *Miller* rule that governmental restrictions upon employee interests in personal appearance are not subject to review in the federal courts.\(^\text{122}\) The court of appeals reversed, holding that a categorical denial of constitutional relief would be inconsistent with *Kelley* and reflected that it would be more appropriate to analyze the problem in terms of a rational relationship between the rule and a public purpose.\(^\text{123}\) *Pence* further suggests that the Seventh Circuit will

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119. *Williams* v. *Kleppe*, 539 F.2d 803 (1st Cir. 1976) (nude bathers). This appears to be the only case aside from *Wilson*, discussed *infra*, involving private citizens outside of an institutional or employment context.

120. 573 F.2d 395 (7th Cir. 1978).

121. 495 F.2d 658 (7th Cir. 1974). See notes 56-59 & accompanying text *supra*.

122. 573 F.2d at 397, 400.

123. *Id.* at 399. The court explained the basis for its change in position: "The *Miller* approach is to hold categorically that a government employee's interest in choosing a style of appearance is not significant enough to raise a constitutional issue when he is discharged or excluded from government employment because the employer requires a different style. The Supreme Court's approach in *Kelley* does not support *Miller*. Indeed, but for the language about assuming a liberty interest, *Kelley* conflicts with *Miller*. At least the Supreme Court preferred to analyze the relationship of the rule to a governmental purpose than to adopt a principle categorically excluding the government employee's liberty interest in choice of personal appearance from constitutional protection." *Id.*
abandon the fundamental rights classification applied to students in *Breen v. Kahl* in favor of a uniform application of the liberty interest approach of *Kelley*.

Although Pence acknowledges that *Kelley* does provide some leadership in this field, the courts continue to divide over the proper classification of the interest in personal appearance. Some of the decisions outside of disavowing any recognition of the right as fundamental, are inconclusive as to when, if ever, the right will be upheld against state intrusion. Other courts are willing to characterize the right as a fourteenth amendment liberty interest; some only assume such a status for decisional purposes. Moreover, some of the state courts have avoided constitutional inquiry entirely by resolving the issue through statutory construction.

The First Circuit Court of Appeals has recognized that the liberty interest of a private citizen may deserve more extensive protection than that of a public employee or individual in an institutional context. This view derives support from *Kelley*, yet the Supreme Court offers little guidance as to the appropriate standard of review in such a case. Perhaps for this reason, the First Circuit in *Williams v. Kleppe* chose

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124. 419 F.2d 1034 (7th Cir. 1969). See notes 49-52 & accompanying text supra.
126. *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838 (2d Cir.), rev'd on rehearing en banc, 562 F.2d 856 (2d Cir. 1977), is a prime example of the confusion and lack of consensus engendered by this issue. A public school teacher challenged the constitutionality of a rule requiring him to wear a tie in class. Judge Oakes wrote the majority opinion, finding that the rule violated first and fourteenth amendment rights. *Id.* at 840-44. In so doing, he employed an intermediate standard of review akin to a balancing test. *Id.* at 846. Judge Meskill dissented and argued for a strict *Kelley* test. *Id.* at 852-54. He also denied that first amendment rights were involved. *Id.* at 847-51. On rehearing en banc the majority shifted and Judge Meskill wrote the majority opinion, *id.* at 856, while Judge Oakes, dissenting, echoed the sentiments of his now defunct majority opinion. *Id.* at 863-66.
131. See notes 110-13 & accompanying text supra.
to apply in the alternative three standards of review. In *Williams*, a private citizen claimed that a total ban on nude bathing along the Cape Cod seashore infringed upon "one of the smaller liberties entitled to substantive constitutional protection."\(^{133}\) In response, the court assumed for purposes of the decision that the right deserved "some measure" of protection and sustained the regulation since it met the "ordinary, relaxed standard of review, satisfied by a conceived, rational relationship."\(^{134}\) It arrived at a similar conclusion through the form of intermediate review contemplated in *Richards v. Thurston*.\(^{135}\) This holding required a finding that the government interest in preserving the coastal wilderness outweighed the interest of the plaintiffs in having a place to nude bathe.\(^{136}\) The court indicated it would find an unconstitutional infringement only if the citizen's interests were deemed fundamental; however, it expressly rejected such a characterization.\(^{137}\)

The current lack of judicial consensus may stem from the inherent limitations of the rationality test itself. The framework drawn in *Kelley* serves well a court dealing with claims arising purely from state or local regulation of uniformed organizations. As was shown in *Wilson*,\(^{138}\) however, when confronted with a different set of circumstances, the courts, out of a sense of justice, absence of guiding precedent, or simple confusion, often stray from a mechanistic search for a rational connection and apply a significantly different standard of review.

