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Notes

WHEN THE OPEN ROAD IS CLOSED TO JUVENILES: THE CONSTITUTIONALITY OF JUVENILE CURFEW LAWS AND THE INCONSISTENCIES AMONG THE COURTS

I. INTRODUCTION

[A]ll reasonable people believe that minors should not be roaming the street at all hours of the night. Most reasonable people would also agree that the state has a legitimate interest in maintaining a curfew for minors for their own health and welfare, to aid parents in enforcing the rules set within the family unit, as well as to minimize participation in illegal and/or harmful activities that youths might be tempted to undertake under the cover of darkness, such as vandalism or worse. As laudable as these goals are, the promulgation of a curfew law must also consider that certain things that youths do in public places after the curfew hour are not only legal, but also are strongly protected by the United States Constitution from interference by the state.¹

Hannah, a sixteen-year old high school sophomore, and her friends were walking down the street at 12:15 a.m. on a Tuesday night when a police officer stopped them for a curfew violation.² The city's curfew ordinance required minors seventeen years of age and younger to be off the street between the hours of eleven o'clock at night and six o'clock in the morning from Sunday to Thursday and from twelve o'clock at night to six o'clock in the morning on Friday and Saturday. The ordinance was enacted to deter juveniles from committing crimes, to protect children from becoming victims of crime, and to reinforce parental authority. The ordinance included exceptions for the following: (1) First Amendment activities, (2) interstate travel, (3) involvement in activities with the consent or accompaniment by a parent or guardian, (4) persons

¹ Hodgkins v. Goldsmith, No. IP99-1528-C-T/G, 2000 WL 892964, at *1 (S.D. Ind. July 3, 2000).

² This is a hypothetical created entirely by the author and contains fictitious names and events. The words "juvenile," "minor," and "child" will be used interchangeably throughout this Note to signal anyone who is under the majority age in his state, which is generally eighteen years old.

on direct route from employment or in the course of employment, (5) persons on direct route home from any school or other civic organization function, (6) persons on a reasonably necessary errand at the bequest of a parent or guardian, and (7) persons involved in an emergency situation. Violating the ordinance was a misdemeanor, punishable by a fine. Hannah and her parents sued the city under the First, Fourth, and Fourteenth Amendments to enjoin the city from enforcing the curfew ordinance.³

This is a typical scenario that arises out of juvenile curfew ordinances.⁴ These ordinances are a national phenomenon, plagued with many constitutional issues and no clear solution. Because the Supreme Court has provided no guidance on the constitutional implications of curfew ordinances, lawsuits continue to trouble the courts.⁵ Cases are decided inconsistently, and legislators remain uncertain about how to draft curfew ordinances.⁶ Judges and legislators face conflicts between

³ Both minors and parents have been found to have standing in curfew litigation, even though they may not have been arrested, fined, or threatened with either. *Naprstek v. City of Norwich*, 545 F.2d 815, 817 (2d Cir. 1976). It is enough that the ordinance prohibited intended conduct and "had been applied to and enforced against persons under circumstances identical to those in which the plaintiffs found themselves at the time of bringing the action." *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

⁴ See, e.g., Danny R. Veilleux, Annotation, *Validity, Construction, and Effect of Juvenile Curfew Regulations*, 83 A.L.R. 4th 1056 (1991).

Most of the litigation regarding juvenile curfew regulations has focused on their validity (§ 3-23), and the success or failure of the various challenges frequently depended upon the scope or clarity of the particular curfew restrictions and the judicial analysis of the nature or extent of a juvenile's due process, equal protection, or First Amendment rights under the United States Constitution or similar rights guaranteed under various state constitutions.

Id. at 1064.

⁵ Howard T. Matthews, Jr., Comment, *Status Offenders: Our Children's Constitutional Rights Versus What's Right for Them*, 27 S.U. L. REV. 201, 207-08 (2000). "With as many cases concerning the constitutionality of curfew ordinances that have entered the judicial system, the lack of Supreme Court guidance has left the federal courts without any concrete method of analysis." *Id.*; *Bykofsky v. Borough of Middleton*, 535 F.2d 1245 (3d Cir. 1975), *cert. denied*, 429 U.S. 964 (1976) (denying certiorari to a case involving a constitutional challenge to a juvenile curfew ordinance). In his dissent from the denial of a writ of certiorari, Justice Marshall stated that, "[b]ecause I believe this case poses a substantial constitutional question one which is of importance to thousands of towns with similar ordinances I would grant a writ of certiorari." *Bykofsky*, 429 U.S. at 966. The Court has also denied certiorari in other cases. See, e.g., *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999).

⁶ See, e.g., Jill A. Lichtenbaum, *Juvenile Curfews: Protection or Regulation*, 14 N.Y.L. SCH. J. HUM. RTS. 677, 686 (1998) (noting the inconsistent results over curfew ordinances due to the different analyses undertaken by the courts).

the rights of minors, citizen safety, public policy, and parental rights.⁷ Several provisions of the Constitution and Bill of Rights are, therefore, at issue—namely the First, Fourth, and Fourteenth Amendments.⁸

Although curfew ordinances come in a variety of forms, this Note focuses on the most popular—nocturnal juvenile curfew ordinances.⁹

⁷ See, e.g., William L. Foreman, Note, *Constitutional Law: Hutchins v. District of Columbia: The Constitutional Dilemma Over Juvenile Curfews*, 53 OKLA. L. REV. 717, 717 (2000) (recognizing the dangerous situation that arises because judges are required to balance the interests of a political community with the constitutional rights of individuals).

⁸ Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews and the Constitution*, 34 GONZ. L. REV. 267 (1998). “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.” U.S. CONST. amend. I.

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. amend. IV.

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

Id. amend. XIV, § 1. Fourth Amendment claims raise a number of other constitutional issues, which are beyond the scope of this Note. See *Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974).

⁹ Deidre E. Norton, Note, *Why Criminalize Children? Looking Beyond the Express Policies Driving Juvenile Curfew Legislation*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 175, 185 (2000). Other types of curfews include emergency, gender-based, race-based, and ethnicity-based. *Id.* at 185-91. Emergency curfews are implemented for a brief time period in order to promote public safety. *Id.* at 185. They are usually enacted during natural disasters or social protests. *Id.* They are consistently held to be “a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction.” *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) (imposing a county curfew after a hurricane); see also MADISON, WL, CODE ch. 23, § 47(2)(b) (2000), <http://livepublish.municode.com/20/lpext.dll/Infobase32/1/3642/289d?f=altmain-nf.htm&q=curfew&x=Simple&2.0> (last visited Apr. 16, 2003).

(2) The emergency power of the Common Council . . . includes the general authority to order . . . whatever is necessary and expedient for the health, safety, welfare and good order of the city in the emergency . . . includes . . . the power to:

....

(b) Impose a curfew upon all or any portions of the City thereby requiring all person in such designated curfew areas to remove themselves forthwith from the public streets, alleys, parks or other public places.

These curfews commonly order juveniles to be off the streets between the hours of eleven o'clock at night and six o'clock in the morning.¹⁰ This Note explores the validity of various juvenile curfew laws and proposes a model ordinance that will withstand a constitutional challenge. In doing so, Part II gives a broad background on juvenile rights, curfew ordinances, and the theories of relief under which these claims are

MADISON, WI., CODE ch. 23, § 47(2)(b). See also *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1115 (D.C. V.I. 1989) (upholding a curfew enacted in the wake of a hurricane). But see *Waters v. Barry*, 711 F. Supp. 1125, 1140 (D.D.C. 1989) (declaring curfew enacted to combat drug and violence crisis to be unconstitutional and unenforceable).

Gender-based curfews are normally enacted to protect a woman's safety and restrict her behavior. Norton, *supra*, at 185-86. For example, Eastern Kentucky University imposed a curfew on female freshmen, and after their freshman year, women could only be exempted from the curfew if they: "(1) maintained a 'C' average and remained free of academic or social probation; (2) paid a fifteen dollar fee each semester; and (3) if they were under twenty-one, obtained parental consent." *Id.* at 186. The curfew was challenged in *Robinson v. Board of Regents of Eastern Kentucky University*, but the court upheld the curfew despite the challenge. 475 F.2d 707, 711 (6th Cir. 1973).

Race-based curfews have been enforced by the United States itself and upheld by the Supreme Court. Norton, *supra*, at 187. These curfews were based on fear and applied to blacks in order to prohibit them from traveling during the nighttime when whites could not observe them. *Id.* This type of blatant discrimination was present in the mid-nineteenth century. *Id.* The problem now is not that curfews are enacted in such a matter, but rather that this discrimination is a motive in enacting curfew laws. *Id.* at 188.

A final type of curfew is one based on ethnicity, and the most famous of this kind was enacted during World War II and was imposed on Japanese, alien Germans, and alien Italians. *Id.* This generated the *Hirabayashi* cases. *Id.* The importance of these cases is that a law can be supported by valid policy concerns, while concealing invidious justifications, which are extremely difficult to prove. *Id.* at 190-91. These (gender-based, race-based, and ethnicity-based) other curfews "have a long and unpleasant history and have often been motivated by emotions—distrust, disrespect, discrimination, and hate—that have no place in lawmaking." *Id.* at 185.

¹⁰ See KANSAS CITY, MO., CODE § 50-237(a) (1998) ("It is unlawful for any minor under the age of 18 years to loiter, wander, stroll or play . . . at such places, . . . between the hours of 11:00 p.m. on any day and 6:00 a.m. of the following day; . . ."). Most of the hours fall within an hour later or an hour earlier. See, e.g., DENVER, COLO., CODE § 34-61(a)(1)a (2001) (defining curfew hours as those hours between "11:00 p.m. on any Sunday, Monday, Tuesday, Wednesday or Thursday until 5:00 a.m. the following day"). Others differ depending on the age of the individual. See, e.g., MINNEAPOLIS, MINN., CODE § 395.20(a)(b) (2001).

(a) For any person under fifteen (15) years of age the hours of restriction are between 10:00 p.m. and 4:00 a.m. . . .

(b) For any person who has attained the age of fifteen (15) years of age and is under eighteen (18) years of age, the hours of restriction are between 12:01 a.m. and 4:00 a.m. on the same day.

Id. In a poll of 800 cities done by the National League of Cities as a follow-up to a 1999 survey, fifty-five percent of the cities said the curfews extended one hour on the weekends. *Cities Say Curfews Help Reduce Gang Activity and Violent Crime*, U.S. NEWSWIRE, Oct. 25, 2001, 2001 WL 28753463.

brought.¹¹ Part III analyzes these claims individually and critiques how the courts have handled them in light of curfew ordinances.¹² Part IV deals with the critical language of challenged ordinances in order to propose a model ordinance that would withstand even an application of strict scrutiny.¹³ Finally, Part V provides a brief conclusion regarding the validity of curfew ordinances.¹⁴

II. BACKGROUND

This Part reviews the foundation and history of juvenile curfew law in the United States. A review of the inconsistencies and reasoning of the courts' decisions is necessary to understand the status of the law today. Subpart A discusses the history of the treatment of juveniles in the constitutional setting in order to justify the restrictions that curfews place on minors.¹⁵ The next Subpart examines the underpinnings of curfew legislation and why cities and states began enacting them.¹⁶ Following the discussion on why curfew ordinances are enacted, the decisions of the federal circuit courts are examined.¹⁷ Finally, the third Subpart scrutinizes the theories under which claims are brought by plaintiffs in curfew litigation.¹⁸

A. *The History of Juvenile Rights*

"[C]hildren do not fail to make decisions and plans on matters that they know about. What we really think of them is not that they cannot make decisions but rather that they are incapable of making good ones."¹⁹

There are two basic issues that are necessary to the discussion of juvenile constitutional rights.²⁰ The first concern is the conflict between

¹¹ See *infra* Part II.

¹² See *infra* Part III.

¹³ See *infra* Part IV.

¹⁴ See *infra* Part V.

¹⁵ See *infra* Part II.A.

¹⁶ See *infra* Part II.B.1.

¹⁷ See *infra* Part II.B.2.

¹⁸ See *infra* Part II.C.

¹⁹ LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 21 (1992) (citation omitted).

²⁰ See, e.g., Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child and State Relations*, 72 N.Y.U. L. REV. 131, 133 (1997) (discussing the history of the fundamental right of parents to guide the upbringing of their children). The analysis must include the custodial role that a parent plays and should balance the interests of the state with the

the parents' right to guide the upbringing of their children and the government's right to regulate the conduct of children.²¹ The government's ability to regulate children stems from the power of the state as *parens patriae*.²² This doctrine imposes a duty on states to protect the welfare of children.²³ Under this doctrine, states are authorized to intervene in the relationship between the parent and the child in certain situations.²⁴ Such intervention is warranted where there is some compelling interest at stake.²⁵ Courts have found that protecting the community from crime, deterring juveniles from committing crime, and protecting juveniles from becoming victims of crime are all compelling governmental interests.²⁶ A juvenile's liberty interest may, therefore,

minor's rights. *Id.* The starting point should be an examination of the relationships among the state, minors, and parents. *Id.*

²¹ Frank J. Kopecky, *Introduction to Juvenile Justice*, J. JUV. L. & PRAC. § 1.5 (2001). "It is difficult to draw the line between the state's duty to protect children and the parents' 'liberty' right under the Fourteenth Amendment to raise their children as they see fit." *Id.* This conflict has been ensuing for over 100 years. *Id.* The more recent analysis has been termed as "family privacy and parental control as opposed to state intervention and protection of children." *Id.* (citations omitted). The court has also taken a more traditional role in determining when this theory is appropriate. *Id.*; see also DAVID ARCHARD, CHILDREN: RIGHTS & CHILDHOOD 111 (1993) (recognizing that it is in the best interest of the child to be reared by its parents but that certain situations warrant the intervention of the state).

²² "[Latin 'parent of the country'] The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). "The concept of *parens patriae* developed in medieval times when the king provided wardship or shelter for orphaned children of lords and barons." Kopecky, *supra* note 21, § 1.4. The doctrine is most often used when a person in society is unable to take care of himself. *Id.* There is a presumption that the family will be primarily responsible for the care of its children. *Id.* However, if the family is unable to provide the needed care, the state may step in and do so. *Id.* This theory is the foundation for much of the social welfare laws that states have in place today. *Id.* The theory was thought to make its way into American law in the case of *Ex part Crouse*, 4 Whart. 9 (E.D. Pa. 1839). *Id.*

²³ *Ginsberg v. New York*, 309 U.S. 629, 639 (1968) (noting that the well-being of children is within the power of the state to regulate); see also Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 551-52 (2000) (recognizing that parents do not have absolute control over their children's lives because society has a stake in the healthy development of children, and "it will bear the burden of parental failure to fulfill their obligations").

²⁴ Tracey B. Harding, *Involuntary Termination of Parental Rights: Reform is Needed*, 39 BRANDEIS L.J. 895, 895 (2001) (discussing the power of the states to legislate subjects which traditionally have been decided in the intimate relationship of parent and child).

²⁵ *Arnold v. Bd. of Educ. of Escambia County, Ala.*, 880 F.2d 305, 312-13 (11th Cir. 1989) (holding that there must not be interference with the family absent a compelling justification).

