

NOCTURNAL JUVENILE CURFEW ORDINANCES: THE FIFTH CIRCUIT "NARROWLY TAILORS" A DALLAS ORDINANCE, BUT WILL SIMILAR ORDINANCES ENCOUNTER THE SAME INTERPRETATION?

I. INTRODUCTION

On the evening of September 27, 1994, Terrell Collins, a fourteen-year-old straight 'A' student who had earned a four year scholarship to a Catholic high school, was gunned down in West Side Chicago.¹ Terrell's death was not a typical gang-banger or drug-runner fatality.² Until his fateful last steps onto the West Side streets, he had possessed the good sense and good fortune to avoid the carnage surrounding these glorified

1. John W. Fountain, *More Street Injustice and Again Good Die Young*, CHI. TRIB., Sept. 29, 1994, § 1, at 1. Although Terrell's death occurred at 8:39 p.m., beyond the purview of most curfews, his tragic story is indicative of the juvenile crime and violence that happens most frequently during curfew hours.

Between 1986 and 1991, nationwide homicide rates peaked between the hours of 9:00 p.m. and 6:00 a.m. OFFICE OF CRIMINAL JUSTICE PLANS AND ANALYSIS HOMICIDE REPORTS (1992). Furthermore, nearly 41% of all violent crimes between 1986 and 1991 occurred between the hours of midnight and 6:00 a.m. *Id.*

Overall juvenile crime rates have also dramatically increased. Violent crimes among teens increased by 57% in the past decade. See Mark Potok, *Cities Deciding That It's Time for Teen Curfews*, USA TODAY, June 6, 1994, at A3. Violent crimes are defined as homicide, forcible rape, robbery, and aggravated assault. See 1988-1993 F.B.I. UNIFORM CRIME REPORTS. In 1988, juveniles comprised 8% of all murder-related arrests. See 1988 F.B.I. UNIFORM CRIME REPORTS. In 1993, juveniles accounted for 15% of murder-related arrests even though their percentage of the overall population had decreased. See 1993 F.B.I. UNIFORM CRIME REPORTS. Additionally, juvenile crime victimization rates increased by 23.4% from 1988 to 1993. See 1988-1993 F.B.I. UNIFORM CRIME REPORTS. See also Robert Davis, *Young People Victimized the Most, Study Says*, USA TODAY, July 18, 1993 at 3A (citing a 1992 Justice Department study, which reports that juveniles comprised only 10% of the population but accounted for 23% of all crime victims). Per 100,000 people, juveniles aged 12 to 17, are violent crime victims twice as often as adults ages 25 to 34, and five times as often as adults ages 35 and over. See also *Calif. Mayor Urges Curfew to Cut Crime: 55 Murdered This Year in City 'Under Siege'*, ATLANTA J., Mar. 25, 1992, at A9. In enacting a juvenile curfew ordinance, the Oakland mayor stated, "Our city is in dire distress from the wave of violence that has been building over the last ten years The homicide figures since the beginning of this year have certainly brought us to a critical mass where we must take some action." *Id.*

2. See Fountain, *supra* note 1, § 1, at 7. The article refers to another disturbing violent story that occurred among gang-bangers only a week before Terrell's death. Apparently, Chicago police were searching for an eleven year-old boy who had recently slain a fourteen year-old. *Id.* The manhunt summarily ended when police discovered that members of his own gang had already murdered their associate. *Id.*

urban enterprises. Lately, tragedies like Terrell's have become all too common.³

Chicago,⁴ and many other areas⁵ of the United States, have recently suffered marked increases in juvenile crime and victimization. Civic organizations, city councils, state legislatures, and other concerned citizens groups have promulgated a seemingly endless list of activities and programs in efforts to curb juvenile violence.⁶ Unfortunately, most efforts have

3. Terrell's death adds to the already appallingly large number of murders in the United States in recent years. See 1993 F.B.I. UNIFORM CRIME REPORTS 14 (indicating 23,271 murders in the United States in 1993). United States Senator Daniel P. Moynihan recently offered sociological insight into America's endemic problem with epidemic violence. Daniel P. Moynihan, *What is Normal? Defining Deviancy Down*, CURRENT, Sept. 1993, at 12. Moynihan postulates that modern American society refuses to confront juvenile violence and its attendant consequences. *Id.* at 15. Moynihan opines that society has lowered the threshold of normalcy to accommodate rising deviancy. *Id.* He underscores his position by comparing the nation's horror when seven gangsters were killed in the St. Valentine's Day Massacre of 1929. *Id.* Congress promptly responded by ending prohibition. *Id.* The carnage of that massacre pales in comparison to many weekend body counts in large cities like New York and Los Angeles. Furthermore, Moynihan observes that societal response to the appalling violence and death has regressed from outrage to banal "shoulder-shrugging." *Id.* at 22.

Another public official concerned with American society's acceptance of violence, New York Supreme Court Judge Edwin Torres, urges citizens to act: "[T]his numbness, this near narcoleptic state can diminish the human condition A society that loses its sense of outrage is doomed to extinction." *Id.* at 23. See also, *The Price of Life*, USA TODAY, Dec. 9, 1993, at 14A.

Together, the positions of Moynihan and Torres form a theoretical justification for the adoption of nocturnal juvenile curfews. Historically, towns created curfews to reestablish order during riots and other violent situations. See *infra* notes 40-44 and accompanying text. Modern curfew proponents have extended this "emergency response" rationale to justify curfews as a response to the epidemic violence and riot conditions that permanently plague many modern communities. For a discussion of this violence, see *supra* note 1. In effect, contemporary town councils utilize nocturnal curfews to attempt to return society to "normalcy" during a disproportionately violent period.

4. In 1993, 33% of Chicago's 850 homicide victims were between the ages of 11 and 20, establishing a new record. *An Epidemic of Juvenile Crime*, CHI. TRIB., July 29, 1994, at 18.

5. In Baltimore, the number of juveniles who were fatally shot jumped from 26 in 1988 to 41 in 1992. Paul W. Valentine, *New Curfew in Baltimore: Parents of Violators Face Tougher Penalties*, WASH. POST, July 29, 1994, at A1. Additionally, during the same time period, the number of juveniles wounded by gunfire rose from 179 to 316 and the number arrested for drug distribution increased from 666 to 1,373. *Id.* In 1992, Florida juveniles, setting new state records, accounted for 45% of auto thefts, 36% of burglaries, 25% of robberies, 15% of rapes, and 12.5% of murders. Diane Hirth, *Fla. Legislators Weigh Imposing Statewide Juvenile Curfew*, FORT LAUDERDALE SUN-SENTINEL, Dec. 19, 1993, at A2. In an alarming statistic, Fulton County, Georgia recently reported homicide as the leading cause of juvenile death. *And a Creative Approach in Fulton*, ATL. CONST., Oct. 23, 1994, at D4 [hereinafter *Creative Approach*].

6. The programs created to restrain juvenile violence have ranged from conventional to bizarre. In Fulton County, Georgia, the legislature enacted a bill, modeled after cigarette and alcohol packaging requirements, mandating that gun dealers affix warning labels to firearms. *Creative Approach*, *supra* note 5, at D4. Although such approaches are seemingly futile considering the ineffectiveness of alcohol and cigarette packaging warnings, proponents believe the labels may force owners to contemplate the

proven futile.⁷

The epidemic violence has driven legislatures to return to a crime-fighting measure that, until recently,⁸ many critics had dismissed as an unconstitutional boondoggle: the juvenile curfew ordinance. While even proponents concede that curfew statutes will never be a panacea,⁹ curfews

attached safety tips and health hazards before firing away. *Id.*

Many suburban Chicago town councils have enacted "parental responsibility" laws empowering local police to prosecute parents for their children's crimes. Christi Parsons & Andrew Martin, *Party's Over, Even for Parents: Suburbs Making Them Pay If Teens Break the Law*, CHI. TRIB., Oct. 1, 1994, at A1. Although most of these ordinances are aimed at curbing juvenile revelry, many extend to curfew violations, weapon offenses, or driving while intoxicated offenses. *Id.*

For discussions of some of the more common juvenile crime control schemes, see Robert Becker, *Late-night Games Take Place of Crime: Enhanced Recreation Programs Hailed For Making Streets Safer*, CHI. TRIB., Oct. 25, 1994, at A1 (examining late night recreational programs in a Cincinnati suburb that include late-night basketball, teen dance programs, field trips, tutoring, and sewing classes); Ruben Castaneda, *Police Launch Initiatives to Cut Juvenile Crime*, WASH. POST, Oct. 28, 1993, at C1 (reporting on a "learning center" for juveniles suspended from high school that is staffed by volunteer retired teachers, counselors, and a police officer, and operated at a Washington D.C. police boys and girls club); Bruce Frankel, *Teen Crime Surge Sparks Crackdown*, USA TODAY, Mar. 17, 1994, at 1 (considering the utility of truancy programs and shopping mall bans); *How to Make Curfews Work*, L.A. TIMES, June 13, 1994, at B6 (noting the effectiveness of an East Los Angeles curfew provision mandating that families of curfew violators attend peaceful conflict resolution classes); Deborah Sharp, *Cities Try Curfews to Take Time Out of Crime*, USA TODAY, Dec. 28, 1993, at 6A (discussing plans to adopt gang intervention and juvenile job programs).

Additionally, for discussion of a creative but highly controversial and constitutionally tenuous attempt at controlling juvenile gang violence, see Seth Mydans, *New Anti-Gang Weapon: Bar Legal Conduct*, N.Y. TIMES, June 11, 1995, at A1 (focusing on injunctions that identify known gang members by name and prohibit them, solely on the basis of past gang-related crimes from "engaging in specified activities that in many cases are perfectly legal for everybody else [such as] sitting in parks, climbing trees or roofs, whistling, making gang hand signals, wearing large belt buckles or carrying bottles, baseball bats or flashlights").

7. In an indicative about-face, Chicago public guardian and lifetime welfare reformer Patrick Murphy argued that the social programs of the child welfare system are part of the problem of juvenile violence, rather than the solution. Thomas Hardy, *'Fallen' Liberal Urges Tough Welfare, Crime Reforms*, CHI. TRIB., Nov. 30, 1994, at 1. Murphy emphasizes that, "draconian measures are needed to stem [the] epidemic of youth crime," and adds that, "[welfare] is a horrible, patronizing, racist message and we've got to turn it around." *Id.*

However, some juvenile crime prevention programs have been successful. In San Jose, California, daytime burglaries have dropped by 50% since the inception of its truancy program in 1981. Frankel, *supra* note 6. Similarly, in Oklahoma City, daytime burglaries decreased by 33% in the first two years of its truancy crackdown. *Id.* In Winston Hills, Texas, after the implementation of a late-night recreation program, arrests dropped from 645 in the first six months of 1992 to 491 for the same period in 1993, approximately a 25% decrease. Becker, *supra* note 6.