**City of Chicago v. Wilson**

Kimberly and Wallace Wilson are transsexuals who made the decision to undergo sex-change operations. In preparation for the operations, they were advised by their psychiatrists to practice living and dressing as females to test the correctness of their decision. On February 17, 1974 they were arrested on a public street in Chicago while dressed in women's clothing, wearing wigs and heavy make-up.\(^{139}\) The

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133. Id. at 806.
136. 539 F.2d at 807.
137. Id.
138. See notes 173-83 & accompanying text infra.
139. Both Wilson and Kimberly admitted to the arresting officers that they were biologically male and explained that they were transsexuals planning to undergo sex-change operations and were consequently required to practice cross-dressing as part of the usual preoperative therapy. They were nonetheless arrested and at the station house were required to pose for pictures in various stages of undress. Both the appellate court and the supreme court acknowledged the picture taking, but neither commented on its propriety. *City of Chicago v. Wilson*, No. 49229, slip. op. at 1 (Ill. May 1978); 44 Ill. App. 3d 620, 621, 357 N.E.2d 1337, 1339 (1976).
city ordinance that they were charged with violating provides in pertinent part: “Any person who shall appear in a public place in a dress not belonging to his or her sex, with intent to conceal his or her sex, shall be fined. . . .” At a joint bench trial Wilson and Kimberly were convicted of violating the ordinance and were each fined $100.

From the very outset, Wilson and Kimberly argued that the ordinance was unconstitutional because it unduly infringed upon their freedom of expression protected by the first amendment, denied them equal protection guaranteed by the fifth and fourteenth amendments, and was vague and overbroad in violation of due process. They also argued that freedom of appearance is a fundamental right protected by the ninth amendment and the privacy penumbra of the Bill of Rights. Finally, they urged protection for freedom of appearance under the fourteenth amendment as a matter of substantive due process.

The Appellate Court of Illinois rejected these arguments and upheld the constitutionality of the ordinance. It disposed of the first amendment issue by distinguishing pure speech from conduct and held that the defendants’ dress in this case was mere unprotected conduct in that it was not intended to convey any particular message. The equal protection issue was based upon the inherent sexual distinction in the ordinance. The actual effect was to allow a woman to wear a particular outfit while denying a man the right to wear those same clothes. Conceding that on its face the ordinance treated men and women identically, the defendants pointed out that the impact on each sex would be different and they argued that the use of a sex-based distinction in this case was arbitrary and beyond the legitimate interests of the city. The appellate court did little to answer this contention, except to summarily state that the classification was not arbitrary and to offer the cryptic and not terribly relevant observation that “the classification which is the subject of this action is gender itself.”

140. CHICAGO, ILL., CODE § 192-8 (1964). Ordinances and statutes that may be used to prohibit cross-dressing are fairly common in the United States although their enforcement is sporadic. 44 Ill. App. 3d at 623, 357 N.E.2d at 1340. See note 6 & accompanying text supra.

141. In short, the defendants’ sought all of the constitutional protections discussed earlier in this Note. See notes 10-37 & accompanying text supra. This “shotgun approach” was criticized in the city’s appellate court brief for indicating uncertainty as to the source of constitutional protection. Brief of Plaintiff-Appellee at 8. With the law in such a state of confusion, persons arguing the unconstitutionality of appearance restrictions have little choice but to raise every possible constitutional protection. See Craven, Personhood: The Right to be Let Alone, 1976 DUKE L.J. 699, 708.


143. 44 Ill. App. 3d at 624-25, 357 N.E.2d at 1341.

144. In theory the converse is also true, but it might well be argued that the ordinance, practically speaking, only limits the liberty of males since there are few masculine garments that women have not appropriated in modern fashion.