²⁶ See, e.g., *Schall v. Martin*, 467 U.S. 253, 264 (1984) (holding the protection of the community from crime to be a compelling interest); *Nunez v. City of San Diego*, 114 F.3d

give way to the state's *parens patriae* power in order for the state to preserve and promote the welfare of children.²⁷

The second issue is the extent and scope of rights that children should enjoy under the Constitution.²⁸ The Supreme Court has examined the rights of juveniles on a case-by-case basis.²⁹ This methodology reflects the Court's view that the law should take special care of children.³⁰ Initially, legal jurisprudence did not favor minors.³¹ Although the concern for juvenile rights has advanced through the last century to afford minors greater protection under the Constitution, it is well established that the state's power to regulate the conduct of minors is more expansive than its power to regulate the conduct of adults.³² The

935, 947 (9th Cir. 1997) (finding the reduction of juvenile crime and juvenile victimization to be compelling interests); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (recognizing that the state interest in the well-being of its juveniles is compelling); *Washington v. J.D.*, 937 P.2d 630, 634 (Wash. Ct. App. 1997) (holding that crime prevention and protecting minors from being victimized are compelling interests).

²⁷ See *J.D.*, 937 P.2d at 633 (noting that in order to provide minors additional protection, the state can curtail their freedom, even "at the expense of their full constitutional rights").

²⁸ See *Chen*, *supra* note 20, at 131-32 (discussing the shift in the approach to minors' rights from focusing on the conflicts between the state and the parent, to conflicts between the state and the minor, and finally to separating the interest of the parent and the minor).

²⁹ Charles W. Gerdes, Note, *Juvenile Curfew Challenges in the Federal Courts: A Constitutional Conundrum Over the (Less Than) Fundamental Rights of Minors*, 11 ST. THOMAS L. REV. 395, 400 (1999); see also *Chen*, *supra* note 20, at 139 (noting that the Court has applied "general legal principles and theories . . . without establishing a structured framework for minors' rights").

³⁰ See, e.g., *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

³¹ *Harding*, *supra* note 24, at 895. There was a strong presumption that children are dependent persons who are not competent to make decisions about their own interests. *Id.* at 903; see also *ARCHARD*, *supra* note 21, at 47 (claiming that the law treats children worse than adults "not simply by denying them these rights, but by imposing extra burdens upon them").

³² *Gerdes*, *supra* note 29, at 400-01; see also *Ginsberg v. New York*, 390 U.S. 629 (1968).

Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public, citing statutes proscribing the sales of firearms and deadly weapons to minors without parental consent, and other statutes relating to minors' exposure to certain types of literature, the purchase by pawnbrokers of property from minors, and the sale of cigarettes and alcoholic beverages to minors.

Planned Parenthood v. Danforth, 428 U.S. 52, 72, 74 (1976) (holding that the constitutional rights of minors do not "mature and come into being magically" when a minor becomes an adult); *In re Gault*, 387 U.S. 1, 18 n.23 (1967) (stating that the child "receives the worst of both worlds" because he does not get the rights of adults nor the care and treatment of a child); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (recognizing that just because a state cannot prohibit an activity done by an adult "does not mean it cannot do so for children").

Supreme Court has frequently upheld laws as constitutional if they were aimed at children, even though these same laws would be unconstitutional if they had been aimed at adults.³³ The question then becomes what rights are in fact afforded to children and what level of scrutiny the Court should apply to alleged infringements of those rights.³⁴

The Supreme Court has not been clear in its decisions regarding this issue.³⁵ Some decisions explicitly state and protect the rights of children, while others tend to reflect a more paternalistic view.³⁶ For instance,

³³ See, e.g., *Ginsberg*, 390 U.S. at 638 (recognizing the scope of the power of the state to control the conduct of children as more expansive than its authority over adults); *Prince*, 321 U.S. at 168 (“The state’s authority over children’s activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment.”). The Supreme Court was most clear when it stated:

[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

Ginsberg, 390 U.S. at 649-50 (footnote omitted).

³⁴ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion). In regard to many of the constitutional claims brought by minors, the Supreme Court has found minors’ rights are “virtually coextensive with that of an adult.” *Id.* For instance, the Court has held that the Due Process Clause of the Fourteenth Amendment is applicable to minors in juvenile proceedings. See, e.g., *In re Winship*, 397 U.S. 358, 378 (1970) (holding that juveniles can only be found guilty upon proof beyond a reasonable doubt); *In re Gault*, 387 U.S. at 13 (holding that minors have the right to adequate notice, the assistance of counsel, and the opportunity to confront their accusers). The juvenile criminal justice system, however, is distinguishable from the adult system, which assumes that juveniles constitutionally may be treated differently. *Bellotti*, 443 U.S. at 635. Juveniles are not entitled to all of the requirements of a criminal trial, which includes a trial by jury. *Id.* For a discussion on the level of scrutiny to be applied, see *infra* Part II.B.2.

³⁵ NANCY E. WALKER ET AL., *CHILDREN’S RIGHTS IN THE UNITED STATES: IN SEARCH OF A NATIONAL POLICY* 10 (1999). One reason asserted for judicial inconsistency on this issue is the changing composition of the Supreme Court. *Id.* In the past twenty years, the constituency of the Court has changed from predominantly liberal to predominantly conservative. *Id.* Thus, the majority has been “unwilling to grant to minors those rights routinely acknowledged for adults.” *Id.* There are other differences between the justices that may influence their decisions, including “their willingness to consider social science findings to be ‘evidence’ [and] their knowledge of the stages of child development, including the ability to make informed decisions.” *Id.* at 11. “It has been said that ‘the development of children’s rights began with the Warren Court’ and advocates of self-determination rights were encouraged by such decisions as *Tinker* and *In re Gault*.” *Id.* at 12.

³⁶ *Id.* at 10; see also *Scott*, *supra* note 23, at 547.

there are certain procedural rights that are afforded to children in a criminal context such as adequate notice, the opportunity to confront their accusers, and access to counsel.³⁷ Conversely, children are not afforded the right to a jury trial, bail, or indictment by grand jury.³⁸ Today, there is a higher level of paternalism toward children, and courts do not always use the highest level of scrutiny to analyze possible burdens on their fundamental rights.³⁹

Many cases have addressed the issue regarding the scope of the rights of minors, but the landmark case that states that juveniles are less protected and can be regulated to a greater extent by the state is *Bellotti v. Baird*.⁴⁰ This case summarized the Supreme Court's decisions regarding the constitutional rights of children.⁴¹ The issue in the case was the constitutionality of a Massachusetts statute that required parental consent before an abortion could be performed on a minor who was unmarried, unless a court order issued on good cause was obtained.⁴² The Court could not agree on a single rationale, but eight Justices agreed that the statute was unconstitutional.⁴³

The plurality stated that the starting point for analysis in a case dealing with the rights of minors is that the Fourteenth Amendment and the Bill of Rights protect both children and adults.⁴⁴ Nevertheless, the Court cautioned that these legal theories would be unsound if not

Paternalistic legal regulation of children is based on a conventional understanding of childhood, an understanding that conforms quite well to the developmental account of human capacities in the early stages of life. Immature youths are assumed to be unable to look out for themselves, and thus are in need of adult supervision and guidance. Several interrelated dimensions of immaturity are important in shaping legal policies that treat children differently from adults. First, children are dependent on others Children also lack the capacity to make sound decisions. . . . Children's decision-making also reflects immature judgment, which may lead them to make choices that are harmful to their interests and the interests of others. . . . [C]hildren are assumed to be malleable and thus vulnerable to both influence and harm from others.

Scott, *supra* note 23, at 550-51 (footnotes omitted).

³⁷ *In re Gault*, 387 U.S. at 1.

³⁸ *Id.* at 22; *see also* *Kent v. United States*, 383 U.S. 541, 555 & n.2 (1966).

³⁹ WALKER ET AL., *supra* note 35, at 12.

⁴⁰ 443 U.S. 622 (1979) (plurality opinion).

⁴¹ *Id.* at 634-35; *see also* *Gerdes*, *supra* note 29, at 402.

⁴² *Bellotti*, 443 U.S. at 625.

⁴³ Justice White penned the only dissenting opinion. *Id.* at 656 (White, J., dissenting).

⁴⁴ *Id.* at 633-34.

adjusted to fit the needs of children.⁴⁵ Thus, the plurality held that children's constitutional rights should not be equated with those of adults and justified its conclusion with three reasons: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."⁴⁶

Courts continue to utilize these factors today to address situations involving the rights of children.⁴⁷ However, not all courts have used the *Bellotti* factors in curfew cases.⁴⁸ The major debate about their use centers on whether or not the factors should apply outside the abortion context in which they were originally created.⁴⁹ Nevertheless, even in

⁴⁵ *Id.* "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *Id.* (citation omitted). The Court also noted the importance of passing down values and morals on to our children. *Id.*

⁴⁶ *Id.* at 634. The first factor, the peculiar vulnerability of children, is especially important when analyzing situations where minors are deprived of liberty and property interests. Gerdes, *supra* note 29, at 403. An example of the application of this factor is that juveniles are given a separate criminal justice system and are not afforded the right to a jury trial. *Id.* The most important implication of this factor is that "legal systems can recognize and adjust for the unique liabilities of children in a given legislative scheme without doing violence to the Constitution." *Id.* The next factor, the inability to make critical decisions, is especially difficult to measure because the Supreme Court has not defined the type of choices or decisions that are critical. *Id.* at 404. It is clear that states can limit a child's decision-making capacity in situations where such decisions would have serious consequences. *Id.* This is especially evident in the treatment of First Amendment rights for minors. *Id.* at 405. Another example of a situation where a minor's decision making is limited is the requirement that a parent consent before a minor can enter into a marriage. *Id.* at 406-07. The final factor to be considered is the importance of the parental role in child rearing. *Id.* at 407. The Supreme Court has identified the parental constitutional right to guide the upbringing of their children in a number of cases. *Id.* at 408 (citing *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). However, the right is not absolute, and there are some situations where the state may step in as *parens patriae*. *Id.*

⁴⁷ Brian Privor, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 429 (1999) (recognizing that courts have most often used the *Bellotti* factors when dealing with the rights of minors).

⁴⁸ See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 538-40 (D.C. Cir. 1999) (declining to apply the *Bellotti* factors); *Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997) (applying the *Bellotti* factors); *Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 184 (D. Conn. 1999) (same); *Waters v. Barry*, 711 F. Supp. 1125, 1137 (D.D.C. 1989) (same); see also Adam Poff, Comment, *A Tale of Two Curfews (And One City): What Do Two Washington D.C. Juvenile Curfews Say About the Constitutional Interpretations of District of Columbia Courts and the Confusion Over Juvenile Curfews Everywhere?*, 46 VILL. L. REV. 277, 298-99 (2001).

⁴⁹ Poff, *supra* note 48, at 299. Courts and commentators who oppose using the *Bellotti* factors in juvenile curfew cases look to the Court's own words in *Bellotti*, "[t]he abortion decision differs in important ways from other decisions that may be made during minority

situations where courts do agree that the *Bellotti* factors should be applied, the results are still inconsistent.⁵⁰ To understand the application of the *Bellotti* factors in the curfew context, it is important to examine the history of curfew ordinances and the decisions in which they have been analyzed, which is discussed in the following subpart.

B. *Curfew Ordinances*⁵¹

*In light of this nation's long relationship with juvenile curfews, one would think that the related constitutional issues before so many American courts would have been resolved long ago. After all, United States cities began implementing juvenile curfews over a century ago. Nevertheless, the constitutional issues surrounding juvenile curfews are anything but well settled.*⁵²

1. History of the Ordinances

Curfew ordinances have been around since before the Civil War.⁵³ They are generally examined under two opposing viewpoints.⁵⁴ First,

... [T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Id.* (citing *Bellotti*, 443 U.S. at 642). Opponents also rely on the fact that only four Justices joined in the opinion in which the factors were established. *Id.*

Advocates of the use of the factors also rely on the language of the case itself, particularly that the "status of minors under the law is unique in many respects." *Id.* at 300 (citing *Bellotti*, 443 U.S. at 633). They argue that the statement means the Court intended for the factors to apply outside the abortion context. *Id.* However, the Court failed to explicitly limit its decision to abortion cases and even relied on cases outside the abortion context to establish the factors. *Id.* In forming the factors (i.e., the test), the Court relied on *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Ginsberg v. New York*, 390 U.S. 629 (1968), *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Id.* at 300 n.166.

⁵⁰ Jeff Beaumont, *Nunez and Beyond: An Examination of Nunez v. City of San Diego and the Future of Nocturnal Juvenile Curfew Ordinances*, 19 J. JUV. L. 84, 103 (1998). In the context of juvenile curfews, the *Bellotti* factors have been inconsistently applied. *Id.* Some ordinances have been invalidated due to an application of the factors, and some have been upheld. *Id.*

⁵¹ Curfew is defined as "the sounding of a bell at evening" or "a regulation enjoining the withdrawal of usu. specified persons (as juveniles or military personnel) from the streets or closing of business establishments or places of assembly at a state hour." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 284 (10th ed. 1998).

⁵² Poff, *supra* note 48, at 277-78.

⁵³ DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE* 1000 (2000). Even then, there were problems and constitutional issues regarding the ordinances. *Id.* at 1000-01. They were initially used to control slaves

some opponents contend that curfews infringe on the rights of minors and parents, which make the ordinances unconstitutional.⁵⁵ Second, they suggest that curfews do not adequately serve the interest for which they are enacted.⁵⁶ Advocates assert that curfews do serve very important purposes: the protection of juveniles from becoming the victims of crime and the deterrence of juveniles from committing crimes.⁵⁷ Since no national juvenile curfew law exists, cities and

or free blacks. *Id.* at 1000. At the end of the nineteenth century, they were directed solely at juveniles. *Id.* The curfews got their greatest support when President Benjamin Harrison called them the "most important municipal regulation for the protection of children of American homes, from the vices of the street." *Id.* At the turn of the century, there were about 3000 villages and municipalities that had a curfew law of some sort. *Id.*

⁵⁴ Lichtenbaum, *supra* note 6, at 678 (noting the groups that form between parents, children, lawmakers, and legislators and the division as to the constitutionality and practicality of curfew ordinances); see also Brant K. Brown, *Scrutinizing Juvenile Curfews: Constitutional Standards & The Fundamental Rights of Juveniles & Parents*, 53 VAND. L. REV. 653, 653 (2000) (noting that, "not surprisingly," two viewpoints arise surrounding curfew laws).

⁵⁵ Brown, *supra* note 54, at 653-54; Privor, *supra* note 47, at 427.

⁵⁶ See Jason T. Ross, *Mandatory Detention: The Fourth Circuit Upholds Charlottesville's Juvenile Curfew Ordinance*, 17 N.Y.L. SCH. J. HUM. RTS. 835 (2000) (recognizing that some studies show juvenile crime has increased, while others show it has not); David McDowall et al., *Juvenile Curfew Laws and Their Influence on Crime*, 64 DEC. FED. PROB. 58 (2000). The studies that are available do not conclude that curfews are ineffective. McDowall, et al., *supra*, at 62; see Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 1999 National Report* 111 (1999), <http://www.ncjrs.org/html/ojdp/nationalreport99/toc.html> (last visited Oct. 6, 2002). Studies done on juvenile crime do not "shed much light on the problem of juvenile crime." Snyder & Sickmund, *supra*. There are a number of reasons for the inconsistencies in juvenile crime rates, especially within the primary source of information on juvenile arrests, which is the Federal Bureau of Investigation's Uniform Crime Reporting Program. *Id.* at 112. Some of the problems include the following: (1) changes in arrest rates may be due to a greater willingness of victims to come forward and report crimes and not that more crimes are being committed; (2) crimes may be reported by the number of arrests that are made, not the number of persons that are arrested; (3) normally only the most serious crime the individual committed is reflected in the data; (4) only those crimes that have been "cleared" (i.e., an arrest was made) are reported; and (5) officers have a great deal of discretion in arrest procedures. *Id.* at 112-14.

