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# Assessing the Constitutional Validity of Juvenile Curfew Statutes

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# NOTES

## ASSESSING THE CONSTITUTIONAL VALIDITY OF JUVENILE CURFEW STATUTES

### I. Introduction

Curfew legislation applicable to an entire urban population has been used only sparingly in this country.[1] Curfews directed at specific groups, however, have been used to a much greater extent;[2] typically, the focus of these ordinances has been minors. Juvenile curfew legislation actually has had a long history in the United States. This type of legislation was in widespread use at the end of the 19th Century when approximately 3000 American municipalities and villages had adopted such ordinances. Interest in these laws declined until World War II when, with parents in the service or working in war plants at night and with the influx of military personnel into urban areas, conditions again were ripe for the imposition of curfew legislation prohibiting juveniles from loitering in public places during the evening hours.[3]

As of 1964 there were 48 cities in the United States with populations over 100,000 that enforced curfews aimed solely at minors. Nine other cities of this size had such legislation but failed to enforce it.[4] Although 11 states had vagrancy or loitering statutes which had the same effect as curfews, Oregon was the only state with an outright curfew law.[5] There is no evidence of any large scale repeal of this legislation. Thus, these figures provide an approximation of the legislation's current use.

In view of the prevalence of juvenile curfew legislation, it is surprising that the courts have continually been at odds with respect to the constitutionality of these laws. Beginning with the cases of *Ex parte McCarver*[6] and *Baker v. Borough of Steelton,*[7] handed down over sixty years ago, and continuing up through the most recent cases,[8] the judiciary has failed to reach a consensus on the validity of these enactments.

1 A general curfew was imposed in Detroit, Michigan in 1943 to cope with race riots and in New Castle, Indiana in 1956 in response to labor riots. For a discussion of the New Castle curfew *see* Note, *Rule by Martial Law in Indiana: The Scope of Executive Power,* 31 IND. L.J. 456 (1956). Racial tension in the 1960's led many cities to enact temporary general curfews. *See* Comment, *The Riot Curfew,* 57 CALIF. L. REV. 450 (1969); Note, *Judicial Control of the Riot Curfew,* 77 YALE L. J. 1560 (1968).

2 *See e.g.,* Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943), regarding a 1942 wartime curfew which required all persons of Japanese ancestry residing in designated areas to remain within their place of residence between the hours of 8:00 p.m. and 6:00 a.m.

3 Thistlewood v. Trial Magistrate, 204 A.2d 688, 690-91 (1964).

4 *See* Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime,* 107 U. PA. L. REV. 66, 68 (1958); Annot., 59 A.L.R.3d 321 (1974).

5 Illinois enacted a statewide curfew applicable solely to minors, but it was struck down in the case of People v. Chambers, 32 Ill. App. 3d 444, 335 N.E.2d 612 (1975). The Oregon statute was struck down in the case of Portland v. James, 251 Ore. 8, 444 P.2d 554 (1968), overruling an earlier decision which upheld the statute, City of Portland v. Goodwin, 187 Ore. 409, 210 P.2d 577 (1949).

6 39 Tex. Crim. 448, 46 S.W. 936 (1898).

7 17 Dauph. 17 (Dauphin, Pa. County Ct. 1912).

8 *Compare* Bykofsky v. Borough of Middletown, 410 F. Supp. 1242 (M.D. Pa. 1975), *aff'd,* 535 F.2d 1245 (3d Cir. 1976), *cert. denied,* 97 S. Ct. 394 (1976) (holding the curfew valid) *with* People v. Chambers, 32 Ill. App. 3d 444, 335 N.E.2d 612 (holding the curfew invalid).

The purpose of this note is to analyze the considerations that underlie an assessment of the constitutional validity of juvenile curfew statutes and to review the judicial treatment these statutes have received. An examination will first be made of the rights these ordinances potentially infringe upon and the judicial protection such rights must be accorded. Since the specific focus of this work is on curfews directed at juveniles, the special factors courts must consider when ruling on legislation applicable solely to minors will also be discussed. In light of this examination, the cases that have dealt with this issue will then be reviewed. It will become evident that the courts have been inconsistent in their assessment of these enactments. Consequently, as a guide for the courts, a framework will be proposed that is designed to provide the judiciary with a consistent basis for ruling on this matter in the future.

## II. Constitutional Rights Affected by Curfews

To assess the constitutional validity of curfew ordinances, it is necessary first to identify the constitutional rights such legislation may restrict. The primary purpose of curfew ordinances clearly is to restrict the ability of persons to move about. Consequently, to the extent that such a right is recognized, these enactments necessarily infringe on the "freedom of movement." However, since this right is not explicitly mentioned in the Constitution, it is important to determine whether such a freedom is protected through other constitutional rights. There are at least three constitutional rights to consider as possibly providing this protection: these include the right to travel, first amendment rights, and the right of privacy.

### A. *The Right to Travel*

The Supreme Court has alluded to the constitutional stature of freedom of movement in the context of freedom of travel, a right that has long been accorded constitutional protection. Essentially, freedom of travel is itself the aggregate of those rights associated with the specific freedoms of interstate and foreign travel.

The right of interstate travel has had an especially illustrious history and has been repeatedly recognized as protected by the Constitution. Over the years, the courts have relied upon a wide variety of sources to establish this right to travel from state to state. Included among the various doctrinal underpinnings are article IV, § 2 of the Constitution,[9] the commerce clause,[10] and the privileges and immunities clause of the fourteenth amendment.[11]

Regardless, though, of the initial doctrinal basis used to support the existence of the right of interstate travel, it is clear that the Supreme Court expressly

9 Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867); Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

10 Edwards v. California, 314 U.S. 160 (1914).

11 314 U.S. at 178 (Douglas, J., concurring); Hague v. C.I.O. 101 F.2d 774 (3d Cir. 1939), *modified and as modified aff'd* 307 U.S. 496 (1939).

recognizes this right as firmly established by the Constitution. Noting that this right was a "necessary concomitant of the stronger Union the Constitution created," the Court in *United States v. Guest*[12] described freedom to travel from state to state as "a basic right under the Constitution." In affirming the right to interstate travel, however, the Court has also stated that the term "travel" in this context is not synonymous with movement. It means, rather, a right to "migrate, resettle, find a new job, and start a new life."[13] Thus, whatever the ultimate scope of the right to interstate travel, it is clear that it cannot be extended to cover freedom of movement.

A constitutional right to travel has also been recognized by the Supreme Court in the context of travel abroad. The landmark case of *Kent v. Dulles*[14] involved a suit brought against the Secretary of State for denying the issuance of passports to certain applicants due to their alleged Communistic beliefs and associations. In ruling that the Secretary had exceeded his authority in denying the applicants passports on these grounds, the Court indicated the importance of this right by noting: "the right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law."[15]

In recognizing this right, the Court appeared to be affirming a more general right encompassing movement itself. Thus, in describing the right it was seeking to protect, it did not distinguish foreign travel from movement in general when it declared that this freedom is

> deeply engrained in our history . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, [is] part of our heritage . . . Freedom of movement is basic in our scheme of values.[16]

A similar interpretation of *Kent* is provided by Justice Douglas in his concurring opinion in *Aptheker v. Secretary of State*.[17] Recognizing the *Kent* court's equation of freedom of movement with the right to travel, he noted:

> This freedom of movement is the very essence of our free society, setting us apart, . . . it often makes all our other rights meaningful;—knowing, studying, arguing, conversing, observing, and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.[18]

Although the Supreme Court has never been required specifically to uphold "freedom of movement" in this broad sense, it has intimated its existence on other occasions. Thus, in referring to the right of "free transit," the Court has noted this extension in terms of a "right of locomotion":

12 383 U.S. 745, 758 (1966).
13 Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974), *citing* Shapiro v. Thompson, 394 U.S. 618, 629 (1969).
14 357 U.S. 116 (1958).
15 *Id.* at 125.
16 *Id.* at 126.
17 378 U.S. 500 (1964). This case involved the constitutionality of § 6 of the Subversive Activities Control Act of 1950 which made it unlawful for a member of the Communist party to obtain or use a passport. The provision was struck down for being overly broad.
18 *Id.* at 520.

