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THE JUVENILE CURFEW: UNCONSTITUTIONAL IMPRISONMENT

Tona Trollinger*

Faced with rising crime rates, many municipalities in recent years have enacted juvenile curfews. Professor Tona Trollinger uses an ordinance enacted in Dallas, Texas, as a framework for analyzing juvenile curfews. The author discusses various prudential and constitutional objections to these curfews, including both substantive and procedural due process challenges. The author concludes that the admittedly valid governmental objectives underlying such curfews do not override their constitutional infirmities.

* * *

[T]he [curfew] ordinance . . . is paternalistic, and is an invasion of the personal liberty of the citizen. It may be that there are some bad boys in our cities and towns whose parents do not properly control them at home and who prowl about the streets and alleys during the nighttime and commit offenses. Of course, whenever they do, they are amenable to the law. . . . 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 [I]t is an undue invasion of the personal liberty of the citizen [and] an attempt to usurp the parental functions. . . .

Ex parte McCarver, 46 S.W. 936, 937 (Tex. Crim. App. 1898).

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The curfew ordinance recognizes the dangers to which minors are subject if allowed at nighttime to be upon the streets unattended by adults. Legislation peculiarly applicable to minors is necessary for their proper protection. Likewise, due to their immaturity, legislation peculiarly applicable to minors is warranted for the protection of the public, e.g., to protect the community from youths aimlessly roaming the streets during the nighttime hours.

Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1257 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

INTRODUCTION

The juvenile¹ curfews that proliferate across the nation are both a recent and a not so recent² tool to confront a continually increasing rate of juvenile crime and victimization. Curfews are as controversial³ as they are common. A prophylactic device often shrouded in virulent discrimination,⁴ the curfew is both touted as a necessary adjunct to existing criminal laws and criticized as an imprudent and unconstitutional intrusion into cherished freedoms. It is essential to effective law enforcement in an era of family disintegration and gang violence. It is a scourge on the integrity of law-abiding youths and is constitutionally intolerable.

¹ In this Article, the terms "juvenile," "youths," and "minors" are used interchangeably to refer to persons covered by curfew laws restricting the activities of younger citizens. Although most laws set the outside age at 16 or 17, some restrict persons 18 years of age and older. Kansas City, Missouri, for example, enacted a curfew for persons under the age of 21 covering a popular night section of the city. Kansas City, Mo., Ordinance 941,914 (1993). The ACLU affiliate challenged the curfew as unconstitutional under the Missouri Constitution, which established 18 as the age of majority. The parties settled, and the city repealed the ordinance. *City of Kansas City v. Salyer*, No. MA-94-1461 (Mo. Cir. Ct., Jackson Co. 1993) (record sealed under Missouri's "Sunshine Law").

² The long, sometimes tumultuous, history of the curfew is well-chronicled in literature and in case law. See *Thistlewood v. Trial Magistrate*, 204 A.2d 688, 690-91 (Md. 1964); *Eastlake v. Ruggiero*, 220 N.E.2d 126, 127-28 (Ohio Ct. App. 1966); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66, 66 n.5 (1958) [hereinafter *Curfew Ordinances*].

³ One writer astutely characterized the curfew: "Once, kids were supposed to be seen, not heard. But today, some cities don't want to see them, either." *Curfews on Kids No Answer to Crime*, USA TODAY, June 18, 1991, at 12A [hereinafter *Curfews on Kids*].

⁴ See *infra* note 31.

This Article discusses prudential and constitutional considerations underlying the juvenile curfew controversy, using as a blueprint a Dallas ordinance and the litigation it spawned. Part I proposes a framework of polar prototypical ordinances, differentiating on existential and constitutional planes the emergency and juvenile laws. Part II addresses the often catechismic prudential arguments framing the controversy. Part III chronicles the Dallas experience from the passage of the original ordinance in June 1991 to the denial of the petition for certiorari issued May 31, 1994. Part IV examines the deprivation of procedural due process inherent in most curfew ordinances, which are rarely, if ever, challenged. Part V describes possible substantive due process deficiencies, encompassing such enumerated liberties as freedom of speech, freedom of association, and such unenumerated liberties as freedom of movement and parental privacy. Part V closes with an analysis of equal protection challenges, including the potential for selective enforcement. The section concludes that, stripped of its vestments, the blanket curfew law operates to give police officers, who are otherwise constrained by the Fourth Amendment,⁵ reasonable suspicion to stop and question youths appearing at night in suspicious circumstances. This may be the curfew's primary purpose and its greatest advantage; it is, however, in its entire ambit, its constitutionally irremediable vice.

I. THE CURFEW: ORDINANCES AT THE POLES

Curfew ordinances are divisible analytically into two types: emergency and non-emergency.⁶ The former typically encompass situations of natural and human disaster,⁷ while laws regulating juvenile nocturnal activity generally fall into the latter category. Emergency and non-emergency curfews differ in scope and breadth, resulting in divergent prudential and constitutional characteristics and conclusions.

⁵ U.S. CONST. amend. IV; *see infra* note 106 and accompanying text.

⁶ Some courts also distinguish between laws that proscribe "presence" or "being" and laws that prohibit "remaining" or "loitering." *See, e.g.,* *People v. McKelvy*, 100 Cal. Rptr. 661, 665 (Ct. App. 1972) (noting that "mere presence on the street during the prohibited hours cannot constitute 'loitering' within the meaning of penal statutes or police regulations"); *People v. Walton*, 161 P.2d 498, 501 (Cal. Ct. App. 1945) (holding that ordinance using term "remain" prohibits "tarrying and staying unnecessarily upon the streets and public places," but does not restrict "using" or "going to or from places of business or amusement or otherwise"). Other courts have rejected this distinction. *See, e.g.,* *Thistlewood v. Trial Magistrate*, 204 A.2d 688, 691 (Md. 1964) (noting that zealous enforcement may make one the equivalent in practice of the other). Specific laws directed against "loitering" are not within the scope of this Article. "Traveling" laws form a possible third category. Interstate "travel" generally is excepted from curfew ordinances. Most laws necessarily restrict intrastate travel, raising the issue of whether this activity is a fundamental freedom. *See infra* part V.B.4.

⁷ *See, e.g.,* *Moorhead v. Farrelly*, 723 F. Supp. 1109 (D.V.I. 1989).

A. *The Blanket Curfew: Scope and Breadth*

The typical contemporary juvenile curfew law operates as a blanket,⁸ restricting the nocturnal⁹ public movements and activities of persons under the age of sixteen or seventeen. In stark contrast to the emergency curfew, it truly is a "blanket" prohibition in that it extends to virtually all activities¹⁰ of covered persons occurring within the proscribed period.¹¹ The youth law is usually not spatially limited to a particular geographic area within a city,¹² confined to a specific exigency, or narrowly limited in duration. To conform to judicial precedent and anticipated constitutional challenges,¹³

⁸ See, e.g., *City of Wadsworth v. Owens*, 536 N.E.2d 67, 69 (Wadsworth Mun. Ct., Ohio 1987) (observing that "the court can find no compelling state interest that would justify the blanket prohibition contained in" an ordinance prohibiting parents or guardians from allowing minors to be in public during certain hours).

⁹ The typical effective hours of a curfew are between 11:00 p.m. or midnight to 6:00 a.m. Recently, New Orleans enacted a dawn to dusk curfew that police claim is reducing the volume of criminal activity. See *Crime in N.O. Reduced Overall*, TIMES PICAYUNE, Nov. 15, 1994, at A1.

¹⁰ Each law contains a set of exceptions to violations or defenses to prosecution. See *infra* notes 13-20 and accompanying text.

¹¹ See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981).

¹² Most juvenile curfew laws are enacted by municipalities and extend across the municipal jurisdictional area. Illinois enacted a state-wide curfew in 1973, originally applicable to all persons under 18 years of age and amended in 1975 to apply to persons under 17 years. ILL. REV. STAT. ch. 23, para. 2371 (1975). The statute, as amended, excepts persons "accompanied and supervised by a parent, legal guardian or other responsible companion at least 18 years of age approved by a parent or legal guardian or . . . engaged in a business or occupation which the laws of this State authorize a person less than 17 years to perform." *Id.* An Illinois appellate court held the statute unconstitutional, ruling that its terms were vague and that it abridged First Amendment liberties and freedom of movement and travel without the "compelling emergency" that is necessary to justify "temporary suspension of fundamental liberties." *People v. Chambers*, 335 N.E.2d 612, 617-18 (Ill. App. Ct. 1975), *rev'd*, 360 N.E.2d 55 (Ill. 1976). The Illinois Supreme Court reversed, finding that the statute was not aimed at fundamental freedoms and that, given the "phenomenon of increased juvenile crime," the State was justified in acting on the assumption that "when a child is at home during the late night and early morning hours, [the child] is protected from physical as well as moral dangers." *People v. Chambers*, 360 N.E.2d 55, 57 (Ill. 1976). The court was not presented with evidence of either the "phenomenon" or the relative safety of children in the home, and both conclusions are disputable. The statute, in substantially similar form, remains a part of Illinois law. ILL. ANN. STAT. ch. 720, para. 555/1 (Smith-Hurd 1993).

¹³ Governing bodies enacting curfew ordinances are well aware of potential constitutional infirmities. In Dallas, the ACLU affiliate informed the city council that it would challenge the ordinance upon passage. Several councilmembers alluded to its possible unconstitutionality but nevertheless voted in favor of the ordinance.

the juvenile law typically excepts certain activities. A 1981 Fifth Circuit case that held unconstitutionally overbroad an ordinance that excepted only minors accompanied by a parent or "responsible adult" or upon an "emergency errand"¹⁴ suggests the necessary, if not sufficient, constitutionally significant conditions.¹⁵ Reserving opinion on the validity of an ordinance "narrowly drawn to accomplish proper social objectives,"¹⁶ the court held that the failure to except certain activities rendered the ordinance before it constitutionally deficient:

[U]nder this curfew ordinance minors are prohibited from attending associational activities such as religious or school meetings, organized dances, and theater and sporting events, when reasonable and direct travel to or from these activities has to be made during the curfew period. The same inhibition prohibits parents from urging and consenting to such protected associational activity by their minor children. The curfew ordinance also prohibits a minor during the curfew period from, for example, being on the sidewalk in front of his house, engaging in legitimate employment, or traveling through [the city] even on an interstate trip.¹⁷

As a result of this and similar rulings, contemporary laws provide exceptions for these and comparable activities.¹⁸ Thus, minors do not violate a curfew when they engage in constitutionally protected conduct, attend civic or adult-sponsored functions, are involved in employment, travel to or from certain listed excepted activities or employment, or engage in interstate travel.¹⁹ In addition, married or emancipated minors also typically are excepted from the purview of the curfew law.²⁰

The effect of the exceptions is debatable. Even with proliferous exceptions, a blanket curfew law prohibits every innocent—and guilty—person

¹⁴ *Johnson*, 658 F.2d at 1071.

¹⁵ *Id.* at 1074.

¹⁶ *Id.* at 1072.

¹⁷ *Id.*

¹⁸ See, e.g., Dallas, Tex. Ordinance No. 20,966 (June 10, 1991) [hereinafter Original Dallas Ordinance]; Dallas, Tex. Ordinance No. 21,309 (June 12, 1992) [hereinafter Amended Dallas Ordinance]; *infra* notes 102-05.

¹⁹ See, e.g., Original Dallas Ordinance, *supra* note 18, § 31-33(c).

²⁰ See, e.g., *id.* § 31-33(c)(1)(I). Arguably, the exception is disingenuous. Any argument that married or emancipated minors are less prone to crime is belied by the continually increasing adult crime rate. The exception likely results from a conception that although blanket adult curfews are unconstitutional, the different legal and factual status of minors makes constitutional the juvenile curfew enactment.

within its purview from moving about as she pleases at night.²¹ If free movement is a fundamental constitutional liberty,²² or if curfew laws necessarily abridge other fundamental liberties, exceptions to a violation may not salvage the law. As one court astutely noted, "it is what these curfews restrict, and not what they exempt, that matters most."²³ A blanket law still covers far more than it leaves available. Thus, a blanket curfew law replete with every possible exception that would not render ineffective its proscriptions might still sweep too widely to survive a constitutional challenge. The pivotal issue, therefore, may be the inherent scope of the restriction, irrespective of the scope of the exceptions.²⁴

B. *The Emergency Curfew: Limitation to Exigency*

In contrast, the emergency curfew is by definition more narrowly tailored in scope.²⁵ It is enacted to meet a specific, short-term exigency, and is limited spatially and temporally to the scope of the exigency.²⁶ Emergency curfews addresses the extraordinary ramifications of such natural and human-made disasters as riots,²⁷ extreme disorderly conduct,²⁸ hurricanes,²⁹

²¹ See *id.*; see also *infra* notes 275-79 and accompanying text.

²² See *infra* part V.B.4.

²³ *Waters v. Barry*, 711 F. Supp. 1125, 1136 (D.D.C. 1989).

²⁴ The scope of the exceptions is informative and can ameliorate, although possibly not eviscerate, all constitutional deficiencies. See *infra* notes 275-82 and accompanying text.

²⁵ Emergency curfews tend to be more specific, but specificity is not a constitutional panacea. Some emergency laws may operate so expansively as to be constitutionally intolerable. In general, however, the limited breadth of emergency laws constitutionally differentiates them from the blanket curfew. For pedagogical purposes, the term "emergency" is used in this Article to designate the narrowly drawn law in contrast to the blanket provision.

²⁶ See *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1112-13 (D.V.I. 1989).

²⁷ See, e.g., *United States v. Chalk*, 441 F.2d 1277 (4th Cir.) (holding constitutional a curfew imposed upon declaration of the existence of a state of emergency following a racial clash between police and 200 to 250 students at an Asheville, North Carolina high school that resulted in broken windows, damaged cars, and serious personal injuries), *cert. denied*, 404 U.S. 943 (1971); *Davis v. Justice Court*, 89 Cal. Rptr. 409 (Ct. App. 1970) (holding constitutional a curfew imposed on persons in a housing project that was permeated by continuous riotous conditions, including promiscuous discharge of firearms and rock and bottle throwing); *State v. Boles*, 240 A.2d 920 (Conn. Cir. Ct. 1967) (holding constitutional a limited curfew imposed after New Haven was "rocked asunder by tumultuous and riotous conditions [in which] looting and destruction of property were prevalent; and the general welfare of the entire city was seriously threatened"); *Glover v. District of Columbia*, 250 A.2d 556 (D.C. 1969) (holding constitutional a one-day curfew imposed on all persons in the District of Columbia following riots dispersed throughout the District with no discernible pattern that threatened property, persons, and exercise of rights); *Ervin v. State*, 163 N.W.2d 207 (Wis. 1968)

earthquakes,³⁰ and war,³¹ and typically is predicated on a continuing dec-

(holding constitutional a curfew imposed to prevent riot from occurring in Milwaukee in the summer of 1967). During the 1943 race riots, Detroit imposed a curfew that required all persons without important business or not traveling to or from employment to remain in their place of abode between 10 p.m. and 6 a.m. See NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS REPORT, MUNICIPAL CURFEW FOR MINORS—MODEL ORDINANCE ANN. (1943). Similarly, New Castle, Indiana, enacted a curfew following labor riots in 1956. See Note, *Rule by Martial Law in Indiana: The Scope of Executive Power*, 31 IND. L.J. 456 (1956). See generally Note, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560, 1561-62 (1968) [hereinafter *Riot Curfew*] (discussing the riot curfew and its prudential and constitutional implications). The riot curfew can quell the emergency but, like the juvenile curfew, does not address the underlying social issues that cause crime and other violence. See *infra* notes 82-86 and accompanying text.

²⁸ In *Thistlewood*, for example, the Maryland Court of Appeals held constitutional an Ocean City ordinance that imposed a Labor Day weekend nocturnal curfew on persons under the age of 21. *Thistlewood v. Trial Magistrate*, 204 A.2d 688 (Md. 1964). The ordinance recited the impetus for its enactment:

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. Reviewing the evidence and precedent, the court noted that during the Labor Day weekend, the resort town “becomes swollen a hundredfold from its usual winter size and to several times its average summer day size,” and that the curfew would apply to persons “who would not be using the streets for the ordinary or serious purposes they most often would be if at home.” *Id.* at 693. The court concluded that the curfew was a short-term emergency measure to protect citizens, visitors, and the visiting minors, applicable on only the four crucial nights the legislature knew from experience were “the dangerous nights of the year because marauding groups of minors, which formed because its members, not knowing what to do for pleasure or ‘kicks,’ after midnight, remained and loitered on the streets or boardwalk, looking, in the vernacular, for trouble.” *Id.*

²⁹ See *Moorhead*, 723 F. Supp. 1109 (denying injunctive relief against a nocturnal curfew imposed in wake of a hurricane).