⁵⁷ See Privor, *supra* note 47, at 421. Crime rates have increased significantly, allowing for wide public support of the curfews. *Id.* A poll by CBS news showed that of 2000 adult respondents, eighty-seven percent of them approved an eleven o'clock weekday curfew; fifty-three percent felt a nocturnal curfew would be very effective; and thirty percent thought that the curfew would be somewhat effective. *Id.* In a poll of nearly 800 cities done by the National League of Cities ("NLC"), "the overwhelming majority" said that the curfews were effective in improving safety in a number of areas: "combating juvenile crime (effectiveness reported by 97 percent of respondents), fighting truancy (96 percent of respondents), making streets safer (95 percent of respondents), and reducing gang violence (88 percent of respondents)." *Cities Say Curfews Help Reduce Gang Activity and Violent Crime*, U.S. NEWSWIRE, Oct. 25, 2001, 2000 WL 28754463. Among those cities polled that had

municipalities across the United States have enacted their own curfew ordinances.⁵⁸ They became increasingly popular in the 1990s due to an increase in gang activity.⁵⁹ A study done in 1997 revealed that eighty

nighttime curfews, fifty-six percent reported a decrease in the amount of violent crime and fifty-five percent reported a decrease in gang activities after only one year of the enactment of the curfew. *Id.*

⁵⁸ Norton, *supra* note 9, at 177. While only a few states have a state-wide curfew law, most are enacted and governed by local governments pursuant to their police powers. ABRAMS & RAMSEY, *supra* note 53, at 1001. Florida, Hawaii, Illinois, Indiana, Michigan, New Hampshire, and Oregon have statewide curfew laws. *Id.* For instance, the statute in Florida contains the following language:

(1)(a) A minor may not be or remain in a public place or establishment between the hours or 11:00 p.m. and 5:00 a.m. of the following day, Sunday through Thursday, except in the case of a legal holiday.

(b) A minor may not be or remain in a public place or establishment between the hours of 12:01 a.m. and 6:00 a.m. on Saturdays, Sundays, and legal holidays.

FLA. STAT. ANN. § 877.22(1)(a)-(b) (West 2002). In Hawaii, the statute prohibits:

Any child under sixteen years of age, who, except in case of necessity, or except when permitted so to do in writing by a judge of the family court, goes or remains on any public street, highway, public place, or private place held open to the public after ten o'clock in the evening and before four o'clock in the morning, unaccompanied by either a parent or guardian or an adult person duly authorized by a parent or guardian to accompany the child, is subject to adjudication under section 571-11(2).

HAW. REV. STAT. ANN. § 577-16 (Michie 2001). Similarly in Indiana, there is a codified curfew law that prohibits children fifteen through seventeen to be in a public place "(1) between 1 a.m. and 5 a.m. on Saturday or Sunday; (2) after 11 p.m. on Sunday, Monday, Tuesday, Wednesday, or Thursday; or (3) before 5 a.m. on Monday, Tuesday, Wednesday, Thursday, or Friday." IND. CODE ANN. § 31-37-3-2 (West 2002). Another provision limits children less than fifteen years of age to be in a public place "after 11 p.m. or before 5 a.m. on any day." *Id.* § 31-37-3-3. However, each of these states also has a provision that allows for counties, cities, or towns to modify the curfew regulation. *See, e.g.,* FLA. STAT. ANN. § 877.25 (allowing the county or municipality to adopt or incorporate the curfew or to provide more or less stringent regulations); HAW. REV. STAT. ANN. § 577-21 (allowing counties to create their own curfew ordinances which would supercede the statute); IND. CODE ANN. § 31-37-3-4 (allowing a city, town, or county to "advance the curfew time within the jurisdiction of the city, town, or county by not more than two (2) hours").

⁵⁹ Norton, *supra* note 9, at 176. President Clinton endorsed the enactment and enforcement of curfews, particularly the one proposed in New Orleans. Wolf Blitzer, *Clinton Supports Curfews To Cut Youth Crime* (May 30, 1996), <http://www.cnn.com/ALLPOLITICS/1996/news/9605/30/Clinton.curfew/index.shtml> (last visited Mar. 17, 2003). He noted that "[t]hey must also know that it's a dangerous world out there and these rules are being set by people who love them and care about them and desperately want them to have good lives." *Id.* In a related article, the President expressed his opinion that such curfews are "designed to help people be better parents." *ACLU Condemns President's Curfew Policy* (June 1, 1996), <http://www.aclu.org/news/s060196c.html> (last visited Mar. 17, 2003).

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percent of cities with populations of over 100,000 had enacted curfew laws within the past forty years.⁶⁰ Since 1990, at least ninety of these cities have enacted a new curfew or modified an existing one.⁶¹ In addition, the study showed that four out of five cities with populations of over 30,000 had nighttime curfews.⁶² Thus, it is clear that communities everywhere embrace and enact curfew ordinances.⁶³

The language of the ordinances varies, but they generally share four common features: "a blanket rule, exceptions to the rule, punishment for violation of the rule, and a list of purposes for promulgating the rule."⁶⁴ In essence, curfew ordinances make it punishable for a juvenile to be away from home at particular times of the evening.⁶⁵ Most jurisdictions treat a violation as a status offense.⁶⁶ Other jurisdictions punish violators with fines, community service, or just use the curfews as a means to get minors off the streets.⁶⁷ These ordinances also give rise to a host of

⁶⁰ Privor, *supra* note 47, at 419 (citing the Bureau of Justice Statistics, *Sourcebook of Criminal Justice and Statistics*, 102-07, tble. 1.114 (1996)).

⁶¹ United States Conference of Mayors, *A Status Report on Youth Curfews in America's Cities: A 347 City Survey* 8 (1997), <http://www.usmayors.org/uscm/news/publications/curfew.htm> (last visited Mar. 17, 2003).

⁶² *Id.*; see also Privor, *supra* note 47, at 419-20.

⁶³ Hemmens & Bennett, *supra* note 8, at 269. Juvenile curfews are one of the most popular methods used to combat juvenile crime. *Id.* at 323. "Juvenile curfews are not new, but their current degree of popularity is unparalleled." *Id.*

⁶⁴ Brown, *supra* note 54, at 656-57; see also Norton, *supra* note 9, at 175. Common exceptions include emergencies, running errands for parents, school functions, religious, government and civic events, and any activity as long as it is with a parent or guardian. Brown, *supra* note 54, at 657.

⁶⁵ Norton, *supra* note 9, at 177. "Juvenile curfew legislation creates status offenses by criminalizing activities of minors that would be legal if undertaken by adults." *Id.* They generally require "older minors" to be home between the hours of 11:00 p.m. and 5:00 a.m. *Id.* "Younger minors" have to be at home between 10:00 p.m. and 6:00 a.m. *Id.* Penalties can include fines from fifty to thousands of dollars. *Id.* Some ordinances hold parents liable for their children's behavior. Lichtenbaum, *supra* note 6, at 705.

⁶⁶ Hemmens & Bennett, *supra* note 8, at 271. Status offenders are treated differently than other offenders. *Id.* The Supreme Court has held that a state cannot criminalize status, but "this does not apply to juveniles because their age serves to mitigate their responsibility and requires the state to seek the 'best interests' of the child." *Id.* at 271 n.26; see also Matthews, *supra* note 5, at 201. The status offender is a statutory creation that comes within the court's jurisdiction for committing an act that would not be criminal had it been done by an adult. Matthews, *supra* note 5, at 202.

⁶⁷ Hemmens & Bennett, *supra* note 8, at 271. Some ordinances also include provisions that punish the parent or business owner. See, e.g., *Qutb v. Strauss*, 11 F.3d 488, 497 (5th Cir. 1993). The language of the ordinance in *Qutb* provided in part: "a parent or guardian commits an offense if he knowingly permits, or by insufficient control allows, the minor to remain in any public place or on the premises of any establishment within the city during curfew hours" and "the owner, operator, or any employee of an establishment commits an

issues, which relate to both the Constitution and public policy.⁶⁸ Legislatures have advanced similar public policy rationales in order to support these curfew ordinances: a reduction in juvenile crime rates, a reduction of the victimization of juveniles, and reinforcement of parental authority.⁶⁹ The majority of the public has been deeply concerned over the rise in juvenile crime and supports the implementation of these curfews as a possible solution to the problem.⁷⁰

2. Court Decisions

The first juvenile curfew case was heard in a Texas state court in 1898.⁷¹ The ordinance at issue was very broad, contained only two

offense if he knowingly allows a minor to remain upon the premises of the establishment during curfew hours." *Id.* The National Conference of State Legislatures found that "approximately half the states have amended existing laws or created new ones to apply to the parents of curfew violators." Lichtenbaum, *supra* note 6, at 705. Some jurisdictions require parents to undergo mandatory counseling with their children, partake in community volunteer work, pay fines up to five hundred dollars, or spend up to fifteen days in jail. *Id.* at 705-06.

⁶⁸ ABRAMS & RAMSEY, *supra* note 53, at 1002-03. Public policy concerns include the need to (1) assist parents in controlling their children; (2) compel parents to supervise their children; (3) protect children from criminal violence by other juveniles; (4) regulate gang activity; (5) protect society from the violence of juveniles; and (6) relieve juveniles from peer pressures that produce criminality in children who are not otherwise prone to criminal activity. *Id.* Opponents of juvenile curfew ordinances assert the following criticisms: (1) curfews are an undesirable crutch for parents; (2) they violate parents' prerogatives to control the upbringing of their children; (3) they have more of an effect on law abiding juveniles; (4) they involve law abiding juveniles in the criminal justice system; (5) they unfairly punish innocent youths for the crimes of a few; and (6) they waste good police resources. *Id.*

⁶⁹ Norton, *supra* note 9, at 175. These are the three most popular rationales that are put forth by legislators. *Id.* An additional problem that is raised by those who oppose curfew ordinances is that ulterior motives may be influencing legislators when they enact the laws. *Id.* These other potential motives include the public's fear of juveniles, the desire to get children off the streets, and the assistance that the curfews provide parents in the discipline of their children. *Id.* However, courts have found the interest of a reduction of juvenile crime and victimization as sufficient justification for the ordinances. *Id.*

⁷⁰ See, e.g., Jason J. Bach, Comment, *Students Without Rights: The Elimination of Constitutional and Civil Rights, As They Apply to Minors*, 1 NEV. LAW. 19 (Jan. 2000). Media attention has been focused on the violence of youths and society's inability to control them. *Id.* Regaining control of our youth has become "a top priority, even if that means elimination of fundamental Constitutional and civil rights that all other Americans enjoy." *Id.*

⁷¹ *Ex parte McCauer*, 46 S.W. 936 (Tex. Crim. App. 1898). The initial complaint was from a nineteen-year-old who was ticketed and detained for violating the ordinance. *Id.* at 936. He filed by writ of habeas corpus, and the case was remanded by the county judge and was then appealed. *Id.* The ordinance at issue made it unlawful for anyone under twenty-one years old to be on the streets "15 minutes after ringing of what is called the 'curfew bell'

exceptions, and was invalidated.⁷² The court held that the ordinance caused an undue invasion of a child's liberty interest and usurped the parental function.⁷³ The first federal case to examine the constitutionality of a nocturnal juvenile curfew ordinance was *Bykofsky v. Borough of Middletown*.⁷⁴ The court held that, with the exception of a few vague

provided for by the ordinance," which was nine o'clock in the evening. *Id.* at 937. The ordinance exempted those who were accompanied by a parent or were in search of a physician's services. *Id.* at 936.

⁷² *Id.* at 937.

⁷³ *Id.* The court stated:

The rule laid down here is as rigid as under military law, and makes the tolling of the curfew bell equivalent to the drum taps of the camp. In our opinion, it is an undue invasion of the personal liberty of the citizen, as the boy and girl (for it equally applies to both) have the same rights of ingress and egress that citizens of mature years enjoy. We regard this character of legislation as an attempt to usurp the parental functions, and as unreasonable, and we therefore hold the ordinance in question as illegal and void.

Id. The court held that the ordinance was unreasonable, paternalistic, and invasive of a citizen's personal liberty. *Id.* The court also noted that there were not enough exceptions in the ordinance and that they could think of a number of other situations where citizens would reasonably need to be on the street (church, social gathering, errand, etc.). *Id.*

⁷⁴ 401 F. Supp. 1242 (M.D. Penn. 1975). This action was brought by Ms. Bykofsky, on behalf of herself and her minor son, under the Civil Rights Act, 42 U.S.C. § 1983, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, seeking a declaratory, preliminary, and permanent judgment against the defendant, the Borough of Middletown. *Id.* at 1246. The plaintiffs requested that the court find the ordinance unconstitutional and enjoin the enforcement of the curfew. *Id.* In earlier proceedings, the court denied plaintiff's request for a preliminary injunction and defendant's motion to dismiss. *Id.* The Borough then decided to enact a new juvenile curfew ordinance that replaced the one in effect at the time of the suit. *Id.* The complaint and pleadings were amended to allow the plaintiffs to challenge the new ordinance in the present action. *Id.* Thus, the case before the court was the plaintiff's request for declaratory judgment to hold the new ordinance unconstitutional. *Id.* The ordinance prohibited minors from being on the street from ten o'clock or eleven o'clock in the evening (it varied with age) to six o'clock in the morning unless they fit into one of the curfew's exceptions. *Id.* The exceptions included the following: a minor accompanied by a parent (legal guardian, person standing *in loco parentis*, or one who has legal custody from a court order); a minor accompanied by a person authorized by the parent to do so; a minor exercising First Amendment rights, as long as written notice was given to the Mayor ahead of time; a minor in a case of reasonable necessity after a parent has notified the police of the situation; a minor on the sidewalk of his home or of the next door neighbor; a minor returning home (via a direct route) within thirty minutes of the end of a school, religious, or voluntary activity if prior notice had been given to the police; a minor has received a special permit from the Mayor; the minor is part of a group that is authorized by the Mayor to be out after curfew hours; a minor has a certified card for employment; a minor has parental consent to be in a motor vehicle for travel (travel within Middletown not covered under the curfew); and a minor is seventeen years old and excepted from the curfew by the Mayor. *Id.* at 1246-47. The ordinance also prohibited

words and phrases, the ordinance was constitutional.⁷⁵ The court also found that the ordinance did not violate any fundamental right of the child or the parents.⁷⁶ Additionally, it noted that, since the conduct of children can be regulated more than the conduct of adults, the curfew was a proper exercise of the City's police power.⁷⁷ The decision in *Bykofsky* was appealed to the Third Circuit Court of Appeals, who affirmed the lower court's decision.⁷⁸ The Supreme Court denied certiorari.⁷⁹

Since *Bykofsky*, other federal circuits have approached challenges to curfew ordinances in different ways.⁸⁰ For instance, in *Hutchins v.*

parents from "knowingly" allowing a child to violate the curfew. *Id.* at 1247. Finally, the curfew set out the punishment procedure. *Id.*

⁷⁵ *Id.* at 1266. The court found the word "normal" in the phrase "normal . . . night-time activities" to be unconstitutionally vague because the ordinance did not set forth any guidelines as to what constituted normal activity. *Id.* at 1250. It also held that the phrase "a minor well along the road to maturity" was unconstitutionally vague. *Id.* The problem with both of these phrases is that they left too much discretion with the Mayor as to what activity was permissible. *Id.* The court also held that the section that allowed the Mayor to enact a regulation if "consistent with the public interest" was vague. *Id.* The phrases "a sufficient degree of maturity" and "as an incentive to and recognition of approaching maturity" were also vague. *Id.* at 1251. The ordinance had a severability provision which allowed the court to delete the vague phrases without having to denote the entire ordinance unconstitutional. *Id.* at 1250.