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.[19]

Consistent with the language in these cases, freedom of movement, in the context of a juvenile curfew statute, has been regarded as a protected liberty. The court in *Bykofsky v. Borough of Middletown*,[20] termed freedom of movement a "substantive due process right" equating it with a right of intrastate travel.

### B. *First Amendment Rights*

Many courts view curfew restrictions as infringing on first amendment rights. However, despite its frequent assertion as a consideration in determining the validity of these ordinances, there has been no consistent treatment of the manner or extent to which this legislation encroaches upon the rights embodied in the first amendment. One theory views a curfew's restriction on movement as directly infringing upon the freedoms of speech, assembly, and religion.[21] An alternative explanation treats freedom of movement itself as a first amendment right.[22]

Among the courts that have addressed first amendment rights in the context of juvenile curfew statutes, both of these theories have surfaced as controlling. Thus, in *Chambers*, the court stated that only when a person is in public can he enjoy the most meaningful exercise of his freedoms of speech, association, assembly, and religion. To safeguard these rights the court held:

> The right of an individual to go into public, to travel in public places, at any hour of any day, must also be considered as protected by the first amendment.[23]

In *Bykofsky* the court declined to view freedom of movement as a first amendment right. Nevertheless, it did state that the curfew directly infringed on minors' first amendment right to gather in public for social purposes. The court contended, however, that the curfew did not regulate freedom of speech. It stated that any infringement on speech was only incidental to the nonspeech purposes furthered by the ordinance.[24]

### C. *The Right of Privacy*

The personal rights restricted by curfews might also be considered as protected by the right of privacy. This right has in some cases been a factor in determining the validity of curfew statutes.

19 Williams v. Fears, 179 U.S. 270, 274 (1900).

20 401 F. Supp. at 1261. *See also* Glover v. District of Columbia, 250 A.2d 556 (D.C. Ct. App. 1969). This case discussed a curfew's abridgement of freedom to travel.

21 *See, e.g., id.;* People v. Kearse, 58 Misc. 2d 277, 295 N.Y.S.2d 192 (1968). *See also* 77 YALE L.J. at 1565.

22 *See, e.g.,* People v. Chambers, 32 Ill. App. 3d 444, 335 N.E.2d 612; Ervin v. State, 41 Wis. 2d 194, 163 N.W.2d 207 (1968).

23 32 Ill. App. 3d at 449, 335 N.E.2d at 617.

24 401 F. Supp. at 1260-61.

The right of privacy is another right that receives no explicit mention in the Constitution. Despite this, its constitutional foundation has been ascribed to a number of sources.[25] As indicated in *Roe v. Wade,* "the [Supreme] Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[26] The Court further stated that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. Although there has been much controversy regarding the rights that are within the scope of these terms, the Court has recognized that this right extends to matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.[27]

The right of privacy may comprise two personal rights affected by juvenile curfew statutes. The first is minors' right to move about freely. The second is parents' right to raise their children free from government interference.[28] It is unnecessary to closely examine both of these, however, because the parents' right is basically a derivative of the child's. A resolution that the juvenile's right is fundamental would be determinative of the issue with respect to the parents. Although it does not necessarily follow, the converse also seems true. If the state can legitimately impose a curfew on minors, it could be argued that the state could additionally impose a responsibility on parents requiring them to ensure their children's compliance with the curfew.[29]

Justices Marshall and Brennan clearly support the view that the right of the juvenile at stake is fundamental. Their belief in the fundamental nature of this right caused them to dissent from the Supreme Court's denial of *certiorari* to *Bykofsky v. Borough of Middletown.* They stated:

> The freedom to leave one's house and move about at will is "of the very essence of a scheme of ordered liberty. . . ." To justify a law that significantly intrudes on this freedom, therefore, a State must demonstrate that the law is "narrowly drawn" to further a compelling state interest.[30]

Justice Douglas, in his concurring opinion in *Doe v. Bolton,* bolsters this position. He termed fundamental the freedom to "walk, stroll, or loaf."[31] If this assessment is accepted, then the right of privacy also can be viewed as providing a basis for treating freedom of movement as a constitutional right.

Infringements on the right of privacy have not yet appeared as the sole basis for striking down a curfew statute. Moreover, this right has been relied upon much less frequently than other constitutional freedoms in questioning the validity of curfew statutes. Encroachments on this right, however, have been cited as a consideration in striking down curfew legislation.[32]

25 *See* Roe v. Wade, 410 U.S. 113 (1973) and cases cited therein.
26 *Id.* at 152.
27 *Id.* at 152-53.
28 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
29 *See* 107 U. PA. L. REV. at 98.
30 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd,* 535 F.2d 1245 (3d Cir. 1976), *cert. denied,* 97 S. Ct. 394, 395 (1976) (Marshall, J., dissenting).
31 410 U.S. 179, 213 (1973) (Douglas, J., concurring).
32 Hayes v. Municipal Court, 487 P.2d 974 (1971); 251 Ore. 8, 444 P.2d 554.

### D. *Constitutional Rights of Minors*

Much of the discussion relating to the constitutional rights infringed upon by curfew legislation has been provided by courts dealing with adults rather than juveniles. Consequently, the propriety of labeling a right "constitutional" when it is exercised by juveniles rather than adults comes into question. The Supreme Court's response to this has been provided in a long series of cases clearly indicating that a constitutional right loses none of its significance because it is exercised by minors. Specifically, the Supreme Court has dealt with minors' rights in connection with first amendment freedoms,[33] due process,[34] the right of privacy,[35] and equal protection claims.[36]

In *Tinker v. Des Moines Independent Community School District* one of the leading exponents of minors' rights, the Court vigorously noted that activity in a school environment does not require abandonment of first amendment rights. The Court, referring to high school students, stated:

> [Students] are possessed of fundamental rights which the state must respect. . . . In the absence of a specific showing of a constitutionally valid reason to regulate their speech, students are entitled to freedom of expression of their views.[37]

In a series of cases dealing with juvenile delinquency proceedings, the Supreme Court has had an opportunity to discuss the due process rights of juveniles and the protection these rights are to be granted. Acknowledging that the Bill of Rights is not for adults alone, the Court has held that the juvenile is entitled to adequate notice, counsel, protection against self-incrimination, and the right to confront witnesses.[38] Furthermore, the Court has held that in juvenile proceedings the case against the minor must be proven beyond a reasonable doubt.[39]

Again, this notion that minors have rights that are to be accorded no less stature than those of adults is recognized in the area of privacy, specifically the right of privacy as it pertains to abortion. Noting that "constitutional rights do not mature and come into being magically when one attains the state-defined

33 Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (armbands worn as a form of symbolic speech); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (mandatory flag salute).

34 Breed v. Jones, 421 U.S. 519 (1975) (after a juvenile court adjudicatory hearing the double jeopardy clause of the fifth amendment protects the minor from prosecution for the same offense as an adult); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (juvenile court proceeding does not require a jury trial) *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt required in an adjudicatory delinquency proceeding); *In re* Gault, 387 U.S. 1 (1967) (minors entitled to adequate written notice, right to counsel, protection against self-incrimination, and right to confrontation in juvenile court proceedings); Gallegos v. United States, 370 U.S. 49 (1962) (involuntary confession is inadmissible).

35 Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (minor's right to an abortion without parental consent).

36 Brown v. Board of Educ., 347 U.S. 483 (1954) (school desegregation).

37 393 U.S. at 511.