145. 44 Ill. App. 3d at 626, 357 N.E.2d at 1342.
Not restricting itself to a finding that the classification was rationally related to a legitimate governmental objective, the court went one step further to declare that "the State does have an interest in maintaining the integrity of the sexes." Furthermore, the court foreclosed the possibility of an equal protection argument based on discrimination against transsexuals when it said, "[B]ecause the United States Supreme Court has not recognized any 'liberty' interest in alternative sexual orientations we may not entertain equal protection arguments based on any but the two traditional sexual classifications." This argument is weak at best. An arbitrary classification denies equal protection regardless of whether there is a recognized liberty interest in being a member of the group. Otherwise, the legislature might legally discriminate against any group that had no previous sanction of protection from the United States Supreme Court.

The court also denied that the ordinance was vague or overbroad. The defendants suggested that unisex fashions make it impossible to determine what constitutes the clothing of one's own sex, but the court rejected this argument on the grounds that the specific intent required in the statute cured any possible vagueness; the wearing of potentially prohibited unisex fashions would not fall within the ordinance since the wearer would lack the necessary "intent to conceal his or her sex." In making this determination the court distinguished City of Columbus v. Rogers, an Ohio case in which a similar cross-dressing ordinance had been struck down on the basis of vagueness. The Ohio ordinance required no specific intent on the part of the offender and thus was clearly distinguishable.

The appellate court almost entirely avoided the question of fourteenth amendment protection of personal appearance as a liberty interest. It cited Kelley only in passing to indicate that the existence of such protection is still unclear. Instead, the court skirted the issue of appearance rights by saying that this ordinance was really not intended to regulate appearance, but rather to prohibit displays of offensive homosexual conduct. It gave no support for this reading except to say that "the language of the ordinance suggests" it. Other than the fact that section 192-8, the ordinance involved here, is part of the "Public Morals" Chapter of the Municipal Code, and that it includes a prohibition of public nudity, it is difficult to understand how the court derived

146. Id.
148. Id. at 625, 357 N.E.2d at 1342.
149. 41 Ohio 2d 161, 324 N.E.2d 563 (1975).
150. 44 Ill. App. 3d at 623, 357 N.E.2d at 1340. See note 92 & accompanying text supra.
151. 44 Ill. App. 3d at 623, 357 N.E.2d at 1340.
Furthermore, the court's typification of cross-dressing as homosexual conduct demonstrates a basic ignorance about sexual minorities. Neither transsexuals, such as the defendants in this case, nor transvestites are properly termed homosexuals and their motivations and conduct should be analyzed differently in light of the different implications for society. The appellate court decision also overlooked the fact that regardless of the "intentions" of the City Council in adopting section 192-8, the effect of the ordinance is still to regulate dress, and the ordinance should therefore rightfully be examined as an infringement upon the freedom of appearance.

Concluding that this case, in essence, concerned homosexual conduct rather than appearance, the court examined the defendant's ninth amendment, privacy, and substantive due process arguments in light of homosexual conduct. Citing Doe v. Commonwealth's Attorney for Richmond, the court held that homosexual activity is not constitutionally protected as a fundamental right or as a lesser liberty interest. In Doe, the defendants had challenged the constitutionality of a Virginia sodomy statute, claiming that it violated their rights to due process, privacy, and free expression. A three-judge district court upheld the statute and the United States Supreme Court summarily affirmed. From this, the Illinois Appellate Court concluded that there was not even a liberty interest in alternative sexual orientations and that therefore the defendants' claim of a fundamental right was unfounded, regardless of the source of the alleged right in the constitution.

Dismissing the privacy issue, the court simply concluded that if an act (in this case homosexual conduct) may be prohibited in private then it may likewise be prohibited in public. Again, the court analyzed the prohibited act as homosexual conduct rather than as a mere dress-style choice.