³⁰ See, e.g., John Flinn & Eric Brazil, *Huge Traffic Jam Snarls L.A.*, S.F. EXAMINER Jan. 19, 1994, at A1; Chip Johnson, *East Valley Focus: Van Nuys; Man Sentenced for Trespass After Quake*, L.A. TIMES, Mar. 24, 1994, at B3. One clergyman compared the juvenile situation to an earthquake: “We are in a state of emergency. . . . If an earthquake hit the city, they would slap a curfew on in a minute. And we have a social earthquake here.” Clarence Johnson, *Time to Get Tough*, S.F. CHRON., Dec. 27, 1993, at A1 (quoting Rev. Amos Brown of the Third Baptist Church).

³¹ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944). The Court cited military exigence as a justification for holding constitutional a law that excluded persons of Japanese ancestry from the area in which their homes were located: “Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify excluding persons from the area in which their

laration of a state of emergency.

Arguably, the proposed distinction between emergency and juvenile curfews collapses in the context of rampant crime. Few seriously can doubt that juvenile crime and victimization rates are increasing and that crime poses a serious threat to safety, health, and the exercise of liberties for both minors and adults.³² If gang and other juvenile violence poses a grave threat, and the violence is dispersed across a large geographical area without a pattern that would permit narrow confinement of the restriction to the precise exigency, the blanket law arguably becomes an emergency measure.³³

Nevertheless, attempts to collapse the distinction between emergency and blanket juvenile curfews have failed. In 1989, the District of Columbia City Council declared a "state of emergency" and enacted a district-wide juvenile curfew law.³⁴ The Temporary Emergency Curfew Act was to remain in effect for no longer than ninety days, as required by District law.³⁵ The impetus for the ordinance was the dramatic increase in the number of minors arrested for possession or distribution of narcotics and the number of those victimized by violent crime.³⁶

The Federal District Court for the District of Columbia held that the ordinance unconstitutionally reached innocent conduct and abridged fundamental freedoms.³⁷ The purported exigency was insufficient to justify the

homes are located." *Id.* at 218-19. The Court noted: "Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions." *Id.* at 219-20; see also *Hirabayashi v. United States*, 320 U.S. 81 (1942) (holding constitutional as justified by "military necessity" a curfew confining "all persons of Japanese ancestry" residing in a military area to their places of residence daily between the hours of 8:00 p.m. and 6:00 a.m.). Scholars criticize the cases as ethnically discriminatory. See, e.g., JACOBUS TEN BROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1954); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Patricia M. Wald, 'One Nation Indivisible, with Liberty and Justice For All': *Lessons from the American Experience for New Democracies*, 59 FORDHAM L. REV. 283 (1990).

³² In 1983, 1175 juveniles were arrested for committing murder, 3914 for forcible rape, 29,917 for aggravated assault, and 66,296 for all violent crimes. In 1992, the figures were 2680 for murder, 4882 for forcible rape, 48,383 for aggravated assault, and 104,137 for all violent crimes. FBI Uniform Crime Report.

³³ See Martin P. Hogan, Note, *Waters v. Barry: Juvenile Curfews—The D.C. Council's "Quick Fix" for the Drug Crisis*, 1 GEO. MASON U. CIV. RTS. L.J. 313 (1990).

³⁴ D.C. Code Ann. § 1-229 (1990 Supp.), § 2-6 D.C. Law 8-13 (June 16, 1989), 36 D.C. Reg. 3373, amending the Short Term Curfew Emergency Act of 1989.

³⁵ *Id.* § 8.

³⁶ *Id.* § 3(a)(1)-(3); see Hogan, *supra* note 33, at 314.

³⁷ *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989).

breadth of the restriction. "The Act casts . . . aside [the fundamental freedoms of movement and association] like so much straw."³⁸ The court recognized that the "crippling effects of crime demand stern responses,"³⁹ but declared that the District had chosen to address the problem "through means that are stern to the point of unconstitutionality."⁴⁰

The fallacy with any argument conflating juvenile and emergency curfew measures lies in both the factual predicates and the legal consequences. Justifiably transforming a blanket provision into an essential emergency measure requires extreme conditions combined with extraordinary care in drafting; only rarely can a juvenile law satisfy these requisites.

1. *Factual Bases*

Emergency curfews, in stark contrast to blanket laws, typically are supported by substantial evidence detailing the nature and extent of the exigency and the justifications for declaring an emergency.⁴¹ The laws frequently are predicated on an executive or legislative declaration of a state of emergency⁴² and are reevaluated periodically to ensure that the exigency contin-

³⁸ *Id.* at 1134.

³⁹ *Id.* at 1135.

⁴⁰ *Id.*

⁴¹ See, e.g., *United States v. Chalk*, 441 F.2d 1277, 1281-83 (4th Cir.) (describing the nature of the riots, the level of tension, and the destruction to person and property), *cert. denied*, 404 U.S. 943 (1971); *Davis v. Justice Court*, 89 Cal. Rptr. 409, 411 (Ct. App. 1970) (detailing threats, complaints, property damage, and specific instances of criminal misconduct); *State v. Boles*, 240 A.2d 920, 925 (Conn. Cir. Ct. 1967) (relating the circumstances and breadth of the riot and stating that "[o]nly the use of modern police weaponry broke up what was certainly a dangerous situation"); *Glover v. District of Columbia*, 250 A.2d 556, 561 (D.C. 1969) (citing statistics verifying the number of buildings and housing units damaged or destroyed, persons dead and injured, and property damage). The stated proposition that emergency curfews are supported by substantial evidence, however, is not without exception. In *Hirabayashi*, the Court relied on a public proclamation reciting that the circumstances of war following the bombing of Pearl Harbor "require[] as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within . . . Military Areas." *Hirabayashi v. United States*, 320 U.S. 81, 88 (1942). The Court's analysis collapses for at least two reasons. First, "enemy aliens" presumably were encompassed within the parameters of existing laws sufficient to meet the exigency. Second, the Court did not review any evidence, outside of hunch or intuition, tending to indicate a high correlation between enemy aliens and persons of Japanese ancestry. See also *Korematsu v. United States*, 323 U.S. 214, 218-20 (1944).

⁴² See, e.g., *Korematsu*, 323 U.S. at 216-17 (describing executive order reciting necessity of protecting against espionage and authorizing Secretary of War or a military commander to prescribe movement restrictions); *Hirabayashi*, 320 U.S. at 85-88 (describing executive order reciting necessity of protecting against espionage and authorizing Secretary of War or military commander to prescribe movement restrictions and

ues to exist so that the restriction does not exceed the proclaimed necessity.⁴³ The crises that animate these laws challenge the very survival of the community and make impossible the conduct of normal business and the endeavors of normal life.⁴⁴

Juvenile curfews, on the other hand, usually are substantiated by only broad proclamations regarding juvenile crime and victimization, incomplete statistics, and anecdotal evidence.⁴⁵ In the Dallas litigation, for example, the city failed to provide precise data to support its curfew,⁴⁶ offering only anecdotal evidence and incomplete and noncomparative reports of juvenile crime and victimization. At trial, witnesses related their personal knowledge that gang and drug problems paralyzed law enforcement and that minors committed some crimes in public at night.⁴⁷ Only at a second hearing did the city present any statistics, which the federal district court analyzed and substantially discounted.⁴⁸

issue proclamations of military necessity; congressional law criminalizing violations of proclamations); *Davis*, 89 Cal. Rptr. at 410 (noting that director of disaster office, pursuant to county ordinance, proclaimed state of emergency); *Glover*, 250 A.2d at 558-59 (detailing factual basis upon which pursuant to District Code, commissioners determined emergency situation existed); cf. *Chase v. Twist*, 323 F. Supp. 749, 767 (E.D. Ark. 1970) (rejecting a curfew on the basis that "it does not take much time to enact 'emergency' ordinances").

⁴³ See e.g., *Chalk*, 441 F.2d at 1278 (noting that mayor declared and reimposed curfew on a daily basis upon finding a state of emergency); *Boles*, 240 A.2d at 922-23 (describing how mayor imposed curfew upon daily evaluation and reevaluation of conditions).

⁴⁴ See Hogan, *supra* note 33, at 315.

⁴⁵ See, e.g., *Ruff v. Marshall*, 438 F. Supp. 303, 306 (M.D. Ga. 1977) (observing that "[s]urely, mere reports of juvenile delinquency and civil disorders are insufficient to justify an ongoing blanket curfew"); *Allen v. City of Bordentown*, 524 A.2d 478, 483 (N.J. Super. Ct. Law Div. 1987) (noting that "nothing in the ordinance provides any basis for the selection of any particular time span for the curfew"). The paucity of evidence does not support the constitutional requirement that restrictions on fundamental rights be narrowly tailored and necessary to accomplish a compelling governmental interest. See *infra* part V.C.2.

⁴⁶ The Dallas curfew is described in detail in part III.

⁴⁷ *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 16-17 (N.D. Tex. Aug. 10, 1992), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

⁴⁸ The court noted that the evidence represented merely the number of arrests that were made during curfew hours in public places with nothing to indicate the time the offense actually occurred, as the records are more reflective of the time at which the officer completed the report. *Qutb*, No. CA 3-91-CV-1310-R, slip op. at 36. The court added that the evidence presented by the city was not overwhelming:

Moreover, of the supposed 494 arrests of juveniles during curfew hours, only 316 occurred in 'public places,' as defined by the curfew, and 60 were for runaway minors (an offense that is outside the objective of the curfew). Thus, for the five-

Other courts have taken, or rejected taking, judicial notice of the rising crime rate. In *City of Panora v. Simmons*,⁴⁹ the court reasoned that “‘courts should at least know what everyone else knows,’ and it is common knowledge that drug usage among minors has reached epidemic dimensions.”⁵⁰ Similarly, in *City of Seattle v. Pullman*,⁵¹ the dissent proposed taking judicial notice that “children without purpose wandering about the streets at all hours of the night often leads to mischief to their detriment and to the members of society who, in some instances, become victims of mugging and assaults, robberies and other violent crimes committed by juveniles.”⁵²

In *Panora*, the dissent found that “the city failed to prove any juvenile crime in its community approaching a level of emergency,”⁵³ implying that, upon proper evidence, a juvenile curfew could collapse into an emergency measure.⁵⁴ The issue, however, is not merely one of evidentiary sufficiency. The common identifiers of the emergency law—spatial and temporal limitation, close relation between scope and exigency, declaration of emergency—inherently are incompatible with the necessary breadth of the juvenile curfew. Even an extreme escalation in public, nocturnal juvenile crime is probably insufficient to justify a blanket curfew, which simply cannot be

month period between January and May, the City has a record of only 256 arrests that occurred during curfew hours and in public places. Of these, 8% (26 offenses) involved harm to another individual, either by aggravated assault or aggravated robbery.

These figures tell very little about the number of juvenile offenders and victims of crime during curfew hours. One conclusion is certain, however. The evidence is wholly inadequate to support an ordinance that promises to infringe upon the fundamental rights of most minors in the City of Dallas.

Id. at 36-37.

⁴⁹ 445 N.W.2d 363 (Iowa 1989).

⁵⁰ *Id.* at 369 (quoting *Stenberg v. Buckley*, 61 N.W.2d 452, 455 (Iowa 1954)). Even if the propriety of taking judicial notice is conceded, that juvenile drug use is epidemic is immaterial absent further data. The fact indicates nothing about the ages of drug users, the places or times at which minors use drugs, or adult drug usage, distribution, and ramifications.

⁵¹ 514 P.2d 1059 (Wash. 1973) (en banc). While rejecting a curfew ordinance on grounds of vagueness and overbreadth, the court noted that “minor curfew ordinances may be permissible where they are specific in their prohibition and necessary in curing a demonstrable social evil.” *Id.* at 1065.

⁵² *Id.* at 1067 (Hunter, J., dissenting).

⁵³ *City of Panora*, 445 N.W.2d at 373 (Lavorato, J., dissenting).

⁵⁴ Justice Marshall, however, dissenting from a denial of a writ of certiorari in *Bykofsky v. Borough of Middletown*, 429 U.S. 964 (1976), contrasted the juvenile and the emergency ordinances, characterizing the law at issue as a “nonemergency” curfew. *Id.* at 964 (Marshall, J., dissenting). He observed: “I have little doubt but that, absent a genuine emergency, a curfew aimed at all citizens could not survive constitutional scrutiny.” *Id.* at 965 (citing *United States v. Chalk*, 441 F.2d 1277 (4th Cir.), *cert. denied*, 404 U.S. 943 (1971)).

limited to the geographical area of proven danger, to the period of exigency, or to the perpetrators or targets of crime.

2. *Legal Constraints*

In addition to the factual constraints on recognition of blanket juvenile curfews as a form of emergency curfew, the legal ramifications of blanket and emergency curfew measures differ starkly. Although both the emergency and the juvenile curfew necessarily criminalize innocence by encompassing some persons who would not violate any other penal provision, the net cast by the blanket ordinance is, by definition, wider and more indiscriminate.⁵⁵ Consequently, analyses of the nexus between the end and the selected means for purposes of strict constitutional scrutiny radically diverge.⁵⁶ The blanket curfew interdicts more innocent activity for a longer period of time. Further, the type of exigency that makes ordinary life, and thus alternative measures, impossible does not typify the blanket provision.

In any event, the "emergency" blanket curfew law poses at the very least a constitutional conundrum. Legitimate emergency curfews tend to be constitutional, while blanket curfews can only very rarely and under the most extreme circumstances survive constitutional scrutiny.⁵⁷ The blanket law possesses many of the determinative elements of an emergency curfew, but is, within its operative geographical area and personal effect, blanket in application. Thus, it can be constitutional if and only if it possesses all or most of the characteristics that render constitutional the narrowly confined emergency curfew while possessing few or none of the characteristics that render unconstitutional the blanket law.⁵⁸

II. PRUDENTIAL ARGUMENTS

A. *Saving Lives*

Curfews possess a strong superficial appeal. Arguably, or at least in theory, they save lives. This rationale is compelling: "We don't know how

⁵⁵ See *Riot Curfew*, *supra* note 27, at 1564-66.

⁵⁶ See *infra* part V.C.2.

⁵⁷ See *infra* notes 283-85 and accompanying text.

⁵⁸ For example, Austin, Texas implemented a "6th Street" ordinance that may transcend the dichotomy of these analytical constructs. With the concurrence of the local ACLU chapter, the city council enacted a curfew to address continuing problems of nocturnal crime and disorder in a circumscribed area near the University of Texas. Although not limited in duration, the interdiction of the law is confined to the small geographical area that experience proved tended to be presently and continually tumultuous, if not dangerous. See AUSTIN, TEX., MUN. CODE § 10-7 (1991).

many lives the curfew will save. But if it saves one, if it protects that four-year-old, if it says to them, 'The streets [are] not the place for you,' then it's time for a curfew."⁵⁹

Curfews arguably reduce juvenile crime and juvenile victimization through a very simple means—proscribing juveniles' presence on public streets and public property. If juveniles are confined to their homes, they cannot commit or be victimized by crime—at least public crime. To some, the small price of encumbering many young lives is worth the benefit of saving others.⁶⁰ "We cannot afford to lose another child."⁶¹

In addition, proponents argue that a curfew imposes parental responsibility: "The curfew [is] not so much a case of kids losing their freedom, but of parental rights to responsibility being restored."⁶² The curfew gives parents a "backup."⁶³ As former Dallas Chief of Police William Rathburn argued, "Parents also need an ordinance. Parents need to be reminded of their responsibility to control the behavior of their kids."⁶⁴ "[A]nyone that argues that it should solely be the parents' responsibility to set curfews and keep their kids at home just does not realize the extent to which parental authority has been eroded."⁶⁵

Some proponents also think the curfew is the answer to social weaknesses in the family:

An archaic welfare system has turned the intact family into an impediment to receiving federal money, television and movies have turned the father into a buffoon and mom into either a shrill witch or dysfunctional ditz, and advertising, which is increasingly designed to speak to the child in the

⁵⁹ *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 16 (N.D. Tex. Aug 10, 1992) (quoting Edna Pemberton, Co-Chairperson, Oak Cliff Concerned Citizens Against Crime), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

⁶⁰ *Teen Curfew*, DALLAS MORNING NEWS, Dec. 10, 1993, at 24A.