38 387 U.S. 1 (1967). In *In re* Doe, 54 Haw. 647, 513 P.2d 1385 (1973), the Supreme Court of Hawaii held that due process guarantees protected minors as well as adults. It therefore struck down a Honolulu juvenile curfew statute because it was vague and overbroad.

39 397 U.S. at 368. The Supreme Court has refused to extend to the juvenile proceeding one right that is constitutionally required in adult criminal trials. The Court has held that trial by jury is not required in a juvenile proceeding. *See* 403 U.S. 528.

age of majority,"[40] the Court in *Planned Parenthood v. Danforth* declined to classify the minor's right of privacy as any less important than an adult's. It held that the state did not have the right to give to a third party an absolute and possibly arbitrary veto power over a minor's decision to terminate her pregnancy with an abortion. The Court struck down a statutory provision requiring parental consent before a minor could obtain an abortion during the first twelve weeks of her pregnancy. In the Court's estimation, any independent interest a parent might have in the termination of a minor daughter's pregnancy was no more significant than the minor's right of privacy.[41]

Thus a constitutional right is not subject to less protection simply because it is exercised by a minor rather than an adult. Moreover, when a constitutional right is at stake, whether an adult or a minor is involved, it can only be infringed upon for a constitutionally valid reason.

## III. The Scope of Judicial Review

### A. *Review of Legislative Enactments*

When legislation curtails an individual's rights, the courts must determine if there is a constitutionally valid justification for the curtailment. Consideration must therefore be given to the standard of review used by the courts in making this determination.

The scope of judicial review in the context of determining the constitutionality of legislative enactments has never been specifically defined.[42] Over the years, however, standards of judicial review have evolved with the extent of the review dictated by the nature of the rights allegedly at stake.

In the area of economic regulation, for instance, the Supreme Court initially held that as long as the legislation in question bore a "reasonable relation to a proper legislative purpose" and was neither arbitrary nor discriminatory, it satisfied the requirements of due process.[43] This "reasonable relation" test was later modified so that regulatory legislation was upheld as long as it was related by some "rational basis" to the furtherance of a legitimate state interest.[44]

The lenient "rational basis" standard, however, has not been employed in reviewing the validity of all legislative enactments. It is clear that certain types of legislation have been subjected to a much stricter standard of judicial scrutiny. First amendment rights, for example, have long been given a "preferred status."[45] In order to be upheld, legislation infringing upon these rights requires much more than the showing of a mere rational basis for furthering a particular state interest. Legislation will be upheld only when it is shown to advance a compelling

40 428 U.S. at 74.
41 *Id.* at 74-75.
42 For an excellent discussion of the scope of judicial review *see* Goodpaster, *The Constitution and Fundamental Rights,* 15 ARIZ. L. REV. 479 (1973).
43 Nebbia v. New York, 291 U.S. 502 (1934).
44 United States v. Carolene Prod., 304 U.S. 144 (1938).
45 Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

state interest.[46] The Supreme Court made this point clear in the case of *N.A.A.C.P. v. Button* when it stated:

> The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.[47]

In addition, when it is possible for a statute to be more narrowly drawn and thereby to avoid conflicts with first amendment rights, the statute must be so drawn.[48]

The Court has extended its use of strict review beyond legislation that deals solely with first amendment rights to enactments that encroach upon any "fundamental right." In *Griswold v. Connecticut*,[49] Justice Goldberg pointed out that the Supreme Court has long held it would not be enough for the state to show that the legislation in question had "some rational relationship to the effectuation of a proper state purpose" when "fundamental personal liberties" were involved.[50] Quoting from earlier language the Court had used in *Bates v. Little Rock*,[51] he noted that "the State may prevail only upon showing a subordinating interest which is compelling."[52] In reviewing the constitutionality of abortion statutes the Court has reaffirmed its use of strict judicial review to protect fundamental rights.[53] The Court has stated that only a "compelling state interest" could justify the regulation of the right of privacy. Furthermore, the legislation had to be "narrowly drawn to express only the legitimate state interests at stake."[54]

The primary development of this double standard of review has occurred in cases involving deprivations of liberties protected by the due process clause of the fourteenth amendment. This approach, however, has also been used to assess alleged violations of the equal protection clause of the fourteenth amendment. In reviewing cases arising under equal protection claims, the underlying rationale has been that persons living under similar circumstances should be treated in a similar manner unless a legitimate reason exists for treating them differently. The Supreme Court has put forth two distinct tests for assessing the constitutionality of a particular classification. The traditional basis has been that a classification is valid if it is rationally related to a legitimate state interest. If, however, the classification involves a "suspect" grouping or the restriction of a fundamental right, then the state's action can be upheld only if it is in the furtherance of a compelling state interest.[55]

Thus, in terms of juvenile curfew statutes, if any of the rights restricted are

46 *See, e.g.*, N.A.A.C.P. v. Button, 371 U.S. 415 (1964); Sherbert v. Verner, 374 U.S. 398 (1963); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).
47 371 U.S. at 438.
48 United States v. Robel, 389 U.S. 258, 268 n.20 (1967).
49 381 U.S. 479 (1965).
50 *Id.* at 497 (Goldberg, J., concurring).
51 361 U.S. 516 (1960).
52 381 U.S. at 497 (Goldberg, J., concurring).
53 410 U.S. 113.
54 *Id.* at 155. *See also*, Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 NW. U.L. REV. 1 (1965).
55 *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See also* 401 F. Supp. at 1264-65.

deemed "fundamental," the legislation is subject to challenge on either a due process or an equal protection basis. The enactment may be challenged as either state deprivation of minors' fundamental rights without due process of law, or as a violation of equal protection because it deprives a particular class of the citizenry, minors, of a fundamental right. Under either approach, the statute could be upheld only if it furthered a compelling state interest.

### B. *Is Freedom of Movement a Fundamental Right?*

In view of this double standard of judicial review, the question to consider is whether the constitutional rights discussed earlier are all included within the confines of "fundamental rights." If they are, then freedom of movement can be viewed as a fundamental right regardless of the specific constitutional protection it is thought to come under.

#### 1. First Amendment Rights

There is no doubt that first amendment rights are properly categorized as fundamental and require the furtherance of a compelling state interest if they are to be abridged. As earlier indicated, the Supreme Court has consistently employed the compelling interest test in judging infringements upon a first amendment right.[56] Furthermore, the applicability of the compelling interest test does not seem to rest on the judicial determination that the infringement involved directly rather than incidentally affects these rights. In *United States v. O'Brien,* which upheld the constitutionality of a federal law making it a crime for a person to knowingly destroy his draft card, the Supreme Court stated:

> [W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental limitations* on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has used a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.[57]

Thus, if freedom of movement is itself viewed as a first amendment right, clearly the strict standard of review must be applied to restrictions. Even if not viewed as a first amendment right, if restrictions on movement have a direct or incidental impact on other first amendment rights, more than a rational relation to a legitimate state purpose is needed to justify the restrictions.

#### 2. The Right to Travel

The right to interstate travel has been accorded the status of a fundamental right. In *Shapiro v. Thompson,*[58] the Court stated that the showing of a mere rational relationship between an abridgement of the right to interstate travel

56 *See* text accompanying notes 45-47 *supra.*
57 391 U.S. 367, 379 (1968) (emphasis added).
58 394 U.S. 618.

and admittedly permissible state objective was not enough. The Court continued by noting:

> Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.[59]

The long standing recognition of this right as a constitutionally protected freedom seems to underly this classification.

As indicated earlier, however, the term "travel" in the interstate context is meant to imply more than movement; it refers to interstate travel associated with "an interest to settle and abide."[60] Thus, it is necessary to go beyond the right of interstate travel to determine whether the right to travel provides a basis for treating freedom of movement as a fundamental right.