One last argument raised by Wilson and Kimberly concerned their special situation as transsexuals who planned to undergo sex-change operations. Both defendants testified that they were under the care of a

152. Id. at 622, 357 N.E.2d at 1339.
155. 44 Ill. App. 3d at 623-24, 357 N.E.2d at 1340-41.
156. Id. at 624, 357 N.E.2d at 1341. See notes 14-21 & accompanying text supra for an overview of the privacy right in appearance cases. For a view that advocates that the privacy right be uniformly expanded to cover appearance issues, see Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U. L. Rev. 670 (1973).
psychiatrist who recommended public cross-dressing as a necessary part of the preoperative therapy.\textsuperscript{157} The appellate court refused to consider this, stating that the harmful effects on society of the cross-dressing were the same regardless of the defendants' motives. The court claimed to have no authority to judicially create an exception to the ordinance.\textsuperscript{158}

On appeal, the Supreme Court of Illinois approached the Wilson case much differently. Most importantly, it viewed the ordinance as a regulation of personal appearance and analyzed it in that light. It held, in unqualified terms, that freedom of appearance is indeed protected by the United States Constitution.\textsuperscript{159} In so doing, Justice Moran, writing for the majority, placed primary importance on Kelley, although acknowledging that the assumption of a protectable interest in Kelley was for decisional purposes only and did not establish a precedent.\textsuperscript{160} In analyzing Kelley, the Illinois court was fully aware of the distinction between private persons and individuals in an institutional setting, and apparently agreed that the private citizen's interest is entitled to a greater degree of protection.\textsuperscript{161}

In conjunction with its reliance on Kelley, the court cited a number of its own prior decisions that clearly limited the power of the state to regulate personal courses of action having no demonstrable effect on society at large.\textsuperscript{162} These cases involved a statute requiring the rider of a motorcycle to wear a helmet,\textsuperscript{163} and ordinances prohibiting dancing in public restaurants,\textsuperscript{164} the private possession of liquor,\textsuperscript{165} smoking outdoors in public areas,\textsuperscript{166} and the erection and maintenance of billboards in designated areas.\textsuperscript{167} In each case the court found no damaging effect on the populace and consequently struck down the statute or ordinance. The precise purpose of these citations in Wilson is unclear, but they are important for two reasons. First, they indicate the court's willingness to inquire into the legitimacy of the statute's purpose. In

\textsuperscript{157} This is a typical procedure for sex-change candidates. In order to be sure that the patient has made a correct decision he or she must learn what it will be like to function in society as a member of the opposite sex. Normally, the cross-dressing period lasts from one to two years. Comment, M.T. v. J.T.: An Enlightened Perspective on Transsexualism, 6 CAP. L. REV. 403, 408 (1977).

\textsuperscript{158} 44 Ill. App. 3d at 624, 357 N.E.2d at 1341.

\textsuperscript{159} City of Chicago v. Wilson, No. 49229, slip. op. at 3 (Ill. May 1978).

\textsuperscript{160} Id. at 2.

\textsuperscript{161} Id. at 4.

\textsuperscript{162} Id. at 3.

\textsuperscript{163} People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969).

\textsuperscript{164} City of Chicago v. Drake Hotel Co., 274 Ill. 408, 113 N.E. 718 (1916).

\textsuperscript{165} Town of Cortland v. Larson, 273 Ill. 602, 113 N.E. 51 (1916).

\textsuperscript{166} City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914).

\textsuperscript{167} Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911).
terms of a means test, this investigation suggests a principled inquiry into the end as well as means components. Second, this line of cases suggests that the Illinois court will restrict legislative curtailments of personal freedoms to situations that result in actual harm to society. Relying on these cases in conjunction with *Kelley*, the court easily found that the Constitution "provides an individual some measure of protection with regard to his choice of appearance." Neither the degree of protection to be afforded, nor the constitutional source of the right was specified, but it is clear that the right was not deemed fundamental.

Having established the existence of a protectable interest, the court concentrated on determining when the state may infringe that interest. It acknowledged that *Kelley* offers no guidance on this point, since it concerned a uniformed public employee rather than the private citizens involved here. The court set up its own standard, which is quite different from the rationality test applied in *Kelley*. Two elements were considered in ruling on the permissibility of the infringement on appearance rights: the circumstances of the case and the reasons given by the city to justify the ordinance. The term "circumstances" was not defined, but was applied very broadly to include the particular factual situation of these defendants in their status as preoperative transsexuals advised to cross-dress as part of their psychiatric therapy. This analysis directly opposed the appellate court determination that the individual defendants' circumstances were irrelevant.