⁷⁶ *Id.* at 1258. "The minor's interest in freedom of movement upon the streets . . . is clearly outweighed by the governmental interests which the ordinance furthers." *Id.* Also, the court noted that the ordinance "is a constitutionally permissible regulation of the minor's right to freedom of movement upon and use of the streets as guaranteed by the Due Process Clause of the Fourteenth Amendment." *Id.* Additionally, the ordinance did not unconstitutionally infringe on the First Amendment rights or the right to travel of the Borough's minors. *Id.* at 1260, 1262. Finally, the court also held that the ordinance did not unconstitutionally infringe on the parents' right to guide the upbringing of their children. *Id.* at 1262.

⁷⁷ *Id.* at 1266.

⁷⁸ 535 F.2d 1245 (3d Cir. 1976). The decision was noted only in a table of "Decisions Without Published Opinions." *Id.* Such tables only indicate the disposition of the case and do not generally have value to any person other than the parties and the court. *Id.*

⁷⁹ 429 U.S. 964 (1976). The Court denied certiorari by a seven to two vote. *Id.* The denial contained a strong dissent by Justices Marshall and Brennan. *Id.*

⁸⁰ Calvin Massey, *Juvenile Curfew and Fundamental Rights Methodology*, 27 HASTINGS CONST. L.Q. 775, 775 (2000) (analyzing the decisions of the Fourth, Fifth, Ninth, and D.C. Circuits). Other state and federal district courts have heard curfew cases, but the results have not been consistent either. See, e.g., *Hodgkins ex rel Hodgkins v. Peterson*, 175 F. Supp. 2d 1132 (S.D. Ind. 2001) (holding the ordinance to be constitutional); *Hodgkins v. Peterson*, No. IP-00-141-C-T/G, 2000 WL 33128726 (S.D. Ind. Dec. 20, 2000) (holding the Indianapolis curfew to be constitutional with the deletion of certain vague words and phrases); *Hodgkins v. Goldsmith*, No. IP99-1528-C-T/G, 2000 WL 892964 (S.D. Ind. July 3, 2000) (holding the Indiana curfew to be overbroad in violation of the First Amendment);

District of Columbia,⁸¹ the en banc court held, in a plurality opinion, that the curfew survived strict scrutiny and did not violate the First or Fourth Amendment rights of minors.⁸² This particular curfew contained numerous exceptions to its enforcement, including involvement in First Amendment activities.⁸³ The Second Circuit has heard one case on the issue but did not decide the case on the merits, holding instead that the ordinance was unconstitutionally vague because it contained no end time.⁸⁴ The Fourth Circuit, in examining and upholding a curfew ordinance as constitutional, applied intermediate scrutiny, reasoning that minors deserved more protection than rational basis, but not the most stringent level of protection.⁸⁵

Ramos v. Town of Vernon, 48 F. Supp. 2d 176, 188 (D. Conn. 1999) (holding the ordinance to be constitutional in light of equal protection, vagueness, and Fourteenth Amendment due process claims); Moorhead v. Farrelly, 723 F. Supp. 1109, 1114 (D.V.I. 1989) (holding that plaintiff was not entitled to injunctive relief regarding the emergency curfew due to lack of probable success on the merits); Waters v. Barry, 711 F. Supp. 1125, 1140 (D.D.C. 1989) (holding the temporary curfew to be unconstitutional); McColester v. City of Keene, 586 F. Supp. 1381, 1386 (D.N.H. 1984) (holding the ordinance to be overbroad on its face and violative of the Fourteenth Amendment Due Process Clause); *In re Spagnoletti*, 702 N.E.2d 917, 920 (Ohio Ct. App. 1997) (holding the ordinance to be unconstitutionally overbroad because the curfew restricted too much activity); Sale v. Goldman, 539 S.E.2d 446 (Va. 2000) (holding the ordinance to be constitutional because no fundamental rights were burdened by the ordinance); City of Milwaukee v. K.F., 426 N.W.2d 329, 338-39 (Wis. 1988) (holding that the ordinance passed constitutional muster even though the fundamental rights of juveniles were impinged upon by the ordinance).

⁸¹ 188 F.3d 531 (D.C. Cir. 1999) (plurality opinion). For a complete discussion of the *Hutchins* decision, see Benjamin C. Sasse, Note, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681 (1997).

⁸² *Hutchins*, 188 F.3d at 531. The plurality felt that the curfew did not implicate any fundamental rights of the minors or their parents. *Id.* However, even had such rights been violated, the court held that the ordinance would have withstood strict scrutiny. *Id.*

⁸³ *Id.* at 535. The curfew contained eight defenses to its enforcement which included the following: if a minor is (1) accompanied by a parent or guardian, (2) on an errand, (3) in a vehicle for the purpose of interstate travel, (4) occupied in employment activity or travel to and from employment, (5) involved in an emergency, (6) on the sidewalk "that abuts the minor's or the next-door neighbor's residence," (7) at an "official school, religious, or other recreational activity sponsored by the District of Columbia, a civic organization, or another similar entity," (8) or in the exercise of First Amendment rights, "including free exercise of religion, freedom of speech, and the right of assembly." *Id.*

⁸⁴ *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976). The court expressly limited its holding to the constitutional problems that arose because of the lack of termination time for the curfew. *Id.* "The failure [of the curfew] to provide the hour at which the curfew ends, makes the ordinance void for vagueness. Parents and minors subject to the ordinance are not given fair notice of when children under the age of seventeen are permitted to return to the streets." *Id.*

⁸⁵ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). The court did not apply rational basis because it accepted that minors do have some rights under the

The Fifth Circuit is the only circuit to have addressed the issue twice, rendering opinions on curfews that were extremely different in nature.⁸⁶ The earlier case found the curfew to be overbroad, and the merits were not reached in the court's narrow holding.⁸⁷ The latter case found the curfew to be valid under a strict scrutiny analysis because the curfew contained so many exceptions, thus satisfying the narrowly tailored requirement.⁸⁸ Finally, the Ninth Circuit applied strict scrutiny to a curfew ordinance because of the restriction on a minor's fundamental right to free movement and held the ordinance to be overbroad and unconstitutional.⁸⁹ It is very difficult to see the common ground with these cases, and, absent any resolution by the Supreme Court, "no discernible trend has yet appeared."⁹⁰ There are only a few consistencies

Constitution. *Id.* However, the court recognized that those rights are not coextensive with those of adults. *Id.* Thus, the court felt that the most appropriate standard to use was intermediate scrutiny, which required a showing that the ordinance was substantially related to an important government interest. *Id.* The court found that the City had an important (even compelling) interest in reducing juvenile violence, fostering the welfare of its children, and protecting them from harm. *Id.* at 847-48. The court also held that the City was justified in believing that the statute would meet the state's interest. *Id.* at 849; *see also* Ross, *supra* note 56, at 836-37 (discussing the *Schleifer* decision).

⁸⁶ *See* Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993); Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981).

⁸⁷ *Johnson*, 658 F.2d at 1071-72. The ordinance only contained exceptions for situations in which a minor is accompanied by a parent or a responsible adult or is on an emergency errand. *Id.* at 1071. The plaintiffs alleged that the ordinance was unconstitutionally overbroad. *Id.* Because the ordinance lacked sufficient exceptions, the court was precluded from narrowing the statute and found that it was unconstitutionally overbroad. *Id.* at 1074. However, the court specifically narrowed its holding to the overbreadth challenge and did not rule on the constitutionality of curfew ordinances. *Id.*

⁸⁸ *Qutb*, 11 F.3d at 496. The court found the ordinance to be constitutional and applied strict scrutiny based on the assumption, for purposes of analysis, that the right to free movement was fundamental. *Id.* at 492. However, the court declined to decide whether or not the assumption was true. *Id.* In this case, the ordinance contained numerous exceptions, including exemptions for employment, First Amendment activities, and interstate travel. *Id.* at 490. Thus, the court found that the ordinance was narrowly tailored to meet the state's compelling interest of protecting juveniles from crime on the streets. *Id.* at 496.

⁸⁹ *Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997). The court used strict scrutiny to analyze this statute because of the fundamental rights that were implicated by the ordinance. *Id.* at 944-46. The court held that the City did not show that the curfew was narrowly tailored because it "sweeps broadly, with few exceptions for otherwise legitimate activity." *Id.* at 949. For a complete discussion of the *Nunez* decision, see Beaumont, *supra* note 50.

⁹⁰ ABRAMS & RAMSEY, *supra* note 53, at 1002; *see also* Privor, *supra* note 47, at 419 (suggesting that "the [Supreme] Court is practicing self-restraint, allowing the states to experiment with innovative crime control techniques and allowing the curfews to be tested

that can be gleaned from these cases: minors do have constitutional rights; the conduct of minors may be regulated to a greater extent than that of adults; exceptions to the ordinance are often outcome determinative; and curfew ordinances are motivated by a compelling state interest.⁹¹

The inconsistencies in the circuit court opinions are due in part to the varying levels of scrutiny that the courts have applied.⁹² There are three different levels of scrutiny that can be applied to constitutional issues: rational basis, intermediate scrutiny, and strict scrutiny.⁹³ In juvenile

in the laboratories of the states before making any legal pronouncements that might be premature or lacking all the relevant data").

⁹¹ See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 539 (D.C. Cir. 1999) (holding that the rights of juveniles are not coextensive with those of adults and that the state's authority is broader over minor's conduct than it is for adults); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (recognizing that the rights of minors are not the same as those of adults and exceptions in the ordinance at issue were sufficiently narrow to meet the city's compelling interest); *Quibb*, 11 F.3d at 496 (holding that the ordinance was narrowly tailored to meet the compelling interest of the city); *Johnson*, 658 F.2d at 1074 (holding the ordinance to be unconstitutionally overbroad due to the lack of sufficient exceptions).

⁹² See, e.g., *Massey*, *supra* note 80, at 775 (noting that only two circuit courts agree as to what standard of review should apply in equal protection claims).

⁹³ See, e.g., *Brown*, *supra* note 54, at 660. The lowest level of scrutiny a court can apply when reviewing an equal protection claim is rational basis. *Id.* at 661. Rational basis requires that the law be reasonable with a fair relation to the subject matter. *Id.* This is a very deferential standard, and it is very rare for the Supreme Court to find a law that fails this test. *Id.* at 661-62. The challenger carries the burden of proof at this level and will not succeed unless he demonstrates that the law "has no legitimate purpose or that the means used are not a reasonable way to accomplish the goal" or that "the government's action is 'clearly wrong, a display of arbitrary power, not an exercise of judgment.'" ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 652, 659 (2d ed. 2002) (citation omitted). The Court has invalidated some laws at this level of review. *Id.* at 653; see, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528 (1973). The Court now describes the level of review as "not a toothless one." *Brown*, *supra* note 54, at 661 (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

Intermediate scrutiny was explicitly laid out in *Craig v. Boren*, where the Court stated the standard as "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 666-67 (discussing *Craig v. Bowen*, 429 U.S. 190, 197 (1971)). It is applied when the regulation is based on poverty, age, and alienage (if for employment in a government job). *Id.*

The most stringent level of scrutiny is strict scrutiny, which requires a compelling government interest and a statute that is narrowly tailored to meet that interest. *Id.* at 663-65. This is an extremely difficult standard to meet, and statutes are much less likely to be found constitutional. *Id.* at 665. This standard is applied only where a fundamental right is at stake or where the individual challenging the constitutionality of the law is a part of a suspect class. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); Douglas A. Smith, A

curfew cases, no uniform standard of review has been applied.⁹⁴ Rational basis has been used where one of three findings is present: (1) the rights of minors have a diminished value; (2) the state has a heightened interest in regulating children's behavior; or (3) there are no fundamental rights burdened by the ordinance.⁹⁵ Intermediate scrutiny has been applied in curfew litigation where the court recognizes that minors do have constitutional rights but also that those rights are not coextensive with those of adults; thus, a lesser degree of scrutiny is appropriate.⁹⁶ Finally, strict scrutiny has been applied when courts

Return to First Principles? Saenz v. Roe and the Privileges and Immunities Clause, 2000 UTAH L. REV. 305, 342-43 (2000). A suspect class is one that has been laden with disabilities as a result of discrimination, subjected to a history of purposeful unequal treatment, or relegated "to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Plyler*, 457 U.S. at 216 n.14. A fundamental right is a freedom that is essential to the concept of ordered liberty, a right that is inalienable. *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

Justices Thurgood Marshall and John Paul Stevens have argued that a sliding scale of review should replace the three levels of review for group classifications. *CHEMERINSKY*, *supra*, at 646-47. The Court continues to carve out exceptions and make subcategories within the three levels. *Id.* at 647. For instance, mental retardation is given "heightened rational basis." *Cleburne*, 473 U.S. at 471-72. Also, illegitimate persons are given slightly less than intermediate scrutiny. *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 620-21 (1973).

⁹⁴ Lichtenbaum, *supra* note 6, at 685; see also Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 554 (2000) ("Of the federal cases that have adjudicated juvenile curfews under one of the three standards of scrutiny, ten federal judges have articulated strict scrutiny . . . ten have chosen intermediate scrutiny, and six have chosen rational review.").

⁹⁵ See, e.g., *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1257-58 (M.D. Penn. 1975) (finding that the conduct of minors can be regulated to a greater extent than adults so rational basis was the appropriate standard to apply); *City of Panora v. Simmons*, 445 N.W.2d 363, 369 (Iowa 1989) (holding that rational basis was appropriate level of review because there was no fundamental right of intracity travel); *In re Spagnoletti*, 702 N.E.2d 917, 920 (Ohio Ct. App. 1997) (applying rational basis since freedom of movement is not a fundamental right of minors); *Sale v. Goldman*, 539 S.E.2d 446, 457 (W. Va. 2000) (applying rational basis because age is not a suspect classification).

⁹⁶ *Hutchins*, 188 F.3d at 541.

So "although children generally are protected by the same constitutional guarantees . . . as are adults, the State is entitled to adjust its legal system to account for children's vulnerability" by exercising broader authority over their activities. This means, at minimum, that a lesser degree of scrutiny is appropriate when evaluating restrictions on minors' activities where their unique vulnerability, immaturity, and need for parental guidance warrant increased state oversight.

Id. (citation omitted); see also *Schleifer*, 159 F.3d at 847 (holding that intermediate scrutiny was appropriate because children do possess qualified rights, which deserve something more than rational basis review, but that their rights are not the same as those of adults so

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recognize that curfew ordinances do infringe on the fundamental rights of minors and, regardless of the fact that minors' rights are not coextensive with those of adults, find the highest level of scrutiny to be appropriate.⁹⁷

Unfortunately, even when the same level of review was applied, the reasoning and outcome of the cases have been conflicting.⁹⁸ There are a number of reasons for this inconsistency. The most likely rationale is the disagreement among the courts as to whether or not juveniles possess the same fundamental rights as adults, which then determines whether or not juveniles' rights should subject the curfews to strict scrutiny.⁹⁹ Another factor is that the courts do not agree if there are any fundamental rights at stake in curfew litigation or if the curfews infringe on such rights.¹⁰⁰ This is often reliant on the exceptions that the curfew contains, which vary from one ordinance to another.¹⁰¹ A final possibility is that courts choose to focus their analysis on different theories of relief that are brought by plaintiffs, which are discussed below.¹⁰²

the standard should be less than strict scrutiny); *Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 184 (D. Conn. 1999) (applying intermediate review because minors do not possess the same rights as adults).