In affirming the right to travel abroad, the Supreme Court did not explicitly label it a fundamental right. Nevertheless, it declared that infringements on this right would be warranted only in situations similar to those that meet the compelling interest standard. Thus, in *Zemel v. Rusk,* although the Court upheld a regulation of the right to travel, it stated that the regulation was supported by the "weightiest considerations of national security."[61] In *Aptheker v. Secretary of State,* the Court also compared regulation of this right to regulation of first amendment rights, noting that in both "precision must be the touchstone of legislation so affecting basic freedoms."[62] Therefore, it is apparent that the Supreme Court treats the right to travel abroad as fundamental. The "large social values" the right promotes seem to provide the basis for this classification.[63] Justice Douglas has explained that these social values include the right to know, converse, and consult with others as well as to observe social, physical, political, and other phenomena.[64]

As discussed earlier, the Court intimated an equation of the right to travel abroad with freedom of movement. The same considerations that underlie the Court's treatment of the right to travel abroad as fundamental are also directly applicable to freedom of movement, in its broadest sense. All forms of movement promote the large social values the Court referred to in *Kent.* The view that free movement within a state as well as between states and beyond the national borders is a fundamental right is also supported by the Court's language in *United States v. Wheeler.* Here the Court referred to the fundamental nature of intrastate as well as interstate movement when it noted:

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59 *Id.* at 638.

60 *See* text accompanying note 13 *supra.*

61 381 U.S. at 16. Although this case dealt with the regulation of international travel, the Court did have occasion to indicate the kind of circumstances that would justify the regulation of domestic travel: "The right to travel *within* the United States is of course also constitutionally protected. . . . But that freedom does not mean that areas ravaged by flood, fire, or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area. . . ." *Id.* at 15-16.

62 378 U.S. at 514.

63 *See* Kent v. Dulles, 357 U.S. 116, 126 (1958).

64 Zemel v. Rusk, 381 U.S. 1, 24 (1965) (Douglas, J., dissenting).

> In all the States from the beginning down to the Articles of Confederation the citizens thereof possessed the *fundamental right,* inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right.[65]

Thus, viewing freedom of movement as encompassed by the right to travel also results in treating it as a fundamental right.

### 3. The Right of Privacy

As noted, the right of privacy embraces only those personal rights that are fundamental.[66] Thus, by definition, a right that falls within the right of privacy can be subject to regulation only upon the showing of a compelling state interest.

It is evident, therefore, that the first amendment, the right to travel, and the right of privacy, all provide a basis for treating freedom of movement as a fundamental right. If it is regarded as encompassed by any of these constitutional protections, restrictions of the freedom must be subject to strict judicial scrutiny.

## C. *Special Considerations in Reviewing Minors' Rights*

The cases that have dealt with general curfew legislation, rather than curfews applicable solely to minors, consistently employ the stricter standard of review in determining the validity of the enactment.[67] Therefore, it is apparent that in the context of general curfews the courts feel that the rights infringed are fundamental in nature. The problem is raised, however, as to the proper manner of review to be accorded legislation directed solely at minors. As indicated earlier, the existence of a constitutional right is not affected by the application of that right to either a minor or an adult; the constitutional rights involved in curfew situations exist for all persons regardless of age. Contrastingly, the scope of protection accorded these rights may well depend upon the age of the party allegedly restrained.

Although the Supreme Court has refrained from setting forth a framework for analyzing minors' rights, that differs from that applied to adults;[68] it has indicated that there are special factors to consider in reviewing legislation infringing on the rights of minors. The special factors considered by the Court accommodate two concepts, which, to some extent, are at odds. On the one hand, it is recognized that the state has broader authority over the rights of minors than it has over the rights of adults.[69] On the other hand, the Court has firmly stated

65 254 U.S. 281, 293 (1920) (emphasis added).

66 *See* text accompanying notes 25-27 *supra.*

67 *See, e.g.,* People v. McKelvy, 23 Cal. App. 3d 1027, 100 Cal. Rptr. 661 (1972); State v. Boles, 5 Conn. Cir. Ct. 22, 240 A.2d 920 (1967); Glover v. District of Columbia, 250 A.2d 556; Ervin v. State, 41 Wis. 2d 194, 163 N.W.2d 207 (1968).

68 *See, e.g.,* Ginsberg v. New York, 390 U.S. 629 (1968); *In re* Gault, 387 U.S. 1 (1967). The Court in each of these cases refrained from analyzing the totality of the relationship of the juvenile and the state.

69 *See* 390 U.S. 629; Prince v. Massachusetts, 321 U.S. 158 (1944).

that the Bill of Rights is not for adults alone,[70] and that minors' constitutional rights "do not mature and come into being magically" at the age of majority.[71]

In light of these concepts, two possible approaches emerge that might be used to assess the validity of legislation infringing on the constitutionally protected rights of juveniles. The first approach would view the fundamental rights of minors as not being of the same caliber as those of adults; therefore, the courts would not apply the strict compelling interest in reviewing statutes infringing on these rights. Alternatively, the courts would accord the fundamental rights of minors the same significance as those of adults; there would be, however, certain compelling interests the state could advance when dealing with juveniles' rights that could not be advanced when dealing with adults' rights. An analysis of the Supreme Court's treatment of minors' rights indicates that the latter approach more accurately reflects the position of the Court.

The Supreme Court directly addressed the issue of whether the rights of juveniles could be subject to greater restrictions than those of adults in *Prince v. Massachusetts*.[72] Prince involved the conviction of the guardian of a nine year old. The guardian had violated a Massachusetts child labor law by permitting the minor to sell magazines on public streets. Both the minor and her guardian were members of the Jehovah's Witnesses. They contended that since the goods being sold were religious in nature, the state was violating the child's first amendment freedom of religion by preventing her from engaging in this activity. Although the Court admitted that a first amendment right was involved, it nevertheless pointed out:

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and matters of employment. 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.[73]

The Court went on to note that children have rights in common with adults in the use of the streets. Nevertheless, the fact remained that the streets present certain dangers for minors that do not affect adults, especially when they constitute the child's place of employment.[74] Therefore, in an effort to safeguard the child from these dangers, the Court upheld the law, stating:

> [W]ith reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . .[75]

The Court indicated that this type of activity created situations difficult enough even for adults to cope with, let alone children of "tender years." It also discussed the threat of emotional, psychological, and physical injury this

70 387 U.S. at 13.
71 428 U.S. at 74.
72 321 U.S. 158.
73 *Id.* at 168.
74 The Court cited several sources to support its contention that placing children in the labor force had a deleterious impact on them. *Id.* at 168 n. 15-16.
75 *Id.* at 170.

type of activity posed regardless of the presence of a parent or guardian.[76]

In reaching its decision, the Court employed the same standard of strict review it would have employed had adult rights been at stake. Justice Murphy in his dissenting opinion made this clear when he stated that, in order for the state to impose constitutional restraints on the child's freedom of religion, there had to be "convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals, or welfare of the child."[77] Although Justice Murphy did not believe that a compelling interest was present, the majority felt that the importance of safeguarding the child from the abuses associated with the activity in question provided the required state interest.

Another case in which the Court relied upon its broader authority over the rights of minors was *Ginsberg v. New York*.[78] Here the Court ruled on the constitutionality of an obscenity statute which prohibited the sale of material defined to be obscene to people under the age of seventeen. The material was labeled obscene on the basis of its appeal to children, even though the same material might not be obscene for adults.