In its brief the city listed four objectives of the ordinance, which the court summarized as follows: "1) to protect citizens from being misled or defrauded; 2) to aid in the description and detection of criminals; 3) to prevent crimes in washrooms; and 4) to prevent inherently antisocial conduct. . .." Although the city asserted these purposes, it offered no data to substantiate its conclusion that cross-dressing is related to criminal activity and has deleterious effects on society's morals. Under the *Williams* rationality test the city would not have been required to state its purposes, much less to prove the connection between the statute and goal, but, as will be shown, the city's lack of evidence

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169. *Id.* at 4.
170. *Id.* at 4-5. If the *Kelley*-type rationality test had been applied, the city almost certainly would have prevailed. In both cases there was a paucity of evidence supporting the regulation's effect and some evidence expressly indicating that it failed to achieve its purported goals. Nonetheless, the police department prevailed in *Kelley* because the court was unwilling to inquire whether there was a "practical" connection. See notes 99-107 & accompanying text *supra*.
171. See notes 151-53 & accompanying text *supra*.
172. Slip. op. at 4.
was crucial in this court’s determination.\textsuperscript{173}

The standard used by the Illinois Supreme Court in evaluating the circumstances of the case and the city’s reasons for the ordinance is very difficult to identify precisely. Nowhere does the court label or explain the test that it applied, but the process of analysis used indicates that either a means test or a balancing test was employed; the decision is equally susceptible to either interpretation.\textsuperscript{174}

A means test, commonly applied in equal protection cases, places primary emphasis on the efficacy of a statute in executing its purported goals.\textsuperscript{175} In short, it focuses on the means used to achieve an admittedly legitimate end. There is no question that a city has the power to enact ordinances protecting its citizens from “washroom crimes,” helping to detect criminals, and safeguarding the morals of the community.\textsuperscript{176} Although these goals are normally legitimate and recognized concerns of government, the Illinois Supreme Court questioned the efficacy of section 192-8 in achieving these goals.\textsuperscript{177} As previously indicated, the city failed to demonstrate any connection between cross-dressing and criminal behavior, and the court refused to assume the existence of such a connection. In addition, the fact that Wilson and Kimberly were not engaged in otherwise criminal activity and had a positive reason for cross-dressing further weakened the city’s position. In summary, four factors indicated that the ordinance did not act as a “means” which achieved a legitimate goal: 1) the lack of evidence by the city; 2) the lack of any self-evident connection between criminality and cross-dressing; 3) the fact that these defendants were not engaging in otherwise criminal activity; and 4) the positive reason given by the defendants for their cross-dressing.

The same process was used to evaluate the city’s final justification, the prevention of inherently antisocial conduct. The city’s brief is devoid of any evidence showing the effect of cross-dressing on the morals of the citizenry.\textsuperscript{178} The court was willing to assume that witnessing cross-dressing might offend the aesthetic sensibilities of a passerby, but

\begin{footnotes}
\item[173] See notes 62-63, 98-106 & accompanying text supra.
\item[174] There is language in the decision to support both interpretations. The words “weighing” and “balance” appear in the decision, but the court also stressed the city’s burden of showing how the purported harm to society results.
\item[175] See generally Gunther, \textit{Forword In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 HARV. L. REV. 1 (1972) (suggesting that an intensified means scrutiny, under the auspices of equal protection, will provide the courts new flexibility in deciding a wide variety of personal liberty cases).
\item[176] These goals fall within the traditional role of the state to protect the health, safety, welfare, and morals of its citizens.
\item[177] City of Chicago v. Wilson, No. 49229, slip. op. at 4-5 (Ill. May 1978).
\item[178] The brief contains but one sentence concerning morals. Brief of Plaintiff-Appellee at 19.
\end{footnotes}
it refused to assume any more serious effect on morals.\textsuperscript{179} Because of this failure to demonstrate causality, and since purely aesthetic sensibilities are not in and of themselves usually protectable at the expense of another's liberty, the court concluded that the public would have to suffer some minor discomfort so that the defendants could pursue their recommended therapy.\textsuperscript{180} Viewed in terms of a means test, the court was actually saying that the ordinance had not been shown to protect public morals in any meaningful way.\textsuperscript{181}