⁹⁷ See *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997). The court applied strict scrutiny because it found that there were fundamental rights at stake. *Id.* It also noted that it did not believe a lesser degree of scrutiny was appropriate just because minors were involved. *Id.*; see also *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993). For purposes of analysis, the court assumed that minors had a fundamental right to move freely. *Qutb*, 11 F.3d at 492. The court also recognized that minors may be treated differently than adults but applied strict scrutiny anyway. *Id.*

⁹⁸ See *Massey*, *supra* note 80, at 775 ("Only two circuits agree on the standard of review to apply to the equal protection claims, and those two disagree on the result.").

⁹⁹ See *supra* Part II.A (discussing the history of the rights of minors); see also *Hemmens & Bennett*, *supra* note 8, at 324-25 (noting that courts that find that minors' rights are the same as those of adults apply strict scrutiny and those courts that do not apply only rational basis).

¹⁰⁰ See *infra* Parts II.C, III.C (recognizing the importance of the exceptions that are contained in the ordinances in order to evaluate the fundamental rights that are at stake).

¹⁰¹ See *supra* this Part, Part II.B (discussing the components of curfew ordinances).

¹⁰² See *infra* Part II.C (discussing the theories of relief under which curfew cases are brought).

C. *Theories of Relief*

While some plaintiffs in curfew litigation bring a host of different claims, the most common constitutional challenges to curfew ordinances are brought under the First and Fourteenth Amendments.¹⁰³

1. First Amendment Claims

First Amendment claims generally address two different concerns.¹⁰⁴ First, plaintiffs allege that the curfew ordinances violate their freedom of speech, religion, assembly, and association, all of which are fundamental rights.¹⁰⁵ Even though these rights are explicit in the Constitution, children have not been afforded the same protection as adults.¹⁰⁶ Traditionally, courts have taken a more paternalistic approach to children with regard to First Amendment issues and have allowed stricter regulation of minors than adults.¹⁰⁷ This is justified because parents have the authority to direct the upbringing of their children in their own household, and the state has an interest in the well-being of children.¹⁰⁸ Even though this is true, First Amendment claims are

¹⁰³ Norton, *supra* note 9, at 179. See *supra* note 8 for the relevant constitutional provisions.

¹⁰⁴ Another claim that is made on a rare occasion is that curfews infringe on a freedom of movement that is found in the First Amendment. Poff, *supra* note 48, at 289. These claims are made on the basis of an infringement on one's right to "social association." *Id.* The Court has recognized that the freedom of association is limited and that the "Constitution [does not] recognize a generalized right of 'social association.'" *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

¹⁰⁵ Brown, *supra* note 54, at 677. The freedom of association was first officially recognized as a constitutional right in the court system in *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958). The freedom of association is a constitutional right included in the bundle of First Amendment rights made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Louisiana ex rel Gremellon v. NAACP*, 366 U.S. 293 (1961).

¹⁰⁶ See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (holding that state could restrict children from purchasing adult magazines even though it implicated their First Amendment rights); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding that the prohibition on children selling religious literature on the street was constitutional even though it burdened First Amendment rights).

¹⁰⁷ See Brown, *supra* note 54, at 678. "[T]he rule that the rights of minors are not coextensive with those of adults holds true in this [First Amendment] setting as well." *Id.*; see also *supra* Part II.A.

¹⁰⁸ See *Ginsberg*, 390 U.S. at 639.

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

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virtually always at issue.¹⁰⁹ However, this type of claim has been easily avoided by cities or states by including an exception in the ordinance for First Amendment activities, and, thus, most courts do not go through any First Amendment analysis.¹¹⁰

A second claim that is made under the First Amendment is that the ordinances are vague and/or overbroad.¹¹¹ The “void for vagueness” doctrine encompasses two main principles.¹¹² First, the ordinance must define the offense clearly so that a person of reasonable intelligence can understand what conduct is prohibited.¹¹³ Second, the ordinance must give clear guidelines to the enforcers of the statute to ensure that the statute is not enforced in a discriminatory or arbitrary manner.¹¹⁴ If these two conditions are not met, the ordinance will be struck down on vagueness grounds.¹¹⁵ The vagueness doctrine takes on particular importance in cases that deal with First Amendment rights and has been enforced more strictly in those situations.¹¹⁶

The overbreadth doctrine is a First Amendment doctrine that applies when a law regulates substantially more speech than is allowed by the Constitution.¹¹⁷ This doctrine also has a special rule that enables persons

Prince, 321 U.S. at 166 (citation omitted). The *Prince* Court further observed that “a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.” *Id.* at 168.

¹⁰⁹ *Brown*, *supra* note 54, at 677.

¹¹⁰ See *Lichtenbaum*, *supra* note 6, at 691.

¹¹¹ Most curfew ordinances that have been the subject of litigation have been challenged under either the vagueness or overbreadth doctrines. See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 535 (D.C. Cir. 1999) (challenging the ordinance as vague); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998) (same); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1068 (5th Cir. 1981) (challenging the ordinance as both vague and overbroad); *Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 180 (D.C. Conn. 1999) (same); *Ruff v. Marshall*, 438 F. Supp. 303, 305 (M.D. Ga. 1977) (challenging the ordinance as overbroad).

¹¹² *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (citing *Finley v. Nat'l Endowment for the Arts*, 100 F.3d 671, 675 (9th Cir. 1996)).

¹¹³ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). “[A statute must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and “provide explicit standards for those who apply [the statute].” *Id.*

¹¹⁴ *Id.*

¹¹⁵ *CHEMERINSKY*, *supra* note 93, at 763 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Vague laws violate due process whether speech is involved or not. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Lichtenbaum*, *supra* note 6, at 692. “The overbreadth doctrine applies when a law ‘does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an

to have standing in order to challenge a statute when they are not personally harmed but can show that the statute would restrict the speech of another person.¹¹⁸ Because laws that are overbroad have the ability to “chill” constitutionally protected speech, the doctrine and its standing rule are justified in certain situations.¹¹⁹ However, the Supreme Court does not favor the doctrine and has repeatedly found that a statute should not be invalidated because it is overbroad unless it is not subject to a narrower construction and has a real and substantial deterrent effect on First Amendment activity.¹²⁰

The two doctrines are very closely related and are most often alleged simultaneously, but it is important to note that these doctrines are not identical and require a separate analysis in order to be used to invalidate a law.¹²¹ The curfew ordinances that are most susceptible to these

exercise’ of protected First Amendment rights.” *Id.* (alteration in original) (citation omitted).

¹¹⁸ *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 957 (1984). The Court held that

where the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims “and with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.”

Id. (citations omitted).

¹¹⁹ *Ruff v. Marshall*, 438 F. Supp. 303, 305 (M.D. Ga. 1977).

Facial overbreadth scrutiny emphasizes the need to eliminate an overbroad law’s deterrent impact on constitutionally protected expressive activity. “Chilling effect” is a short-hand way of describing this vice of an overbroad law. Since by definition an overbroad statute covers some privileged as well as non-privileged activity, the statutory burden operates as a disincentive to action and creates an *in terrorem* effect on conduct within the protection of the First Amendment Lack of fair warning to actors or lack of adequate standards to guide enforcers also may lead to a “chill” on privileged activity.

Id. (citing *Hobbs v. Thompson*, 448 F.2d 456, 459-60 (5th Cir. 1971)).

¹²⁰ *See, e.g.*, *Nat’l Endowment of the Arts v. Finley*, 524 U.S. 569, 580 (1998) (holding that there must be some substantial risk of suppressing speech in order to invalidate a statute on its face); *Erznozik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (holding the ordinance to be overbroad because it was not susceptible to a narrowing construction and had both a real and substantial deterrent effect); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (“Application of the overbreadth doctrine . . . is manifestly strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.”).

¹²¹ *CHEMERINSKY*, *supra* note 93, at 917. A law can be overbroad without being vague and vice versa. *Id.* For example, in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*,

challenges are those that do not include exceptions, fail to define terms, and fail to include proper hour requirements.¹²²

2. Equal Protection and Due Process Claims

In addition to First Amendment challenges, actions have been brought against curfew ordinances claiming violations of equal protection and due process.¹²³ The Equal Protection Clause was adopted in order to ensure that all persons are treated equally under the law.¹²⁴ This clause guarantees that no state can regulate a suspect class differently or interfere with a fundamental right, unless the regulation meets strict scrutiny.¹²⁵ All curfew laws make distinctions based on age, but the Supreme Court has found that age is not a suspect class; thus, only a rational basis analysis is applied to regulations based on age.¹²⁶ Since rational basis is so deferential to the state, equal protection challenges to curfew ordinances would fail virtually every time.¹²⁷ The more common use of the Equal Protection Clause for plaintiffs in curfew litigation is the safeguarding of fundamental rights.¹²⁸ If the court finds that there is a fundamental right at stake in a particular case, strict scrutiny is normally applied.¹²⁹ The analysis is the same under the Due Process Clause of the Fourteenth Amendment.¹³⁰

482 U.S. 569, 574-75 (1987), the Court declared the ordinance overbroad because it prohibited all protected expression, but did not consider the law vague. *Id.*

¹²² See *Johnson v. Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981) (holding that the ordinance was void as overbroad because it did not contain any exceptions, other than for emergency errands); *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976) (holding that the ordinance was vague because it contained no end time); *McCollester v. City of Keene*, 586 F. Supp. 1381, 1385 (D.N.H. 1984) (holding that the ordinance was overbroad because it did not contain any exceptions for chaperoned juvenile activity).

¹²³ Norton, *supra* note 9, at 179; see also *supra* note 8.

¹²⁴ Lichtenbaum, *supra* note 6, at 682; see also *supra* note 8.

¹²⁵ Lichtenbaum, *supra* note 6, at 682-83; see also *supra* note 93.

¹²⁶ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); see also Norton, *supra* note 9, at 179. It has not been argued that minors are a discrete and insular class, which deserves the utmost protection under the constitution. Norton, *supra* note 9, at 179. Age, however, has been found to be subject only to rational basis. *Id.*

¹²⁷ See *supra* note 93 and accompanying text.

¹²⁸ CHEMERINSKY, *supra* note 93, at 526. "Since *Brown*, the Supreme Court has relied on the equal protection clause as a key provision for combating invidious discrimination and for safeguarding fundamental rights." *Id.*

¹²⁹ See *supra* note 93.

¹³⁰ Lichtenbaum, *supra* note 6, at 696. Similar to equal protection violations, courts will look at whether or not the ordinance interferes with the fundamental rights of a minor in order to determine whether or not a due process violation has occurred. *Id.* "Just as in

Both parents and children allege that curfew ordinances encroach on their fundamental rights.¹³¹ Parents typically argue that their fundamental right to raise their children without governmental interference is violated.¹³² The Court first recognized this right in *Meyer v. Nebraska*¹³³ and has continually recognized it since.¹³⁴ However, the Court has never held the right to be absolute.¹³⁵ For instance, the Supreme Court has allowed the state to regulate school attendance, child labor, and mandatory vaccinations.¹³⁶

Courts agree that parents do enjoy a fundamental right to guide the upbringing of their children; however, they do not always agree as to whether or not this right is infringed upon when curfews are enacted.¹³⁷

Equal Protection analysis, if the curfew ordinance infringes on a fundamental right, it is subject to strict scrutiny, and therefore, must be narrowly tailored to serve a compelling state interest. *Id.*

¹³¹ See, e.g., *Brown*, *supra* note 54, at 670-80 (discussing the rights of both minors and their parents).

¹³² *Norton*, *supra* note 9, at 179. The right comes from the liberties protected under the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

¹³³ 262 U.S. 390. The case dealt with a Nebraska statute that forbade the teaching of any language other than English. *Id.* at 397.

¹³⁴ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972) (finding a parent's right to free exercise in the context of compulsory education, which was against the Amish religion); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that the regulation infringed on the parent's right to choose their child's education).

¹³⁵ See *supra* Part II.A (discussing the state's power as *parens patriae*).

¹³⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citations omitted). The Court stated:

[T]he mere fact [that] a state could not wholly prohibit this form of adult activity . . . does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the state's command.

Id. at 168.

¹³⁷ See *Hutchins v. District of Columbia*, 188 F.3d 531, 540-41 (D.C. Cir. 1999) (holding that the parent's fundamental right to guide the upbringing of their children was not implicated by the curfew); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852 (4th Cir. 1998) (recognizing that parents do not possess an unqualified right to raise their children); *Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997) (holding the ordinance to be an unconstitutional burden on the fundamental rights of parents to guide the upbringing of their children); *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993) (holding the statute did not impermissibly infringe on parental rights); *Ramos v. Town of Vernon*, 48 F. Supp. 2d 176, 188 (D. Conn. 1999) (holding that there was no violation of any fundamental rights);

Some courts have explicitly recognized this parental right but failed to find that the right was implicated by curfew ordinances or at least that any intrusion was minimal.¹³⁸ Other courts have found that curfew ordinances do unconstitutionally infringe on parental rights because the curfews unduly burden the parents' right to be the primary authority over their children.¹³⁹ In many cases, however, the analysis focuses on the language of the ordinance. When the particular curfew at issue includes an exception for activities undertaken with a parent or guardian, or activities done with the parent's consent, courts have found the curfew valid on this point and invalid where the curfew lacked such exceptions.¹⁴⁰

Children challenging the ordinance further argue that they are being denied the right to travel or the right to freedom of movement.¹⁴¹ While the Supreme Court has recognized the right to interstate travel since the nineteenth century, the Court has never expressly resolved the question of whether or not there is a fundamental right to intrastate travel.¹⁴² The closest indication the Court has given to an explicit decision regarding the right was in *Bray v. Alexandria Women's Health Clinic*,¹⁴³ in which the

McCollester v. City of Keene, 586 F. Supp. 1381, 1386 (D.N.H. 1984) (holding the ordinance invalid due to the infringement on parent's rights).

¹³⁸ See *supra* note 137.

¹³⁹ See *Nunez*, 114 F.3d at 951-52. The court held that the ordinance "[was] not a permissible 'supportive' law, but rather an undue, adverse interference by the state." *Id.* at 952; see also *McCollester*, 586 F. Supp. at 1386. The court found that the ordinance was an "impermissible intrusion into [the] plaintiff parents' privacy and liberty interests in family and childbearing." *McCollester*, 586 F. Supp. at 1386.

¹⁴⁰ See, e.g., *Nunez*, 114 F.3d at 952. "The ordinance does not allow an adult to pre-approve even a specific activity after curfew hours unless a custodial adult actually accompanies the minor. Thus, parents cannot allow their children to function independently at night, which some parents may believe is part of the process of growing up." *Id.*

¹⁴¹ The right to free movement and the right to intrastate travel will be used interchangeably throughout this Note.