8. In the past five years, legislators have enacted or amended over 1,000 curfew ordinances. Peter Pae, *Leesburg to Enforce Curfew*, WASH. POST, Oct. 6, 1994, at V1.

9. Don Postell, a Dallas assistant city attorney who helped draft a curfew ordinance that withstood constitutional scrutiny, see *infra* notes 14-25 and accompanying text, stresses that legislators should not naively assume that curfews are "magic weapons." Sharp, *supra* note 6.

can be surprisingly effective.¹⁰ Of course, municipalities that fail to adequately consider the time, effort, and money necessary to implement effective curfew programs will find curfews to be ineffective. However, municipalities with meticulous legislators and police forces committed to prudent enforcement¹¹ of their curfew ordinances will succeed in reducing crime.¹² The most successful curfews are not isolated remedies, but those incorporated into larger programs aimed at controlling municipal crime.¹³

On June 12, 1991, in response to public demands to protect Dallas citizens from a recent outbreak of juvenile crime, the Dallas City Council enacted a juvenile curfew ordinance.¹⁴ The Council enumerated four

10. Cities significantly reducing juvenile crime through curfews include; Denver, Colorado; New Orleans, Louisiana; Phoenix, Arizona; and San Antonio, Texas. After Denver's implementation of a curfew, the incidence of serious crimes, including homicide, assault, robbery, and burglary, decreased by 30%, and the number of juveniles arrested for homicides dropped 60%. Darryl Fears, *Urban Spotlight, Focus on Cities, Problems, Solutions, Trends*, ATL. CONST., Oct. 9, 1994, at D3. In the first two months after New Orleans initiated curfew enforcement, the city experienced a comparable decrease in juvenile crime, and police detained over 2,000 juveniles in the city's Curfew Center. *Id.* At the center, police and volunteers counsel curfew violators until parents pick up their children. *Id.* Subsequent to the adoption of a curfew, juvenile victimization in San Antonio dropped by 14% between 1991 and 1992. SAN ANTONIO YOUTH CURFEW REPORT, Aug. 20, 1992. Furthermore, San Antonio curfew arrest reports disprove criticism that police discriminately administer such curfews. *Id.* There is a close demographic correlation between racial population and arrest ratios (the largest gap being 2% among Hispanics). *Id.*

Atlanta recently amended its curfew in an attempt to revamp failed crime-fighting efforts. *See* ATLANTA, GA., CODE § 17-7002, -7003 (1990). Nevertheless, these good intentions have failed because Atlanta police refuse to enforce the remodeled ordinance. *See* Fears, at D3. In 1993, both Phoenix and Denver police issued more than 3,000 curfew violation tickets in 1993 whereas Atlanta police issued only 270. *Id.* Because Phoenix's population is over twice that of Atlanta's, the figure illustrates the massive disparity. THE 1994 INFORMATION PLEASE ALMANAC 793, 808 (listing Phoenix's population as 983,403 and Atlanta's as 394,017).

11. Police enforcement is the key to the success or failure of curfews. Police receptiveness varies from jurisdiction to jurisdiction. *See, e.g.,* Fears, *supra* note 10 (quoting an Atlanta police chief who stated: "We tell our patrols to vigorously enforce the curfew law. We look at curfews as a crime-fighting tool."); Indira A.R. Lakshmanan & Michael Grunwald, *Violating Curfew: Chelsea Ordinance Seldom Enforced*, BOSTON GLOBE, June 5, 1994, at 29 (quoting Chelsea police chief who sees the curfew as a deterrent that "ideally, . . . encourages voluntary compliance," and another police officer who "said with a shrug . . . 'we could make curfew arrests all night long. But what would be the point of that?'"); Valentine, *supra* note 5 (reporting, not surprisingly, that police will not give top priority to a recently adopted Baltimore curfew).

12. For crime reduction statistics in cities where legislators have adopted curfews, *see supra* note 10.

13. *See* Richard T. Ford, Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693, 1710 (1994) (suggesting the use of curfews "as part of a comprehensive response to the social and economic ills that beset urban areas and . . . not [as] an end in themselves").

14. Dallas, Tex., Ordinance 20,966 (June 12, 1991), *cited in* Qutb v. City of Dallas, No. 3:91-CN-1310-R, slip op. at 5 (N.D. Tex. Aug. 10, 1992). The City of Dallas amended this initial ordinance in

purposes for the curfew: first, to protect minors from each other and from other persons; second, to protect the general public; third, to promote parental responsibility and control of children; and fourth, to reduce juvenile crime and victimization.¹⁵ Two weeks after the Council passed the statute, four Dallas parents, challenged the ordinance's constitutionality,¹⁶ seeking both a temporary restraining order and a permanent injunction.¹⁷ The District Court for the Northern District of Texas enjoined the enforcement of the curfew, holding the ordinance to be violative of the First and Fourteenth Amendment rights of free association and equal protection.¹⁸

In *Qutb v. Strauss*,¹⁹ the Fifth Circuit overturned the district court's ruling. The court applied a "strict scrutiny" test²⁰ and held that the Dallas

June of 1992. *Qutb*, No. 3:91-CN-1310-R, slip op. at 11. For the sake of clarity, this Note refers only to the amended version. DALLAS, TEX., CITY CODE ch. 31, § 31-33 (June 10, 1992), *reprinted in* *Qutb v. Strauss*, 11 F.3d 488, at 496-99 (5th Cir. 1992). For the full text of the amended Dallas ordinance, see Appendix, *infra*.

15. See Appendix, *infra*. The overriding purpose of the ordinance is summarized in the final two "whereas" clauses: to protect the "public health, safety, and general welfare" and "diminish the undesirable impact of [the prescribed] conduct on the citizens of the city of Dallas." *Id.*

16. The parents filed suit both individually and as next friends of their teenage children. *Qutb v. Strauss*, 11 F.3d 488, 491 (5th Cir. 1993). Subsequently, the suit was certified as a class action with two subclasses: persons under the age of seventeen, and parents of persons under the age of seventeen. *Id.*

17. *Id.* The parents originally claimed seven constitutional violations: 1) violation of the children's First Amendment rights of free association and free speech; 2) violation of the children's Fourth and Fourteenth Amendment right against unreasonable search and seizure; 3) violation of the children's Fifth and Fourteenth Amendment rights to a presumption of innocence, proof beyond a reasonable doubt, and freedom against self-incrimination; 4) violation of the children's and parent's Fourteenth Amendment Due Process rights of fundamental liberty and privacy; 5) violation of the children's Fourteenth Amendment right to equal protection under the law; 6) overbreadth; and 7) vagueness. *Id.* at 491 n.4. The district court held the ordinance unconstitutional on free association and equal protection grounds; therefore, the court did not significantly address the other arguments the plaintiffs posed. *Id.* at 491 n.5. In reversing the district court, the Fifth Circuit focused on the equal protection challenge, but also addressed the First Amendment and privacy arguments. *Id.* at 492, 494-96 & n.9.

18. *Qutb*, No. 3:91-CN-1310-R, slip op. at 30-35, 42-43.

19. 11 F.3d 488 (5th Cir. 1993), *cert. denied sub nom.* *Qutb v. Bartlett*, 114 S. Ct. 2134 (1994).

20. Although the strict scrutiny test varies slightly depending on the plaintiff's specific constitutional challenge, a uniform two prong inquiry emerges. *Compare* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a sterilization statute under strict scrutiny analysis as an impermissible invasion of marriage and procreation because it violated the equal protection clause) *with* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (establishing, under the First Amendment, that "the government may impose reasonable restrictions on the time, place, or manner of protected speech provided [they] 'are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication'")). First, the ordinance must promote a compelling governmental interest. 11 F.3d at 492. Second, the statute must be narrowly tailored to meet only that compelling state interest, with

City Council had a compelling state interest in enacting the curfew.²¹ The Fifth Circuit concluded that the curfew was narrowly tailored to achieve only the stated interest,²² and that the curfew was the least restrictive means of accomplishing the Council's objective.²³ The court also noted that the ordinance was not violative of the First Amendment, because juveniles exercising their First Amendment rights were excluded from the scope of the ordinance's coverage.²⁴ Additionally, the ordinance did not unconstitutionally intrude upon the parents' fundamental right of privacy or their right to raise children without undue governmental interference.²⁵

The *Qutb* case is the first federal decision in seventeen years to uphold a juvenile curfew ordinance, and the only federal decision ever to uphold an ordinance under "strict scrutiny" analysis.²⁶ The Supreme Court has

"no less restrictive means available to effectuate the desired end." *Id.*

21. 11 F.3d 488, 492. The *Qutb* court noted that the Dallas City Council had a compelling interest in protecting juveniles and decreasing juvenile crime. *Id.* at 493. For the stated purpose of the ordinance, see *supra* note 15 and accompanying text.

22. 11 F.3d 488, 493-94. The *Qutb* court highlighted the ordinance's carefully drafted exemptions by contrasting it with a sweeping curfew the Fifth Circuit had declared unconstitutional twelve years before in *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981). In *Johnson*, the court found a curfew ordinance overbroad and unconstitutional because it prohibited minors from traveling to or from school or religious activities, strolling on the sidewalk or yard of their homes, engaging in legitimate employment, or interstate travel through the city. *Id.* at 1072-74. The court had implied, however, that a curfew with a sufficiently narrow scope could survive constitutional scrutiny. *Id.* at 1074.

23. 11 F.3d at 493-95. Under more recent Supreme Court cases analyzing other statutes with time, place, and manner restrictions on free speech, the ordinances need not implement the least restrictive means. See *Ward*, 491 U.S. at 797-98.

24. 11 F.3d at 494. See also Appendix, *infra* § 1(C)(1)(H). The court conceded that the ordinance necessarily restricts First Amendment rights. *Id.* However, the court questioned whether a fundamental right to freedom of social association even exists for juveniles. 11 F.3d at 495 n.9 (quoting *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)). The court reasoned that the First Amendment exception exempted most associational activities and concluded that "any negligible burden on the individual's right to associate is outweighed by the compelling interest of the state." *Id.* The *Qutb* court held, and the plaintiffs conceded, that reducing juvenile crime and victimization and promoting juvenile safety were compelling state interests. *Id.* at 492. The court concluded by stating that any infringement upon juveniles' constitution rights "will be minimal," and thus apparently allowable. *Id.* at 495.

25. 11 F.3d at 495-96. The court recognized the fundamental right of parents to "rear their children without undue government influence." *Id.* at 495 (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). However, the court reasoned that the ordinance "presents only a minimal intrusion into the parents' rights" because it only infringed upon their right to allow children, "unaccompanied by a parent or guardian or other authorized person," in public areas during curfew hours. *Id.* at 495-96. The court again highlighted the exemptions and emphasized that parents "may still allow child[ren] to hold a job, to perform an errand, and to seek help in emergency situations." *Id.* at 496; see also Appendix, *infra*.