⁶¹ Ann B. Gesalman & Sylvia Martinez, *Curfew for Teens Upheld*, DALLAS MORNING NEWS, Nov. 23, 1993, at 10A (quoting Edna Pemberton).

⁶² Ann Melvin, *City Curfew Is a Victory for Parents*, DALLAS MORNING NEWS, Nov. 27, 1993, at 31A.

⁶³ *Id.*

⁶⁴ Tracy Everbach, *Judge Rules Proposed Teen Curfew Unlawful*, DALLAS MORNING NEWS, Aug. 11, 1992, at 8A. A Dallas city councilmember elaborated: "If a parent cannot control their [sic] children, why should that child be unleashed upon the public?" Lori Stahl, *Dallas Panel Urges Curfew for Teens*, DALLAS MORNING NEWS, May 21, 1991, at 1A, 4A (quoting Councilmember Al Lipscomb).

⁶⁵ Melvin, *supra* note 62, at 31A.

family, implies that he is the decisionmaker; the parent merely the obligatory money earner.⁶⁶

As one Dallas city councilmember stated, "This is a family issue. The biggest problem is the breakdown of the American family. If mama and daddy care about where the kids are at midnight, then maybe the kids will do better."⁶⁷ The governmental curfew, therefore, is thought essential because the traditional parental curfew is anachronistic: "We're living in a changing world. Mobility, materialism, rejection of responsibility and greed have almost collapsed family life."⁶⁸

The social change required to fundamentally alter the impulses of criminal behavior is both expensive and slow, possibly too slow:

Who can deny that our concept of social order and social structure is changing? In each of the summers since 1963, riots in all parts of this nation have become nothing less than the vogue. Too often, if a large city does not experience a riot or two, it occasions the inquiry, 'Why not?' or the accusation that the community is apathetic. Certainly this is a new trend that must of necessity be met with new remedial and preferably preventive measures. Obviously, the most desirable and preventive measure is to labor hard to make each community an open community. But since this cannot be done in one day, there is no justification for permitting lawless disorder. The existence of injustice to our fellow human beings can never bring us to condone violence, lawlessness, hate, arson and destruction, for this would be the beginning of the end of our hoped-for free society.⁶⁹

The impetus for the Dallas curfew reflected this sentiment. A coalition of African-American citizens expressed fatigue with rampant juvenile crime—particularly drug distribution and gang violence—and demanded a curfew to ameliorate the blight.⁷⁰

⁶⁶ *Id.*

⁶⁷ *Dallas Passes Curfew for Youths as Resident Deplore [sic] Rise in Crime*, N.Y. TIMES, June 15, 1991, at A1 [hereinafter *Dallas Passes Curfew*] (quoting Councilmember Charles Tandy).

⁶⁸ Tottie Ellis, *Curfews Help Cities Fight Growing Crime*, USA TODAY, June 18, 1991, at 12A.

⁶⁹ *State v. Boles*, 240 A.2d 920, 924 (Conn. Cir. Ct. 1967).

⁷⁰ One city councilmember testified at trial, "I have personally observed the gangs and the crack houses. I've seen the kids that should be at home asleep or studying out there being lookout people for the drug pushers." Victor Inzunza, *Both Sides Rest in*

Yet neither the coalition nor the council nor the police⁷¹ viewed the curfew as a panacea. They understood "that the curfew [was] not a cure-all but another stopgap to save the lives of . . . young people."⁷² It "'establishe[d] a basis to protect children who could be victimized' because it could 'help cut down on the involvement of minors in wrong activities[,] benefit[ing] parents by providing' support for their efforts 'to keep younger members of the family at home' during curfew hours."⁷³ The curfew could "'aid . . . single parents'" and "'minimize the peer pressure'" that often causes youths to commit crimes.⁷⁴

In Dallas, the coalition founder deemed the situation critical and envisioned the curfew as an ameliorative solution: "We realize[d] that to save this generation of young people, there needed to be structure in their lives. And that is when we sat down and realized that a curfew is a piece of the puzzle."⁷⁵ To proponents, the curfew was not penal but solicitous: it was not a "penalty," but protection from the temptations of the street.⁷⁶ Youths require protection; curfews can provide such protection.

At the time of this writing, the curfew has been in effect in Dallas for approximately one year, and the police claim a stark reduction in juvenile crime.⁷⁷ The police department cites statistics reflecting a dramatic decline in both the number of juveniles taken into custody during curfew hours and the number of violent offenses against juveniles.⁷⁸ The chief of police ad-

Suit Over Dallas Curfew, FORT WORTH STAR TELEGRAM, July 24, 1991, at B4 (quoting Councilmember Al Lipscomb). The Oak Cliff Concerned Citizens Against Crime, under the leadership of Edna Pemberton, an African-American female, was composed primarily of ministers and parishioners of a predominantly African-American church. The coalition petitioned the city council and city councilmembers and spoke to the public safety committee and the council, exerting a strong influence on the council.

⁷¹ The Chief of Police, William Rathburn, supported the ordinance. Although members of the force, speaking in confidence, expressed opposition, none was willing to challenge the ordinance in public. See *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 18 (N.D. Tex. Aug. 10, 1992), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

⁷² *Gesalman & Martinez*, *supra* note 61, at 10A (quoting Edna Pemberton, Co-Chairperson, Oak Cliff Concerned Citizens Against Crime).

⁷³ *Qutb*, No. CA 3-91-CV-1310-R, slip op. at 17 (quoting Dr. Charles Hunter, minister and sociologist).

⁷⁴ *Id.* (quoting Councilmember Diane Ragsdale).

⁷⁵ *Dallas Passes Curfew*, *supra* note 67, at 12A (quoting Edna Pemberton).

⁷⁶ Lauren Robinson, *Dallas Eyes 11 p.m. Youth Curfew*, DALLAS TIMES HERALD, Apr. 17, 1991, at A12.

⁷⁷ Christopher Lee, *Dallas Youth Crime Down Since Curfew, Chief Says*, DALLAS MORNING NEWS, Jan. 6, 1996, at 1A.

⁷⁸ *Id.* at 5A.

mits, and the regional director, Carrie Sperling, argues, however, that the curfew could not have been the entire impetus for the reduction.⁷⁹

B. *Constricting Liberty*

Opponents attack curfew laws on at least three central foundations: they are inefficacious, they burden scarce police resources, and they unconstitutionally restrict liberty.⁸⁰ As the regional director of the North Texas ACLU stated, a "curfew is not going to make it safer, but it is going to make us a lot less free."⁸¹

Concededly, curfews may save a few lives, and the death of any child is tragic. Nevertheless, to use this as the primary justification for a law that removes all juveniles from public places during a substantial portion of the day is analogous to clearing the streets of all cars or reducing the speed limit to twenty miles per hour to reduce the substantial number of child deaths caused by automobile accidents.⁸² Curfew laws are essentially cosmetic solutions to systemic problems. They require fewer resources than are necessary to reach the underlying social problems that contribute to juvenile crime. They are, according to opponents, desperate measures that allow cities to appear tough on crime.⁸³ The curfew is "a quick-fix, do-nothing solution that provides cover for politicians to say they are doing something about the crime problem."⁸⁴ Curfews are, effectively, political responses to perplexing and expansive social and criminal issues:

[Officials of curfew cities] say they are protecting their youths, forcing parents to control their kids and making the streets safer.

⁷⁹ *Id.* at 1A, 5A.

⁸⁰ One author made five objections to curfew ordinances: (1) the peak of juvenile criminal activity is in the early hours of the evening; (2) only a small portion of the juvenile population engages in criminal activity and the curfew is a "shotgun" approach; (3) effective enforcement stretches beyond the physical capability of police forces; (4) curfews shift the focus of attention from more pressing problems of delinquency; and (5) the deterrent effect is minimal. *See Curfew Ordinances, supra* note 2, at 68-96.

⁸¹ *See* Melvin, *supra* note 61, at 31A (quoting ACLU regional director Joe Cook).

⁸² *See* Ellis, *supra* note 68, at 12A.

⁸³ *See* statement of Dallas City Councilmember Glenn Box opposing passage of the curfew ordinance. Box, considered in the Dallas community as politically conservative, was the only member to oppose the curfew. Box argued that the ordinance was patently unconstitutional.

⁸⁴ Ann B. Gesalman, *City Wins Another Round in Fight to Enforce Teen Curfew*, DALLAS MORNING NEWS, Jan. 22, 1994, at 32A (quoting Joe Cook, Executive Director, American Civil Liberties Union of North Texas).

They aren't. They are just making baby sitters of cops. They are toying with the constitutional rights of youth.

And for what? To keep teens off the streets when most crime is committed by adults.

Cities that want to delude voters into thinking they are fighting crime can pass teen curfews. It might fool some.

But cities that really want to stop crime will concentrate on arresting and prosecuting people who commit violent crimes instead of harassing teenagers.

Cities that want to keep kids out of trouble will create jobs and recreation for them, not arrest them for hanging out.

Cities that really want to protect their young will seek those at risk in high-crime neighborhoods and counsel them, not make teens prisoners in their homes.

And cities that care will provide services that help parents, especially working single parents, cope.⁸⁵

The simple fact, argue proponents, is that youths are in public at night because of a basic breakdown in the family and other social structures that a facile curfew cannot cure.⁸⁶

Opponents further argue that curfews are infirm conceptually.⁸⁷ That a curfew will deter criminal activity when extant criminal laws with penalties considerably more severe are ineffective is a strong assumption.⁸⁸ As the lone dissenter on the Dallas City Council noted, "If someone is robbing or stealing, telling them there is a curfew is laughable."⁸⁹ A curfew only punishes the law-abiding.

The curfew strikes an exacting blow on law-abiding youths. It addresses a crime problem as if it were a youth problem. It presumes youths to be guilty and conveniently ignores the voices of the disenfranchised. It penalizes juveniles less for their action than for their status,⁹⁰ and alienates them

⁸⁵ *Curfews on Kids*, *supra* note 3, at 12A.

⁸⁶ See Henry Tatum, *The Wide Blanket of a Curfew*, DALLAS MORNING NEWS, Apr. 24, 1991, at 20A.

⁸⁷ Everbach, *supra* note 64, at 8A.

⁸⁸ *Id.*

⁸⁹ *Id.* (quoting Dallas City Councilmember Glenn Box). "If a kid is willing to carry an Uzi, he certainly is not going to abide by a curfew." *Id.* (quoting Sabrina Qutb, plaintiff in the Dallas litigation).

⁹⁰ For this reason, curfews arguably violate *Robinson v. California*, 370 U.S. 660 (1962), which proscribed criminalizing status offenses. The difficulty with this argument is that those constrained by a curfew are doing *something*, though possibly very little. The youths are, at the very least, remaining in public during the proscribed hours. The distinction between conduct and status is tenuous in this context, but a court would not likely overturn a curfew law on this ground.

from police.⁹¹ As one youth explained, "It makes me feel like I'm in a country that's Army-controlled, and I'll get shot if I go out."⁹²

Opponents also take issue with the effect curfews will have on the allocation of police resources. Police forces already are stretched to the limits, and shifting energy to a "non-crime" wastes precious energy and resources. Further, every moment consumed in questioning a person for a potential curfew violation is a moment not available for responding to other more urgent demands.

Finally, opponents concede that children generally should be home at night but object, prudentially and constitutionally, to the government acting as decisionmaker.⁹³ The proponents' argument that a curfew enhances parental responsibility rests on the dubious, if not irrational, assumption that a governmentally imposed curfew will cause recalcitrant parents to care. Conversely, a curfew "ignores the many thousands of families for whom the ideal of family unity and parental control still lives."⁹⁴

Alternatives to curfews, though more expensive, do exist. For example, several months after passing the curfew, the City of Dallas hired a juvenile coordinator to talk to troubled youth and parents and implement beneficial programs. Additionally, less expensive options may be viable. Vancouver, British Columbia, dispersed loitering teens by playing, twenty-four hours a day, the ballads of Perry Como and Barry Manilow.⁹⁵ In addition, the 1994 federal crime bill included proposals for youth midnight basketball,⁹⁶ a program that may be cut in a new crime bill.⁹⁷ Thus, the curfew may be as unnecessary as it is unconstitutional.

⁹¹ See, e.g., Catalina Camia, *Teen Curfew Opponents Rally Peers*, DALLAS MORNING NEWS, June 9, 1992, at 25A ("Youths are already leery of dealing with police. This ordinance will totally alienate youths from police. If the city thinks at 11:01 p.m. I'll be ready to break into a 7-Eleven and steal something . . . then there is no trust." (quoting William Fisher, plaintiff in the Dallas litigation)).

⁹² Stacey Freedenthal, *Upcoming Curfew on Minds of Teens*, DALLAS MORNING NEWS, Nov. 23, 1993, at 10A (quoting Darryl Reif, age 16, of Dallas).

⁹³ The constitutional objections are detailed *infra* parts IV and V.

⁹⁴ *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 28 (N.D. Tex. Aug. 10, 1992) (quoting *Waters v. Barry*, 711 F. Supp. 1121, 1137 (D.D.C. 1989)), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

⁹⁵ See Steve Marmel, *Skip the Curfew; Use Muzak*, USA TODAY, June 18, 1991, at 12A. Marmel humorously suggested solutions. At drag areas, he proposed hiring parents to drive Lincoln Towncars back and forth. *Id.* At fast food places, he suggested forcing youths to eat: "The digestive process takes 20 minutes. They'll leave soon after." *Id.* At "make-out" places, he proposed bellowing the theme from *Love Boat* behind cardboard cut-outs of Captain Stubing and other cast members. *Id.*

⁹⁶ 42 U.S.C. § 11903(a) (1994).

⁹⁷ See Elizabeth Kolbert, *Private Lobbyist for Public Safety; Adam Walinsky*, N.Y. TIMES, Oct. 30, 1994, § 6, at 42; Katherine Q. Seelye, *The New Crime Bill: Overview*, N.Y. TIMES, Aug. 22, 1994, at A1.

III. THE DALLAS EXPERIENCE

A. *The Ordinance*

On June 12, 1991, the Dallas city council enacted a juvenile curfew ordinance⁹⁸ prohibiting all persons under the age of seventeen years from remaining on public streets between the hours of 11 p.m. and 6 a.m. from Sundays through Thursdays, and 12 a.m. and 6 a.m. on Fridays and Saturdays.⁹⁹ The ordinance defined "remain" as "to linger or stay unnecessarily" or to "fail to leave premises when requested to do so."¹⁰⁰ The enactment imposed penal sanctions on minors, parents, and owners and operators of businesses.¹⁰¹

The ordinance included numerous exceptions to prosecution.¹⁰² Thus, a minor who violated the ordinance could raise affirmative defenses at trial if she was, when arrested, accompanied by her parent; on an errand at the direction of her parent and using a "direct route;"¹⁰³ involved in interstate travel; engaged in employment activity; involved in an emergency; on the sidewalk abutting her house or the house of a next-door neighbor; attending or returning home by a direct route from an "official"¹⁰⁴ school or religious activity; exercising First Amendment rights; or emancipated.¹⁰⁵

The ordinance provided an elaborate enforcement mechanism. An officer finding a minor in violation was directed to (1) ascertain the minor's name and address;¹⁰⁶ (2) issue a written warning of violation; and (3) order the

⁹⁸ Original Dallas Ordinance, *supra* note 18, § 31-33(a)(2), (b)(1).

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 31-33(a)(11).

¹⁰¹ *Id.* § 31-33(b)(1)-(3).

¹⁰² *Id.* § 31-33(b)(3)(c). In the typical curfew law, exemptions are styled "exceptions" and carry a different meaning than defenses. An exception negates any violation, whereas a defense allows the accused affirmatively to raise the issue in a prosecution.