¹⁴² Nicole I. Hyland, Note, *On the Road Again: How Much Mileage Is Left on the Privileges or Immunities Clause and How Far Will It Travel?*, 70 *FORDHAM L. REV.* 187, 229 (2001). In fact, the Court has explicitly declined to even address the issue in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255-56 (1974). *Id.*

¹⁴³ 506 U.S. 263 (1993). The case dealt with a request for a permanent injunction to stop anti-abortion organizations from obstructing ingress or egress from facilities that provided abortions or related counseling due to an alleged conspiracy to deprive women of their fundamental right to interstate travel. *Id.* at 266.

majority held that the intrastate restriction did not implicate the right of interstate travel in that particular case.¹⁴⁴

Without any specific guidance from the Supreme Court, federal circuit courts are divided on the issue.¹⁴⁵ The First, Second, and Third Circuits have recognized the right to intrastate travel.¹⁴⁶ The courts recognized that the right to interstate travel could not be effectuated without recognizing the right to move within one's own state.¹⁴⁷ The Fourth, Fifth, Sixth, and Seventh Circuits have refused to recognize the right, and the District of Columbia has not decided the issue.¹⁴⁸ These circuits have found that recognizing the fundamental right to interstate travel does not necessitate finding a fundamental right to intrastate travel.¹⁴⁹ Not all of the circuit courts have discussed the issue with regard to curfew laws, but those that have are split on the issue. The District of Columbia rejected the idea that minors have a fundamental right to freedom of movement.¹⁵⁰ However, the Fifth and Ninth Circuits recognize, or at least assume, that there is some right to free

¹⁴⁴ *Id.* at 277. "Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them." *Id.* One scholar suggests that this holding resolves the issue of intrastate travel and proposes that the decision explicitly ruled out a fundamental right to intrastate travel. Hyland, *supra* note 142, at 230.

¹⁴⁵ Hyland, *supra* note 142, at 229. The circuit courts have analyzed the issue in a variety of contexts. *Id.* at 231. For example, they have examined "municipal durational residency requirements for recipients of public benefits, residence requirements for public employees, salary differentials for public employees based on residence, anti-cruising ordinances, and juvenile curfews." *Id.* at 231-32 (citations omitted).

¹⁴⁶ *Id.* at 232-36 (citing *Lutz v. New York*, 899 F.2d 255, 261 (3d Cir. 1990); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971); *Cole v. Hous. Auth.*, 434 F.2d 807 (1st Cir. 1970)).

¹⁴⁷ See, e.g., *King*, 442 F.2d at 648 ('It would be meaningless to describe the right to travel between the states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.');

Hyland, *supra* note 142, at 232 (citing *Wardwell v. Bd. of Educ.*, 529 F.2d 625 (6th Cir. 1976); *Wright v. City of Jackson*, 506 F.2d 900, 901-02 (5th Cir. 1975); *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972); *Eldridge v. Bouchard*, 645 F. Supp. 749 (W.D. Va. 1986)).

¹⁴⁹ See *infra* Part III.C.2 (analyzing the decisions on the rights to interstate and intrastate travel).

¹⁵⁰ See *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999). The court suggested that adults do have such a right but limited the analysis to children's rights. *Id.* "We think juveniles do not have a fundamental right to be on the streets at night without adult supervision. The Supreme Court has already rejected the idea that juveniles have a right to 'come and go at will' because 'juveniles, unlike adults, are always in some form of custody.'" *Id.* (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)).

movement.¹⁵¹ The more important question that arises with regard to curfew litigation is this: if such a right were recognized, would it in fact be extended to children?¹⁵²

III. ANALYSIS

The inconsistencies and splits among the courts put forth the framework for understanding the current state of the law. Part III evaluates the decisions of the courts in order to determine what constitutional issues are at stake with curfew ordinances.¹⁵³ Subpart A discusses the use of the *Bellotti* factors in curfew litigation.¹⁵⁴ In light of that analysis, Subparts B and C look at the implications that curfew ordinances have on the rights of parents and their minor children.¹⁵⁵

A. *The Use of the Bellotti Factors*

The Court in *Bellotti* intended its three-factor test to apply in situations outside the abortion context because it recognized that minors have a unique status under the law and did not explicitly limit its holding to the abortion context.¹⁵⁶ Also, in promulgating the factors, the Court relied on prior decisions outside the abortion context that distinguished between the rights of minors and those of adults.¹⁵⁷ It would be illogical to think that the factors do not apply in the context from which they were derived.¹⁵⁸ Thus, the factors should apply outside the abortion context and, in particular, should apply to curfew ordinances.

An application of the *Bellotti* factors to a particular case does not establish that a lower level of scrutiny should be applied to assess the

¹⁵¹ See *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (declining to decide whether or not a fundamental right actually existed in the case but rather assumed so for purposes of the analysis); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981) (noting that the right to travel "certainly extends in some measure to juveniles, as citizens of the United States"). The Ninth Circuit discussed the issue in *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). The court held that "the district court erred in stating that minors' 'circumscribed' liberty interest was not fundamental and could be subjected to intermediate scrutiny." *Id.* at 946.

¹⁵² See *infra* Part III.C.

¹⁵³ See *infra* this Part, Part III.

¹⁵⁴ See *infra* Part III.A.

¹⁵⁵ See *infra* Part III.B-C.

¹⁵⁶ *Bellotti v. Baird*, 443 U.S. 622, 633-37, 647-48, 651 (1979) (plurality opinion).

¹⁵⁷ See *generally id.*; Poff, *supra* note 48, at 300.

¹⁵⁸ Poff, *supra* note 48, at 300.

constitutional rights of minors; rather, it enables courts to determine whether the state has a compelling interest which justifies greater restrictions on minors than on adults.¹⁵⁹ Such a justification is met in the realm of curfew ordinances. The first factor is the particular vulnerability of children.¹⁶⁰ Courts and law enforcement officers have both acknowledged the vulnerability of children to the dangers of the streets at night.¹⁶¹ The Court has also established an entirely separate juvenile justice system that affirms the notion that children are not to be treated like adults due to their special vulnerabilities and needs.¹⁶²

The next factor is the inability of children to make critical decisions in a proper manner.¹⁶³ Here, the Court has acknowledged that “minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them.”¹⁶⁴ Their immaturity may lead to a decision to commit delinquent acts such as vandalism, drug use, or violent crimes.¹⁶⁵ Adults may make the same decisions but do so in a more mature, informed way with a better understanding of the consequences of their actions.¹⁶⁶

Finally, the third factor is the importance of the parents’ role in the upbringing of their children.¹⁶⁷ Curfew laws actually reinforce parental authority and encourage parents to be more active in the supervision of their children.¹⁶⁸ Additionally, properly drafted ordinances give parents

¹⁵⁹ *Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997).

¹⁶⁰ See *supra* note 46 and accompanying text.

¹⁶¹ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998). “Each unsuspecting child risks becoming another victim of the assaults, violent crimes, and drug wars that plague America’s cities. Given the realities of urban life, it is not surprising that courts have acknowledged the special vulnerability of children to the dangers of the streets.” *Id.* (citation omitted). “Two experienced City [of Charlottesville] police officers confirmed to the district that the children they observe on the streets after midnight are at special risk of harm.” *Id.*

¹⁶² *Bellotti*, 443 U.S. at 635. “[T]he State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’” *Id.* (quoting *McKeiver v. Pennsylvania*, 413 U.S. 528, 550 (1971) (plurality opinion)).

¹⁶³ See *supra* note 46 and accompanying text.

¹⁶⁴ *Bellotti*, 443 U.S. at 635.

¹⁶⁵ *People in Interest of J.M.*, 268 P.2d 219, 223 (Colo. 1989).

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* note 46 and accompanying text.

¹⁶⁸ *City of Panora v. Simmons*, 445 N.W.2d 363, 368 (Iowa 1989) (quoting *People in Interest of J.M.*, 268 P.2d at 223); see also *Bellotti*, 443 U.S. at 639. The Supreme Court has recognized “the special interest of the State in encouraging [minors] to seek [parental advice] in making [important decisions].” *Bellotti*, 443 U.S. at 639. “Legal restrictions on minors,

the ability to allow their minor children to be out past curfew hours, which again gives the parents the ultimate decision-making power over their children.¹⁶⁹ Therefore, cities and states are justified in restricting the rights of minors by enacting curfew laws, even though it may not be constitutional to do so for adults. In light of these considerations, the rights alleged to be infringed upon by curfew ordinances are discussed in the following subparts.

B. Claims Under the First Amendment

The rights contained in the First Amendment are undoubtedly fundamental under the Constitution and are afforded to children as well as adults.¹⁷⁰ However, children have been given less protection under the First Amendment than adults.¹⁷¹ Consequently, the courts have concluded that exempting First Amendment activities from a curfew ordinance is sufficient protection of the First Amendment rights of minors.¹⁷² Every reported federal case that has withstood a constitutional challenge has contained an explicit First Amendment

especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Id.* at 638-39.

¹⁶⁹ See *supra* notes 132-40 and accompanying text (discussing the history of the parental right to guide the upbringing of their children).

¹⁷⁰ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that students in public schools have First Amendment rights).

¹⁷¹ See *supra* Part II.A; see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (holding that the students' newspaper is not protected under the First Amendment); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (recognizing that "the First Amendment gives a high school student the classroom right to wear *Tinker's* armband, but not *Cohen's* jacket") (citations omitted); *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985) (affirming the notion that the constitutional rights of students are not automatically coextensive with those of adults).

¹⁷² *Brown*, *supra* note 54, at 677-78. The exception can merely be "for the exercise of any First Amendment rights." *Id.* In cases that do not contain exceptions for First Amendment activity, courts have analyzed the First Amendment claims in a variety of ways. *Id.* For instance, the district court in *Bykofsky* held that the curfew ordinance did not regulate speech under the rubric of *United States v. O'Brien*, 391 U.S. 367 (1968). *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1260 (M.D. Pa. 1975). The Ninth Circuit analyzed the curfew under a time, place, and manner test, which includes three parts: (1) the curfew must be content neutral; (2) it must be narrowly tailored to advance a significant government interest; and (3) it must leave open alternative channels of communication. *Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997). The court found that the ordinance failed the test because it was not narrowly tailored since it failed to exempt First Amendment activities. *Id.* The time, place, and manner analysis raises numerous other issues, which are beyond the scope of this Note.

exception.¹⁷³ Some commentators argue that the exception itself is what makes the curfew unconstitutionally vague.¹⁷⁴ They allege that it would take a “constitutional scholar” to know which activities would be covered under such an exception.¹⁷⁵ This argument is rebutted by a stronger notion—that the exception is really no more vague than the actual amendment itself.¹⁷⁶ There certainly are activities that will undoubtedly fall within the exception and some that will not, but situations in between are not enough to render the ordinance vague.¹⁷⁷ It would be inconsistent to find that the exception is vague when its foundation gives no additional guidance.

The First Amendment exception ensures that protected activities remain secure and is better than having no protection at all.¹⁷⁸ In regard to challenges that the ordinances are overbroad, allowing the exception is the only way to properly narrow the ordinances, ensuring that only the necessary activity is regulated. Thus, it is clear from past curfew

¹⁷³ *Hodgkins v. Goldsmith*, No. IP99-1528-C-T/G, 2000 WL 892964, *14 (S.D. Ind. July 3, 2000). “[E]very reported federal case in which a curfew law has been upheld against constitutional challenge has involved a curfew law with significantly broader exceptions, including an explicit First Amendment exception.” *Id.* The lack of a First Amendment exception will generally invalidate a curfew ordinance. Chudy, *supra* note 94, at 568.

¹⁷⁴ *Hutchins v. District of Columbia*, 188 F.3d 531, 546 (D.C. Cir. 1999); *see also* Chudy, *supra* note 94, at 568.

¹⁷⁵ *Hutchins*, 188 F.3d at 546; *see also* Chudy, *supra* note 94, at 568.

¹⁷⁶ *Hutchins*, 188 F.3d at 546; *see also* Schleifer v. City of Charlottesville, 159 F.3d 843, 853 (4th Cir. 1998); *Sale v. Goldman*, 539 S.E.2d 446, 458 (W. Va. 2000).

¹⁷⁷ *Hutchins*, 188 F.3d at 546.

[I]t is perfectly clear that some activities, such as religious worship and political protests, would be protected under the defense, and that other activities, such as rollerblading would not. That there may be marginal cases between these two poles can be addressed as they arise, but such cases do not render the provision void for vagueness.

Id. (citation omitted).

¹⁷⁸ *Schleifer*, 159 F.3d at 853. The court stated:

We decline to punish the City for its laudable effort to respect the First Amendment. A broad exception from the curfew for such activities fortifies, rather than weakens, First Amendment values. . . . If councils draft an ordinance with exceptions, those exceptions are subject to a vagueness challenge. If they neglect to provide exceptions, then the ordinance is attacked for not adequately protecting First Amendment freedoms. It hardly seems fitting, however, for courts to chastise elected bodies for protecting expressive activity.

Id. (citation omitted); *see also* *Sale*, 539 S.E.2d at 458-59.

litigation that an exception for First Amendment activity is the best answer to the problem that has been suggested thus far.¹⁷⁹

The shortcoming of the courts' analyses is that most do not focus on whether or not the exceptions are defenses to prosecution or if they are exceptions to enforcement of the curfew.¹⁸⁰ If they are merely defenses to the prosecution of the offense, it will likely have a chilling effect on minors' First Amendment rights.¹⁸¹ This is because if minors have to be arrested and charged first, they have already suffered some harm. Without any decisions discussing this issue, one could possibly infer that the courts have not been troubled by any possible chilling effect. Therefore, the most effective way to deal with First Amendment problems is to include an exception to enforcement of the curfew for a First Amendment activity, rather than a defense to prosecution.

¹⁷⁹ A good illustration of this principle is what occurred with the Indiana curfew. The state curfew was found unconstitutional in the summer of 2000 because it did not contain an exception for First Amendment activity. *Federal Judge Rules State Curfew Law Legal*, available at http://www.indygov.org/mayor/press/2001/November/01-15-01_h.htm (last visited Oct. 14, 2002). However, the Mayor immediately took action to introduce a Marion County curfew ordinance and, after it passed the City-County Council, began enforcing the curfew. *Id.* The Indiana Civil Liberties Union ("ICLU") immediately sued to stop the implementation of the ordinance. *Id.* The same federal judge who found the ordinance unconstitutional last summer, denied the ICLU's request and ruled that it was "likely constitutional because it provides ample room for minors to engage in First Amendment activities and does not infringe on parents' rights to govern their children's nighttime activities." *Id.*

¹⁸⁰ *But see* *Hodgkins ex rel Hodgkins v. Peterson*, 175 F. Supp. 2d 1132 (S.D. Ind. 2001). The court in *Hodgkins* discussed the significance of including a First Amendment "defense" or "exception." *Id.* at 1145-50. The plaintiffs were concerned because under the curfew, the First Amendment defense was an affirmative defense that would not come into play during the time of arrest. *Id.* at 1145. Thus, it would potentially chill the speech of minors subject to the curfew. *Id.* The court, however, determined that a police officer is required to take into account the "totality of the circumstances to determine whether probable cause exists to make an arrest." *Id.* at 1148.

¹⁸¹ *See supra* note 180 and accompanying text.

C. Fundamental Rights Implicated by Curfew Ordinances

[M]ost curfew ordinances do not substantially burden a juvenile's fundamental rights. Furthermore, the fundamental rights of juveniles do not equal those of adults, and curfews, therefore, should not be examined under strict scrutiny.¹⁸²

There are three common rights that are alleged to be fundamental and burdened by curfew ordinances: the parental right to guide the upbringing of their children, the child's right to interstate travel, and the child's right to intrastate travel.