26. *Qutb v. City of Dallas*, No. 3: 91-CN-1310-R, slip op. at 32 n.70. The only other federal court upholding a curfew ordinance utilized rational relationship review. See *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975). For a discussion of strict scrutiny and rational

never resolved the constitutionality of juvenile curfew ordinances. Indeed, its only statement regarding the issue came in a dissent from a denial of certiorari.²⁷ In *Bykofsky v. Borough of Middletown*,²⁸ Justice Marshall joined by Justice Brennan,²⁹ focused on whether juveniles are entitled to the same due process rights as are adults.³⁰ Justice Marshall believed that this issue required resolution because of the Court's ambiguous precedent regarding juvenile's fundamental rights.³¹ He attacked the constitutionality of curfew ordinances aimed at all citizens but declined to opine about the constitutionality of nocturnal juvenile curfews.³² In denying certiorari to *Qutb* seventeen years later, the Supreme Court again refused to address the constitutionality of juvenile curfew ordinances.³³

Primarily because the exemption clauses equitably balanced efficacy and constitutionality,³⁴ the Fifth Circuit interpreted the Dallas ordinance as a narrowly tailored statute.³⁵ Despite this favorable ruling, room for improvement remains.³⁶ First, the Dallas ordinance lacks clear enforcement provisions and consequently fails to provide uniform standards for police officers implementing the ordinance.³⁷ Second, because the Fifth Circuit failed to clarify the sweeping First Amendment curfew exemption, application of these exemptions is likely to be haphazard.³⁸ Nevertheless, until a federal court overturns a similar curfew,³⁹ the Dallas ordinance will

relationship review, see *infra* notes 55-61 and accompanying text.

27. See *Bykofsky v. Borough of Middletown*, 429 U.S. 964 (1976) (Marshall, J., dissenting).

28. *Id.*

29. *Id.* Justice White was also willing to grant certiorari but did not join Justice Marshall's dissent. *Id.*

30. *Id.* at 965. A little over two years later the Court answered this inquiry in the negative. *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979). For a more complete analysis of *Bellotti*, see *infra* notes 51-61 and accompanying text.

31. 429 U.S. at 965.

32. *Id.*

33. *Qutb v. Bartlett*, 114 S. Ct. 2134 (1994).

34. See *Qutb v. Strauss*, 11 F.3d 488, 494-95 (emphasizing the differences between the Opelousas curfew ordinance, struck down by the same court 13 years earlier in *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1991), and the Dallas ordinance, which the court upheld). The Opelousas ordinance only included two exemptions: when "said minor is accompanied by his parents, tutor or other responsible adult or [when] said minor is upon an emergency errand." *Opelousas*, 658 F.2d at 1067 n.1. On the other hand, the Dallas curfew includes nine "defenses." See Appendix, *infra*.

35. *Qutb*, 11 F.3d 488, 496 (5th Cir. 1993).

36. See *infra* notes 158-89 and accompanying text.

37. See *infra* notes 62-79 and accompanying text.

38. See *infra* notes 85-114, 155, 167-69 and accompanying text.

39. Other courts faced with constitutional challenges to similar curfews may not adopt as charitable a review as the Fifth Circuit. See, e.g., *Pred v. Dade County*, No. 94-03203-CA-21 (Fla. Cir. Ct. Sept.

persist as a benchmark for cities across the country.

This Note asserts that, even though the *Qutb* court upheld the Dallas juvenile curfew ordinance, future drafters should modify the Dallas framework to further insulate such ordinances from constitutional attack. Part II traces the history of curfews from their inception to their modern-day application as crime fighting measures. Part III focuses on typical constitutional attacks on nocturnal juvenile curfew ordinances. Part IV discusses and critiques the *Qutb* decision. Part V compares the Dallas curfew with other municipal curfews and proposes methods that drafters can utilize to deter constitutional challenges. Part VI concludes that only nocturnal juvenile curfew ordinances that legislators carefully and skillfully draft will continue to withstand constitutional challenges and judicial scrutiny.

II. HISTORY OF CURFEW ORDINANCES

Laws requiring people to vacate streets and public areas during nighttime hours have existed for centuries.⁴⁰ Traditionally, federal, state, and municipal legislatures have enacted curfews under emergency and police

21, 1994). The *Pred* court invalidated a Dade County juvenile curfew ordinance because it violated the fundamental right to privacy awarded to Floridians by the state constitution, which "embraces more privacy interests and extends more protection to individuals in those interests than does the [F]ederal [C]onstitution." *Id.*, slip op. at 12, 14. The court explicitly distinguished the Dade County curfew from the Dallas curfew at issue in *Qutb* in two ways. First, *Qutb* involved the Federal Constitution rather than the more stringent Florida Constitution. *Id.* at 14. Second, the plaintiffs in *Qutb* stipulated that the Dallas curfew served a compelling state interest, whereas the plaintiffs in *Pred* did not, and the defendant was unable to establish such an interest. *Id.* In fact, the *Pred* court argued that even if Dade County had established a compelling state interest, the curfew was not the least restrictive means of achieving the interest. *Id.* at 14-15.

Additionally, the court compared a San Antonio, Texas curfew to Dade County's ordinance, highlighting the shortcomings of the latter. *Id.* at 7; see also San Antonio, Tex., Ordinance 76,419 (Sept. 3, 1992). The court criticized Dade County's ordinance's punitive rather than preventative approach, its failure to empower police to detain curfew violating juveniles in a holding facility, and most importantly, its failure to simultaneously implement "educational, social, vocational, and recreational programs designed to reduce juvenile recidivism." *Id.* See also *supra* note 6.

40. See generally Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile-Curfews and the Constitution*, 97 HARV. L. REV. 1163 n.2 (1984). The term "curfew" likely derived from the french word *couvre feu*, 'to cover the fire,' which referenced feudal laws requiring citizens to rake coals over their hearths at dusk and retire for the evening. *Id.* (citing BLACK'S LAW DICTIONARY 344 (5th ed. 1979)). Apparently these "curfews" originated in eleventh-century England during the reign of William the Conqueror. BLACK'S LAW DICTIONARY 381 (6th ed. 1990). There is also evidence that towns in Normandy, France, and Spain started enforcing similar laws during the same time period. *Id.* More recently, legislative curfews have expanded to include periods where citizens must stay indoors during wars or civil commotions. See Note, *infra*, at 1164 n.7 (referencing such curfews).

powers to control civil disorders, riots, and epidemics.⁴¹ Nocturnal juvenile curfew ordinances originated at the beginning of this century, primarily to supplement the perceived inadequate parenting that legislators attributed to the large influx of immigrants entering the United States.⁴² The use of curfews subsided until World War II, when many legislatures adopted nocturnal juvenile curfews in response to the war's massive displacement of parents overseas and the attendant difficulties in preventing juveniles from remaining in public areas late at night.⁴³ More recently, municipal legislatures have enacted and amended curfews to combat juvenile crime and victimization caused by drug and gang related violence.⁴⁴

Although courts have almost uniformly upheld emergency curfews

41. See, e.g., *United States v. Chalk*, 441 F.2d 1277 (4th Cir. 1971) (holding emergency curfew instituted during race riots constitutional); *ACLU v. Chandler*, 458 F. Supp. 456 (W.D. Tenn. 1978) (upholding emergency curfew adopted during local policemen's strike). The Supreme Court also has upheld, rather ignominiously, the constitutionality of emergency curfews imposed upon Japanese-Americans during World War II. See *Hirabayashi v. United States*, 320 U.S. 81 (1943) (holding an emergency curfew applicable only to Japanese-Americans to be constitutionally valid); *Yasui v. United States*, 320 U.S. 115 (1943) (same).

42. Note, *supra* note 40, at 1164 n.9. Approximately 3,000 municipalities adopted curfews at the beginning of this century. *Id.* See also Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66 (1958) [hereinafter *Curfew Ordinances*].

43. *Curfew Ordinances*, *supra* note 42, at 67 n.5.

44. See PHOENIX, ARIZ., CODE § 22-1 (1993); DENVER, COLO., CODE § 34-61 (1994); Washington, D.C., Juvenile Curfew Amendment Act of 1995 (to be codified at D.C. CODE ANN. § 11-48 (1996)); Little Rock, Ark., Ordinance 16,564 (Jan. 4, 1994), ordinance 16,602 (Feb. 15, 1994); Dade County, FL., Ordinance 94-1 (Jan. 18, 1994); ORLANDO, FL., CODE § 43-80 (1994); New Orleans, La., Ordinance 16,498 (May 31, 1994); BALTIMORE, MD., § 96, art. 19 (1993) (act withdrawn 1995); Austin, Tex., Ordinance 900531-C (May 31, 1990), Ordinance 920409-K (Apr. 9, 1992); San Antonio, Tex., Ordinance 76,419 (Sept. 3, 1992). Baltimore government officials decided to cease enforcement of and remodel their curfew after the highest court in Maryland found the language "bona fide organization" unconstitutionally vague and invalidated a duplicative Frederick, Maryland curfew. See *Ashton v. Brown*, 660 A.2d 447 (Md. 1995). See also Melody Simmons, *Baltimore Halts Discredited Curfew*, BALT. SUN, July 8, 1995, at A1; *Retoiled Curfew Law in Baltimore*, WASH. POST, July 28, 1995, at D6 (modeling the new ordinance after the Dallas curfew). For a discussion of the vagueness challenge to curfews, see *infra* notes 62-79 and accompanying text.

Neither the Baltimore nor Frederick city councils modeled their ordinances after the Dallas ordinance, thus limiting the persuasive effect of the *Qutb* decision. Presumably, Baltimore's officials reacted in an attempt to forestall similar suits because the Court of Appeals of Maryland remanded *Brown* to a lower court to determine whether the city of Frederick was liable for assault and battery and false imprisonment. *Id.* at 469-74.

In *Brown*, during "early morning hours," police officers entered a Baltimore restaurant and, believing one of the plaintiffs to be a curfew-violating juvenile, photographed, handcuffed, and searched a nineteen-year-old patron. *Id.* at 452-53. *Brown* responded by filing a potpourri of legal claims including overbreadth, vagueness, First and Fourteenth Amendment violations, Maryland Declaration of Rights violations, assault and battery, false imprisonment, invasion of privacy, intentional infliction of emotional distress, negligence, and gross negligence. *Id.* at 454.

premised on state or federal emergency police powers,⁴⁵ courts have not developed a distinct standard for evaluating the constitutionality of non-emergency nocturnal juvenile curfew ordinances. Not surprisingly, courts addressing this issue have reached strikingly different conclusions.⁴⁶ Nevertheless, in modern times, courts generally agree that the first step in resolving curfew constitutionality is determining whether curfews infringe upon juveniles' fundamental rights.⁴⁷

III. CONSTITUTIONAL ATTACKS

Courts have found a myriad of constitutional deficiencies in curfew ordinances.⁴⁸ This section focuses first on the core, and often determinative issue, of whether the Constitution grants the same fundamental

45. See *supra* note 38 and cases cited therein; *North Carolina v. Dobbins*, 178 S.E.2d 449 (N.C. 1971) (holding that the enactment of an emergency curfew was within the state's police power to control fires and destruction of property during riots); *Glover v. District of Columbia*, 250 A.2d 556 (D.C. 1969) (upholding an emergency curfew barring all citizens except firemen, sanitation workers, police, and medical workers from public areas during a riot). See also John F. Dienelt, Note, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560 (1968); and Glenn C. Frese, Comment, *The Riot Curfew*, 57 CAL. L. REV. 450 (1969).