The Court initially noted that obscenity was not within the area of protected speech.[79] Furthermore, in deciding whether that material was obscene, the Court felt justified in adjusting the definition of obscenity to accommodate "social realities" by assessing the appeal of this type of material in terms of the sexual interests of juveniles. In ruling on the impact of this material on minors, the Court referred to its broader authority over such persons to justify the use of different standards in determining the question of obscenity. Moreover, it noted that parents and others who have the primary responsibility for children's well-being are entitled to the support of the law in meeting that responsibility.[80] Thus, the Court stated that since the material in question could be classified as obscene when viewed by minors, its sale was not within the ambit of the rights protected by the first amendment. Therefore, since no fundamental rights were involved, it was unnecessary to demonstrate that the law furthered a compelling state interest. The Court felt that the legislation was rationally related to a legitimate state end; accordingly, it was upheld.

The Supreme Court, however, made it unmistakably clear in *Planned Parenthood v. Danforth* that legislation plainly infringing on a minor's fundamental rights cannot be upheld on the showing of a mere rational relation to a legitimate state interest.[81]

These cases serve to show that the fundamental rights of minors are to be given a standard of protection similar to that accorded to the right of adults. The state is given more leeway, however, in restricting the rights of minors than it has in restricting adult rights. *Prince* indicates that the state may be able to invoke certain compelling interests when restricting minors' rights that could not be used when adults are involved. Thus, the *Prince* court recognized that

76 *Id.*
77 *Id.* at 174 (Murphy, J., dissenting).
78 390 U.S. 629.
79 *Id.* at 635, *citing* Roth v. United States, 354 U.S. 476 (1957).
80 *Id.* at 638-39.
81 428 U.S. 52 (1976).

the need to protect minors from dangers associated with the public proclaiming of religion is a basis for justifying a restriction of a fundamental right. *Ginsberg* provides further justification for a state's regulation of the activities of minors to a greater extent than those of adults. There the Court showed that a state may be justified in concluding that the impact of certain activities is such that when an adult engages in these activities, fundamental rights are involved; when a juvenile participates in these same activities, however, no fundamental rights are at stake. A court is thus warranted in applying a strict standard of review to legislation restricting the rights of adults in these areas and the more lenient standard of review for legislation restricting the rights of minors.

In terms of juvenile curfew statutes, if fundamental rights are involved, then the *Prince* rationale could permit the state to impose a curfew on minors which would be invalid if imposed on adults. There may be instances, which will be discussed later, when a court may find that the protection of juveniles requires a restriction of their evening activities which is greater than that imposed upon adults. *Prince* would justify this finding. Only part of the *Ginsberg* rationale, however, seems applicable. To the extent that none of the rights affected by curfew statutes appear to involve "social realities" that make them fundamental when exercised by adults, but not fundamental when exercised by minors, *Ginsberg* is inapplicable. The rationale applies to the extent that a juvenile curfew can be viewed as a law aiding parents in the discharge of the duty they have towards their children. Whether such a statute can be justified as an aid to parents will also be discussed later.

## IV. Judicial Treatment of Juvenile Curfew Statutes

In assessing the validity of legislative enactments, courts will employ different standards of review depending on the nature of the right involved. As noted, when fundamental rights are involved, a compelling state interest must be found to justify the infringement; the legislation must also be narrowly drawn to meet a precise evil. When fundamental rights are not at stake, the legislation need only be rationally related to a legitimate state end. Furthermore, simply because juveniles are involved, it is clear that the employment of more lenient standards of judicial review is not permitted. There may be circumstances present, however, even when fundamental rights are involved that justify restricting juveniles to a greater extent than adults.

With this basic understanding of the constitutional framework involved, a more complete analysis of prior juvenile curfew cases may be made. The purpose of this analysis is to demonstrate the inconsistent approach the judiciary has taken in reviewing these statutes. Some courts employ the compelling interest test; others rely on the rational basis test. Consequently, it is not surprising that the judiciary has failed to reach a consensus on the validity of these enactments.

One problem that arises, however, in reviewing these cases is that in some instances it is difficult to immediately categorize the standard of review used by a particular court. Some courts fail to explicitly state whether they are relying on the compelling interest standard or the more lenient rational basis test. There-

fore, it is necessary in some instances to infer the standard used through reliance on the justifications provided by the court to uphold or strike down the legislation.

### A. *Cases Employing the Strict Standard of Review*

The first decision to rely on a seemingly strict standard of review was handed down by a Maryland court of appeals in the 1964 case of *Thistlewood v. Trial Magistrate*.[82] The importance of this case is twofold: first, it was the first of the more modern decisions to uphold a juvenile curfew statute; second, it set forth a standard for reviewing these enactments that has been relied upon by succeeding courts.

The question presented regarded the validity of an ordinance that prohibited persons under twenty-one from remaining on the streets of the town of Ocean City, Maryland between the hours of 12:01 a.m. and 6:00 a.m. on the Labor Day weekend of 1963. Ocean City is a resort town and the law was enacted as a result of serious difficulties the town had experienced with minors during Labor Day weekends in the recent past. These prior disorders has created near riot conditions.[83]

In reviewing the statute, the court noted that the basic standard against which the statute must be judged is reasonableness. In order for the ordinance to be labeled reasonable, three criteria had to be met. First, there had to be an evil. Second, the means selected to curb the evil had to bear a real and substantial relationship to the result sought. Third, the means availed of could not unduly infringe upon the fundamental rights of those whose conduct was curbed.[84] The third criterion, however, need only be applied if an affirmative answer could be given to the first two.

The court in *Thistlewood* apparently employs both of the standards of review previously discussed. The first two criteria, which emphasize the statute's relation to the result sought, seem similar to the rational basis test. The final criterion, however, with its emphasis on the protection of fundamental rights, seems analogous to the compelling interest test. Thus, the court goes through a two-step process in assessing the validity of this enactment. It initially determines whether the statute at least meets the rational basis test. If it does, and if fundamental rights are at stake, the court then applies the compelling interest test.

The court summarily concluded that affirmative answers could be given to the rational basis part of the test. In answering the compelling interest question, the court first noted the short-term nature of this emergency measure necessitated by the city's desire to protect its citizens and visitors from groups of minors, as well as the minors from themselves. Furthermore, the law was only applicable on the four crucial nights the town's legislature knew from experience to be

82 236 Md. 548, 204 A.2d 688.

83 During the Labor Day weekends of 1960, 1961 and 1962 "Ocean City suffered from the presence in the municipality of extremely disorderly groups of minors, said disorder amounting almost to riots, requiring many police officers, both local and state, and, on occasions, police dogs, to control the situation and maintain the peace of an otherwise normal and peaceful community, and to protect the property and personal safety of visitors to and residents of Ocean City. . . ." *Id.* at 690, *quoting* Ocean City, Maryland, Ordinance 120-A, August 13, 1963.

84 204 A.2d at 693.

dangerous. On these nights marauding groups of youths were, in the court's words, "looking for trouble."[85] The court felt that in light of the emergency nature of the situation and the short duration of the ordinance, it was not an oppressive infringement on the minors' fundamental rights and was therefore valid.

It seems proper to categorize this decision as one that employed the stricter standard of review. Although the court did not explicitly use this terminology, the riotous conditions that confronted the town are analogous to those that subsequently allowed the courts to find a compelling interest permitting cities to enact general curfews to cope with racial tensions in the late 1960's and early 1970's.[86]

The most recent decision to employ the strict standard of review was handed down by an Illinois district court of appeals in *People v. Chambers*.[87] The court maintained that this state curfew, by inhibiting minors' freedom of movement, infringed upon the exercise of first amendment rights. To justify this encroachment, more than police convenience or a mere hope that society or juveniles might benefit was required.[88] The court noted that military and general curfews, which infringed on similar freedoms but had been upheld, all were connected with emergency situations wherein the safety and well-being of the public were threatened. Furthermore, these curfews were limited in time to the duration of the emergency. Since no comparable emergency situation was involved in the case before the court, it held the curfew to be unconstitutional.[89]

Several juvenile curfews have been invalidated for failing to be narrowly drawn to meet a precise evil.[90] The most prominent among these is *City of Seattle v. Pullman*,[91] decided by the Supreme Court of Washington in 1973. The defendant, a high school senior, had his car stopped by a policeman because it was emitting excessive amounts of noise. Although it was after curfew, two minors under eighteen accompanied the defendant. He was therefore charged with violating that section of the Seattle curfew ordinance that made it unlawful for anyone not the parent or guardian or without the express consent of the parent or guardian to be with a minor under the age of eighteen who was violating the curfew.[92]

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85 *Id.*

86 *See* note 67, *supra*.