Perhaps an even more convincing method of analyzing the court's reasoning is in terms of a balancing test in which the interests of the two parties are weighed.\textsuperscript{182} Many of the same factors are involved in a balancing test as in a means test, but they appear in a different analytical framework. Essentially, the importance of the government's purpose and the efficacy of the statute in achieving it are balanced against the importance of the liberty interest involved and the severity of the infringement. When this analysis is applied to reasons one through three above, the city's mere assertion that persons do in fact cross-dress for the purposes of committing crimes and/or escaping detection is weighed against the defendants' need to cross-dress and the fact that if the ordinance is upheld against them they will be deprived of the therapy that medical experts consider crucial. When the balance was struck, the defendants prevailed. The issue was more complicated with respect to reason number four since the court was at least willing to assume that cross-dressing would offend the general public. The need to protect its citizenry from "offensive" displays of atypical sexuality constituted the whole of the city's interest, in the court's view. This interest was balanced against the need for an efficacious therapy program. Weighing the interests, the court concluded that the defendants prevailed. The significance of framing the defendants' interest in terms of their particular circumstances rather than in the abstract becomes immediately apparent.

Lest this distinction between a means test and a weighing standard

\textsuperscript{179} The appellate court had been willing to assume that cross-dressing "is likely to end in a contribution to moral delinquency." \textsuperscript{44} Ill. App. 3d 620, 623, 357 N.E.2d 1337, 1341 (1976).
\textsuperscript{180} City of Chicago v. Wilson, No. 49229, slip. op. at 5 (Ill. May 1978).
\textsuperscript{181} The court cites Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911), which says, in discussing dress and other personal choices: "[I]t has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other like matters, although the highly cultured may find on every street in every town and city many things that are not only open to criticism but shocking to the aesthetic tastes." \textsuperscript{Id} at 443, 94 N.E. at 923.
\textsuperscript{182} For a discussion of pre-\textit{Kelley} cases using a weighing test, see notes 67-69 & accompanying text supra. Judge Craven of the Fifth Circuit proposes a balancing test, as do a number of other legal scholars. Craven, Personhood: The Right to be Let Alone, 1976 DUKE L.J. 699; \textit{Kelley} v. Johnson and Tonsorial Tastes, supra note 10.
seem unimportant,\textsuperscript{183} it is essential to consider \textit{Wilson} as a source of precedent. Since the court's decision leaves the statute in force, it is possible that another case might arise involving a transvestite defendant not under a psychiatrist's care. This change in the factual situation would be more likely to alter the outcome under a weighing test than under a means test since the former test tends to give more consideration to context and particular circumstances. In a weighing test, the defendant's sole interest might be reduced to a desire to dress as he or she chooses. When balanced against the city's interest in sheltering its citizens from displays that they find offensive, the result might be very different and, at the very least, the precedential value of \textit{Wilson} in deciding the case would be weakened. On the other hand, if \textit{Wilson} is read as applying a means test, then a change in the particular defendant's situation should not, theoretically, be as crucial since the ordinance is still no more or less effective as a means of achieving the desired ends.

\textbf{Conclusion}

As the first significant case since \textit{Kelley v. Johnson} in which the constitutional interest of a private citizen in controlling his or her appearance is burdened by state regulation, the \textit{Wilson} decision stands as an important attempt to fill the analytical void left by the Supreme Court. In assessing the significance of the case, it is immediately apparent that the court was sensitive not only to the importance of dress choices, but to another interest of the defendants' as well.