1. The Parental Right To Guide the Upbringing of Their Children

There is little debate that the parental right to guide the upbringing of their children is fundamental.¹⁸³ However, such a right is not absolute. The state as *parens patriae* can restrict parental control in many ways.¹⁸⁴ The enactment of curfew ordinances is a good example of where such restriction is necessary and warranted. If the right to parental upbringing was absolute, one could infer that the state does not have the power to regulate juvenile delinquency, which is obviously not

¹⁸² Brown, *supra* note 54, at 670-71.

¹⁸³ See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (finding that parents had a fundamental interest to "guide the religious future and education of their children"); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing the parental right to control and direct child's education); see also *supra* Part II.C.2.

¹⁸⁴ Prince, 321 U.S. at 166. The Supreme Court in *Planned Parenthood v. Casey* cast doubt on the notion that the fundamental rights of parents to guide the upbringing of their children includes the right to allow their children in public places after curfew hours. 505 U.S. 833 (1992). The Court focused on the private matters of the family and mentioned that those interests that are protected under the Fourteenth Amendment are those that are central to personal dignity and autonomy. *Id.* at 851; see also Sale v. Goldman, 539 S.E.2d 446 (W. Va. 2000). The court noted that

juveniles, unlike adults are always in some form of custody Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae* In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

Sale, 539 S.E.2d at 454 (citations omitted); see also Brown, *supra* note 54, at 678-79 ("In some situations, the Court has stated that it is appropriate for the state to step in and either fill in where the parent is deficient or aid the parent in raising a child."); see also *supra* Part II.A.

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the case.¹⁸⁵ The state also has a compelling interest in protecting the community from crime and in protecting children from becoming victims of crime.¹⁸⁶ The Court has sustained other regulations in light of this interest.¹⁸⁷

Furthermore, the cases where the Court has found parental rights to be fundamental do not involve the same circumstances or restrictions that are at issue with curfew ordinances.¹⁸⁸ The aspect of the parental right that is alleged to be infringed by curfew laws is not personal in nature and does not define the attributes of personhood, the concept of existence, or the meaning of the universe or human life, as in the earlier cases.¹⁸⁹ In other words, the ordinances do not infringe upon the intimate family decisions on which the Court has previously ruled.¹⁹⁰ The only infringement on parental rights that occurs in enacting curfews is the right to allow a minor child to remain on the streets during the

¹⁸⁵ See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). “[A]lthough children are generally protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability” *Id.*

¹⁸⁶ See *supra* note 26 and accompanying text.

¹⁸⁷ See, e.g., *Hodgkins ex rel Hodgkins v. Peterson*, 175 F. Supp. 2d 1132 (S.D. Ind. 2001). The court determined that the state did have a compelling interest in the safety and well-being of its children. *Id.* at 1144. It relied primarily on cases that dealt with protecting children from pornography and crime prevention. *Id.*

¹⁸⁸ *Hodgkins v. Peterson*, No. IP00-1410-C-T/G, 2000 WL 33128726, at *11 (S.D. Ind. Dec. 14, 2000). The rights recognized in other cases “are of a higher quality than that claimed by plaintiff in the instant case.” *Id.* The plaintiff did not convince the court that the decision of a parent to allow his child to be in public places after curfew hours would fundamentally affect a person. *Id.*; see also *Hutchins v. District of Columbia*, 188 F.3d 531, 540-42 (D.C. Cir. 1999) (citing *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999)). The *Hutchins* court, after reviewing *Meyer*, *Pierce*, *Prince*, and *Yoder*, noted that

We glean from these cases, then, that insofar as a parent can be thought to have a fundamental right, as against the state, in the upbringing of his or her children, that right is focused on the parents’ control of the home and the parents’ interest in controlling, if he or she wishes, the formal education of children. It does not extend to a parent’s right to unilaterally determine when and if children will be on the streets—certainly at night. That is not among the ‘intimate family decisions’ encompassed by such a right.

Hutchins, 188 F.3d at 540-41.

¹⁸⁹ *Hodgkins*, 2000 WL 33128726, at *11.

¹⁹⁰ *Hodgkins*, 175 F. Supp. 2d at 1162. The court also noted that the newest case in which the parental right was examined dealt with a “mother’s right to control the persons with whom her children associated and consequently, the persons who would have influence over them.” *Id.* at 1161. It noted that this too was of a “higher quality than claimed by Plaintiff in the instant case.” *Id.* at 1162.

curfew hours.¹⁹¹ It is illogical to equate the right to direct the education of a child with the right to allow a child to roam the streets unsupervised at night. Extending this fundamental right to the situation of curfew laws would embroil the federal courts into family law, a matter traditionally left to the states.¹⁹² It would also be too easy for plaintiffs to then plead in such a way that would elevate the rights of children to adults and make them coextensive, which traditionally has been found by the courts not to be the case.¹⁹³

Nevertheless, few curfews even remotely tread on this parental right because most ordinances contain exceptions for juveniles who are out after curfew hours with their parents or with their parents' consent.¹⁹⁴ Even courts that recognize the right to guide the upbringing of one's children in connection with curfew laws do not find the ordinance unconstitutional when it contains such exceptions.¹⁹⁵ Thus, including such exceptions does not take away any control from the parents but instead allows them to make choices with regard to their children's conduct. In fact, some parents even agree that the curfew aids in controlling and monitoring their children.¹⁹⁶

Therefore, since the parental right to guide the upbringing of their children is not implicated by curfew ordinances and in most cases is not even at issue due to exceptions in the ordinance, only rational basis should be applied in analyzing these claims. Since rational basis is so deferential to the state, its application would not impede enforcement of the ordinance.

¹⁹¹ *Hutchins*, 188 F.3d at 540. The court did not think a higher level of scrutiny should be used regarding the parental right to guide the upbringing of children, "not because we think that no such fundamental right exists in any dimension, but rather because we think it not implicated by the curfew." *Id.* Any infringement is limited to certain times and to children of certain ages. See *Brown*, *supra* note 54, at 679.

¹⁹² *Hodgkins*, 2000 WL 33128726, at *12.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., PHOENIX, ARIZ., CODE § 22-1 (2001); DENVER, COLO., CODE § 34-61(b)(1)-(2) (2001); KANSAS CITY, KAN., CODE § 50-237(a)(1)-(2) (1998); SAN ANTONIO, TEX., CODE § 21-123(a)-(b) (2001).

¹⁹⁵ See *supra* Part II.C.2 (discussing the courts' views on the parental right to guide the upbringing of their children).

¹⁹⁶ Eric Stirgus, *Largo Crafts Revision to Juvenile Curfew*, ST. PETERSBURG TIMES, Oct. 27, 2001 at 8, 2001 WL 28597154. One Commissioner stated "she has encountered several parents with little control over their children who told her the curfew was the only way they could make their kids abide by their rules." *Id.* She also said that she thought "it in some ways puts (authority) back in control of the parents." *Id.*

2. Children's Rights

*The minor's interest in freedom of movement upon the streets during the nighttime curfew hours under circumstances other than those provided for in the numerous curfew exceptions is clearly outweighed by the governmental interests which the ordinance furthers.*¹⁹⁷

Juveniles generally argue that there are two basic fundamental rights at issue in curfew litigation: the right to interstate travel and the right to intrastate travel.¹⁹⁸ The rights are independent of each other, but they need to be examined together to get a better understanding of their relationship. It is clear that there is a fundamental right to interstate travel.¹⁹⁹ The right to travel has been interpreted by the Supreme Court as a fundamental right and a liberty interest, which should be analyzed under strict scrutiny.²⁰⁰ Additionally, the right is applicable to all "persons" under the Fourteenth Amendment.²⁰¹

The purpose of the fundamental right to interstate travel is both to protect travelers from barriers to interstate movement and from being treated differently than citizens of the state to which they are traveling.²⁰² In other words, it was meant to prevent states from extending fewer rights or privileges to new residents than it extended to established residents of the state.²⁰³ The cases in which the right to interstate travel

¹⁹⁷ Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1258 (M.D. Pa. 1975).

¹⁹⁸ See, e.g., Norton, *supra* note 9, at 179; Sasse, *supra* note 81, at 681.

¹⁹⁹ Hutchins v. District of Columbia, 188 F.3d 531, 536 (D.C. Cir. 1999). The right to travel was declared fundamental in *U.S. v. Guest*, 383 U.S. 745, 757-58 (1966). The precise source of the right is unclear, but it has been said to come from a number of sources: the concern over state discrimination against out-of-staters, rather than the concern to freely move about; the Commerce Clause; the Privileges and Immunities Clause of the Fourteenth Amendment; the Articles of Confederation as a necessary part of the Union that the Constitution created; the Privileges and Immunities Clause of Article IV; and from general principles of federalism. See *id.*, 188 F.3d at 635-47 (citing Saenz v. Roe, 526 U.S. 489 (1999); Zobel v. Williams, 457 U.S. 55 (1982); *Guest*, 383 U.S. 745; Edwards v. California, 314 U.S. 160 (1941)); see also Sasse, *supra* note 81, at 682.

²⁰⁰ See Shapiro v. Thompson, 394 U.S. 618 (1969). The Court held that residency requirements for welfare benefits were unconstitutional. *Id.* at 627. The requirements violated the fundamental "freedom of travel" by discouraging poorer families from moving wherever they would like. *Id.* at 638.

²⁰¹ Foreman, *supra* note 7, at 731 (citing Mem'l Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro, 394 U.S. 618; Edwards, 314 U.S. 160).

²⁰² Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).

²⁰³ Eldridge v. Bouchard, 645 F. Supp. 749, 753 (D. Va. 1986). "The fundamental right to travel, however, is not necessarily movement, but the ability and opportunity to migrate,

has been recognized deal with situations that would tend to deter someone from moving freely or infringe on another liberty interest.²⁰⁴ Curfew ordinances do not tend to pose either of these problems. They are applied to all minors, both in-state and out-of-state citizens. Whether or not they would deter anyone from moving from state to state is questionable as well, since most of the persons covered by the ordinances already lack the freedom of movement in the sense that they are denied the right to drive.

The resolution of the issue is not critically important in curfew litigation because the right to interstate travel is not discussed in any significant length in any of the circuit court decisions on the constitutionality of curfew laws. Nonetheless, in order to safeguard the ordinance's constitutionality, drafters often include an exception for such travel.²⁰⁵ The basic problem lies with finding the line between interstate and intrastate travel, which has been blurred in past decisions.²⁰⁶

Plaintiffs in curfew litigation often rely on the interstate cases to support their contention that a fundamental right to intrastate travel exists as well.²⁰⁷ This reliance is unfounded for two reasons. First, the sources from which the right to travel arise do not support its extension to intrastate travel.²⁰⁸ The Article VI Privileges and Immunities Clause does not support the extension because it applies only to state action that discriminates against nonresidents.²⁰⁹ Curfew laws treat all minors the

resettle, find a new job and start a new life." *Id.* (citing *Wardwell v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 529 F.2d 625, 627 (6th Cir. 1976)).

²⁰⁴ See, e.g., *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (finding that distributing income based on the length of citizens' residency is unconstitutional); *Dunn v. Blumstein*, 405 U.S. 330, 336, 338 (1972) (holding that a one-year residency requirement to vote infringed on both the right to vote and the right to interstate travel); *Shapiro*, 394 U.S. at 630-31 (holding that a one-year residency requirement as a condition for receiving welfare benefits a violation of the right to interstate travel).

²⁰⁵ See, e.g., DENVER, CO., CODE § 34-61(b)(3) (2001); KANSAS CITY, KAN., CODE § 50-237(a)(6) (1998); SAN ANTONIO, TEX, CODE § 21-123(h) (2001); see also *Hutchins v. District of Columbia*, 188 F.3d 531, 535 (D.C. Cir. 1999) (curfew contained an exception where a minor was "in a vehicle involved in interstate travel"); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 846 (4th Cir. 1998) (curfew contained an exception for "minors who are engaged in interstate travel").

²⁰⁶ See *Sasse*, *supra* note 81, at 683-85.

²⁰⁷ *Id.* at 683.

²⁰⁸ *Id.* at 685-90.

²⁰⁹ "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States." U.S. CONST. art. IV, § 2; see also Jason Hangartner, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel*, 14 PACE L. REV. 203, 222 (1994).

same and make no distinction between residents and nonresidents. Similarly, the Commerce Clause is inapplicable because curfew laws are facially neutral toward and do not impose any burden on interstate commerce.²¹⁰ A final theory that is used to possibly support the right to travel is the Due Process Clause.²¹¹ This contention fails as well because under due process analysis, in order for a right to be fundamental, it must either be “‘implicit in the concept of ordered liberty’” or “‘deeply rooted in the Nation’s history and tradition.’”²¹² The right to intrastate travel does not fall into either of these categories.

The second reason that the right to interstate travel cannot be extended to include intrastate travel is that, while the Supreme Court may have suggested that there is some right to free movement, these comments have been nothing more than dicta.²¹³ For instance, the primary case relied on is *Papachristou v. City of Jacksonville*.²¹⁴ The Court in *Papachristou* did mention that the ability to move freely about was an important amenity of life, but the vagrancy law at issue was struck down on vagueness grounds and the discussion about free movement was only dicta.²¹⁵ The case also focused on the freedom of adults, not children,

²¹⁰ Hangartner, *supra* note 209, at 222. The “dormant” Commerce Clause does not support the right either because “if the right . . . is derived from the negative Commerce Clause, then ‘it could be eliminated by Congress.’ Second, . . . there is no protectionist motive on the part of the state or municipality in enacting a curfew law.” Sasse, *supra* note 81, at 687 (citations omitted).

²¹¹ Hangartner, *supra* note 209, at 222.

²¹² *Id.*; see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (recognizing as a new formulation for fundamental rights as those deeply rooted in the history and tradition of the nation); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (defining a fundamental right as one that is implicit in ordered liberty).

²¹³ *Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999). The cases cited dealt with travel across borders, not mere “locomotion.” *Id.*

²¹⁴ 405 U.S. 156 (1972). The case dealt with the constitutionality of a vagrancy ordinance in Jacksonville, Florida. *Id.* at 157. Eight persons were convicted, fined, and sentenced to jail time. *Id.* at 156-67.

²¹⁵ *Id.* at 162. “This ordinance is void for vagueness, both in the sense that it ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,’ . . . and because it encourages arbitrary and erratic arrests and conviction.” *Id.* (citations omitted).

While vagrancy statutes certainly prohibit individuals from moving about, the constitutional infirmity in these statutes is not that they infringe on a fundamental right to free movement, but that they fail to give fair notice of conduct that is forbidden and pose a danger of arbitrary enforcement. In other words, they do not afford *procedural* due process.

Hutchins, 188 F.3d at 537.

and never identified walking or loitering as rights, just their importance to a free society.²¹⁶

On the other hand, the Supreme Court has suggested that the fundamental right to free movement does not exist.²¹⁷ For instance, when the Supreme Court dismissed *Detroit Police Officers Ass'n v. City of Detroit*²¹⁸ due to a lack of a substantial federal question, it implied that there was not a right of intrastate travel that was federally protected.²¹⁹ A dismissal of an appeal for want of a substantial federal question is essentially a decision on the merits of the case.²²⁰ Thus, the dismissal

²¹⁶ *Papachristou*, 405 U.S. at 164. The Court, after reaching its decision on the constitutionality of the ordinance, noted that

The difficulty is that these activities are historically part of the *amenities* of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten *amenities* have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These *amenities* have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Id. (emphasis added).