87 32 Ill. App. 3d 444, 335 N.E.2d 612. This curfew statute made it unlawful for a person under 18 to be present at or upon any public assembly, building, place, street, or highway at the following times unless accompanied and supervised by a parent, legal guardian or other responsible companion at least 21 years of age approved by parent or legal guardian or unless engaged in a business or occupation which the laws of the state authorized a person under 18 to perform: 1) Between 12:01 a.m. and 6:00 a.m. Saturday and Sunday; 2) Between 11:00 p.m. on Sunday to Thursday, inclusive, and 6:00 a.m. on the following day. *Id.* at 444-45, 335 N.E.2d at 614.

88 *Id.* at 449, 335 N.E.2d at 617.

89 *Id.* at 450, 335 N.E.2d at 618.

90 *See, e.g.*, Alves v. Justice Court, 148 Cal. App. 2d 419, 306 P.2d 601 (1957); 54 Haw. 647, 513 P.2d 1385; 487 P.2d 974; *Ex parte* McCarver, 39 Tex. Crim. 448, 46 S.W. 936 (1898).

91 82 Wash. 2d 794, 514 P.2d 1059 (1973).

92 Section 2 of Seattle, Washington, Ordinance 95984 made it unlawful for any minor under 18 to loiter, idle, wander or play in public places or in an automobile during curfew hours. Exceptions were made for a minor accompanied by his or her parent or guardian; or for a minor traveling by direct route to or from work in the regular course of properly

The court held this section, as well as the entire curfew, to be unconstitutional. It acknowledged that the state had an interest in protecting minors from "abuses," as *Prince* had termed it. Nevertheless, it could only speculate as to the abuses avoided due to the curfew; the invasion of protected freedom, however, the court found evident.[93] It noted that even curfews applicable solely to minors had to be "specific in their prohibition and necessary in curing a demonstrable social evil."[94] Failing this test, the statute was struck down.

### B. *Cases Employing the Lenient Standard of Review*

Several courts have employed a seemingly lenient standard of review in assessing the constitutionality of juvenile curfew statutes. Only one court has expressly stated that the rational basis test is applicable because no fundamental rights are involved. The other courts appear to take the view that a more lenient standard can be imposed because the focus of the legislation is juveniles.

The first court to uphold a juvenile curfew statute as constitutionally valid employing a lenient standard of review was the Pennsylvania case of *Baker v. Borough of Steelton*.[95] In this 1912 decision the court held that a statute prohibiting a person under sixteen years of age to be or remain on the streets after nine o'clock unless accompanied by a parent or guardian, or unless bearing a note signed by a parent or guardian indicating that the minor was on an emergency errand, was a reasonable exercise of the state's police power. The court noted that the state had a legitimate interest in preventing children from coming into contact with the "corrupting influences of improper associates."[96] It viewed the legislation in question as related to and tending to promote the good order and welfare of the community.[97] Therefore, it dismissed the plaintiff's complaint and refused to hold the law unconstitutional.

The next decision to employ a rational basis test and uphold a juvenile curfew was *People v. Walton*.[98] In *Walton* a parent was appealing his conviction for willfully permitting his minor child to violate the Los Angeles curfew.[99] The court pointed out that legislation peculiarly applicable to minors was necessary for their protection. Consequently, when it was induced by rational considerations looking to that end, its validity could not be challenged.[100] The court held that

approved employment and the minor had in his possession evidence of such appoval, or for a minor traveling by direct route to or from activities sponsored by religious or educational organizations, or for a minor sent by his parent or guardian on some lawful business or errand, in which case the minor was required to have with him the written consent of his parent or guardian. Section 4 of this ordinance made it unlawful for anyone not the parent or guardian of any child under the age of eighteen, or not having the express consent of the parent or guardian to be with or accompany any child who at the time was violating Section 2 of the ordinance. *Id.* at 1060-61 n. 1.

93 *Id.* at 1064.

94 *Id.* at 1065.

95 17 Dauph. 17 (Dauphin, Pa. County Ct. 1912).

96 *Id.* at 22.

97 *Id.* at 23.

98 70 Cal. App. 2d 862, 161 P.2d 498 (1945).

99 The statute involved in this case made it a crime for anyone having the legal care and custody of a person under eighteen to permit this person to remain on the public streets between the hours of 9:00 p.m. and 4:00 a.m. the next day, unless the minor had in his possession a permit to do so or unless the minor was accompanied by a parent, guardian, or other adult having the care and custody of the minor. *Id.* at 864, 161 P.2d at 500.

100 *Id.* at 867, 161 P.2d at 501.

the statute was designed to prevent minors from "tarrying and staying unnecessarily upon the streets." Because the statute did not restrict minors who were using the streets while "going to or from places of business or amusement or otherwise,"[101] the court upheld the legislation, stating that it was premised on rational considerations of a legitimate state interest.[102]

In 1966 the rational basis text seemed to again be employed, this time by an Ohio court that upheld a municipal juvenile curfew statute in *City of Eastlake v. Ruggiero*.[103] The statute established curfew hours varying with the age of the minor. It provided exceptions for minors with a legitimate excuse and minors accompanied by a parent, guardian, family member over eighteen, or some responsible person over twenty-one.[104] The court held that the ordinance was justified as a necessary police regulation to control the presence of juveniles in public places during the evening hours. The ordinance was also considered to promote the safety and good order of the city by lowering the incidence of juvenile criminal activity.

In upholding the ordinance, the court cited *Thistlewood* and concluded that the law did not exceed the bounds of reasonableness.[105] The validity of this court's reliance on *Thistlewood,* however, is questionable. The reasonableness test put forth there is a two-step process, with the first step similar to a rational basis test, the second to a compelling interest standard. The curfew in *Thistlewood* passed both; it was, however, a temporary measure enacted to cope with an emergency situation. Similar circumstances were not present in *Ruggiero*. Although the promotion of the safety and good order of the city would suffice for a rational basis standard, there is nothing in the case to indicate that the curfew could meet a compelling interest standard.

Another juvenile curfew case, *In re C.*,[106] relied on the *Thistlewood* test in a nonemergency situation and upheld the curfew in question.[107] This court also apparently felt that the test was more akin to the rational basis than to the compelling interest standard. In testing the reasonableness of the ordinance, the court stated that "the measures so adopted must have some relation to the ends

101 *Id.* at 866, 161 P.2d at 501.

102 The validity of distinguishing between statutes prohibiting "remaining" on the streets for those proscribing "presence" or "being" on the streets, as the court did in *Walton* is questionable. The problem is that remaining and being are generally given synonymous interpretations at the enforcement and administrative levels. As a practical matter, there is no difference between the two. Thus, it is fallacious to draw upon this as a meaningful distinction. *See* 401 F. Supp. at 1252. *See also* Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime,* 107 U. PA. L. REV. 66, 99 (1958).

103 7 Ohio App. 2d 212, 220 N.E.2d 126 (1966).