46. Courts have applied "strict scrutiny" analysis, "rational relationship" analysis, the "void for vagueness" doctrine, and the "overbreadth doctrine." For further explanation of these tests and example cases, see *infra supra* notes 51-98 and accompanying text. Frequently, because plaintiffs lodge multiple constitutional claims, courts must apply several similar tests. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1071-74 (5th Cir. 1981) (expressly limiting its holding to the overbreadth of the ordinance); *Ruff v. Marshall*, 438 F. Supp. 303, 305-06 (M.D. Ga. 1977) (invalidating ordinance because of unconstitutional overbreadth); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1248-50, 1257-58 (M.D. Pa. 1975) (engaging in both vagueness and rational relationship inquiries), *aff'd without op.*, 535 F.2d 1245 (3d Cir.), *and cert. denied*, 429 U.S. 964 (1976).

47. If juveniles and adults enjoyed the same fundamental rights in all circumstances, juvenile nocturnal curfew ordinances would undoubtedly be unconstitutional absent a state of emergency or equivalent state interest. See *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 965 (1976) (Marshall, J., dissenting) (declaring that, "absent a genuine emergency, a curfew aimed at all citizens could not survive constitutional scrutiny" even if it would protect their safety and prevent "nocturnal mischief"). However, the Supreme Court has determined that juvenile and adult fundamental rights are not coextensive. *Bellotti v. Baird*, 443 U.S. 623, 634 (1979) (recognizing that the "constitutional rights of children cannot be equated with those of adults"). For analysis of *Bellotti*, see *infra* notes 51-61 and accompanying text.

48. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1074 (invalidating a curfew solely on overbreadth grounds); *Naprstek v. City of Norwich*, 545 F.2d 815, 819 (2d Cir. 1976) (holding a curfew invalid on vagueness grounds because it failed to specify at what hour the curfew ended); *Waters v. Barry*, 711 F. Supp. 1125, 1132-40 (D.D.C. 1989) (invalidating D.C. curfew because it violated the Due Process and Equal Protection Clause, of the Fifth Amendment); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1386 (D.N.H. 1984) (holding that a municipal curfew was overbroad and violative of the Fourteenth Amendment Due Process Clause); see also *infra* notes 51-150 and accompanying text.

protections to juveniles that it provides to adults.⁴⁹ The remainder of this section discusses constitutional issues that stem from this initial inquiry.⁵⁰

A. *Bellotti v. Baird/Substantive Due Process Rights*

In *Bellotti v. Baird*,⁵¹ the seminal case examining juvenile constitutional rights, the Supreme Court recognized that juvenile rights are not coextensive with adult rights in all situations.⁵² The Court cited three justifications for its position: “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.”⁵³

Following *Bellotti*, most courts have utilized the *Bellotti* factors to determine which juvenile rights are fundamental rights, and to what degree a curfew infringes upon such rights.⁵⁴ Depending on the answers to these inquiries, courts couple the *Bellotti* test with either the “rational relationship”⁵⁵ or the “strict scrutiny” test.⁵⁶ Courts concluding that curfews do

49. See *infra* notes 51-61 and accompanying text.

50. See *infra* notes 62-150 and accompanying text.

51. 443 U.S. 622 (1979).

52. *Id.* at 634. In *Bellotti*, the Court invalidated a Massachusetts statute requiring parental consent, or parental notification and judicial approval, before a physician could perform an abortion on an unmarried woman under the age of 18. *Id.* at 625, 651. The Court found that the statute’s consent provision “unduly burdened” the juvenile’s constitutional rights to seek an abortion by imposing conditions upon her initial access to court. *Id.* at 647. The Court reasoned that a juvenile should be granted an opportunity to receive unrestricted judicial evaluation of her maturity and decision making ability. *Id.*

53. *Id.* at 634. See also *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) (emphasizing that the state “has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgement may sometimes impair their ability to exercise their rights wisely”).

54. See Katherine H. Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1337 (1995) (indicating that twelve out of the sixteen courts reviewing curfew constitutionality since *Bellotti* have utilized its analysis). Including the Eleventh Judicial Circuit court of Florida’s citation to *Bellotti* in *Pred v. Dade County*, No. 94-03203-CA-21 (Fla. Cir. Ct. Sept. 21, 1994), thirteen out of seventeen courts reviewing curfews have utilized *Bellotti*. Courts that apply *Bellotti* include *Waters v. Barry*, 711 F. Supp. 1125, 1136-37 (D.D.C. 1989) (applying *Bellotti* factors to invalidate a curfew ordinance); *McCollester v. City of Keene*, 586 F. Supp. 1381, 1385-86 (D.N.H. 1984) (using *Bellotti* factors to determine “validity of restraints on minors [that] would be unconstitutional if placed on adults,” and finding an infringement of fundamental privacy rights); *People ex rel. J.M.*, 768 P.2d 219, 223 (Colo. 1989) (utilizing the *Bellotti* test and finding no fundamental right infringement); *City of Panora v. Simmons*, 445 N.W.2d 363, 368-69 (Iowa 1989) (applying the *Bellotti* test and upholding restrictions on a juvenile’s non-fundamental right of intracity travel).

55. See *infra* note 58 and accompanying text. For cases applying this test in other constitutional arenas, see *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (applying the rational relationship test in upholding the constitutionality of “economic and social legislation” restricting land use to one-family dwellings); *Euclid v. Amber Realty*, 272 U.S. 365, 391, 395-96 (1926) (utilizing rational

not infringe upon a juvenile's fundamental rights apply the rational relationship test.⁵⁷ Application of rational relationship review increases the likelihood of constitutional validity because the state need only prove that the ordinance is rationally related to the ends of preventing juvenile crime and victimization.⁵⁸ Conversely, courts finding that curfews necessarily infringe upon the fundamental rights of juveniles apply the strict scrutiny test.⁵⁹ Under more burdensome strict scrutiny analysis, the state must prove that the ordinance is narrowly drawn to meet a compelling state interest.⁶⁰ Application of strict scrutiny usually results in invalidation of the examined law.⁶¹

Thus, the *Bellotti* test is critical because it determines which standard a court uses to evaluate the validity of a curfew, and the concomitant level of proof the municipality must meet. However, it is only a preliminary inquiry prefacing the many intricate constitutional issues presented in

relationship test and finding zoning ordinance to be a "valid exercise of authority").

56. See *supra* note 20 and accompanying text.

57. See, e.g., *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1256-58 (M.D. Pa. 1975); *People ex rel. J.M.*, 768 P.2d 219, 223-24 (Colo. 1989) (applying rational relationship test because it is clear that constitutional rights of juveniles and adults are not coextensive); *City of Panora v. Simmons*, 445 N.W.2d 363, 367-69 (Iowa 1989) (upholding a curfew under the rational relationship test); *People v. Walton*, 161 P.2d 498, 501 (Cal. App. Dep't Super. Ct. 1945) (using rational relationship analysis because juveniles and adults do not enjoy coextensive protection of fundamental rights).

58. *Bykofsky*, 401 F. Supp. at 1265.

59. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1074 (5th Cir. 1981) (using strict scrutiny to invalidate a curfew because of insufficient exemptions); *Waters v. Barry*, 711 F. Supp. 1125, 1138 (D.D.C. 1989) (invalidating a Washington, D.C. curfew under strict scrutiny because it is a "bull in a china shop of constitutional values"); *People v. Chambers*, 335 N.E.2d 612, 617 (Ill. App. Ct. 1975) (voiding a curfew under strict scrutiny because the state failed to provide a compelling government interest and the ordinance violated juveniles' fundamental right to travel); *Allen v. City of Bordentown*, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987) (employing a form of strict scrutiny review labelled the "compelling interest test," and invalidating a curfew as unconstitutionally vague, overbroad, and a violation of equal protection rights); *Milwaukee v. K.F.*, 426 N.W.2d 329, 339 (Wis. 1988) (upholding a curfew even under strict scrutiny analysis because the legislature drafted it "as narrowly as practicable"). *But see* *Federle*, *supra* note 54, at 1351 (indicating that the Supreme Court "has applied on 'intermediate-intermediate' level of scrutiny in those cases involving an infringement of a minor's privacy rights and has requested the government to show only a 'significant state interest' to justify the restriction"). See also Peter L. Scherr, Note, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 191 (1993) (proposing that the Supreme Court adopt an intermediate level of scrutiny requiring the government to demonstrate "an important and unique interest in keeping children off the streets at night"). See *supra* note 20 to compare the "strict scrutiny" test to these "intermediate level of scrutiny" tests.

60. See *supra* note 20 and accompanying text.

61. See, e.g., *In re Estate of Greenberg*, 390 So. 2d 40, 42-43 (Fla. 1980) (noting that the strict scrutiny test is "almost always" fatal in its application).

curfew analysis.

B. *Void for Vagueness*

The vagueness doctrine is a common-law principle originating in Fourteenth Amendment Due Process concerns of fair warning and notice.⁶² A law is void for vagueness if it is so ambiguous that reasonable people cannot distinguish permissible conduct from prohibited conduct.⁶³ The vagueness doctrine is premised on two distinct concerns.⁶⁴ Legislatures must draft clear statutes, first, to ensure that the public is able to understand and comply with the law and, second, to prevent arbitrary and discriminatory enforcement.⁶⁵

In *Bykofsky v. Borough of Middletown*,⁶⁶ the Middle District of Pennsylvania upheld a curfew notwithstanding its determination that some Middletown ordinance provisions were unconstitutionally vague.⁶⁷ The

62. See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that a penal statute was violative of due process because its terms were so vague that "men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application").

63. See *id.*

64. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). There are strict standing requirements for plaintiffs who file vagueness claims. See *City of Panora v. Simmons*, 445 N.W.2d 363, 366 (Iowa 1989) (holding that a juvenile lacked standing to press vagueness attack against curfew ordinance where the challenged business establishment owner exemptions did not apply to the minor's disputed violation); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 333-34 (Wis. 1988) (finding liberal standing requirements for overbreadth claims but refusing to similarly liberalize standing requirements for vagueness challenges). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-32, at 1036 (2d ed. 1988) ("Where the vice is vagueness, the litigant asserting the vagueness defense must demonstrate that the statute in question is vague either in all possible applications or at least as applied to the litigant's conduct, and not simply as applied to some others.") (citing *Parker v. Levy*, 417 U.S. 733, 753-58 (1974)). For examples of more liberal standing requirements in "overbreadth" challenges, see *supra* note 88 and accompanying text.