¹⁰³ The ordinance defined "direct route" as the shortest path of travel through a public place to reach a final destination without any detour or stop along the way." *Id.* § 31-33(a)(3). Plaintiffs challenged this term, among others, as unconstitutionally vague. *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 16-17 (N.D. Tex. Aug. 10, 1992), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

¹⁰⁴ Original Dallas Ordinance § 31-33(c)(1)(G). The ordinance did not define "official." The term is, arguably, vague. It may mean school-sponsored or simply school-affiliated.

¹⁰⁵ Original Dallas Ordinance, *supra* note 18, § 31-33(c); *Qutb*, No. CA 3-91-CV-1310-R, slip op. at 16-17.

¹⁰⁶ This prong of the enforcement mechanism potentially raises Fourth Amendment search and seizure issues and Fifth Amendment compulsory self-incrimination issues. One objective of the curfew is to eviscerate the commands of the Fourth Amendment, namely, to allow an enforcement officer to confront and question youths suspected of

minor to go home promptly by a direct route.¹⁰⁷ An officer could take a minor into custody if the minor had received two previous written warnings, or if the officer had reasonable grounds to believe that the minor was engaging in delinquent conduct under Texas law.¹⁰⁸

In June 1992, while the litigation was pending, the city substantially amended the ordinance.¹⁰⁹ The amended law incorporated recitations of predicate findings, including the increase in juvenile violence, the peculiar susceptibility of youths to unlawful activities, and the obligation of the city to protect minors.¹¹⁰ The city refined the definitions, adding "guardian" and "step-parent" to the definition of "parent," deleting the term "unnecessarily" from the definition of "remain,"¹¹¹ changing the term "direct route" to "without any detour or stop," rewriting the defense for school or other

criminal activity when the officer otherwise is without the requisite probable cause or reasonable suspicion. The curfew is, in this sense, a manufactured crime specifically designed to circumvent constitutional commands. The Constitution, and specifically the Fourth Amendment, are ephemeral if they do not proscribe this type of legislation. *See generally infra* part V.B.1. On the other hand, as the court in *Waters* recognized in rejecting the argument based on Fourth Amendment grounds, the curfew itself may provide the requisite suspicion:

The plaintiffs' argument reflects, in essence, an attempt to find in the Fourth Amendment an absolute right to be free from searches and seizures, a right that cannot be limited by the government's power to criminalize certain forms of behavior. The Court finds no such absolute right in the Fourth Amendment. Instead, as the very language of the Fourth Amendment provides, a right to be free from such intrusions exists only so long as there is not probable cause to believe that an offense has been committed. . . . Were [the curfew] not otherwise unconstitutional, the proscriptions of the Act would provide, in fact, valid substantive references for determining the presence or absence of probable cause in a given case. . . . So long as the officer could reasonably have believed that the individual looked "young," the search, seizure or arrest would take place on the basis of probable cause and no Fourth Amendment violation would occur.

Waters v. Barry, 711 F. Supp. 1125, 1138 (D.D.C. 1989). Similarly, the curfew's enforcement mechanism requires the officer to obtain the precise information that will incriminate the youth or the parent. Amended Dallas Ordinance, *supra* note 18, § 31-33(d)(1)(A)-(C). No court yet has ruled on this potential Fifth Amendment issue.

¹⁰⁷ *Id.* § 31-33(d)(1)(A)-(C).

¹⁰⁸ *Id.* § 31-33(d)(2)(A)-(B). This aspect of the ordinance raised procedural due process issues. *See infra* part IV.

¹⁰⁹ *See* Amended Dallas Ordinance, *supra* note 18. Hereinafter, textual references to the Dallas "curfew" or "ordinance" are to the amended ordinance, unless the context indicates otherwise.

¹¹⁰ *Id.* at Preface.

¹¹¹ *Id.* § 31-33(a)(4), (7), (9).

civic activities,¹¹² and eliminating the warning procedure.¹¹³ The amended ordinance was substituted into the pending litigation.¹¹⁴

B. *The Case at Trial*

On July 3, 1991, the ACLU of North Texas filed a pre-enforcement facial class action¹¹⁵ challenge, invoking the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and requesting a temporary restraining order and temporary and permanent injunctive relief.¹¹⁶ The parties agreed that the ordinance would not be enforced pending resolution of the issues raised in the litigation.

At a hearing on the merits,¹¹⁷ each minor plaintiff who testified stated that he or she was involved in numerous charitable, community, and entertainment activities that sometimes required presence on public streets during curfew hours.¹¹⁸ The minors testified to the scope of the restriction and

¹¹² *Id.* § 31-33(c)(1)(B), (D), (G).

¹¹³ *Id.* § 31-33(d). Officers were instructed to ascertain the age of the apparent offender and the reason for remaining in a public place and to take enforcement action only upon reasonable belief that an offense had occurred and that no defense was present. *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 16-17 (N.D. Tex. Aug. 10, 1992), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). The amendment likely cured the procedural defects inherent in the original warning procedure, but did not rectify the problem of the effect of "defenses" under state law or the conceptual problem inherent in ascertaining the existence of a defense.

¹¹⁴ Plaintiffs argued by written motion that the city amended the ordinance in response to their complaints, and, consequently, they were entitled to attorneys fees as a prevailing party under 42 U.S.C. § 1988 (1993). The court agreed and awarded 75% of the fees and expenses incurred from the time of the initiation of the litigation to the time of the amendment. The court, in an unpublished opinion, affirmed the judgment awarding fees but cut the amount to 30%. *Qutb v. Strauss*, 11 F.3d 488, 491 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

¹¹⁵ The class action certification prevents the action from becoming moot when all minor plaintiffs reach the age of 17. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *Schall v. Martin*, 467 U.S. 253, 256 n.3 (1984); *Sosna v. Iowa*, 419 U.S. 393 (1975).

¹¹⁶ *Qutb*, 11 F.3d 488. Much of the following trial information is based on the author's personal knowledge developed while she co-litigated *Qutb* on behalf of plaintiffs.

¹¹⁷ The judge consolidated the hearing on the temporary injunction with the hearing on the merits pursuant to FED. R. CIV. P. 65(a)(2).

¹¹⁸ The activities included involvement with Amnesty International, Children's Hospital, Presbyterian Hospital, March of Dimes, Cerebral Palsy, mock trial, city orchestra, school council, crime prevention block parties, community theatre, teen theatre, opera, symphony, Shakespeare in the Park, youth dances, youth clubs, babysitting, studying with friends, and major league baseball games in a neighboring community. Personal knowledge of the author.

offered opinions regarding the impact of the ordinance on daily life.¹¹⁹

The named plaintiff was a single mother of one of the minor plaintiffs who strongly believed that the curfew restricted her constitutional liberty to raise her child.¹²⁰ She testified that, in consultation with her daughter, she imposed a curfew that her child could breach if she called with an explanation.¹²¹ She stated that she gave her child responsibility commensurate with the child's increasing maturity and that she deemed this critical to the child's development into a responsible adult.¹²²

Attorneys for the defendants attempted to prove that any restriction on liberties was minimal. They argued that none of the activities was fundamental, that the enactment satisfied rational basis review, and that the curfew merely required that youths return home a little early or be accompanied by a parent or guardian.¹²³

The city adduced evidence that juvenile crime increases proportionally with age between ten and sixteen years of age but did not provide comparative data on the crime rate for persons older than sixteen.¹²⁴ Plaintiffs countered that the city's evidence largely was anecdotal and that the bare statistics showed that juveniles committed no more than two to three percent of nocturnal public crime.¹²⁵ Further, plaintiffs argued that the evidence of the number of crimes committed by juveniles did not signify the level of nocturnal or public juvenile crime.¹²⁶ The city introduced evidence of the number of juvenile arrests, which, plaintiffs contended, revealed little about the nocturnal juvenile public crime rate.¹²⁷

Plaintiffs adduced evidence that the crime rate was highest among persons seventeen to twenty-five and that many offenses occurred in the home.¹²⁸ Additional evidence indicated that more assaults were committed by relatives and acquaintances than by strangers, and that a substantial proportion of assaults, including sexual assaults, occurred in the home. One police sergeant confidentially opined that the school hours were the most dangerous for juveniles.¹²⁹

Chief of Police William Rathburn and the police sergeant in charge of enforcing the ordinance testified that the enactment would not be enforced

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

against such minors as the plaintiffs who abided by state criminal law.¹³⁰ Rather, they admitted, the ordinance was a law enforcement "tool" that gave police officers probable cause to stop suspicious youths when the officers otherwise would be constrained by the Fourth Amendment.¹³¹ Rathburn testified that officers would be trained to stop only those suspected of wrongdoing,¹³² which, plaintiffs countered, raised issues of selective enforcement.¹³³

The court concluded that the liberty to associate freely is fundamental,¹³⁴ that the activities at issue implicated that liberty interest,¹³⁵ and that the ordinance impermissibly burdened that freedom.¹³⁶ The court also concluded that free movement was a fundamental liberty¹³⁷ and that the ordinance unconstitutionally intruded on this liberty.¹³⁸ The court proceeded to analyze the relative rights of minors under *Bellotti v. Baird*¹³⁹ and found that none of the factors applied.¹⁴⁰ Consequently, the judge found no justification for considering the rights of minors differently from the rights of adults.¹⁴¹

In analyzing plaintiffs' equal protection challenge, the court scrupulously reviewed the evidence presented at the hearing, detailing the defects in the statistical data presented.¹⁴² The court discussed the dangers posed to minors by gang violence and crack houses, but found that the ordinance was

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Inzunza, *supra* note 70, at 3A.

¹³³ Personal knowledge of the author. Selective enforcement is discussed *infra* part V.E.2.

¹³⁴ *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 21 (N.D. Tex. Aug. 10, 1992), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). The court relied on *Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1988), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion). Although *Stanglin* reaffirmed a fundamental right to freedom of association, see *Stanglin*, 490 U.S. at 24-25, the district court's application of *Stanglin* to the facts at issue in *Qutb* is tenuous.

¹³⁵ *Qutb*, No. CA 3-91-CV-1310-R, slip op. at 22.

¹³⁶ *Id.*

¹³⁷ *Id.* at 23.

¹³⁸ *Id.* at 30-34.

¹³⁹ 443 U.S. 622 (1979) (declaring unconstitutional a statute requiring pregnant minors seeking abortions to obtain consent of parents or judicial approval following parental notification). The plurality decision enunciated a tripartite framework for analyzing the freedoms of minors relative to adults. See *infra* notes 248-49 and accompanying text.

¹⁴⁰ *Qutb*, No. CA 3-91-CV-1310-R, slip op. at 24-29. For a discussion of the *Bellotti* test, see *infra* notes 248-52 and accompanying text.

¹⁴¹ *Qutb*, No. CA 3-91-CV-1310-R, slip op. at 29.

¹⁴² *Id.* at 35-37.

not narrowly tailored to achieve the stated objectives and illogically and naively assumed that persons inclined to engage in criminal activities would be deterred by a governmentally imposed curfew.¹⁴³ The court concluded that the distinction between minors and adults was unnecessary to achieve a reduction in juvenile crime and victimization rates and expressed concern that the law would be selectively enforced.¹⁴⁴ Finally, the court concluded that the ordinance violated fundamental rights to privacy in childrearing under the federal and Texas constitutions.¹⁴⁵

C. *The Case on Appeal*

The city appealed the judgment to the United States Court of Appeals for the Fifth Circuit, arguing that the ordinance did not restrict fundamental rights, and, consequently, the "rational basis" standard of review applied.¹⁴⁶ The city further argued that the ordinance imposed only a minimal, constitutionally insignificant burden on liberties.

The Fifth Circuit assumed, for purposes of equal protection analysis, that the right to move about freely in public was fundamental and, thus, strictly scrutinized the ordinance.¹⁴⁷ Plaintiffs conceded that the asserted governmental interests—reducing juvenile crime and victimization—were compelling,¹⁴⁸ leaving for resolution the scope of the nexus between the stated governmental interest and the classification created by the ordinance.¹⁴⁹ The court concluded that the ordinance was narrowly tailored to achieve the stated goals.¹⁵⁰

Reviewing the statistical and data-based evidence, the Fifth Circuit inferred that certain offenses are "most likely" to occur at night.¹⁵¹ The court, however, did not, and could not, infer that these offenses most likely occur in public.¹⁵²

¹⁴³ *Id.* at 37-38.

¹⁴⁴ *Id.* at 38. The court further concluded that the ordinance violated the enhanced guarantee of free speech under the Texas Constitution. *Id.* at 39.

¹⁴⁵ *Id.* at 41.

¹⁴⁶ *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). For a discussion of the various standards of review, see *infra* part V.A.

¹⁴⁷ *Qutb*, 11 F.3d at 492.

¹⁴⁸ *Id.* Specifically, the city asserted six governmental interests: (1) reducing the number of juvenile crime victims; (2) reducing injury accidents involving juveniles; (3) reducing additional time for officers in the field; (4) providing additional options for dealing with gang problems; (5) reducing juvenile peer pressure to stay out late; and (6) assisting parents in the control of their children. *Id.* at 494 n.8.

¹⁴⁹ *Id.* at 492 n.6. The "nexus" requirement is discussed *infra* part V.C.2.

¹⁵⁰ *Qutb*, 11 F.3d at 495.

¹⁵¹ *Id.* at 493.

¹⁵² *Id.*

The court rejected the argument that precise data was essential to justify a restriction on fundamental liberties:

Although the city was unable to provide precise data concerning the number of juveniles who commit crimes during the curfew hours, or the number of juvenile victims of crimes committed during the curfew, the city nonetheless provided sufficient data to demonstrate that the classification created by the ordinance 'fits' the state's compelling interest.¹⁵³

Curiously, the court then conflated the analytical inquiries, juxtaposing the "nexus" test with the "compelling interest" requirement: "We will not, however, insist upon detailed studies of the precise severity, nature, and characteristics of the juvenile crime problem in analyzing whether the ordinance meets constitutional muster when it is conceded that the juvenile crime problem . . . constitutes a compelling state interest."¹⁵⁴

The judges further found that the curfew was the least restrictive means of accomplishing the expressed objectives.¹⁵⁵ The court noted that the ordinance contained numerous "exceptions" to violation and that neither the restrictions nor the exceptions could be viewed in isolation from each other.¹⁵⁶ "To be sure, the defenses are the most important consideration in determining whether this ordinance is narrowly tailored."¹⁵⁷ The court conceded that the ordinance would restrict some late-night activities of juveniles, because "[I]f indeed it did not . . . there would be no purpose in enacting it."¹⁵⁸ The court ruled, however, that, balanced against the compelling interest, the impositions were "minor."¹⁵⁹ The judges found that juveniles within the parameter of the curfew could still engage in their desired activities.¹⁶⁰ The curfew merely required minors to curtail late-night activities, to be home at an earlier time, or to be accompanied by a parent or guardian.¹⁶¹

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 493 n.7. Accordingly, the court misperceived the issue. That the governmental interest is compelling is immaterial to the "fit" between the end and the means selected. The most compelling of interests cannot dilute the nexus requirement of strict scrutiny.

¹⁵⁵ *Id.* at 493. The "least restrictive means" requirement and analysis is discussed *infra* part V.C.2.

¹⁵⁶ *Quib.*, 11 F.3d at 493.

¹⁵⁷ *Id.* at 493-94.

¹⁵⁸ *Id.* at 494.

¹⁵⁹ *Id.* at 495.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

The court easily disposed of the district court's conclusion that the ordinance impermissibly burdened associational liberties, questioning whether, under *Dallas v. Stanglin*,¹⁶² the ordinance implicated an associational interest.¹⁶³ The court further noted that the ordinance excepted any protected associational freedoms.¹⁶⁴

The judges then discounted the testimony of the named plaintiff, holding that the ordinance exerted only a minimal burden on fundamental rights to parental privacy.¹⁶⁵ The court further concluded that the exceptions ameliorated any infringement.¹⁶⁶ Finally, the court readily disposed of the plaintiffs' state constitutional arguments, finding nothing in the Texas Constitution that warranted different treatment of the issues.¹⁶⁷

The Fifth Circuit opinion frames the controversy. Across the nation, substantial contentious diversity surrounds these and other constitutional issues raised by juvenile curfews.¹⁶⁸ While opponents argue that curfews unconstitutionally usurp fundamental rights to freedom of speech, freedom of association, freedom of movement, parental privacy, and deny equal protection of the law,¹⁶⁹ defendants and proponents assert that First Amendment rights are preserved by exceptions, that freedom of movement is not a fundamental liberty, and that any infringement of a constitutionally protected

¹⁶² 490 U.S. 19 (1989) (holding that, because the Constitution did not protect any "generalized right of social association," dance hall patrons did not possess a constitutionally protected associational interest).