104 This statute (Eastlake, Ohio, Ordinance 583.02) made it unlawful for any child under the age of twelve to be upon the streets or sidewalks during any period from darkness to dawn, for minors 12-16 the hours were 11:00 p.m. to 6:00 a.m. and for minors 16-18 the hours were 12:00 midnight to 6:00 a.m. unless the minor was accompanied by a parent, guardian or some responsible person over 21, or a member of his family over 18 or unless he had a legitimate excuse. The ordinance also made it unlawful for a parent or guardian to permit the child to violate this law. *Id.* at 213, 220 N.E.2d at 127.

105 *Id.* at 215, 220 N.E.2d at 128. The *Ruggiero* decision was upheld in *In re* Carpenter, 31 Ohio App. 2d 184, 287 N.E.2d 399 (1972). *Carpenter* concerned the validity of an ordinance that prohibited persons under eighteen to be on or about public streets within the city during hours that the person was required to be in attendance at either a public or private school. The court cited *Ruggiero* as authority for holding this ordinance constitutional.

106 28 Cal. App. 3d 747, 105 Cal. Rptr. 113 (1972).

107 *Id.* at 754, 105 Cal. Rptr. at 118.

thus specified."[108] The court used this language despite the *Thistlewood* court's finding what appears to be a compelling interest to justify the curfew's infringement on minors' rights. As with *Ruggiero,* however, there was no emergency situation involved that led to the enactment of this ordinance, and it was not limited in duration.

Thus, two cases that rely on *Thistlewood* to uphold the validity of a juvenile curfew statute seem to employ a rational basis rather than a compelling interest test. The justification for employing this standard is that the state has broader authority over minors than it has over adults. It is not clear, however, that *Thistlewood* supports the contention that a more lenient standard of review is permissible simply because juveniles are the focus of the legislation. In *Thistlewood* the equivalent of a compelling state interest was advanced to support the argument that a temporary curfew did not unduly infringe upon fundamental rights. Contrastingly, no analogous interest was advanced in either *Ruggiero* or *In re C.,* nor was the curfew temporary. Both cases, therefore, can be distinguished from *Thistlewood.* Consequently, the reliance of these courts on this case seems unsound.

The first federal court decision involving juvenile curfew statutes was handed down in *Bykofsky v. Borough of Middletown.*[109] In *Bykofsky,* the Middle District Court of Pennsylvania analyzed the validity of the statute from several constitutional viewpoints and concluded that it was valid. The court refused to employ a compelling interest test in ruling on its constitutionality, choosing instead to rely on the rational basis standard. Since the court's opinion is quite extensive, it will be considered in some detail.

In analyzing the infringement on the minor's freedom of movement and the minor's first amendment freedom to gather, for social purposes, the court weighed the legitimate interests of the state furthered by the ordinance against the competing liberties of the minor.[110] The court cited four interests the ordinance was designed to promote:[111] (1) the protection of younger children in Middletown from each other and from other persons on the street during the nighttime hours; (2) the enforcement of parental control of and responsibility for their children; (3) the protection of the public from nocturnal mischief by minors; (4) reduction in the incidence of juvenile criminal activity.

The court stated that a rational relation existed between the curfew and the ends the ordinance was trying to meet.[112] Therefore, in light of these interests, and in view of the contention that "the interest of minors in being abroad during nighttime hours included in the curfew is not nearly so important to the social, economic, and healthful well-being of the community as the free movement of adults,"[113] the court concluded that the minors' interests were outweighed by the government's interests. The court also pointed out that the statute did not entirely prohibit a juvenile's presence on the streets. Exceptions were provided for

108 *Id.* at 754, 105 Cal. Rptr. at 118, *quoting In re* Hall, 50 Cal. App. 786, 789, 195 P. 975, 976 (1920).
109 401 F. Supp. 1242.
110 *Id.* at 1255.
111 *Id.*
112 *Id.* at 1256.
113 *Id.*

their presence after hours when they had a specific, important, legitimate purpose or when they were accompanied by a parent.[114]

In discussing the infringement on the minor's right of travel, the court again declined to employ a compelling interest test. It stated that this was just a rephrasing of the freedom of movement argument.[115] The court also refused to employ a compelling interest test when analyzing the constitutional validity of the ordinance from an equal protection viewpoint. The court stated that the classification involved was reasonable. It further held that no fundamental rights were infringed upon. Thus, the court found it unnecessary to find any compelling state interest.[116]

Several questions can be raised concerning the court's methodology in assessing this legislation. First, in analyzing the minor's freedom of movement and freedom of assembly rights, the court employed a balancing test. One of the considerations that went into the weighing of the interests was that the community's welfare is not as dependent on minors' freedom of nocturnal movement and assembly as it is upon the exercise of these rights by adults. Although this may be true, the same thing could be said for any constitutional right. If what the court means by this is that these rights are to be accorded less weight simply because they belong to a minor, then this is inconsistent with the Supreme Court's language in *Danforth* where the Court stated that constitutional rights do not suddenly mature when a person reaches the age of majority.[117]

The court's decision to use a balancing test in analyzing the minor's right of travel argument, which it termed a rephrasing of the freedom of movement argument, is also questionable. The case cited as authority for such a standard, *Sosna v. Iowa*,[118] involved the constitutionality of a one-year residency requirement preceding the filing of a petition for divorce in the State of Iowa. The law was claimed to be an unconstitutional restriction on the petitioner's right to interstate travel. In electing to use a balancing test rather than a compelling interest test, it is not at all clear that the Court intended this to be the proper mode of analysis for any case involving the right of travel. A closer reading of this case leads to the conclusion that the Court determined that divorce upon demand was neither a fundamental right nor a necessity of life. Since the petitioner had not been foreclosed from obtaining a divorce, but only delayed, this statute did not invalidly penalize interstate travel. Since the right to travel was not penalized, no fundamental right was at stake; thus, a compelling interest test did not have to be employed. It is not at all clear that the Supreme Court intended the right of travel to no longer be treated as a fundamental right as the *Bykofsky* Court implies. The dissenting opinion of Justices Marshall and Brennan is very explicit in indicating that a balancing test is not the proper mode of analysis when dealing with the right to travel:

114 *Id.*
115 *Id.* at 1261. The court cited Sosna v. Iowa, 419 U.S. 393 (1975) as authority for the proposition that a balancing test is the proper mode of determining constitutional validity when dealing with the right of travel.
116 401 F. Supp. at 1264-65.
117 428 U.S. at 74.
118 For a discussion of this case *see* Comment, *Sosna v. Iowa; A New Equal Protection Approach to Durational Residency Requirements?*, 22 U.C.L.A.L. REV. 1313 (1975).

> [T]he Court has clearly directed that the proper standard to apply to cases in which state statutes have penalized the exercise of the right to interstate travel is the "compelling interest" test.[119]

Finally, it is not clear why the Court concluded that this ordinance did not infringe on fundamental rights. The Court may have been justified in reaching this conclusion if it found that the exceptions provided in the ordinance prevented it from infringing on these rights.[120] The problem, however, is that the Court explicitly recognized that the statute infringed on the minors' first amendment right to assemble in public places for social purposes. The Court also recognized that the statute infringed on minors' freedom of movement, which it termed a substantive due process right. The only basis provided for applying a balancing test rather than the compelling state interest test to these infringements was that the welfare of the community is not as dependent on minors exercising their rights as it is on adults exercising these same rights. This, however, departs from the language of the Court in the cases discussed earlier relating to minors' rights.[121] Thus, the *Bykofsky* Court seems incorrect in concluding that infringements on these rights need not be subject to strict judicial scrutiny simply because they are minors' rights.

### C. *A Proposed Framework for Assessing the Constitutional Validity of Juvenile Curfew Statutes*

It is evident that the courts have failed to employ a consistent framework in analyzing the constitutionality of juvenile curfew statutes and thus it is not surprising that conflicting conclusions have been reached. Before the judiciary can hope to reach a consensus on juvenile curfew legislation, it must employ a consistent framework in analyzing the question of constitutionality.