Although some commentators lump overbreadth and vagueness together, see Susan M. Horowitz, Note, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J.L. & SOC. PROBS. 381, 400-02 (1991), the doctrines are not coextensive. See, e.g., *In re Doe*, 513 P.2d 1385 (Haw. 1973) (Richardson, J., dissenting) (noting that, although "[t]he terms 'vagueness' and 'overbreadth' are often heard together," and vague statutes are "of necessity" overbroad, the converse is not always true); *K.F.*, 426 N.W.2d at 333 (noting that vagueness originates from procedural due process, whereas overbreadth concerns originate from substantive due process); see also PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 195-96 (3d ed. 1988) (addressing the relationship between vagueness and overbreadth challenges). To compare the vagueness challenge to the overbreadth challenge, see *infra* notes 85-98 and accompanying text.

65. *Kolender*, 461 U.S. at 357; *Grayned*, 408 U.S. at 108.

66. 401 F. Supp. 1242 (M.D. Pa. 1975).

67. *Id.* at 1249-53. The plaintiff challenged five different ordinance exemptions as containing unconstitutionally vague language. *Id.* The court determined that phrases and terms such as "reasonable necessity," "obstruct," "interfere," "remain," "necessary nighttime activities," and "normal travel"

Bykofsky court relied on a severance clause⁶⁸ to justify its decision and required that the Middletown Council jettison the vague provisions before resuming curfew enforcement.⁶⁹ The court recognized that the precision demanded by the plaintiffs would make drafting a constitutional curfew ordinance, or any criminal statute "next to impossible."⁷⁰

However, in *In re Frank O.*,⁷¹ the California Court of Appeals invalidated a Long Beach curfew for vagueness.⁷² The challenged ordinance failed to provide fair notice as to what constituted the proscribed conduct of "loitering" and contained arbitrary standards for police enforcement.⁷³ The court suggested that it might have upheld the ordinance if it had

constituted legally permissible standards. *Id.* (emphasis added). However, the court declared unconstitutionally vague: "a minor well along the road to maturity," "normal . . . nighttime activity," and "consistent with the public interest." *Id.* (emphasis added). The court, in upholding the former grouping, realized that some level of flexibility is necessary in laws of general application. *Id.* at 1253. The court reasoned that the latter set conferred "almost unbridled discretion" upon the mayor and police and based decision-making on their own "personal predilections and beliefs." *Id.* at 1250-51. The court's reasoning, particularly its flip-flop on its interpretation of "normal," indicates that the vagueness standard also lends itself to patently subjective jurisprudence. *See also* *Allen v. City of Bordentown*, 524 A.2d 478, 487 (N.J. Super. Cir. Law Div. 1987) (comparing *Bykofsky* and finding that the Bordentown ordinance language, "reasonable judgement," was less exacting than the Middletown ordinance language, "reasonable necessity," but ultimately concluding that both are "less instructive than the law requires").

68. Middletown, Pa., Ordinance 662 (March 10, 1975), reprinted in *Bykofsky*, 401 F. Supp. at 1266-73. The ordinance states in relevant part:

Severability is intended throughout and within the provisions of the Curfew Ordinance. If any provision, including inter alia any exception, part, phrase or term, or the application thereof to any person or circumstance is held invalid, the application to other persons or circumstances shall not be affected thereby and the validity of the Curfew Ordinance in any and all other respects shall not be affected thereby.

Middletown, Pa., Ordinance 662, § 9. Prudent curfew drafters include severance clauses hoping that, as in *Bykofsky*, courts will still uphold ordinances even if they find portions unconstitutional. *See, e.g.*, PHOENIX, ARIZ., CODE § 22-1 (1993); Austin, Tex., Ordinance 900531-C (Apr. 9, 1992); Little Rock, Ark., Ordinance 16,602 (Jan. 4, 1994); ORLANDO, FLA., CODE § 43-80 (1994); PHOENIX, ARIZ., CODE § 22-1 (1993); San Antonio, Tex., Ordinance 76,419 (Sept. 3, 1992).

69. 401 F. Supp. at 1252.

70. *Id.* at 1253.

71. 247 Cal. Rptr. 655 (Cal. Ct. App. 1988) (unofficially published by order of the California Supreme Court).

72. *Id.*

73. *Id.* at 656-60 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding that "[a]imless idle stops, pauses and purposeless distraction" are constitutionally protected activities, but also recognizing *In re Nancy C.*, 105 Cal. Rptr. 113 (Cal. Ct. App. 1972), and *People v. Walton*, 161 P.2d 498 (Cal. App. Dep't Super. Ct. 1945), which denied juveniles these rights during curfew hours on the basis of the compelling state interests of juvenile protection and crime reduction).

prohibited minors from lingering for the purposes of committing a crime⁷⁴ or, more plausibly, if the curfew had included reasonable exemptions.⁷⁵ In striking the ordinance, the court refused to artificially clarify the ordinance's manifestly ambiguous language.⁷⁶

In sum, the vagueness doctrine itself can lead to manipulative and capricious jurisprudence.⁷⁷ Vagueness challenges permit judges to arbitrarily label words "ambiguous" and substitute subjective interpretations for objective analysis to fit their conclusions regarding curfew unconstitutionality.⁷⁸ Notwithstanding the subjectivity inherent in the vagueness doctrine, plaintiffs will undoubtedly continue posing vagueness challenges. Although no method of immunizing curfew ordinances from such attacks exists, drafters can thwart many vagueness challenges through the use of comprehensive and precise language, particularly in the definition section of an ordinance. Indeed, some courts have invalidated curfews explicitly because of definitional scarcity and inadequacy.⁷⁹

74. *Id.* at 657. The court's first possible construction of the ordinance questions whether a criminal ordinance can criminalize conduct solely on the basis of an individual's mental state. The answer to this inquiry is beyond the scope of this Note. See generally, Jordan Berns, Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 734 (1989) (concluding that loitering laws often accurately predict future criminal conduct but necessarily raise multiple constitutional and practical concerns); William Trosch, Comment, *The Third Generation of Loitering Laws Goes to Court: Do Laws that Criminalize "Loitering with the Intent to Sell Drugs" Pass Constitutional Muster?*, 71 N.C.L. REV. 513 (1993) (finding that loitering laws represent a clear departure from well-established constitutional protection, which forbids arrests based solely on "mere suspicion of future unlawful conduct" and an offender's mental state).

Still, curfews raise legitimate constitutional concerns because they criminalize a person's mere presence. These concerns return to the core issue in curfew constitutionality, the difference between adult and juvenile fundamental rights. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (concluding that in some circumstances adults and juveniles do not share coextensive fundamental rights).

75. *Frank O.*, 247 Cal. Rptr. at 657. Courts have repeatedly emphasized that legislatures who meticulously draft curfews with exacting exemptions significantly increase the likelihood of the ordinance withstanding constitutional scrutiny. See, e.g., *Qutb v. Strauss*, 11 F.3d 488, 493-94 (5th Cir. 1993) (upholding the Dallas ordinance under strict scrutiny and noting that "the defenses are the most important consideration in determining whether [the] ordinance is narrowly tailored").

76. 247 Cal. Rptr. at 657. Considering the brevity of the ordinance and its complete dearth of exemptions, it is not surprising that the court invalidated the curfew:

No person under the age of eighteen years shall loiter about any public place . . . between the hours of ten p.m. and the time of sunrise of the following day when not accompanied by his parent or legal guardian having legal custody and control of such person, or spouse of such person over twenty-one years of age.

Id. at 656-57 (citing Long Beach, Cal., Ordinance C-5738 § 1 (1983)).

77. See *supra* note 67.

78. See *supra* note 67.

79. See *Ashton v. Brown*, 660 A.2d 447, 456-58 (Md. 1995) (invalidating a curfew because the legislature failed to establish a "commonly and generally accepted meaning" or "clear standard" for

C. First Amendment Attacks

Plaintiffs often pose First Amendment⁸⁰ attacks as freedom of association violations. Courts have adopted differing positions on whether juveniles and adults possess equal rights of freedom of association.⁸¹ There are two distinct types of First Amendment challenges to curfews:⁸² (1) overbreadth challenges,⁸³ and (2) traditional facial invalidity challenges.⁸⁴

1. Overbreadth

The overbreadth doctrine⁸⁵ focuses on the constitutional limitations on statutes that proscribe certain types of conduct.⁸⁶ The core inquiry is whether a plaintiff may challenge a law that legitimately prohibits some conduct, but unconstitutionally infringes upon other protected conduct.⁸⁷

what constitutes a "bona fide organization"); *Allen v. City of Bordentown*, 524 A.2d 478, 481-82 (N.J. Super. Ct. Law Div. 1987) (striking down a curfew in part because the legislature failed to define terms such as "facilities," "disturbance or annoyance," "free passage," or "legitimate business").

80. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

81. *See, e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) (discussing First Amendment rights and declaring that high school students possess "fundamental rights that the [s]tate must respect"); *id.* at 515 (Stewart, J., concurring) (finding that children are not "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (citing *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring)).

82. Although overbreadth claims are not exclusively limited to First Amendment challenges, an overwhelming number of courts determining curfew constitutionality evaluate overbreadth in this context. *See infra* notes 85-98 and accompanying text.

83. *See infra* notes 85-98 and accompanying text. Overbreadth is a Supreme Court created common-law doctrine that originated over fifty years ago. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991) (citing *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940)).

84. *See infra* notes 99-114 and accompanying text.

85. The overbreadth doctrine is often misconstrued by courts and critics, and confusingly intertwined with vagueness challenges. *See supra* note 59. However, the doctrines are distinct. It is quite possible for a statute to contain exacting language and still sweep beyond constitutional limits. *See, e.g., TRIBE, supra* note 64, at 1033 (stating that "[v]agueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision and a vague law need not reach activity protected by the [F]irst Amendment").

86. *See, e.g., Trosch, supra* note 74, at 535-44 (analyzing the overbreadth doctrine as it applies to ordinances prohibiting "loitering with intent to sell drugs"); *see generally*, Fallon, *supra* note 83 (comprehensively examining the development and application of the overbreadth doctrine).