²¹⁷ *Hutchins*, 188 F.3d at 537.

²¹⁸ 190 N.W.2d 97 (Mich. 1971), *cert. dismissed*, 405 U.S. 950 (1972). The case involved a Detroit residency requirement that was imposed on policemen through a municipal ordinance. *Id.* at 97. It was alleged that the requirement unconstitutionally infringed on the right to intrastate travel. *Id.* The Michigan Supreme Court applied the rational basis test because there was not a fundamental right at issue and determined the ordinance to be valid. *Id.* at 101.

²¹⁹ *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972). The appeal was "dismissed for want of a substantial federal question." *Id.*; see also *Wright v. City of Jackson*, 506 F.2d 900, 902 (5th Cir. 1975). The Fifth Circuit stated:

Any doubt that the "right to travel" rationale of *Shapiro and Dunn* was meant to apply to intrastate travel and municipal employment residency requirements was put to rest by the Supreme Court's treatment of litigation challenging a Detroit ordinance similar to the Jackson residency requirement. The Detroit ordinance was sustained by the Michigan Supreme Court on the traditional equal protection test that the classification bore a reasonable relationship to the object of the legislation. An appeal was taken to the United States Supreme Court which ordered that the case be "dismissed for want of a substantial federal question."

Wright, 506 F.2d at 902 (citations omitted). For a complete discussion of this argument, see Hyland, *supra* note 142.

²²⁰ *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); see also *Wright*, 506 F.2d at 902-03; *Ahern v. Murphy*, 457 F.2d 363, 364 (7th Cir. 1972). "[T]he Supreme Court has labeled as unsubstantial the very question which constitutes the plaintiffs' most likely basis for asserting federal question jurisdiction." *Ahern*, 457 F.2d at 365. In fact, this type of

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was the same as finding that there was not a federally protected right to intrastate travel. This notion was reinforced by the fact that the Supreme Court had the opportunity to rule differently in *Memorial Hospital v. Maricopa County*²²¹ but declined to do so.²²² In that case, the Court noted that, if the right to travel meant merely movement, even a bona fide residency requirement would burden that right, and the Court has found the opposite to be true.²²³ Thus, it is entirely consistent for the Court to recognize the right to interstate travel without recognizing the right to intrastate travel.

Since the Court has refused to explicitly recognize the right for adults, it would be unreasonable to think it would recognize the right for children since children's rights are not coextensive with those of adults.²²⁴ In curfew cases, the only conduct that is regulated is the hours in which juveniles can be outside of their homes.²²⁵ Recognizing a right for juveniles to roam the streets unsupervised at night would conflict with the state's established power to regulate children in order to preserve and promote their welfare.²²⁶ The government already places numerous other restrictions on children through its police power, all of which are done for a child's welfare.²²⁷ Thus, it would be inconsistent to find that freedom of movement is a fundamental right for children when the Court has already concluded that the state can intrude upon a juvenile's freedoms in so many other areas.²²⁸ Moreover, the Supreme

dismissal in a state court appeal is the equivalent of an affirmance on the merits from a federal court with regard to the federal questions. *Id.* at 364.

²²¹ 415 U.S. 250 (1974).

²²² *Id.* at 255-56 ("Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider . . .").

²²³ *Id.* at 255.

²²⁴ See *supra* Part II.A (discussing the history of the treatment of the rights of minors).

²²⁵ *Brown, supra* note 54, at 677.

²²⁶ *Hutchins v. District of Columbia*, 188 F.3d 531, 539 (D.C. Cir. 1999). "[T]he recognition of such a right would fly in the face of the state's well-established powers of *parens patriae* in preserving and promoting the welfare of children." *Id.*

²²⁷ *Veilleux, supra* note 4, at 1056.

²²⁸ *Id.* Other restrictions include requiring school attendance, prohibiting minors from working in certain industries, regulating the consumption of alcohol, banning the intermingling of minors with adults at certain establishments, and restricting voting, marriage, gun ownership, and motor vehicle operation. *Id.* All of these classifications are based on age and are all a matter of legislative, not judicial concern. *Id.*; see also *Hutchins*, 188 F.3d at 539. The court held "it would be inconsistent to find a fundamental right here, when the Court has concluded that the state may intrude upon the 'freedom' of juveniles in a variety of similar circumstances without implicating fundamental rights." *Hutchins*, 188 F.3d at 539.

Court has explicitly recognized that minors lack some of the most fundamental rights, including the right to come and go at will.²²⁹

Therefore, there are no fundamental rights at issue with a properly drafted curfew ordinance. Thus, rational basis is the level of review that the courts should use to examine curfew ordinances. In the event that a court would still apply strict scrutiny, the next Part of this Note suggests a model ordinance that would withstand such a challenge.

IV. A MODEL ORDINANCE

This Part will propose portions of a model ordinance. It is limited only to those sections which have been at issue in past curfew litigation. However, there are a few other general provisions that must be included in a curfew ordinance. It should include the purposes for enacting the curfew and, if possible, statistics showing the need for the curfew.²³⁰ While statistics are not necessary, a court will be more willing to uphold the statute where there is specific, hard evidence to prove its necessity.²³¹ Additionally, a severability provision should be added to the ordinance so that the court can sever any parts of the ordinance it may find problematic rather than find the entire ordinance to be overbroad.²³²

²²⁹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995). "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will." *Id.*

²³⁰ *McDowall et al.*, *supra* note 56, at 59. Including statistics that show that juveniles do commit a large share of the city's crime and that crime rates are high during curfew hours gives the ordinance "a reasonably secure legal basis." *Id.*; *see also* *Hodgkins ex rel Hodgkins v. Peterson*, 175 F. Supp. 2d 1132, 1139 (S.D. Ind. 2001) (noting that while specific statistics are not required at the preliminary injunction stage, it can be reasonably inferred that crime rates increase at night or that juveniles will most likely be victimized at night).

²³¹ *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968). "We do not demand of legislatures scientifically certain criteria of legislation." *Id.* (citation omitted); *see also* *Action for Children's Television v. FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (recognizing that scientific evidence is not required to support interest in enacting legislation). Not having to produce empirical evidence works to the advantage of the city because it is fairly easy to convince a court in today's society that there is a problem with juvenile crime, and studies are inconclusive as to whether or not the ordinances are effective. *Hemmens & Bennett*, *supra* note 8, at 326.

²³² *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982).

When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. Furthermore, if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it

Ordinances must also detail the procedure to be followed when a minor is stopped for a possible curfew violation and the punishment for violations.²³³

Under the proposed ordinance, minors will be given sufficient notice as to what activities are prohibited under the statute, and activity that is lawful will be properly exempted from enforcement of the statute. Additionally, the fundamental right of parents to guide the upbringing of their children will not be burdened as the curfew will serve to help parents maintain control of their children but will also allow for parents to consent to their children's activities outside the hours of the curfew.²³⁴ Finally, even if a court were to apply strict scrutiny, the exceptions make the ordinance narrowly tailored to meet the compelling interests of cities to protect juveniles and the community from crime.

*Section 1: Definitions*²³⁵

As used in this Chapter:

(a) "Minor" is anyone who is seventeen (17) years of age or younger, who is not judicially emancipated or married.

(b) "Public place" means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(c) "Business establishment" means any privately owned place of business operated for a profit to which the public is invited, including but not limited to, any place of amusement or entertainment.

(d) "Parent" refers to a natural parent, adoptive parent, step-parent, guardian, or any person who is at least eighteen (18) years of age and authorized by the parent or guardian to have care and custody of a minor.

nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated.

Id. See also Veilleux, *supra* note 4, at 1069.

²³³ These issues have been addressed under the realm of the Fourth Amendment, which is beyond the scope of this Note.

²³⁴ See *supra* Part III.C.1 (analyzing the parental right to guide the upbringing of their children).

²³⁵ These definitions have been incorporated from the ordinances that have been cited throughout this Note.

(e) "Curfew hours" are from 11:00 p.m. to 6:00 a.m. on any Sunday, Monday, Tuesday, Wednesday, or Thursday and between 12:00 a.m. (midnight) and 6:00 a.m. on any Friday or Saturday.²³⁶

Commentary

Section 1 clearly defines the ordinance's material terms in order to ensure that all persons who will be subject to the ordinance are aware of the conduct that is prohibited. Minor is defined narrowly so that only those who are not judicially recognized as adults are subject to the ordinance. Next, public place is broadly defined so as to encompass all areas that could possibly be a place where children could be after curfew hours. Business establishment is also broadly defined but provides examples so as to indicate the most common areas where juveniles would likely be found after curfew hours. The term parent is defined to include anyone who has custody or control of a minor. It encompasses those persons in order to ensure that the ordinance does not infringe on the parental right to guide the upbringing of their children. With this definition, parents do not lose any control over the whereabouts of their children because they can consent to their minor child being with an adult of their choosing. Finally, and most importantly, is the definition of curfew hours. To define these hours specifically is important to avoid a vagueness challenge. This particular time frame is commonly used in curfew ordinances.

Section 2: Offenses

(a) *It shall be unlawful for a minor to purposefully remain in a public place, motor vehicle, or business establishment during curfew hours.*

(b) *It shall be unlawful for any owner, operator, or employee of a business establishment to allow minors, unless unaccompanied by a parent or participating in an exempted activity, to remain in such establishments during curfew hours, unless the minor refuses to leave and the police are notified.*

(c) *It shall be unlawful for any parent or guardian who has legal custody of a minor to knowingly, or by lack of supervision and control, allow a minor to remain in any public place or business establishment during curfew hours, unless the activity falls within one of the delineated exceptions.*

²³⁶ See *supra* note 10 for examples of ordinances that contain similar hour provisions.

Commentary

Section 2 sets forth the offenses that are prohibited by the ordinance. The word "remain" is used in section (a), because it is easier to interpret than "loiter" or "hang around."²³⁷ It is common for curfews to provide provisions that punish both parents and business establishments for allowing a minor to violate the curfew ordinance. In order to make curfew laws successful, the entire community needs to be involved, and people need to be held accountable for enforcing the ordinance consistently.²³⁸ Additionally, the business owner is only liable if he does not do what he can to make the minor leave. Parents are only liable if they fail to properly supervise their children. Thus, some affirmative act is needed. These provisions have not normally been challenged in curfew litigation.

Section 3: Exceptions to Enforcement

*The curfew does not apply in the following situations:*²³⁹

- (a) When a minor is accompanied by a parent;*
- (b) When a minor is on a reasonably necessary errand at the bequest of his parent, guardian, or person who has been charged with the care of the minor;*
- (c) When a minor is engaged in First Amendment activity;*
- (d) When a minor is in a motor vehicle traveling to or from an employment-related activity;*
- (e) When a minor is in a vehicle engaged in interstate travel;*
- (f) When a minor is on direct route from any civic or government function;*
- (g) When a minor is on the sidewalk which abuts the minor's home or the home of a neighbor; and*
- (h) When a minor is involved in an emergency, which involves the protection of a person or property from an imminent threat of serious bodily injury or substantial damage.*²⁴⁰

²³⁷ Veilleux, *supra* note 4, at 1087.

²³⁸ See *infra* note 246.

²³⁹ These exceptions have been fashioned from the ordinances which have been discussed throughout this Note.

Commentary

Section 3 sets forth the exceptions to the enforcement of the statute.²⁴¹ The exceptions are the most crucial parts of the ordinance.²⁴² In this particular ordinance, the exceptions apply at the time the minor is initially stopped by the police, rather than at the time of prosecution. This is important because if the defense is only to prosecution, there will be a greater chance that protected speech will be chilled because minors will be apprehensive about being stopped and arrested or detained.²⁴³ Additionally, if the defense is only to prosecution, the harm has already been done if the minor was arrested and charged as the ordinance provides. The problem is eliminated if the exception applies at the time the ordinance would be enforced. Each of these exceptions is important to avoid prohibiting conduct that is not unlawful or is even protected under the Constitution. They are also common among the ordinances that have withstood constitutional scrutiny and those that have recently been enacted.²⁴⁴

V. CONCLUSION

The modern trend is to uphold juvenile curfew ordinances as long as the curfew includes exceptions for certain activities, and the city shows there is some crime problem or valid reason for the enactment of the curfew.²⁴⁵ Curfews have the ability to restore and maintain order in

²⁴⁰ This definition was taken from *Hodgkins ex rel Hodgkins v. Peterson*, 175 F. Supp. 2d 1132, 1137 (S.D. Ind. 2001) (interpreting Ind. Code Ann. §31-37-3-3.5 (West 2002)). Defining the word "emergency" will lessen the likelihood that the ordinance will be deemed vague.

²⁴¹ Veilleux, *supra* note 4, at 1068-69. One scholar divided the important exceptions into three categories: legal guardianship/supervision, prudential/practical, and fundamental rights. See Chudy, *supra* note 94, at 518. These categories were based on the curfew at issue in *Quib v. Strauss*, 11 F.3d 488 (5th Cir. 1993). Legal guardianship/supervision exceptions include "accompanied by a guardian, errand directed by a guardian, sidewalk of minor's residence and emancipated minor." Chudy, *supra* note 94, at 565. Prudential/practical exceptions include "employment activity, school/civic function and emergency situation." *Id.* Fundamental rights include "First Amendment rights and Interstate travel." *Id.*

²⁴² *Hodgkins v. Goldsmith*, No. IP99-1528-C-T/G, 2000 WL 892964, *1 (S.D. Ind. July 3, 2000). "It is the constrictive narrowness of the permitted exceptions to the Indiana curfew law that is its downfall, not the fundamental effort to set reasonable hours for minors." *Id.*

²⁴³ See *supra* Part III.B (discussing the issues that arise due to the defenses or exceptions applying at the time of arrest or prosecution).

²⁴⁴ See *supra* Part III.B-C for a discussion regarding the importance of the exceptions under all of the claims that plaintiffs bring in curfew litigation.

²⁴⁵ Hemmens & Bennett, *supra* note 8, at 326.

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neighborhoods with higher crime rates.²⁴⁶ They also make it easier for parents to place boundaries on their children's activities, since the other youths in the neighborhood have to return home at the same time.²⁴⁷

This Note asserts that minors' rights may be restricted more than those of adults, primarily because the *Bellotti* factors should be applied in these situations.²⁴⁸ Thus, curfews are a proper exercise of the state's power that present no constitutional issues when properly drafted.²⁴⁹ If no constitutional rights are at issue, the level of scrutiny is merely rational basis, and curfews will likely be upheld under such circumstances.²⁵⁰

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²⁴⁶ Juvenile Justice Reform Initiatives in the States: 1994-1996, Curfew, http://ojjdy.ncjrs.org/pubs/reform/ch2_c.html (last visited Oct. 12, 2002). The two most important factors in the success of curfews are sustained enforcement and community involvement. *Id.* Other factors include: enlistment of volunteers to aid in the process; organization of programs, such as counseling, in place for children while they wait for their parents to pick them up; establishment of a curfew center to hold children until their parents can pick them up; creation of a hotline for community questions or problems relating to juvenile delinquency; and enactment of a curfew that entails specific procedures. *Id.*

²⁴⁷ *Id.*

²⁴⁸ See *supra* Part III.A for a discussion of the *Bellotti* factors and the justification for treating the rights of minors differently than adults.

²⁴⁹ Properly drafted means that the curfew contains clear language and ample exceptions to ensure that the ordinance is narrowly tailored to meet the state's compelling interest.

²⁵⁰ See *supra* Part III.C.2.

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