The first step in such a framework requires an analysis of the nature of the rights infringed by the curfew legislation. Based upon the rights involved, the second step would be for the court to determine the degree of judicial scrutiny that should be employed in reviewing the legislation. If the rights are found to be fundamental, the court must find a compelling interest before it can uphold the curfew in question. If the rights are not fundamental, then the court need only find a rational relation between the curfew and a legitimate state interest.

Employing this framework, if a court decides that fundamental rights are not at stake, the curfew legislation should be constitutionally valid. There is a rational relation between keeping juveniles off the streets after certain hours, unless accompanied by an adult, and the legitimate state goal of protecting them from abuses. There is also a clear rational relation between the state's interest in parental supervision and control of minor children and imposing a sanction on parents who allow their children to violate a curfew ordinance. The underlying

119 419 U.S. at 421 (Marshall, J., dissenting).
120 The statute contained an exception to the curfew for the bona fide exercise of first amendment rights for political, religious, or communicative purposes. 401 F. Supp. at 1258.
121 *See* text accompanying notes 33-41 *supra.*

assumption that the likelihood of juvenile criminal activity will decrease as fewer minors are present on the streets after hours and as parents are compelled to exercise closer supervision over their children also seems reasonable. Therefore, such legislation does bear at least a rational relation to the state's interest in reducing juvenile crime and mischief.[122] If fundamental rights are not involved, the constitutionality of a juvenile curfew statute is practically a foregone conclusion under a rational basis approach.[123]

The argument that no fundamental rights are involved is, however, difficult to accept. Notwithstanding the exceptions provided for in juvenile curfew statutes, there is still a restriction placed on the minor's right to move about, even with full parental consent. The courts have required that compelling interests be advanced before sustaining curfew legislation applicable to the general public, thus indicating a conclusion that a fundamental right is at stake in those instances. Whether one wants to rely upon the right to travel, the first amendment, or the right of privacy, it seems clear that before infringing on freedom of movement, courts require the state to advance a compelling interest. Simply because juveniles, rather than adults, are exercising the right, it does not become any less fundamental. Therefore, just as with general curfew legislation, the courts should find a compelling state interest being advanced before upholding curfew legislation applicable solely to minors.

The point has been made, however, that the state may invoke compelling interests when dealing with minors that it cannot invoke when dealing with adults. The question, then, is in what instances can the state claim that it is advancing a compelling interest applicable solely to minors? A *Thistlewood* situation would seem to be one example; there the town knew that an influx of minors would result in emergency conditions.[124] Coping with these conditions seems to be a compelling state interest that justifies a curfew applicable only to minors.[125]

Proponents of juvenile curfew legislation contend that several state interests are advanced by these statutes. Nevertheless, a closer analysis of these interests is needed to determine if they can be labeled "compelling." For example, one state interest that juvenile curfews are said to advance is the state's interest in protecting minors themselves. A problem arises, however, when that legislation applies to an entire area of a city. As the court in *Pullman* indicated, although the state may have an interest in protecting minors from "abuses,"[126] minors are not subject to abuses in all parts of a city. While in certain parts there may be an extraordinary crime rate or some other dangerous circumstance that necessitates protection, in other areas minors can travel freely without being exposed to the threat of crime or other abuses. Therefore, because a curfew imposed on minors' presence in certain sections of a city might qualify as a compelling interest, this does not justify restricting minors' movement in all sections of a city. Thus, curfews limited in geographic scope seem valid as long as the state can demon-

122 For a discussion of these arguments *see* 401 F. Supp. at 1255-56.
123 This assumes, of course, that the statute is not void for vagueness.
124 236 Md. 548, 204 A.2d 688.
125 *See* 32 Ill. App. 3d 444, 335 N.E.2d 612.
126 514 P.2d at 1064.

strate that the area actually poses a threat to the safety of minors.

A second state interest that is claimed to be advanced by curfew statutes is the promotion of parental responsibility for and supervision of children. It is difficult, however, to accept this as a compelling state interest. The Supreme Court concluded in *Planned Parenthood v. Danforth* that promotion of parental responsibility is not a sufficiently compelling interest to justify requiring minors to have parental consent before obtaining an abortion.[127] It is, therefore, unlikely that the state's interest in parental authority would be found compelling in the context of a curfew statute. It would seem incongruous for the courts to hold, on the one hand, that the state's interest in parental supervision is not compelling enough to permit a statute requiring minors to have parental permission before obtaining an abortion, while holding, on the other hand, that the state's interest in parental supervision is compelling enough to permit a statute denying minors the right to walk around the block in the evening hours unless accompanied by a parent or legal guardian. Holding this to be a compelling state interest could put the minor daughter in the anomalous position of not needing her parent's permission to obtain an abortion, but needing a parent to accompany her to the doctor if her appointment were in the evening. Furthermore, even when a parent is aware of the child's whereabouts and even though the child has permission to be out, the statute may impose sanctions on parent and child. Thus, the statute may at times act to derogate parental responsibility.[128]

The final interest that juvenile curfew statutes are said to advance is the state's interest in reducing nocturnal juvenile crime and mischief. There are several factors to consider in determining if this state interest can be termed compelling. One consideration is that the exercise of many rights involves the possibility of mischief; nevertheless, these rights are not for that reason curbed. Justice Douglas points this out while discussing the right of travel abroad:

> Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberties so as to give rise to punishable conduct is part of the price we pay for this free society.[129]

Another factor to consider is that the actual impact juvenile curfew statutes have on reducing nocturnal juvenile crime and mischief is not clear.[130] A final factor meriting consideration is that even though a court might take judicial notice of juvenile crime as a serious problem in a particular city, it is not necessarily a serious problem in all parts of a city; the reduction of nocturnal juvenile crime and mischief is a compelling interest only in those sections of a city where the citizenry is actually confronted with a high rate of juvenile crime. Analogous to the protection of minors' argument, if only certain identifiable sections of a city are subject to a high incidence of juvenile crime, then the city should not be

127 428 U.S. at 75.
128 514 P.2d at 1064.
129 Aptheker v. Secretary of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).
130 *See* 107 U. PA. L. REV. at 95-97.

allowed to advance this as a compelling interest permitting a curfew on minors' activities in all parts of a city.[131]

## V. Conclusion

It is imperative that a court faced with assessing the constitutional validity of a juvenile curfew statute determine the nature of the rights infringed upon by the statute. This is essential because it is the nature of these rights that dictates the standard to apply in reviewing the legislation. The constitutional validity or invalidity of these statutes seems to turn on the standard of review the court elects to use.

Legislation inhibiting conduct must be subject to strict judicial scrutiny if the inhibition involves an abridgement of a fundamental right. A restriction on freedom of movement seems to restrict a fundamental right even though the restriction is applicable solely to minors. The right to travel, the first amendment, and the right of privacy all provide a basis for treating freedom of movement as fundamental. Therefore, the compelling interest seems the proper mode of judicial review in assessing the constitutional validity of such curfew statutes. Emergency situations appear to qualify as compelling interests. The state's interest in protecting juveniles and reducing nocturnal juvenile crime might also qualify as compelling interests if the curfew were drafted so that it applied only to those sections of a city in which it could be shown that the safety of juveniles was threatened or that the rate of juvenile crime was extraordinarily high.

By urging the courts to employ a similar framework in assessing these statutes, it is not meant to imply that the courts will then immediately arrive at a consensus on this matter. Disagreement will in all likelihood continue. The courts may differ as to whether fundamental rights are involved or on what qualifies as a compelling state interest. Nevertheless, by approaching this issue in the same manner, the courts can at least make clear the point at which opinions diverge. It is there that future discussion of this matter can be directed.

*Martin E. Mooney*

131 The *Chambers*' court applied a similar rationale in striking down a statewide curfew.