87. Trosch, *supra* note 74, at 535; Fallon, *supra* note 83, at 858-59. In effect, an overbreadth challenge is a claim that, even though the statute in question may legitimately bar the conduct of the accused, it impermissibly prohibits constitutionally protected activities of persons not presently before

To establish standing for an overbreadth challenge a plaintiff must: first, have violated the ordinance, and second, show that the statute, applied according to its terms, would violate the rights of persons not presently before the court, even though it may be constitutional as applied to the plaintiff.⁸⁸

In addition to the standing requirements, the plaintiff must also prove that the court cannot narrowly construe the statute in efforts to revive its constitutional validity.⁸⁹ Finally, the plaintiff must prove that the curfew's "deterrent effect" on constitutionally protected conduct is both "real" and "substantial."⁹⁰

the court, and accordingly must be invalidated. Thus, it is a standing rule providing for the protection of the constitutional rights of individuals affected by the law suit who otherwise would never have had "the opportunity to air [their] constitutional claims." Trosch, *supra* note 74, at 535; Fallon, *supra* note 83, at 858-59.

88. See *Waters v. Barry*, 711 F. Supp. 1125, 1132 (D.D.C. 1989) (finding plaintiffs challenging a curfew ordinance to lack standing to file an overbreadth claim because "the challenged statute would have no greater impact upon the rights of nonparties than it would have upon the rights of the parties before the court," and instead interpreting plaintiffs' claim to be a direct facial challenge to the ordinance's constitutional validity). For further discussion of *Waters*, see *infra* notes 101-06 and accompanying text. For discussion of "traditional facial invalidity," see *infra* notes 99-114 and accompanying text. The *Waters* court also criticized other courts' analyses of the overbreadth doctrine as applied to other juvenile curfew ordinances. *Waters*, 711 F. Supp. at 1133 n.15 (criticizing *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981); *McColleston v. City of Keene*, 586 F. Supp. 1381 (D.N.H. 1984); *Ruff v. Marshall*, 438 F. Supp. 303 (M.D. Ga. 1974); *Allen v. City of Bordentown*, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987)). For a discussion of the chilling effect of overbroad ordinances, see Trosch, *supra* note 74, at 535-36 (citing *U.S. v. Raines*, 362 U.S. 17, 21 (1960)).

89. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Fallon warns that overbreadth is a weaker doctrine than many critics appreciate. Fallon, *supra* note 83, at 853-55. Because of the "coordinate" relationship of state courts and lower federal courts, state civil and criminal actions may continue under a law previously ruled overbroad by a lower federal court. *Id.* at 853-54. And even the Supreme Court lacks the authority to delete a state statute, or to prohibit a state court from more narrowly construing the statute. *Id.* at 854-55. Thus, under Fallon's interpretation, it seems that if federal courts invalidate curfews on overbreadth grounds, state prosecutors may still pursue all non-parties in a state court. See *id.* at 854. Of course, the state is bound by issue and claim preclusion with regard to the parties in the federal suit. Plaintiffs have attempted to avoid these limitations of the overbreadth doctrine by filing class action suits. See, e.g., *Opelousas*, 658 F.2d at 1069 (noting that the lower court, in erroneously denying class certification, had believed a class action to be "unnecessary" because "any relief obtained by [plaintiffs] would inure to the benefit of all similarly situated minors"). However, filing a class action precludes an overbreadth challenge because it renders the second standing requirement inapplicable. See *Waters*, 711 F. Supp. at 1133; see also *supra* note 88 and accompanying text; *infra* note 103 and accompanying text.

90. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Although the First Amendment protects both free speech and free expression, the *Broadrick* Court made a distinction between statutes regulating speech and regulating conduct. *Id.* at 612-15. As to pure speech, the Court found that under the traditional overbreadth doctrine it could invalidate the entire statute if the ordinance "chilled" or intimidated non-party free speech. *Id.* However, with regards to conduct, the Court limited the doctrine

In the curfew context, the overbreadth challenge typically hinges upon whether there are too few exceptions in the ordinance, thereby unconstitutionally infringing upon the rights of juveniles.⁹¹ Although courts traditionally limit the overbreadth doctrine to First Amendment protections,⁹² courts have allowed overbreadth claims against curfew ordinances under the rights of travel and movement.⁹³

In *Johnson v. City of Opelousas*,⁹⁴ the Fifth Circuit invalidated a juvenile curfew ordinance because its overbroad restrictions infringed upon the rights of Opelousas minors to associate and travel freely.⁹⁵ The court determined that, although juvenile and adult First Amendment rights are not coextensive, minors still enjoy a "significant measure" of fundamental association rights.⁹⁶ The court concluded that the Opelousas curfew was overbroad because the "absence of exemptions" stifled "legitimate activities" and "preclude[d] a narrowing construction."⁹⁷ In dicta, however, the Fifth Circuit left unresolved whether a narrowly drawn curfew ordinance could withstand constitutional scrutiny.⁹⁸

to statutes where overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

91. *See, e.g.*, *Johnson v. City of Opelousas*, 658 F.2d 1065, 1074 (5th Cir. 1981).

92. Specifically, courts limit overbreadth to freedoms of speech, expression, and association. *See People v. J.M.*, 768 P.2d 219, 224-25 (1989) (upholding a curfew and noting that the plaintiff failed to meet First Amendment overbreadth standing requirements).

93. *See, e.g.*, *McColleston v. City of Keene*, 586 F. Supp. 1381, 1384 (D.N.H. 1984) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972)) (noting that although neither the Constitution nor the Bill of Rights explicitly created the right of intrastate travel, rather it is a fundamental "part of the amenities of life"); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254-55 (M.D. Pa. 1975) (elucidating that the right to movement finds broad protection under the Fourteenth Amendment Due Process Clause). *See generally supra* notes 115-50 and accompanying text.

94. 658 F.2d 1065 (5th Cir. 1981). In *Opelousas*, a small rural town in western Louisiana, police detained a local juvenile during curfew hours. *Id.* at 1067. The juvenile and his mother filed a claim based on violations of: 1) vagueness, 2) overbreadth, 3) freedoms of speech, association, assembly, and religion, 4) freedom of movement, 5) freedom of interstate travel, and 6) fundamental parenting rights. *Id.* at 1068. However, the court expressly limited its holding to the overbreadth issue. *Id.* at 1074.

95. *Id.* at 1073 n.8.

96. *Id.* at 1072.

97. *Id.* at 1071, 1074. The court referred to one of their earlier decisions, which invalidated as overbroad a municipal ordinance that forbade operators of pinball parlors from allowing juveniles in their establishment without a parent or adult. *Id.* at 1071 & n.8 (citing *Aladdin's Castle, Inc. v. Mesquite*, 630 F.2d 1029 (5th Cir. 1980)). The court noted the Opelousas ordinance was even broader than that invalidated in *Aladdin's Castle* because it prohibited juvenile presence in any public area. *Id.* at 1071 n.8.

98. *Id.* at 1074. At least one commentator inferred that the *Opelousas* court also would have invalidated a more narrowly drawn curfew ordinance (essentially taking the position that curfew ordinances are inherently unconstitutional). *See* Paul M. Cahill, Note, *Nonemergency Municipal Curfew*

2. *Traditional Facial Invalidity*

In traditional facial invalidity challenges under the First Amendment, the plaintiff asserts that the statute is unconstitutional as applied to her.⁹⁹ Thus, unlike overbreadth claims, a plaintiff must prove that the statute directly abridged her own First Amendment rights; its impact on others is irrelevant.¹⁰⁰ Further, unlike overbreadth, a plaintiff can file a class action suit.

In *Waters v. Barry*,¹⁰¹ the plaintiffs filed a class action suit and challenged a District of Columbia curfew ordinance as overbroad on First and Fifth Amendment grounds.¹⁰² The court declined to grant the plaintiffs standing to pursue an overbreadth claim because a class action suit necessarily includes everyone who could be affected by the litigation.¹⁰³ Instead, the court liberally interpreted the plaintiffs' claim as a direct facial challenge to the ordinance's constitutionality.¹⁰⁴ Because the ordinance put all juveniles under "virtual house arrest," without any differentiation between mischievous or innocent nocturnal activities, the court held that it "trample[d] upon" the First Amendment associational rights and the Fifth Amendment liberty rights of the plaintiffs.¹⁰⁵ The court reasoned that it

Ordinances and the Liberty Interests of Minors, 12 FORDHAM URB. L.J. 513, 538-39. However, in light of the *Quib* decision upholding a "more narrowly drawn" ordinance, see *supra* notes 14-25 and accompanying text, the views of this commentator appear misplaced.

99. See, e.g., *Waters v. Barry*, 711 F. Supp. 1125, 1133 (D.D.C. 1989) (rejecting the plaintiff's overbreadth challenge and instead facially invalidating a D.C. curfew under the First Amendment because the "plaintiff class has been certified which . . . includes everyone who might be affected by the Act." Thus, overbreadth is actually a subset of facial invalidity; one that generally provides more lenient standing requirements. See *supra* note 87. However, overbreadth is discussed separately because of its commonality in challenges to the constitutionality of curfew ordinances.

100. See *supra* notes 87-88 and accompanying text.

101. 711 F. Supp. 1125 (D.D.C. 1989).

102. *Id.* at 1132.

103. *Id.* at 1133. The court stated that "when the challenged statute would have no greater impact upon the rights of non-parties than it would have upon the rights of the parties before the [c]ourt—there is no need to employ a traditional overbreadth analysis." *Id.*

104. *Id.* at 1134. The plaintiffs never filed a traditional facial invalidity challenge under the First or Fifth Amendments. See *id.* at 1132. While the court dismissed the overbreadth portion of the claim, it accepted the claim as a traditional First Amendment challenge. *Id.* at 1134. Ostensibly, the *Waters* court replaced the plaintiffs' stated claim with that most appropriate to their allegations and the facts of the case.

105. *Id.* at 1134. Surprisingly and probably erroneously, in light of the Supreme Court's statements on the right of movement, the D.C. district court categorized the right of movement as "rooted in the First Amendment's protection of expression and association." *Id.* (citing *Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding a Dallas ordinance restricting juveniles from admission to dance clubs)). In *Dallas*

was impossible to segregate permissible from impermissible applications of the curfew and concluded that the District of Columbia could not constitutionally apply the ordinance.¹⁰⁶

In *Bykofsky v. Borough of Middletown*,¹⁰⁷ the court upheld the Middletown curfew ordinance in the face of freedom of speech, freedom of association, and freedom of assembly challenges.¹⁰⁸ The court relied on an ordinance exemption that allowed juveniles to exercise their First Amendment rights during curfew hours if they obtained parental permission, if practicable, and provided written notice to the municipal government.¹⁰⁹ The court determined that the "fairly administered notice provision" only negligibly affected the First Amendment rights of juveniles, restricting the time and place of their exercise of such rights, not the *content*.¹¹⁰ Moreover, the negligible impact was outweighed by the Borough's "legitimate interest in the reasonable control of its streets."¹¹¹ In response to the plaintiff's free speech argument, the court concluded that any infringement on speech was merely incidental to the curfew's actual purpose, regulating *conduct*, a right less deserving of protection than pure speech.¹¹²

In sum, courts have interpreted the First Amendment in divergent fashions. Ostensibly, some courts, like the *Waters* court, broadly interpret

v. Stanglin, the Supreme Court refused to extend First Amendment rights to the freedom of movement and to cover a "generalized right of association." *Id.* at 24-25. The court stated, "it is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* at 25.