¹⁶³ *Qutb*, 11 F.3d at 495 n.9.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 495-96. The nature of these liberties is discussed *infra* part V.D.

¹⁶⁶ *Qutb*, 11 F.3d at 495.

¹⁶⁷ *Id.* at 495 n.9 (equal protection); *id.* at 496 n.10 (parental privacy).

¹⁶⁸ Dade County, Florida recently enacted a curfew modeled after the Dallas ordinance. The local ACLU chapter challenged the ordinance. An appellate court, ruling contrary to precedent, upheld the ordinance. *Metropolitan Dade County v. Pred*, 665 So. 2d 252 (Fla. Dist. Ct. App. 1995).

¹⁶⁹ Curfews also have been challenged as violating procedural due process. See *infra* Part IV. In addition, curfews may infringe on the Fifth Amendment. Secondly, curfew enactments arguably violate the mandate of *Brown v. Texas*, 443 U.S. 47 (1979), by compelling youths to carry identification and respond to police questioning regarding a manufactured offense. Curfew enforcement mechanisms also mandate asking questions that require self-incrimination. Arguably, therefore, arrests cannot be effectuated without providing the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966). Providing *Miranda* warnings, however, would significantly undermine enforcement. The curfew enactment may, in this sense, collide with itself.

freedom is minimal.¹⁷⁰ Thus, as juvenile curfews explode nationwide,¹⁷¹ the status of the liberty, the standard of review, and the role of exceptions are vigorously contested.¹⁷²

IV. PROCEDURAL DUE PROCESS: THE WARNING MECHANISM

Many legislative bodies attempt to ameliorate the severity of curfew arrests by providing warning devices that function as predicates to custodial arrest and prosecution. The original Dallas ordinance, for example, directed an enforcement officer who found a youth in violation of the curfew to issue a written warning and order the minor to go promptly home by a direct route.¹⁷³ An official could take into custody a minor who had received two previous written warnings or who the officer had reasonable grounds to believe had committed delinquent conduct.¹⁷⁴

This and similar enforcement mechanisms deprive the minor of procedural due process by denying a timely hearing, if any is held at all, on the predicate offenses. The minor is, in effect, convicted of a penal offense by the police officer on the street; the officer becomes prosecutor, judge, and jury. If the minor receives only one or two warnings, her record is blemished without any trial on the merits. If she receives a third warning and the prior warnings are jurisdictional, she ultimately may receive a hearing that is constitutionally untimely.

The failure to accord the accused a fair and timely hearing violates even minimal standards of due process.¹⁷⁵ “Punishment without issue or trial [is] contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process”¹⁷⁶ Further, the right to present evidence is essential to the fair hearing required by the Due Process Clause and is particularly fundamental when the proceeding may result in a finding of

¹⁷⁰ *Qutb*, 11 F.3d at 493-96.

¹⁷¹ The Dallas ACLU affiliate conservatively estimates that over 3000 communities have curfew laws.

¹⁷² Dade County recently enacted a curfew modeled after the Dallas ordinance. The local ACLU chapter challenged the ordinance. The courts in two cases ruling contrary to precedent upheld the ordinance.

¹⁷³ See Original Dallas Ordinance, *supra* note 18, § 31-33(d)(1)(B), (C).

¹⁷⁴ *Id.* § 31-33(d)(2)(A), (B).

¹⁷⁵ See *Morgan v. Illinois*, 504 U.S. 719, 725 (1992); *Ross v. Massachusetts*, 414 U.S. 1080, 1081 (1973) (Marshall, J., dissenting to denial of certiorari); *In re Oliver*, 33 U.S. 257 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927); see also *Reno v. Flores*, 507 U.S. 292, 306-09 (1993) (finding due process satisfied by giving juvenile alien detained on suspicion of being deportable a hearing before immigration judge); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (finding denial of due process in failure to afford probationer preliminary or final hearing prior to revocation of probation).

¹⁷⁶ *Taylor v. Hayes*, 418 U.S. 488, 497-98 n.6 (1974) (quoting *Cooke v. United States*, 267 U.S. 517, 536 (1925)).

criminal guilt.¹⁷⁷ Additionally, any undue postponement not required by exigent circumstances violates due process.¹⁷⁸

Thus, the warning mechanism, although laudable, is constitutionally intolerable. The defect is particularly egregious when the enactment offers numerous exceptions or defenses to prosecution that the officer on the street cannot possibly adjudicate. The officer simply cannot, constitutionally, function as both enforcer and judge. He must either send the minor away without a warning that taints a juvenile record, or conduct a custodial arrest.¹⁷⁹

V. SUBSTANTIVE DUE PROCESS

A. *Operative Standards*

The substantive due process component of the Fourteenth Amendment, which guarantees certain substantive rights against governmental infringement, encompasses most of the enumerated liberties of the Bill of Rights and a small list of unenumerated freedoms.¹⁸⁰ Governmental enactments that infringe on these liberties can be constitutional if and only if they survive the test of strict scrutiny.¹⁸¹ Succinctly stated, to pass constitutional muster, the governmental objective must be "compelling"¹⁸² and the regulation must be drawn with precision,¹⁸³ be narrowly tailored to satisfy the compelling objective,¹⁸⁴ and constitute the least restrictive means of accomplishing the legislative purpose.¹⁸⁵

Conversely, federalism requires extensive room for state and local government power and experimentation. Consequently, an enactment within the "police power"¹⁸⁶ of a state or local instrumentality that does not infringe a

¹⁷⁷ *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969).

¹⁷⁸ *Cf. Hughes v. Rowe*, 449 U.S. 5, 11 (1980) (finding that segregation of prisoner without prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions).

¹⁷⁹ The city council amended the original Dallas ordinance following briefing and hearing on the merits to delete the warning mechanism. *See Amended Dallas Ordinance, supra* note 18, § 31-33(d).

¹⁸⁰ *See infra* note 218.

¹⁸¹ *See Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁸² *Roe v. Wade*, 410 U.S. 113, 155-56 (1973); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

¹⁸³ *NAACP v. Button*, 371 U.S. 415, 483 (1963).

¹⁸⁴ *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

¹⁸⁵ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Potential First Amendment violations implicate additional and even more stringent standards of review. *See generally infra* part V.A.

¹⁸⁶ In exercising its "police power," state and local governments act to further the

fundamental right or discriminate against a suspect class need satisfy only a rational basis standard of review, which requires that the means be rationally related to the objective.¹⁸⁷

Most regulations, including curfew regulations, can withstand the deferential analysis of the rational basis test. Consequently, challengers must first prove that a curfew law implicates and burdens a fundamental right, whereupon the burden shifts to the locality to show that the ordinance can withstand strict constitutional scrutiny.

B. *Potential Infringements on Minors' Rights*

1. *Criminalizing Innocuous Activity*

From a substantive due process perspective, the rudimentary fatal defect in the curfew is that it makes innocence a crime.¹⁸⁸ It penalizes conduct that does not infringe upon either the rights or interests of juveniles or adults,¹⁸⁹ summarily branding all children as lawbreakers or potential lawbreakers and all parents as incapable of exercising appropriate supervision.¹⁹⁰ It restricts both innocuous and beneficial activity, correlating conduct calculated to harm with conduct entirely innocent.¹⁹¹ It criminalizes activities that, substantively, cannot be criminalized or otherwise prohibited.

public health, safety, morals, and general welfare. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 391 (1926).

¹⁸⁷ See, e.g., *Schall v. Martin*, 467 U.S. 253 (1984); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Schweiker v. Wilson*, 450 U.S. 221 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

¹⁸⁸ This, of course, begs the essential question. If the legislature declares that certain conduct is a "crime," the behavior is no longer innocent. Surely, however, the Constitution must impose some substantive limitation on the authority of a legislature to criminalize conduct. Traditionally, this might have stemmed from the Due Process Clause, but purported crime will always provide a sufficient justification for an enactment purportedly interdicting crime. Nevertheless, the Constitution should create a zone of innocence into which the legislature cannot intrude.

¹⁸⁹ See, e.g., *McColleston v. City of Keene*, 514 F. Supp. 1046, 1052 (D.N.H. 1981) (holding that curfew penalizes conduct blameless under law and possibly totally innocent in nature), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982); *Hayes v. Municipal Court*, 487 P.2d 974, 978 (Okla. Crim. App. 1971) (holding loitering ordinance unconstitutional).

¹⁹⁰ See, e.g., *City of Panora v. Simmons*, 445 N.W.2d 363, 373 (Iowa 1989) (Lavorato, J., dissenting).

¹⁹¹ See, e.g., *In re Doe*, 513 P.2d 1385, 1387 (Haw. 1983) (declaring a "loitering" juvenile curfew overbroad because of failure to distinguish wrongful and innocent conduct); *City of Seattle v. Pullman*, 514 P.2d 1059, 1061 (Wash. 1973) (en banc).

Violating a curfew ordinance is, in essence, an artificial crime, created by legislative bodies to appear responsive to significant social problems.

Without expressly recognizing the due process implications, a Texas court held in 1898 that the government could not penalize innocuous, or even salutary, conduct:

[The question is whether], conceding that the municipality has authority under its general powers to pass any ordinance that is reasonable to preserve the public peace and to protect the good order and morals of the community, the ordinance in question is reasonable. We hold that it is not; that it is paternalistic, and is an invasion of the personal liberty of the citizen. It may be that there are some bad boys in our cities and towns . . . who prowl about the streets and alleys during the nighttime and commit offenses. Of course, whenever they do, they are amenable to the law. But [it does not] therefore follow that it is a legitimate function of government to restrain them and keep them off the streets when they are committing no offense¹⁹²

Vesting in governmental instrumentalities the authority to deprive persons of freedom to engage in innocent conduct is a frightening proposition. The Due Process Clause should proscribe such a result. Once innocence can be the subject of arrest and criminal prosecution, the concept of due process evaporates.¹⁹³ Arguably, therefore, the substantive component of the Due Process Clause makes even the most carefully drafted blanket law unconstitutional.

2. *Freedom of Association*

The second natural constitutional challenge lies in freedom of association. Logically, any law that restricts public movement for an extended period of time, including restricting travel to and from social activities, restricts association. Yet the constitutional liberty of association is not coex-

¹⁹² *Ex parte McCarver*, 46 S.W. 936, 937 (Tex. Crim. App. 1898).

¹⁹³ A Florida appellate court, declaring unconstitutional a juvenile curfew ordinance, seemed to recognize this proposition, even under a diminished standard of review:

The ordinance would make many activities unlawful which otherwise would be lawful. The general right of every person to engage in lawful activity, while subject to reasonable restriction, cannot be completely taken away under the guise of police regulation. An ordinance to the contrary is an arbitrary invasion of the inherent personal liberties of all citizens.

W.J.W. v. State, 356 So. 2d 48, 50 (Fla. Dist. Ct. App. 1978).

tensive with its literal or colloquial use, complicating the constitutional analysis.

Although the Supreme Court never has definitively stated the derivation of the right to free association, the liberty is firmly entrenched in constitutional jurisprudence.¹⁹⁴ Supreme Court precedent affords constitutional protection to freedom of association in two distinct ways:

First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.¹⁹⁵

The first protection, "intrinsic" freedom of association, is described as a fundamental element of personal liberty. This freedom of intimate association consists of individual choices "to enter into and maintain certain intimate human relationships."¹⁹⁶ "Instrumental" or "expressive" freedom of association consists of the right to associate for the purpose of engaging in activities specifically protected by the First Amendment.¹⁹⁷

In delineating the scope of the constitutional freedom of intimate association, the Court has sketched a continuum, with family associations at one end, and business associations at the other. The former "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."¹⁹⁸ These commitments are characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."¹⁹⁹

The opposite end of the continuum is defined by the converse of these characteristics. Phrased in the negative, business associations are those that lack the qualities of familial and other intimate personal associations and are

¹⁹⁴ Sometimes annexed to the right to travel, *see, e.g.,* *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964), or substantive due process liberty, *see* *Roberts v. United States Jaycees*, 468 U.S. 500, 517 (1964), freedom of association easily flows from the First Amendment. It is incidental to the exercise of express First Amendment freedoms, if not nonconsequentially inherent in the Amendment itself.

¹⁹⁵ *Board of Directors v. Rotary Club*, 481 U.S. 537, 544 (1987).

¹⁹⁶ *Roberts*, 468 U.S. at 617.

¹⁹⁷ *Id.* at 618.

¹⁹⁸ *Id.* at 619-20.

¹⁹⁹ *Id.* at 620.

imbued with qualities that seem "remote from the concerns giving rise to this constitutional protection."²⁰⁰

Between these poles extends a continuum of human relationships "that may make greater or lesser claims to constitutional protection from particular incursions by the State."²⁰¹ The Court has not identified intermediate points, but has concluded that the issue of authority to regulate a particular association "entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."²⁰²

Juveniles within the purview of a curfew ordinance may pursue general social association, but they also may pursue more intimate associations to which public movement may be essential. The Court's decision in *Stanglin*, addressing the issue of "chance encounters" with "hundreds of teenagers,"²⁰³ is not dispositive. As one court noted, a curfew regulation

operates in a much more blunderbuss fashion: While it proscribes 'chance encounters' in dance halls and other forms of random association, it would also effectively prohibit on its face forms of nocturnal . . . association that would clearly fall within the ambit of the First Amendment.²⁰⁴

Further, the freedom *to enter* into an intimate association may be integral to intimate association. The psychology is compelling: "When a person walks out into public he removes the barriers that inhibit ready association and communication by him and his fellow citizens. Only when he is in public may he enjoy the most meaningful exercise of his freedom of . . . association."²⁰⁵ Certainly, the restriction is extreme. A total nocturnal ban on all innocent and normal activity necessarily deprives some minors of the freedom to form and cultivate intimate associations.

Curfews also can infringe expressive association. The Court has described expressive association as tangential to express First Amendment freedoms: the protection of collective effort on behalf of shared goals is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."²⁰⁶ Consequently, "implicit in the right to engage in activities protected by the First

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989).

²⁰⁴ *Waters v. Barry*, 711 F. Supp. 1125, 1134 n.16 (D.D.C. 1989).

²⁰⁵ *People v. Chambers*, 335 N.E.2d 612, 617 (Ill. App. Ct. 1975), *rev'd*, 360 N.E.2d 55 (Ill. 1976).

²⁰⁶ *Roberts*, 468 U.S. at 622.

Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."²⁰⁷ This right, ancillary but intrinsic to the exercise of other First Amendment freedoms, is violated at least to the same extent as are the express First Amendment liberties. Thus, the expressive association analysis, in this context, parallels the analysis of free speech issues.

3. *Freedom of Speech*

a. *Conceptual Flaw*

The curfew regulation, even with an exception for First Amendment activity, suffers from a fatal conceptual flaw. It either is unenforceable or it appears to operate as an intolerable restraint on free speech liberties.

The Dallas ordinance, for example, provides the following enforcement mechanism:

Before taking any enforcement action under this section, a police officer shall ask the apparent offender's age and reason for being in the public place. The officer shall not issue a citation or make an arrest under this section unless the officer reasonably believes that an offense has occurred and that, based on any response and other circumstances, no defense . . . is present.²⁰⁸

An enforcement official confronted in a public place during curfew hours with a youth asserting a free speech exception will either believe the youth and allow her to continue, or disbelieve her and take enforcement action. If the officer believes every assertion of First Amendment activity, the exception will swallow the proscription. If the officer takes enforcement action against a free speech claim, he will in some notable number of cases err, placing a constitutionally intolerable restraint on the exercise of a First Amendment freedom. Because the curfew ordinance is thus "susceptible of regular application to protected expression,"²⁰⁹ it may be constitutionally infirm.

Additionally, the enforcement procedure necessarily may delegate unconstitutionally to the officer on the street impermissible discretion to ascertain the existence of, and to curtail, free speech liberties. Any law involving speech that places too much discretion in the hands of its enforcement

²⁰⁷ *Id.*

²⁰⁸ Amended Dallas Ordinance, *supra* note 18, § 31-33(d).