First, the court explicitly afforded "some measure" of constitutional protection for choices in personal appearance.\textsuperscript{184} In so doing, it chose not to identify the specific source of the right; instead, it reasoned that to permit the state to proscribe certain modes of appearance as if no such right existed would be fundamentally inconsistent with a recognized panoply of individual rights, including "'privacy, self-identity, autonomy, and personal integrity.'"\textsuperscript{185} Second, although the court did not specifically acknowledge a liberty interest in alternative sexual orientations, it was cognizant of the defendants' need for unhindered psychological adaptation to their new sexual identities. This concern figured heavily in the court's final disposition of the case, as evidenced by its unwillingness to assume any state interest beyond enforcement of societal aesthetic preferences and its underscoring of the defendants' interest in maintaining an efficacious preoperative therapy program.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{183} Far from being unimportant, the search for a flexible, workable middle standard of review has been the occasion for voluminous legal writing. For examples of these works see note 186 infra.
\item \textsuperscript{184} City of Chicago v. Wilson, No. 49229, slip. op. at 3 (Ill. May 1978).
\item \textsuperscript{185} Id. (quoting Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting)).
\end{enumerate}
\end{footnotesize}
The court acknowledged that a different result would have frustrated the state policy providing for the issuance of new birth certificates after sex-change operations, but it is difficult to ascertain how heavily this consideration weighed in the court’s analysis. This general sensitivity to the need for sexual adjustment may lay the foundation for a formal recognition, sometime in the future, of a liberty interest in the more general pursuit of alternative sexual identities.

Further significance lies in Wilson’s striking departure from the minimal scrutiny standard announced in Kelley. While Justice Moran cited Kelley for its proposition that the degree of judicial review is dependent upon the context in which the right is asserted, he noted that the rational connection test was inapplicable when the regulation operates only upon citizens at large as opposed to persons in state organizational or institutional settings; thus, he opted for a more flexible standard of review. The chosen course reflects a thoughtful factual inquiry, rather than total deference to state action. This is demonstrated both by the court’s emphasis on the defendants’ unique interests in cross-dressing and its requirement that the city prove some real harm to society before restricting the defendants’ activity. Certainly the need for a middle standard of review similar to that adopted here has been recognized by many authorities; however, this is the first appearance case concerning private citizens to be clearly decided under such an intermediate test.

The difficulty with Wilson, however, is that while it clearly demon-

186. Early recognition of the need for a middle level of review is found in McCloskey. Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34, 40-41. The most extensive treatment appears in Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972). Based upon his observations in equal protection cases, Professor Gunther foresaw an intensified means scrutiny requiring legislative means to substantially further legislative ends. He described the approach as follows: “It would have the court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.” Id. at 21; accord, Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. REV. 670, 704-05 (1973) (proposing a “means scrutiny” to determine whether means chosen by the state are in fact reasonably orrationally related to a legitimate state end).

187. Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976), at least hypothetically applied a balancing test; however, it is unclear whether the holding was actually based on an intermediate standard of review since the court also relied on a rationality test. See notes 102-07 & accompanying text supra.
strates a move away from minimal scrutiny where the private citizen is involved, it fails to fully articulate its chosen standard of review. Statements evidencing either a means scrutiny or a weighing test provide insufficient guidance for future courts. Because of the court's emphasis upon the unique interests of the defendants and its failure to fully explain its analysis, applications of the Wilson approach may be limited by the particular facts of the case. Indeed, there is a clear implication that the city may be able to justify enforcement of the regulation in a different fact situation with a stronger evidentiary showing. Thus, it is unresolved whether other persons who engage in cross-dressing, such as transvestites or "drag queens," who are arrested under similar statutes may confidently cite Wilson as a source of protection.

It is apparent that the search for a standard of review will continue where the nonfundamental right of appearance is asserted in the face of statutory regulation. Until the Supreme Court speaks on the issue, or until the lower courts refine and develop the Wilson standard, the matter will not be resolved. Nevertheless, Wilson is significant evidence of the constitutional protection the right will be afforded. The Illinois Supreme Court avoided dichotomizing sexual conduct and dress choices and adopted an approach considering both the appearance and sexual identity aspects of the case to the extent that they overlapped in the particular facts at issue. Its decision was based on the realization that the issue embraces more than an individual's interest in making unfettered decisions in personal appearance. A mode of dress is a manifestation of personality, and therefore such regulations encroach upon individual efforts to fully develop and express self-identity. In this sense at least, Wilson recognizes the necessity of a more thoughtful consideration of individual interests where a state desires to burden the nonfundamental constitutional rights of its private citizens.

188. The holding in Wilson seems to support this implication. The court refused to invalidate the ordinance on its face which, in effect, gives the city a second chance to make its case should the law be challenged in the future. City of Chicago v. Wilson, No. 49229, slip. op. at 5 (Ill. May 1978).