106. *Id.* at 1133-36.

107. 401 F. Supp. 1242 (M.D. Pa. 1975).

108. *Id.* at 1258-61.

109. *Id.* at 1258. The court cited, among others, *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953), in support of the sufficiency of the notice exemption. *Id.* at 1258-59. The *Bykofsky* court noted that in *Cox*, the Supreme Court "upheld the constitutionality of a statute [that] prohibited parades without a special license, an enactment . . . more restrictive than the mere notice provisions of the curfew ordinance in [the instant case]." *Id.* In *Poulos*, the Court upheld an ordinance requiring persons to obtain a permit before participating in a religious meeting in a public park. 345 U.S. 395. The *Poulos* Court further stated that the First Amendment permits "reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion." *Id.* at 405.

110. *Bykofsky*, 401 F. Supp. at 1258.

111. *Id.*

112. *Id.* at 1260-61 (citing *U.S. v. O'Brien*, 391 U.S. 367, 376-77 (1968)). In *O'Brien*, the Supreme Court determined that when speech and non-speech elements inextricably overlap in the same course of conduct, a compelling government interest in regulating the non-speech element outweighs the incidental infringement on First Amendment protection. 391 U.S. at 376.

the First Amendment so as to preclude any juvenile curfew from surviving First Amendment scrutiny.¹¹³ However, most courts adopt a narrower view.¹¹⁴ To increase the chances of viability in these courts, legislators must draft exemptions that maintain an equilibrium between impermissibly violating First Amendment rights and eviscerating the curfew.

D. Right of Movement: Interstate and Intrastate Travel

Another frequently asserted constitutional challenge to curfew ordinances is the right of movement.¹¹⁵ In *Papachristou v. City of Jacksonville*,¹¹⁶ the Supreme Court firmly established this right as “historically part of the amenities of life” but did not explicitly declare it to be a fundamental right.¹¹⁷ In *Kent v. Dulles*,¹¹⁸ the Court later elucidated freedom of movement to be “basic in our scheme of values” and “part of the ‘liberty’ of which the citizen cannot be deprived without due process of law.”¹¹⁹ Courts have divided the right of movement into rights of interstate and intrastate travel.¹²⁰ Typically, courts recognize the former as a fundamental right,¹²¹ and accord the latter less protection.¹²²

1. Interstate Travel

Courts have repeatedly recognized that citizens enjoy a fundamental right

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

114. *See, e.g., Qutb v. Strauss*, 11 F.3d 488, 495 (5th Cir. 1993) (questioning whether a fundamental right to association even exists); *In re J.M.*, 768 P.2d 219, 224 (Colo. 1989) (finding that the curfew “regulates conduct and does not prevent minors from exercising their First Amendment rights”); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 338 (Wis. 1988) (finding that the curfew did not violate the First Amendment because juvenile fundamental rights are not “automatically coextensive with the rights of adults”).

115. *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1384-85 (D.N.H. 1984); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1261 (M.D. Pa. 1975); *In re Nancy C.*, 105 Cal. Rptr. 113, 118 (Cal. Ct. App. 1972); *In re J.M.*, 768 P.2d 219, 221-23 (Colo. 1989); *City of Panora v. Simmons*, 445 N.W.2d 363, 366-69 (Iowa 1989).

116. 405 U.S. 156 (1972).

117. *Id.* at 164.

118. 357 U.S. 116 (1958).

119. *Id.* at 125-26 (1958). The Court references the Due Process Clause of the Fifth Amendment. However, its statement is presumably equally applicable to the Due Process Clause of the Fourteenth Amendment.

120. *See infra* notes 123-50 and accompanying text.

121. *See infra* notes 123-36 and accompanying text.

122. *See infra* notes 137-50 and accompanying text.

to interstate travel. The textual basis for this right is unclear¹²³ but traditionally courts have relied on the Privileges and Immunities clauses,¹²⁴ and the Commerce Clause to justify its existence.¹²⁵ For instance, in *Aptheker v. Secretary of State*,¹²⁶ the Supreme Court held a federal statute unconstitutional because it barred a member of the Communist party from making an application for or using a passport.¹²⁷ The Court reasoned that the provision "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment."¹²⁸ Four years later, in *Shapiro v. Thompson*,¹²⁹ the Court reiterated that the right to travel interstate is a fundamental right and invalidated a District of Columbia statutory provision that required welfare recipients to reside in D.C. for an entire year immediately before applying for benefits.¹³⁰

In interpreting curfews, courts have recognized that the scope of juveniles' fundamental right of interstate travel does not equal that of adults.¹³¹ Nonetheless, such courts have held curfews to unconstitutionally infringe upon juveniles' rights to travel interstate.¹³² Courts upholding curfews have also highlighted exemptions permitting interstate travel during curfew hours.¹³³ In *Bykofsky*,¹³⁴ the court noted that the ordinance

123. See *City of Panora v. Simmons*, 445 N.W.2d 363, 367 (Iowa 1989) (citing *TRIBE*, *supra* note 64, § 16-8, at 1455 n.3); see also Horowitz, *supra* note 64, at 387-88 (noting that the Supreme Court has not "[found] it necessary to attribute the right of travel to any particular constitutional provision") (citing *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986)).

124. U.S. CONST. art. IV, § 2, cl. 1; *id.* at amend. XIV, § 1.

125. See *TRIBE*, *supra* note 64, § 16-8, at 1455 n.3; Horowitz, *supra* note 64, at 385-88.

126. 378 U.S. 500 (1964).

127. *Id.* at 506.

128. *Id.* at 505. See also *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269-70 (1974) (holding that an Arizona statute, requiring residency for a year as a condition for receiving non-emergency medicare, created an "invidious classification" and thus infringed upon the right of interstate travel "by denying newcomers 'basic necessities of life.'"); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (holding that durational residence laws unconstitutionally restrict the right of free travel).

129. 394 U.S. 618, 622, 630-31 (1969). The Court stated that "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 629.

130. *Id.*

131. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981); *McCollester v. City of Keene*, 586 F. Supp. 1381, 1384-85 (D.N.H. 1984).

132. See, e.g., *McCollester*, 586 F. Supp. at 1384-85 (invalidating a municipal curfew ordinance because "with the exception of employment travel, [it] prohibits the entire spectrum of unchaperoned juvenile activity, ranging from delinquent to heroic").

133. See *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1261 (M.D. Pa. 1975).

exempted juveniles engaged in interstate travel from the curfew's scope.¹³⁵ Therefore, the court concluded, the ordinance did not infringe on the fundamental right to interstate travel.¹³⁶

2. *Intrastate Travel*

Like interstate travel, the right to travel intrastate is a fundamental right.¹³⁷ The Supreme Court recognized the fundamental right to intrastate travel in the 1920 case of *United States v. Wheeler*.¹³⁸ In *Wheeler*, the Court established that citizens have a fundamental right to move freely from place to place and enjoy "free ingress thereto and egress therefrom."¹³⁹ Fifty years later, in *Papachristou v. Jacksonville*,¹⁴⁰ the Court invalidated a vagrancy statute¹⁴¹ that prohibited loitering in public, noting that the freedom of movement permits one to exercise this right even if aimlessly wandering and loitering.¹⁴²

In many curfew cases, courts have recognized that adults enjoy a fundamental right to travel intrastate,¹⁴³ however, unlike interstate rights, that recognition does not uniformly extend to juveniles.¹⁴⁴ For example,

134. *Id.*

135. *Id.* at 1261.

136. *Id.*

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

138. *Id.*

139. *Id.* at 293.

140. 405 U.S. 156 (1972).

141. *Id.* at 156-58 n.1. For an argument that *Papachristou* recognizes a constitutional "right to loiter," see Trosch, *supra* note 74, at 551. Trosch's article argues that contemporary statutes that criminalize "loitering with intent to sell drugs" are unconstitutional in light of the constitutional rights recognized in *Papachristou*. *Id.* at 513-15, 551.

142. *Id.* at 164.

143. See *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254-55 (M.D. Pa. 1975); *In re J.M.* 768 P.2d 219, 221 (Colo. 1989); *City of Panora v. Simmons*, 445 N.W.2d 363, 367 (Iowa 1989).

144. See *Bykofsky*, 401 F. Supp. at 1256 (distinguishing juveniles' right to intrastate travel from adults' rights because the "interest of minors . . . is not nearly so important to the social, economic, and healthful well-being of the community as the free movement of adults"); *J.M.*, 768 P.2d at 221-23 (concluding that a juvenile's liberty interest in "being on the streets after 10:00 o'clock" is not a fundamental right); *Simmons*, 445 N.W.2d at 366-69 (concluding that minors' right of intracity travel is not a fundamental right).

Both *In re J.M.* and *Panora* rely on *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944) to support the argument that the government may constitutionally restrain juveniles' freedom of intrastate movement. In *Prince*, the Supreme Court allowed the state of Massachusetts to restrict a minor's right to use the streets to sell religious magazines. 321 U.S. at 170. The Court reasoned:

The state's authority over children's activities is broader than over like actions of adults. This is particularly true of public activities and in matters of employment . . .

in *In re J.M.*,¹⁴⁵ the Supreme Court of Colorado upheld a municipal curfew and determined that juveniles' liberty interests in the freedom of intrastate movement did not constitute a fundamental right.¹⁴⁶ Similarly, in *Panora v. Simmons*,¹⁴⁷ the Iowa Supreme Court concluded that the fundamental right of intrastate movement did not extend to juveniles.¹⁴⁸ Accordingly, the court applied the rational relationship test, and upheld the Panora curfew as constitutional.¹⁴⁹

In synthesizing the preceding cases, no clear standard emerges for interpreting curfew restrictions on interstate and intrastate travel. Ostensibly, courts would have trouble overturning an ordinance that exempted interstate travel from curfew restrictions. However, inclusion of such an exemption in ordinances in municipalities that rest on state borders could lead to curfew circumvention.¹⁵⁰ Furthermore, a similar exemption for intrastate travel would render a curfew meaningless. Thus, although there is no easy solution, effective curfews must include movement exemptions that strike a balance between constitutionality and permitting juveniles to freely roam the streets in crime-ridden areas.

IV. ANALYSIS OF *QUTB V. STRAUSS*

The Fifth Circuit's decision in *Qutb* prompted many legislatures to draft ordinances modeled after the Dallas ordinance.¹⁵¹ Undoubtedly, the Dallas ordinance is an improvement upon many of its draconian predecessors.¹⁵² However, curfew proponents should not delightfully conclude that the Dallas curfew is a constitutional cure-all. This is particularly true considering the Fifth Circuit's charitable treatment and cursory analysis of the

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

Id. at 168-70.