²⁰⁹ *City of Houston v. Hill*, 482 U.S. 451, 467 (1987).

officials violates the First Amendment.²¹⁰ The curfew enactment by its very nature must delegate such extensive discretion.

Superficially, these arguments appear persuasive. Nevertheless, the underlying principle, taken to its logical extreme, would prohibit proscribing any conduct by which the actor intended to exercise speech interests. The First Amendment, as construed, does not extend this far.

b. *Analytical Flaw*

The analytical flaw, though potentially fatal, may be subject to a similar fate. As most courts recognize, the restriction is not content-based but, rather, content-neutral, only incidentally restricting free speech freedoms. Thus, the less restrictive *O'Brien*²¹¹ analytical framework²¹² determines its constitutionality under the First Amendment.²¹³ Because the test is relatively lenient, the blanket curfew law probably can survive the challenge.

A contrary argument is, however, theoretically sound. Arguably, only in an emergency is a curfew "no greater than is essential"²¹⁴ to further the governmental interest. Only the necessity of extreme action to protect public health and safety from immediate and grave danger that characterizes the emergency laws' blanket restrictions of free speech liberties can justify the curfew.²¹⁵ The "wholesale"²¹⁶ restriction of the curfew broadly stifles the free speech liberties of thousands of innocent youth. Because the massive effect far exceeds any compelling necessity, the restriction cannot be justified as an incidental restriction or a time, place, or manner regulation. Temporally, it depletes six or seven hours from a sixteen-hour waking day. Spatially, it is all-inclusive of the public stage. In scope, it regulates all noctur-

²¹⁰ See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (holding unconstitutional under Free Speech Clause a county ordinance permitting government administrator to vary parade permit fees without providing standards to guide discretion); *Hill*, 482 U.S. at 465 (declaring unconstitutional under Free Speech Clause a municipal ordinance making unlawful the interruption of a police officer exercising duties).

²¹¹ *United States v. O'Brien*, 391 U.S. 367 (1968).

²¹² *O'Brien* requires a reviewing court to uphold a regulation if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest. *Id.* at 377.

²¹³ See, e.g., *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir.), *cert. denied*, 404 U.S. 943 (1971); *Waters v. Barry*, 711 F. Supp. 1125, 1136 (D.D.C. 1989); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1257 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

²¹⁴ *O'Brien*, 391 U.S. at 377.

²¹⁵ See *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1112-13 (D.V.I. 1989) (holding constitutional under *O'Brien* a curfew imposed following a hurricane).

²¹⁶ *Waters*, 711 F. Supp. at 1136.

nal activity by proscribing all nocturnal activity. Its breadth seems to far exceed any necessity.

The Court, however, has expansively construed *O'Brien* and rarely found that an enactment did not satisfy *O'Brien's* constraints.²¹⁷ Consequently, a free speech challenge, though theoretically sound, may not be practicably viable.

4. *Freedom of Movement*

Freedom of movement is not an enumerated liberty,²¹⁸ but this alone does not denigrate its constitutional stature. Like express freedoms, unstated fundamental rights cannot be infringed without demonstrating that the regulation is essential to further a compelling governmental interest, narrowly tailored, and uses the least restrictive means available to secure the objective.

If "[t]he right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society,"²¹⁹ blanket juvenile curfews are unconstitutional unless the governmental entity can satisfy the exacting requirements of strict scrutiny. Unquestionably, the blanket curfew egregiously infringes freedom of movement. The liberty, however, is both amorphous and ambiguous.

Although the Supreme Court early and repeatedly recognized the critical status of movement, it never has declared expressly the right to be fundamental.²²⁰ In 1972, the Court, while holding a vagrancy ordinance unconstitutional, indicated that intra-state and intra-city movement may be

²¹⁷ See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (upholding public indecency statute as applied to nude dancers).

²¹⁸ Unenumerated fundamental freedoms are those "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Supreme Court gingerly has declared certain unenumerated freedoms to be fundamental, including travel, marriage, and privacy in intimate family matter. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (freedom to travel); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (prohibition of interracial marriage infringed fundamental right to marry); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (noting that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"). See generally Note, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 181-82 n.88 (1992).

²¹⁹ *Waters*, 711 F. Supp. at 1134.

²²⁰ In numerous opinions, the Court has solidified the fundamental nature of freedom of interstate travel. See *infra* note 226. Presumably, the activity implicated in curfew ordinances more frequently involves intra-state and intra-city movement.

fundamental. To this end, the Court provided a cogent and persuasive rationale grounded in psychology and history:

[Night walking, loafing, and strolling] 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.²²¹

In an earlier opinion, the Court discussed the right in less eloquent but more decisive terms:

In all the States, from the beginning down to the adoption of 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.²²²

Justice Marshall, joined by Justice Brennan, dissenting from a denial of certiorari in a juvenile curfew case, stated that the "freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty.'"²²³ The current Court, however, has never definitively so held.

In *Waters*, the District Court for the District of Columbia extrapolated from these and other decisions to find a fundamental right to movement rooted in the First Amendment and in the Due Process Clauses of the Fifth and Fourteenth Amendments.²²⁴ The court wrote that the right to walk the

²²¹ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

²²² *United States v. Wheeler*, 254 U.S. 281, 293 (1920).

²²³ *Bykofsky v. Borough of Middletown*, 429 U.S. 964 (1979) (Marshall, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Marshall cited several cases in support of his proposition, including *Papachristou*, 405 U.S. at 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), and *Hague v. CIO*, 307 U.S. 496 (1939).

²²⁴ *Waters v. Barry*, 711 F. Supp. 1109, 1134 (D.D.C. 1989); see also *City of Panora v. Simmons*, 445 N.W.2d 363 (Iowa 1989) (rejecting a challenge to the constitutionality

streets at pleasure is critical "to partake of activities that expand the mind and the soul but also because the right to move about—if even for no reason—is a cherished end in itself."²²⁵

Virtually all courts striking curfew laws, and some courts upholding them, have held that movement is a fundamental liberty.²²⁶ The analysis is

of a juvenile curfew, finding that minors did not possess a fundamental due process freedom of movement). In *City of Maquoketa v. Russell*, 484 N.W.2d 179, 182 (Iowa 1992), the court declared the right to movement fundamental to the exercise of First Amendment freedoms and held a curfew ordinance unconstitutional.

²²⁵ *Waters*, 711 F. Supp. at 1134. One court addressing the issue described attendance at plays, musicals, motion pictures, church functions, dances, and obtaining food and drink as fundamental. See *In re Mosier*, 394 N.E.2d 368, 372-73 (Ohio C.P. 1978). The court's analysis is misguided. It is the movement to these activities that is fundamental, not the activities themselves. A right to participate in an activity does not venerate the activity. For example, the right to *choose* an abortion is fundamental; the right to abort is not. Regulation of the activities the court enumerated would generate only rational basis review.

²²⁶ See, e.g., *McColleston v. City of Keene*, 586 F. Supp. 1381, 1384 (D.N.H. 1984) (finding that "the ordinance implicates a personal liberty interest of the juvenile plaintiff in the freedom of movement"); *McColleston v. City of Keene*, 514 F. Supp. 1046 (D.N.H. 1981) (finding that the rights to locomotion, to freedom of movement, to go where one pleases, and to use the public streets and facilities in a way that does not interfere with the personal liberty of others are invaluable and central to American citizenship), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975) (noting that "[r]ights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are basic values 'implicit in the concept of ordered liberty' protected by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment One may be on the streets even though he is there merely for exercise, recreation, walking, standing, talking, socializing, or any other purpose that does not interfere with other persons' rights."), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 424 U.S. 964 (1976); *Davis v. Justice Court*, 89 Cal. Rptr. 409, 414 (Ct. App. 1970) (noting that "a curfew, restricting as it does the right of free movement, does interfere with what ordinarily is a right of the citizenry. Obviously, the right to free movement cannot be interfered with unless extraordinary and perilous conditions exist, such as a riot, and perhaps only one of formidable dimension."); *In re J.M.*, 768 P.2d 219, 221 (Colo. 1989) (en banc) (noting that "[a]lthough not labeled a 'fundamental right,' the United States Supreme Court has defined the activities enumerated by [the plaintiff] as historical 'amenities of life'"); *Brown v. Ashton*, 611 A.2d 599, 606 (Md. Ct. Spec. App. 1991) (observing that "[w]hatever its source, [the right to movement] is now widely regarded as 'fundamental'"), *vacated*, 660 A.2d 447 (Md. 1992); *Allen v. City of Bordentown*, 524 A.2d 478, 483 (N.J. Super. Ct. Law Div. 1987) (finding the right to travel, loiter, and "loaf" protected by Due Process Clause); *City of Seattle v. Pullman*, 514 P.2d 1059, 1063 (Wash. 1973) (observing that "[p]rima facie mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child") (quoting *Commonwealth v. Carpenter*, 91 N.E.2d 666, 667 (Mass. 1950)); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 337 (Wis. 1988) (stating that the "right to be

elementally correct. First, Supreme Court precedent indicates that movement is fundamental.²²⁷ Second, as the context of a curfew clarifies, movement is "implicit in the concept of ordered liberty"²²⁸ and "so rooted in the traditions and conscience of our people as to be ranked fundamental."²²⁹ Freedom and constitutional government necessarily must encompass the "[a]imless idle stops, pauses and purposeless distraction"²³⁰ that are inextricable to liberty.

Movement is, in every sense, both the essence of freedom and the substance of personhood. Freedom of movement and freedom to choose to move must be deemed fundamental, because movement and choice in movement are instrumental to the exercise of express liberties and are of inestimable intrinsic value. They are the substance of enshrined constitutional freedoms and liberties essential to freedom, and to definition of self.

To vest in governmental authorities the right to define as criminal mere movement about the streets is to divest society of liberty and of the substance of constitutional government. Liberty means that "[o]ne may be on the streets even though he is there merely for exercise, recreation, walking, standing, talking, socializing, or any other purpose that does not interfere with other persons' rights."²³¹ It means freedom to choose to stroll, dance, play, attend and participate in civic and charitable activities, attend sports events, and engage in other benign endeavors. It means freedom to be human.

In a different context, the Supreme Court recently affirmed the concept of substantive due process liberty and expansively defined its parameters in a manner that would seem to include liberty of movement:

free to move about within one's own state is inherent and distinct from the right to interstate travel"). In *Johnson v. City of Opelousas*, the Fifth Circuit annexed movement to the right to travel: "[T]he right of 'all citizens' to be free to travel within and between the states uninhibited by statutes or regulations which unreasonably burden this movement, certainly extends in some measure to juveniles, as citizens of the United States." *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981) (citations omitted). In *Qutb*, the court assumed for purposes of equal protection analysis that movement was a fundamental right. *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). The court then noted that the ordinance was directed solely at the activities of juveniles and proceeded to negate any fundamental right of juveniles to move freely. *Id.*; see also *City of Panora*, 445 N.W.2d at 367 (finding firmly rooted in constitutional jurisprudence the notion that a person's right to merely wander and stroll about town is fundamental, but distinguishing the rights of minors).

²²⁷ See *supra* notes 219, 222-23 and accompanying text.

²²⁸ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²²⁹ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

²³⁰ *In re Frank O.*, 247 Cal. Rptr. 655, 657 (Ct. App. 1988).

²³¹ *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1257 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . .

. . . .
. . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.²³²

Liberty to move is necessarily a facet of this constitutional promise and of the capacity of self-definition that the Constitution embodies. A society that does not perceive freedom of movement and choice in movement as fundamental components of liberty cannot call itself free.

Freedom of movement thus satisfies all the requisites of a "fundamental" right. It is not, however, absolute. It can be regulated upon demonstration that the restriction is necessary to further a compelling governmental interest.²³³ Furthermore, governmental authorities traditionally possess greater authority to regulate the activities of minors, which may dilute the constitutional freedom as applied to juveniles.

C. *Analytical Review*

1. *The Rights of Minors: Augmented Governmental Authority*

Minors undoubtedly possess constitutional rights, but they are not coextensive with those of adults.²³⁴ In 1944, the Court upheld the constitutionality of a statute that restricted a minor's use of the streets for selling religious magazines.²³⁵ The Court acknowledged that the regulation would be unconstitutional as applied to adults but distinguished the role and rights of juveniles:

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.

. . . .
It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults
What may be wholly permissible for adults therefore may

²³² *Planned Parenthood v. Casey*, 505 U.S. 833, 847, 851 (1992).

²³³ See *supra* notes 218-19 and accompanying text.

²³⁴ *City of Panora v. Simmons*, 445 N.W.2d 363, 367 (Iowa 1989).

²³⁵ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

not be so for children, either with or without their parents' presence.

....

We think that with 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, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.²³⁶

Three decades later, the Court described both the rights of and restrictions on minors:

The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer. We have been reluctant to attempt to define the totality of the relationship of the juvenile and the state. Certain principles, however, have been recognized. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. On the other hand, we have held in a variety of contexts that the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.²³⁷

Recently, the Court reaffirmed the constitutional status of the rights of minors: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."²³⁸ Similarly, the Court solidified the First Amendment rights of minors, declaring unconstitutional under the Free Speech Clause a regulation prohibiting students from wearing black arm bands to publicize objections to Vietnam hostilities.²³⁹ Minors possess rights to freedom of religion,²⁴⁰

²³⁶ *Id.* at 168-70.

²³⁷ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977) (citations omitted).

²³⁸ *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (establishing minors' right of privacy in choosing abortion without parental veto).

²³⁹ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

²⁴⁰ *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that a student Christian club was entitled to recognition in public high schools if other noncurricular clubs are recognized).

and constitutional rights in the criminal context are solidly ensconced, including protection against double jeopardy,²⁴¹ the right to be convicted only by proof beyond a reasonable doubt,²⁴² and rights to court-appointed counsel, notice, confrontation of witnesses, and cross-examination.²⁴³

Thus, "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."²⁴⁴ The Supreme Court has recognized, however, that although minors possess a full panoply of constitutional rights,²⁴⁵ governmental entities maintain augmented authority over the conduct of minors.²⁴⁶ Thus, a restriction unconstitutional as applied to adults can be constitutional as applied to minors if it furthers a "significant state interest . . . that is not present in the case of an adult."²⁴⁷ Specifically, a plurality of the Supreme Court held in *Bellotti v. Baird*²⁴⁸ that a regulation which is unconstitutional when applied to adults survives constitutional scrutiny as applied to minors if and only if the following three factors avail: "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."²⁴⁹

²⁴¹ See *Breed v. Jones*, 421 U.S. 519, 527-29 (1975).

²⁴² See *In re Winship*, 397 U.S. 358, 368 (1970) (requiring proof beyond a reasonable doubt in delinquency proceedings involving charges of acts that would be criminal offenses if committed by adults).

²⁴³ See *In re Gault*, 387 U.S. 1, 29-31 (1967).

²⁴⁴ *Bellotti v. Baird*, 443 U.S. 622, 633 (1979).

²⁴⁵ See, e.g., *H.L. v. Matheson*, 450 U.S. 398, 408 (1981) (reaffirming minor's right to choose abortion without veto power of third party but stressing that "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

²⁴⁶ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (upholding constitutionality of provision requiring parental notification of decision to abort if adequate judicial bypass procedure is available); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding censorship of school-sponsored student newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (sustaining discipline of student for using lewd language in nominating speech at student assembly); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that trial by jury not constitutionally required in adjudicative phase of juvenile delinquency proceedings); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding constitutionality of statute prohibiting sale to minors of nonobscene sexually explicit material).

²⁴⁷ *Danforth*, 428 U.S. at 75.

²⁴⁸ 443 U.S. 622 (1979).

²⁴⁹ *Id.* at 634. Although only three members of the Court joined Justice Powell's opinion, none of the other Justices disputed the accuracy or relevance of the three criteria. *Bellotti* represents the only expansive opinion articulating possible bases for distinguishing the rights of minors.

The *Bellotti* analysis is applied inconsistently in the curfew context. Several courts invert the constitutional inquiry by employing the tripartite *Bellotti* test to prove that minors do not possess fundamental rights.²⁵⁰ In *Qutb*, the Fifth Circuit erroneously characterized *Bellotti* as defining the three reasons that permit differential treatment of the rights of minors and adults and stated that the analysis "affects the balancing between of [sic] the state's interest against the interests of the minor when determining whether the state's interest is compelling."²⁵¹

The function of the *Bellotti* framework is not to define the amplitude of the liberties of minors or the amplitude of the governmental interest but to assess the elative impact of the governmental interest in regulating liberties that the Constitution identifies as fundamental to minors and adults. Thus, the juvenile status of the holder does not affect the nature or value of the liberty but only augments the regulatory authority.

Most of the courts properly analyzing the *Bellotti* factors conclude that no interest justifies imposition of a blanket curfew. As one court summarized, the *Bellotti* factors are not germane to issues implicating the innocent activity of juveniles.²⁵²

²⁵⁰ See, e.g., *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1253-58 (M.D. Pa. 1975) (pre-*Bellotti* opinion concluding that different and additional governmental interests in regulating the conduct of minors signifies that freedom of movement, although fundamental to adults, is not fundamental to minors), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976); *In re J.M.*, 768 P.2d 219, 221-23 (Colo. 1989) (en banc) (relying on *Bellotti* to reach same conclusion); *City of Panora v. Simmons*, 445 N.W.2d 363, 368-69 (Iowa 1989) (applying *Bellotti* framework to determine that movement was not fundamental as to minors and, thus, only a rational relationship between means and ends need exist). The dissent in *City of Panora* challenged the *Bykofsky* analysis:

The reasoning in *Bykofsky* was backward. The court held that because the interests served by the curfew ordinance outweighed any infringement of the rights of minors, the ordinance affected no fundamental rights.

The court in *Bykofsky* should have applied a two-step analysis. First, it should have determined the right level of scrutiny by deciding whether a fundamental right was at stake; then, it should have considered whether the government's interest outweighed that right. The court simply relied on the fact that it was dealing with children to justify its use of a rational basis analysis. Because a fundamental right was clearly involved, the court should have used a strict scrutiny analysis as suggested in *Bellotti*. Perhaps the result would have been different

Id. at 374 (Lavorato, J., dissenting) (citations omitted). The court in *Brown v. Ashton* likewise noted the inverted nature of the analysis. *Brown v. Ashton*, 611 A.2d 599, 607 (Md. Ct. Spec. App. 1991), *vacated*, 660 A.2d 447 (Md. 1992).

²⁵¹ *Qutb v. Strauss*, 11 F.3d 488, 492 n.6 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

²⁵² *McCollester v. City of Keene*, 586 F. Supp. 1381, 1386 (D.N.H. 1984).

Crime may pose a peculiar danger to children who are immature and unsophisticated in the ways of the street.²⁵³ Violence is, however, ubiquitous and nonselective, affecting and traumatizing all.²⁵⁴ Thus, although the minor's enhanced vulnerability to crime and its turmoil may justify a separate criminal justice system²⁵⁵ or unique control of obscene material,²⁵⁶ it does not justify blanket restrictions of innocuous activity. Any minimal additional vulnerability of minors does not justify the maximum infringement.²⁵⁷

Additionally, the decision to remain in public during nocturnal hours does not implicate an "important, affirmative choice[] with potentially serious consequences."²⁵⁸ The decision at issue is not whether to engage in criminal activity but whether to remain in public at night, a determination bereft of the potentially serious consequences that infuse the choice to abort,²⁵⁹ to purchase sexually explicit materials, or to possess and view child pornography.²⁶⁰ Only the exceptional case that would have profound consequences warrants such an expansive infringement of fundamental liberties.

Finally, a blanket curfew does not further, but rather frustrates, the parental role. It "gracelessly arrogates unto itself and to the police the precious rights of parenthood."²⁶¹ In *Bellotti*, the Court found that "[l]egal restrictions on minors, 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."²⁶² Limitations that thwart the parental role may have the converse effect. As one court noted: "Instilling the principles of morality, ethical conduct, religion,

²⁵³ See, e.g., *Brown*, 611 A.2d at 608.

²⁵⁴ See *Waters v. Barry*, 711 F. Supp. 1109, 1137 (D.D.C. 1989).

²⁵⁵ *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981); *Brown*, 611 A.2d at 608.

²⁵⁶ See *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994); *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁵⁷ In *McColleston*, the court held the ordinance unconstitutional but found that minors were peculiarly vulnerable, noting that the ordinance indicated a legislative concern over the safety and general welfare of vulnerable, impressionable minors. *McColleston v. City of Keene*, 514 F. Supp. 1046, 1050 (D.N.H. 1981), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982).

²⁵⁸ *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

²⁵⁹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

²⁶⁰ *X-Citement Video*, 115 S. Ct. at 464; *Ginsberg*, 390 U.S. at 629; see also *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding prohibition against possession and viewing of child pornography against First Amendment challenge); *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography was not entitled to First Amendment protection).

²⁶¹ *Waters v. Barry*, 711 F. Supp. 1109, 1137 (D.D.C. 1989).

²⁶² *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979).

and citizenship is primarily the function and responsibility of the minors' parents and, in large part, is beyond the competence of impersonal political institutions," particularly an amorphous, distant government.²⁶³

Further, even assuming some familial deterioration, any benefit that a curfew law may confer on needy children and families comes at the substantial expense of intruding into healthy family units and healthy parenting.²⁶⁴ Conscripting the many to reach the few is inconsistent with a democratic system of constitutional government.

Because a blanket juvenile curfew does not implicate any of the *Bellotti* criteria,²⁶⁵ any expansive governmental interest in regulating the conduct of juveniles cannot rectify the constitutional infirmities of the regulation. Juvenile curfew regulations simply cannot survive a substantive due process challenge unless analogous adult restrictions are constitutionally permissible.²⁶⁶ In addition, even assuming that immaturity and vulnerability justify differential treatment, the juvenile curfew is constitutional if and only if it satisfies the nexus inquiry.

2. *Nexus: Narrowly Tailored and Least Restrictive Means*

The governmental interest in reducing criminal activity and victimization is compelling, but this does not end the constitutional inquiry. The "nexus" requirement mandates that the means selected be narrowly tailored to the objective and the least restrictive means of achieving that objective.²⁶⁷ The

²⁶³ *McColleston v. City of Keene*, 514 F. Supp. 1046, 1051 (D.N.H. 1981), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982).

²⁶⁴ See *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 28 (N.D. Tex. Aug. 10, 1992), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

²⁶⁵ But see, e.g., *Village of Deerfield v. Greenberg*, 550 N.E.2d 12, 16 (Ill. App. Ct. 1990) (quoting *People v. Chambers*, 360 N.E.2d 55, 57-58 (Ill. 1976)). In *Chambers*, the court found all of the *Bellotti* factors applicable:

The statute proceeds upon the basic assumption that when a child is at home during the late night and early morning hours, it is protected from physical as well as moral dangers. Although there are instances, unfortunately, in which this assumption is untrue, we are satisfied that the State is justified in acting upon it.

....

By providing a sanction against the parent who knowingly permits a child to violate the statute, the cooperation of the parent is commanded. That sanction may also operate indirectly to enlist cooperation from the child, who may be willing to risk getting into trouble himself, but unwilling to involve his parents in a violation of the law. Parental control is thereby strengthened.

Chambers, 360 N.E.2d at 57-58.

²⁶⁶ For this reason, equal protection analysis recently has become the nucleus of constitutional challenges. See *infra* part V.E and accompanying text.

²⁶⁷ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Shelton v. Tucker*, 364

government cannot pursue legitimate and substantial ends "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."²⁶⁸

The curfew effects a "serious invasion of personal rights and liberties,"²⁶⁹ and its sweep is immense:

[It] casts [constitutional] rights aside like so much straw. The Act subjects . . . juveniles to virtual house arrest each night without differentiating either among those juveniles likely to embroil themselves in mischief, or among those activities most likely to produce harm. The Act is a bull in a china shop of constitutional values.²⁷⁰

A curfew regulation cannot be narrowly tailored when it restricts the liberties of all to assail the illegal activities of a few.²⁷¹ It may be convenient and buttressed by hope, but convenience and hope are not the touchstones of constitutionality, particularly when the power of arrest for illegal activity remains both available and viable.²⁷²

Stripped of its vestments, the curfew enactment defies logic. If the objective of a curfew law is to reduce juvenile crime and victimization, by definition it is not aimed at those who already abide by the law. The underlying assumption of a curfew provision must be that it will deter juveniles who currently leave their homes at night to engage in illegal activity. As the District of Columbia court stated, "The naivete of such an assumption is striking."²⁷³

A curfew does not aspire to impede innocent activity; this is merely its effect. Its aspiration is to deter conduct already made illegal by laws with substantially enhanced penal sanctions. "Logic thus suggests that the only juveniles for whom the Act will likely have meaning will be those already

U.S. 479, 488 (1960); *see also supra* notes 183-85 and accompanying text.

²⁶⁸ *Shelton*, 364 U.S. at 488.

²⁶⁹ *See, e.g., S.W. v. State*, 431 So. 2d 339, 341 (Fla. Dist. Ct. App. 1983).

²⁷⁰ *Waters v. Barry*, 711 F. Supp. 1109, 1134 (D.D.C. 1989).

²⁷¹ *See, e.g., City of Panora v. Simmons*, 445 N.W.2d 363, 373 (Iowa 1989) (Lavorato, J., dissenting).

²⁷² Several courts that held curfew laws unconstitutional reasoned that they are either not narrowly tailored or the least restrictive means of accomplishing the objective. *See, e.g., Johnson v. City of Opelousas*, 658 F.2d 1065, 1074 (5th Cir. 1981); *Waters*, 711 F. Supp. at 1136 (noting that "the restriction, although perhaps by its nature silent, would be massive"); *In re Doe*, 513 P.2d 1385, 1388 (Haw. 1973); *Allen v. City of Bordentown*, 524 A.2d 478, 483-84 (N.J. Super. Ct. Law Div. 1987).

²⁷³ *Waters*, 711 F. Supp. at 1139.

inclined to obey the law. When fundamental interests are at stake, this inversion of anticipated effects renders the Act constitutionally unacceptable."²⁷⁴

Exceptions to enforcement, however, necessarily enter the equation. In *Qutb*, the Fifth Circuit reasoned that the district court correctly had found legitimate activities with which the curfew would interfere, but held that the curfew was narrowly tailored and the least restrictive means of accomplishing its objectives because of the existence of numerous defenses that allow minors to stay in public during curfew hours.²⁷⁵ Reasoning that neither the restrictions nor the defenses could be viewed in isolation from each other, the court concluded that "the defenses are the most important consideration in determining whether this ordinance is narrowly tailored."²⁷⁶

Persuaded that going home a little early or taking along a parent or guardian comprised constitutionally insignificant burdens, the court found the ordinance to be constitutional.²⁷⁷ The court failed to discern that a curfew restricts minors from exercising fundamental freedoms that cannot be recovered in defenses to prosecution. It failed to recognize that no curfew enactment, however replete with exceptions, can broadly interfere with the legitimate conduct the curfew necessarily curtails without violating the Constitution.²⁷⁸ If a curfew does so, it is not narrowly tailored.

Although exceptions are relevant to the constitutional inquiry, only in the rare case can constitutional infirmities be circumvented by relying on

²⁷⁴ *Id.*

²⁷⁵ *Qutb v. Strauss*, 11 F.3d 488, 493-95 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). The court noted the litany of defenses:

[A] juvenile may move about freely in Dallas if accompanied by a parent or a guardian, or a person at least eighteen years of age who is authorized by a parent or guardian to have custody of the minor. If the juvenile is traveling interstate, returning from a school-sponsored function, a civic organization-sponsored function, or a religious function, or going home after work, the ordinance does not apply. If the juvenile is on an errand for his or her parent or guardian, the ordinance does not apply. If the juvenile is involved in an emergency, the ordinance does not apply. If the juvenile is on a sidewalk in front of his or her home or the home of a neighbor, the ordinance does not apply. Most notably, if the juvenile is exercising his or her First Amendment rights, the curfew ordinance does not apply.

Id. at 494.

²⁷⁶ *Id.* at 493-94; *see also* *City of Eastlake v. Ruggiero*, 220 N.E.2d 126, 128 (Ohio Ct. App. 1966) (noting that exceptions indicate "no curtailment of normal or legitimate nighttime activities").

²⁷⁷ *Qutb*, 11 F.3d at 495.

²⁷⁸ This, of course, begs the ultimate question of whether a governmental instrumentality can criminalize any conduct, thereby making otherwise "legitimate" (innocuous) conduct subject to penal sanctions. Such an enactment may not be within the police power of state governmental authority. Possibly, the Due Process Clause provides protection from criminalization of innocence. *See supra* part IV and accompanying text.

exceptions to regulation. First, a curfew law does not, and cannot, provide a defense for the exercise of the fundamental constitutional freedoms to associate and to move and choose to move about in public places during nocturnal hours. These liberties are obliterated in every case by statutory definition, irrespective of the existence of a purported exception. In fact, the very intent of a regulation is to proscribe nocturnal movement and association unless parental accompaniment avails. Parental accompaniment is neither regularly feasible²⁷⁹ nor insignificantly invasive.

Additionally, many of the terms used to define defenses are necessarily imprecise and, possibly, unconstitutionally vague.²⁸⁰ The terms are inherently subjective and susceptible to varying interpretations. This subjectivity may unconstitutionally vest in the officer the authority to determine, according to whim and predilection, the existence of a violation.

Finally, a curfew restriction, even with exceptions, chills the exercise of constitutional freedoms. The enforcement procedure offers no certainty that a minor exercising legitimate exceptions or possessing a legitimate defense will be secure from custodial arrest.²⁸¹ Thus, the curfew effectively compels minors to choose between participating in a constitutionally protected activity with its attendant risk of arrest or relinquishing constitutionally protected freedoms.²⁸²

As one court noted, the stark differentiation between the blanket and the emergency curfew lies in the relationship between means and ends:

²⁷⁹ The law assumes that, upon enforcement, parental contact can be achieved. This assumes that parents will be home and that a telephone is available. In the many homes in which parents work at night or do not possess telephones, the curfew cannot accomplish its mission.

²⁸⁰ See *supra* notes 220-21 and accompanying text.

²⁸¹ At least one law has a parental permit procedure that excepts from violation minors possessing parental notes. See, e.g., George Stein & Kirk Jackson, *Carson to Keep a Tight Rein on Youths*, L.A. TIMES, Oct. 15, 1987, § 9, at 1. The procedure allows considerably more parental control but does not foreclose law enforcement seizure. The law also expends valuable police resources confirming the validity of permits.

²⁸² Moreover, the belatedness of relief further underscores the inherent tension between the curfew regulation and the exercise of fundamental freedoms. The timeliness of the hearing alone differentiates the curfew from legislation that imposes only a minimal burden on fundamental rights or is narrowly tailored. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 885-87 (1992) (validating temporal limitations on choosing to abort as not impairing the fundamental right); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (same). Mere delay can conscript a liberty. In the First Amendment context, it may compel the silence of the speaker. See *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988). "The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

[C]urfews are constitutionally permissible only where there is some real and immediate threat to the public safety which cannot be adequately met through less drastic alternatives and where the curfew itself is tailored in duration and application so as to meet the specific crisis without unnecessary infringement of individual liberties.²⁸³

Justice Marshall succinctly expressed the distinction: "I have little doubt but that, absent a genuine emergency, a curfew aimed at all citizens could not survive constitutional scrutiny."²⁸⁴ Nothing justifies the differential treatment of juveniles in the context of curfews, at least nothing that can withstand constitutional scrutiny.

The emergency curfew necessarily is more narrowly tailored in scope. Quelling disorder or responding to natural disaster without placing restrictions on movement and the exercise of established constitutional rights is onerous if not impossible. Effective options simply may not be available. If the geographical and temporal limits are reasonable, the emergency law may very well be the least restrictive option of satisfying a grave objective.

In contrast, less restrictive means are available to reduce juvenile crime and victimization and enhance parenting skills. Evening programs for youth, such as sports and dance clubs, provide minors an environment conducive to positive socialization surrounded by constructive role models.²⁸⁵ Community policing allows for the formation of relationships instrumental in reducing

²⁸³ *Ruff v. Marshall*, 438 F. Supp. 303, 306 (M.D. Ga. 1977); see also *People v. McKelvy*, 100 Cal. Rptr. 661, 665 (Ct. App. 1972) (noting that "because such regulations drastically curb an individual's freedom, only a clear showing of emergent necessity can justify its imposition").

²⁸⁴ *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 965 (1976) (Marshall, J., dissenting) (citing *United States v. Chalk*, 441 F.2d 1277 (1971)) (citation omitted). Marshall desired to hear the case because he thought the extent of juvenile rights was unsettled. See also *Davis v. Justice Court*, 89 Cal. Rptr. 409, 414 (Ct. App. 1970) (stating that "[i]t is true that a curfew, restricting as it does the right of free movement, does interfere with what ordinarily is a right of the citizenry. Obviously, the right to free movement cannot be interfered with unless extraordinary and perilous conditions exist, such as a riot, and perhaps only one of formidable dimension"); *Brown v. Ashton*, 611 A.2d 599, 606 (Md. Ct. Spec. App. 1991) (observing that "a general curfew, which . . . is not compelled by an emergency, nor imposed for a short duration, nor in a very discrete geographical area, could not withstand constitutional scrutiny."), *vacated*, 660 A.2d 447 (Md. 1992).

²⁸⁵ Prior to institution of the curfew, youth clubs that restricted entry to persons under age 18 or 21 and did not serve alcoholic beverages pervaded the City of Dallas. Off-duty police officers acted as security guards, talking with and forming relationships with the youth. The chilling effect resulting from enactment of the curfew, even though enforcement was stayed, so disrupted the business of the clubs that none survived.

crime. Seminars and programs for parents can teach skills necessary to enhance respect and control.

The cost of these programs is, of course, substantially greater than a curfew. A curfew allows a governmental entity to do very little while appearing "tough on crime." It answers the impatience of a community unwilling either to await delayed gratification or to embrace the efficacy of more complex initiatives that seek the cure in lieu of applying the Band Aid.

D. *Parental Privacy*

Protection of parental privacy in childrearing and other intimate family choices is a fundamental component of due process liberty:

[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "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."²⁸⁶

Parents have an "important 'guiding role' to play in the upbringing of their children."²⁸⁷ Thus, as the Court has recognized on numerous occasions, the freedom of parents to rear their children according to their own system of beliefs is of constitutional magnitude.²⁸⁸

²⁸⁶ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

²⁸⁷ *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (quoting *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979)).

²⁸⁸ See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (noting that proceedings to remove children from foster families are subject to constraints of the Due Process Clause, and finding that the importance of the familial relationship to individuals involved and to society stems from the emotional attachment that is derived from the intimacy of daily association and the role played in promoting a way of life); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (noting that "freedom of personal choice in matters . . . of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (affirming right of Amish parents whose beliefs conflict with compulsory education laws to raise children according to their own system of religious beliefs); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that an act compelling attendance at public schools deprived parents and children of right to select school, unreasonably interfering with liberty of parent to direct upbringing and education of children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a statute which prohibited the teaching of any language other than English interfered with Fourteenth Amendment liberty to estab-

Curfew enactments, by erecting blanket prohibitions that preclude minors from exercising fundamental freedoms, substantially inhibit the liberty of parents to choose to permit their children to exercise these rights.²⁸⁹ The curfew law usurps parental discretion in supervising a child's activities²⁹⁰ and making decisions that affect innocuous conduct of the child and the timing of that conduct. Critically, the curfew expropriates parental discretion to allow nocturnal activities on the basis of the graduating maturity of the particular child and interferes with the relationship of trust between the child and the parent that ideally expands in direct proportion to age.²⁹¹

Concededly, "[w]hen actions concerning the child have a relation to the public welfare or the well-being of the child, the state may act to promote these legitimate interests."²⁹² In its role as *parens patriae*, the state may restrict parental rights by requiring school attendance,²⁹³ regulating or prohibiting child labor,²⁹⁴ limiting the right to vote,²⁹⁵ restricting gun purchases and usage,²⁹⁶ prohibiting cigarette usage²⁹⁷ and alcohol consump-

lish home and rear children).

²⁸⁹ See *Allen v. City of Bordentown*, 524 A.2d 478, 487 (N.J. Super. Ct. Law Div. 1987).

²⁹⁰ See, e.g., *McColleston v. City of Keene*, 586 F. Supp. 1381, 1386 (D.N.H. 1984).

²⁹¹ Many laws also subject the parent to liability for inadequate supervision. The original Dallas ordinance imposed a penalty on a parent who "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." Original Dallas Ordinance, *supra* note 18, § 31-33(b)(2). The ordinance imposed on the recalcitrant parent a fine not to exceed \$500. *Id.* § 31-33(e)(2). Wichita, Kansas, recently enacted a curfew ordinance that imposes fines on parents, generating an explosive reaction among parents objecting to liability for the actions of children they could not control. WICHITA, KAN., MUN. CODE §§ 5.52010-.52030 (1995). Because of the temptation to enforce the ordinance selectively, see *infra* part V.E.2 and accompanying text, the typical minor violator likely will emanate from an impoverished family without capacity to pay the fine.

²⁹² *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1262 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

²⁹³ *But see Wisconsin v. Yoder*, 406 U.S. 205 (holding that parents may remove children from public school after the eighth grade when continued attendance would gravely endanger the free exercise of their religious beliefs).

²⁹⁴ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a mother could be prosecuted under child labor laws for using her children to dispense literature in streets).

²⁹⁵ See U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age"); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding unconstitutional provisions of the Voting Rights Act Amendments of 1970 that sought to authorize 18-year-olds to vote in state elections).

²⁹⁶ See, e.g., 18 U.S.C. § 922(b)(1) (1994) (restricting sale of firearm to anyone under age 21); *id.* § 923 (requiring firearms distributor to procure license from potential buyer by showing age of at least 21).

²⁹⁷ See, e.g., ALA. CODE § 13A-12-3 (1994) (prohibiting sale of cigarettes to minors);

tion,²⁹⁸ limiting operation of a motor vehicle,²⁹⁹ and preventing abuse and neglect.³⁰⁰

The curfew, however, neither assists in the discharge of parental supervisory duties nor qualifies as a justified usurpation of the parental role in circumstances in which parental control cannot otherwise be provided.³⁰¹ The criminal penalties cannot possibly encourage parents to exercise greater supervision and control when extant laws with greater penalties do not.³⁰² Additionally, the purview of the ordinance may cover situations in which parents did in fact valiantly attempt to exercise reasonable control and guidance.³⁰³

Further, the argument that curfew laws make parents the primary agents of enforcement is spurious;³⁰⁴ public law enforcement authorities enforce curfew laws. Neither the law nor the legal system can coerce good parenting skills.

Thus, by dictating private parental decisions, curfew enactments conscript the liberties of parents to familial privacy and to freedom from governmental intrusion in childrearing decisions. By wholly repudiating the parental role, the curfew imposes a significant burden.³⁰⁵ Its means are neither narrowly tailored to the end nor the least restrictive manner of accomplishing the objective. It does not reaffirm, but supplants, the parental

OKLA. STAT. ANN. tit. 21, § 1241 (West 1994) (same); TEX. HEALTH & SAFETY CODE ANN. § 161.081 (West 1995) (same).

²⁹⁸ See, e.g., COLO. REV. STAT. ANN. § 12-46-112 (West 1991) (prohibiting sale of alcoholic beverages to persons under age 21); MASS. GEN. LAWS ANN. ch. 138, § 34A (West 1991) (same).

²⁹⁹ See, e.g., ALA. CODE ANN. § 32-5-64 (1989) (prohibiting persons under the age of 16 from operating a motor vehicle); D.C. CODE ANN. § 40-301 (1991) (same); MO. ANN. STAT. § 302.250 (Vernon 1994) (same).

³⁰⁰ See, e.g., ARIZ. REV. STAT. ANN. § 13-3619 (1989) (criminalizing child abuse and neglect); CAL. PENAL CODE § 273(a) (West 1994) (same).

³⁰¹ See *Bellotti v. Baird*, 443 U.S. 622, 632-40 (1979); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1386 (D.N.H. 1984).

³⁰² Cf. *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1255 (M.D. Pa. 1975) (holding that curfew encourages parental supervision), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

³⁰³ See *McColleston v. City of Keene*, 514 F. Supp. 1046, 1053 (D.N.H. 1981), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982).

³⁰⁴ *City of Panora v. Simmons*, 445 N.W.2d 363, 370 (Iowa 1989).

³⁰⁵ In *Qutb*, the Fifth Circuit held that the defenses ameliorated any constitutional burden on parental rights: "[T]he only aspect of parenting that this ordinance bears upon is the parents' right to allow the minor to remain in public places, unaccompanied by a parent or guardian or other authorized person, during the hours restricted by the curfew ordinance." *Qutb v. Strauss*, 11 F.3d 488, 495-96 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). The district court had ridiculed this position, speculating that parents could simply accompany their children on dates. *Qutb*, No. CA 3-91-CV-1310-R, slip op. at 28.

role. Certainly, familial intervention and teaching parenting skills would be both less restrictive and more productive means of achieving the states' goals. They also, of course, would be significantly more expensive.

The curfew's purported function of instilling family values and supervision is its greatest social irony. First, juveniles most likely to be violators are those most bereft of the instilled familial patterns of responsibility and control that might cause them to remain at home during nocturnal hours. Thus, the hope of voluntary compliance by those who actually endanger the community is ephemeral or, at best, minimal. Secondly, the home can be a very dangerous place. The curfew thus precludes the child from acting on a responsible decision to leave an abusive home and places the child in the home at a time when abuse is most likely to occur.³⁰⁶

E. *Equal Protection*

1. *The Minor/Adult Classification*

Although a categorization based on age is not a suspect classification,³⁰⁷ age discrimination is subject to strict scrutiny if it implicates a fundamental freedom.³⁰⁸ Because a curfew enactment likely could withstand the more lenient, deferential rational basis review, a finding of infringement of a fundamental liberty is critical to a conclusion of unconstitutionality.³⁰⁹

³⁰⁶ In *Qutb*, the plaintiffs introduced a sociological study concluding that evening hours in the home were the most dangerous for youth. Further, the statistics indicated that runaways comprised a substantial portion of the nighttime arrestees. Many of these likely violated the legitimate rules of good parents; however, many likely acted to save their physical or emotional lives.

³⁰⁷ See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

³⁰⁸ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *United States v. Robel*, 389 U.S. 258, 268 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). But see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (holding that classification that neither affects a fundamental right nor creates a suspect class needs only bear some rational relationship to a legitimate governmental purpose).

³⁰⁹ In *Bykofsky*, for example, the court found that the enactment, although discriminatory on the basis of age, did not infringe a fundamental right and thus applied the rational basis test. *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976). The court easily concluded that because minors as a class are intrinsically distinct from adults, the classification was neither arbitrary nor irrational. *Id.* The court further rejected a challenge to the maximum age selected, reasoning that the legislature could draw lines in a rational manner and, although at some point the government could no longer regulate in this manner, the classification was not unreasonable. *Id.* at 1265-66. But see *Waters v. Barry*, 711 F. Supp. 1121, 1139 (D.D.C. 1989) (concluding that the curfew act could not satisfy even rational basis review).

As discussed, the curfew intrinsically infringes freedom of movement, and has a significant effect on express constitutional liberties such as freedom of speech and association. Consequently, because the curfew only affects minors, it can survive strict scrutiny analysis only if it is narrowly tailored to serve a compelling governmental interest and is the least restrictive means of accomplishing that objective.³¹⁰

In Dallas, crime statistics indicated that persons between the ages of seventeen and twenty-six years old committed the greatest proportion of crime, particularly violent offenses.³¹¹ Thus, a juvenile curfew cannot begin to accomplish the objective of curtailing the primary incidence of crime.

Further, because a curfew enactment deters only the innocent,³¹² the relevant classification is between law-abiding adults and law-abiding youth. This classification cannot possibly withstand even minimal constitutional scrutiny. The curfew enactment is not only not narrowly tailored, it is irrational, and violates the Equal Protection Clause under any standard of analysis.

2. *Selective Enforcement*

The juvenile curfew bristles with the potential for selective enforcement, a situation proscribed by the Equal Protection Clause.³¹³ Selective enforcement is virtually inevitable for at least three reasons. First, the provisions are inherently vague and ambiguous and thus incapable of balanced enforcement. If an enactment requires persons of common intelligence to guess its meaning at the peril of liberty, it is unconstitutionally void for vagueness.³¹⁴ Vague language and inadequate standards vest in law enforcement officers unconfined discretion, unconstitutionally authorizing discriminatory and selective enforcement.

The Dallas ordinance includes defenses for an "other recreational activity" sponsored by an "other similar entity,"³¹⁵—purported standards that are unworkable from the standpoint of the minor, the enforcing officer, and the factfinder.³¹⁶ A New Jersey court held unconstitutionally vague the terms

³¹⁰ *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Shelton v. Tucker*, 364 U.S. 479 (1960).

³¹¹ Plaintiff's evidence. Personal knowledge of the author.

³¹² See *supra* part V.B.1.

³¹³ See *S.W. v. State*, 431 So.2d 339, 341 (Fla. Dist. Ct. App. 1983) (declaring juvenile curfew ordinance unconstitutional on the basis that it interfered with myriad legitimate activities and was not rationally related to its purpose).

³¹⁴ See *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

³¹⁵ Amended Dallas Ordinance, *supra* note 18, § 31-33(c)(1)(G).

³¹⁶ See *Qutb v. City of Dallas*, No. CA 3-91-CV-1310-R, slip op. at 33 (N.D. Tex. Aug 10, 1992), *rev'd sub nom.* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. de-*

"reasonable judgment," "annoyance," "free passage," and "emergency errand."³¹⁷ Other courts object to "loiter, idle, wander or play,"³¹⁸ "bona fide,"³¹⁹ "parentally approved supervised activity,"³²⁰ "reasonable necessity," "normal," "minor well along the road to maturity," "consistent with the public interest," and "best interest of said minors."³²¹ Drafting a law with more precise terms is difficult, if not impossible.

Secondly, as a practical matter, governmental instrumentalities do not possess sufficient resources to enforce curfew laws fully. Enforcement authorities simply cannot stop every person who appears to be within the curfew, nor can every violator be placed within the judicial system. The potential is thus great that enforcement authorities will allocate resources to select only certain persons or classes of persons for seizure and prosecution or confine enforcement to certain geographical areas.

Finally, allocation of resources is, as a practical matter, responsible law enforcement. The enactments are not intended to confine the innocent to the home; they are intended as a tool of law enforcement. They are intended, in effect, as instruments for selective enforcement in known crime areas, as authority to circumvent the constraints of the Fourth Amendment. Thus, facially, the inordinate potential, if not necessity, for discriminatory law enforcement may also make the curfew law unconstitutional under the Equal Protection Clause.

CONCLUSION

The objectives of the curfew enactment are compelling. Certainly, juveniles require protection from criminal victimization and command inducement not to engage in criminal activity. Certainly, juveniles should not be wandering the streets in the late evening or early morning hours. Nevertheless, a governmentally imposed curfew is not the solution. It unconstitutionally restricts the movement of the innocent and deprives all youths, most of whom are law-abiding, of precious constitutional liberties. Its intent and effect is to eviscerate the mandates of the Fourth Amendment, and it criminalizes innocence.

nied, 114 S. Ct. 2134 (1994); *Maquoketa v. Russell*, 484 N.W.2d 179, 185 (Iowa 1992).

³¹⁷ *Allen v. City of Bordentown*, 524 A.2d 474, 481-82 (N.J. Super. Ct. Law Div. 1987).

³¹⁸ *City of Seattle v. Pullman*, 514 P.2d 1059, 1062-63 (Wash. 1973).

³¹⁹ *Brown v. Ashton*, 611 A.2d 599, 610 (Md. Ct. Spec. App. 1991), *vacated*, 660 A.2d 447 (Md. 1992).

³²⁰ *Maquoketa*, 484 N.W.2d at 185.

³²¹ *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1249-51 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976). The court held that, in view of the severance provisions of the ordinance, the offensive words could be deleted without vitiating the enactment.

Aside from its constitutional problems, the curfew stultifies maturation. Further, it cannot begin to touch the societal and familial deterioration that are underlying causes of crime. It cannot begin to reach the troubled youth. Only measures directed at these ills truly can alleviate juvenile crime and victimization.

Finally, the constitutional infirmities are extreme and incurable. The more efficacious the curfew law—the more it restricts freedom of movement—the greater its constitutional defects. A society that permits the nocturnal imprisonment of its youth simply cannot call itself free.

As all agree, the curfew is not a panacea. Under the Constitution, it is not even an option.