145. 768 P.2d 219 (Colo. 1989).

146. *Id.* at 223.

147. 445 N.W.2d 363, 369 (Iowa 1989).

148. *Id.*

149. *Id.*

150. For example, in Washington, D.C., where the city council adopted an ordinance modeled on the Dallas curfew, juveniles residing in the Northern Virginia or Maryland suburbs can drive into the Capital. See Washington, D.C., Juvenile Curfew Amendment Act of 1995 (to be codified at D.C. CODE ANN. § 11-48 (1996)). If police stop their vehicle, juveniles need only tell the officer that they were traveling home to exempt themselves from the curfew. *Id.*

151. See *supra* note 150.

152. For an example of such an ordinance, see notes 71-76 and accompanying text.

Dallas curfew.

The most glaring shortcoming is the court's perfunctory treatment of the ordinance provision that exempts any juvenile exercising conduct protected by the First Amendment.¹⁵³ The court praises it as the most notable exemption but fails to state how Dallas will apply the exception.¹⁵⁴ Interpreting the exemption language plainly would cause curfew enforcement to lapse into inane futility. Any juvenile exercising any form of expression, religious observance, association, or assembly would be exempt from curfew prohibitions.

Additionally, even though the court applied the strict scrutiny test, usually the most rigorous standard, the court did not require the city to produce precise data regarding the number of juvenile violations and victimizations during curfew hours. Basing its decision on Supreme Court precedent, the court refused to demand "scientifically certain criteria."¹⁵⁵

Furthermore, the *Qutb* court did not scrutinize the questionable clarity of the enforcement standards. The Dallas ordinance merely states that an "officer shall not issue a citation or make an arrest . . . unless the officer *reasonably believes* that an offense has occurred."¹⁵⁶ In response to a vagueness challenge, less forgiving courts could invalidate the ordinance because the reasonable belief standard does not allow reasonable persons to distinguish permissible from prohibited conduct.¹⁵⁷

V. PROPOSALS

In light of the inherent constitutional infirmities of curfew ordinances¹⁵⁸ and a recent decision invalidating a curfew loosely modeled after the Dallas ordinance,¹⁵⁹ legislators should examine ways to further shield *Qutb*-like curfews from constitutional attack while retaining sufficient impact to deter crime.

153. See Appendix, *infra*, § (c)(1)(H).

154. *Qutb*, 11 F.3d 488, 494 (5th Cir. 1993).

155. *Id.* at 493 & n.7 (citing *Ginsberg v. New York*, 390 U.S. 629, 642 (1968)). The court merely required that the city "demonstrate that the classification created by the ordinance 'fits' the state's compelling interest." *Id.* at 493.

156. See Appendix, *infra*.

157. See *supra* notes 62-65 and accompanying text for a discussion of the vagueness standards. See also *infra* notes 163-65 and accompanying text for a possible defense to a vagueness challenge.

158. See *supra* notes 48-154 and accompanying text.

159. *Pred v. Dade County*, No. 94-03203-CA-21 (Fla. Cir. Ct. Sept. 21, 1994) (invalidating a curfew as violative of the Florida Constitution). For a more complete discussion of *Pred*, see *supra* note 39.

First, drafters should include a provision implementing an identification card program. Critics have argued that curfews impermissibly burden youthful appearing adults because police frequently stop and question these individuals, believing that they are juveniles in violation of their curfew.¹⁶⁰ An identification card program would give juveniles the option of obtaining a photo I.D. before or after their seventeenth birthday.¹⁶¹ Undeniably, the program would produce financial burdens.¹⁶² However, if drafters adopted a permissive standard, i.e., giving juveniles the option of obtaining an I.D., it would mitigate costs and increase efficiency. Those juveniles who believe they appear old enough or find police questioning tolerable could forego obtaining an identification card. Additionally, police could avoid useless inquiries with persons outside the scope of the curfew.

Similarly, drafters should consider modifying the First Amendment exception by inserting a *Bykofsky*-modeled "permit plan."¹⁶³ Notwith-

160. See *Michigan v. Smith*, 276 N.W.2d 471 (Mich. Ct. App. 1979) (holding curfew ordinance not to "impinge on freedom of movement of youthful looking persons over age of 18").

161. Clearly, in many instances driver's licenses would preclude the need for an identification card program. However, for juveniles above sixteen that do not acquire driver's licenses, the identification card program provides a free opportunity to forestall unnecessary inquiries by police.

162. As stated at the beginning of this Note, and implicit throughout, if a municipality desires effective and constitutional curfew ordinances, it must be willing to accept concomitant financial burdens.

163. Middletown, Pa., Ordinance 662 (March 10, 1975), reprinted in *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1269-70 (M.D. Pa. 1975). The permit provisions, § 5(g), referencing individual juveniles, and § 5(h), referencing groups of juveniles, state in relevant part:

(g) When authorized, by special permit from the Mayor, carried on the person of the minor thus authorized, as follows. When necessary nighttime activities of a minor . . . may be inadequately provided for by other provisions of this ordinance, then recourse may be had to the Mayor . . . for a special permit as the circumstances warrant [or]

(h) [issuing a group permit] to more minors than can readily be dealt with on an individual special permit basis . . . [The permit] should be issued sufficiently in advance . . . and shall define the activity, the scope of the use of the streets permitted, the period of time involved . . . and the reason for finding that such regulation is reasonably necessary . . .

Id. Section 5(g) also requires that the permit include the minor's and parent's names, addresses, and telephone numbers, and the minor's height, weight, sex, eye and hair color. *Id.*

Drafters should select precise language to create a permit provision because the *Bykofsky* court severed vague language from Middletown's original permit provision. *Id.* at 1251. Furthermore, permit provision drafters should recognize that the *Bykofsky* court upheld the plaintiff's First Amendment challenge under the Middletown curfew's "notice" requirement not under the "permit plan." *Id.* at 1258. The notice provision exempts juveniles that submitted written notice, with the juvenile's and, if "practicable," parents' signatures, to a city official prior to exercising First Amendment rights. *Id.* The notice provision differs from the permit plan because it does not require administrative pre-approval, the juvenile need only submit notice. *Id.* Thus, the notice requirement appears to have limited utility because without any authoritative review of submitted notices, as in the permit plan, juveniles could frequently utilize the notice provisions to circumvent the curfew.

standing other ordinance exemptions, the plan would allow juveniles to engage in activities protected by the First Amendment during curfew hours only if they first obtain a permit approved by a state administrative authority.¹⁶⁴ Under the Dallas ordinance, a juvenile falls under its First Amendment exemption merely by exercising "First Amendment rights protected by the United States Constitution."¹⁶⁵ Although, some critics have condemned permit proposals as unduly burdening constitutionally protected activities,¹⁶⁶ some form of limitation on juvenile exercises of First Amendment rights is essential to prevent curfew futility, which would assuredly result from inclusion of an unqualified First Amendment exemption. A *Bykofsky* modeled permit plan would effectively straddle the line between unconstitutionality and curfew futility.

Legislators should also consider modifying the language establishing the ordinance enforcement standard from "reasonable belief"¹⁶⁷ to "probable cause." The inherent ambiguity in the reasonable belief standard unnecessarily invites vagueness attacks.¹⁶⁸ Substitution of the uniform and recognized probable cause standard, buttressed with an explicit definition,¹⁶⁹ would legitimize the standard and give clear guidelines to juveniles, law enforcement officials, and judges alike.

Similarly, the ordinance's enforcement section should distinguish between probable cause to arrest and the less definite standard requiring officers to stop and question persons who are apparently juveniles violating the curfew. Some courts have differentiated between these standards and determined that even if an officer lacks probable cause to arrest an individual, the officer may detain and question that person to determine whether probable cause exists.¹⁷⁰ The Supreme Court, however, noted in

164. See *supra* note 162.

165. See Appendix, *infra*, § (c)(1)(H).

166. See Martin P. Hogan, Casenote, *Waters v. Barry: Juvenile Curfews—The D.C. Council's "Quick Fix" for the Drug Crisis*, 1 GEO. MASON U. C.R. L.J. 313, 323-26 (1990) (concluding that prior registration or permit requirements unconstitutionally infringe upon protected rights).

167. See Appendix, *infra*, § (d).

168. See *supra* notes 62-79 and accompanying text.

169. "Probable cause" is defined as:

Reasonable cause; having more evidence for than against. A reasonable ground for belief in certain alleged facts. A set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction.

BLACK'S LAW DICTIONARY 1201 (6th ed. 1990).

170. See *In re Nancy C.*, 105 Cal. Rptr. 113, 117 (Cal. Ct. App. 1972) (stating that a police officer may stop and question a person and "[i]f the investigation reveals probable cause, then the officer may arrest the suspect and conduct a reasonable search"); *Michigan v. Smith*, 276 N.W.2d 481, 484 (Mich.

Terry v. Ohio that an individual is not required to answer questions in an investigatory stop and that failure to answer questions alone does not provide an officer with probable cause to arrest the individual.¹⁷¹ Still, *Terry* does not preclude a curfew arrest if an officer otherwise establishes probable cause that the detainee is a juvenile violating the curfew.¹⁷²

Additionally, municipalities¹⁷³ that particularly fear challenges to the ordinance based on Equal Protection grounds,¹⁷⁴ should mandate¹⁷⁵ that police officers question any apparent¹⁷⁶ curfew violator. Currently, under the Dallas curfew, enforcement is not mandatory.¹⁷⁷ A mandatory enforcement requirement would forestall claims of arbitrary or discriminatory enforcement because police officers could not selectively choose which juveniles to stop and question. Of course, this too is a trade-off between constitutional surety and curfew practicality. Such a requirement would strain financial and human resources and possibly reduce police and community support.

Another option, although one that could reduce the overall effectiveness of the curfew is to limit curfews to specific geographic areas.¹⁷⁸ A few

Ct. App. 1979) (finding that probable cause to arrest is not necessary for an investigatory stop).

171. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).

172. *See, e.g., Kolender v. Lawson*, 461 U.S. 352 (1983). In *Kolender*, Justice Brennan indicated that "in some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions . . . viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause." *Id.* at 366 n.4. Thus, under *Kolender*, a police officer establishes reasonable suspicion when he or she observes an individual during curfew hours who appears sixteen or under, and establishes probable cause when the purported juvenile refuses to answer the officer's questions.

173. The provision should be included in curfews in municipalities with large minority populations or minority populations concentrated in high crime areas.

174. Knowledgeable parties have stated their fear that curfews could be enforced in a discriminatory fashion. *See Hirth, supra* note 5, at A2 (quoting Bruce Winick, University of Miami Law Professor); Potok, *supra* note 1, at A3 (The ACLU argues curfews can be enforced primarily against inner-city youth, mainly minorities). *See also Chase v. Twist*, 323 F. Supp. 749 (E.D. Ark. 1970) (upholding a curfew and rejecting the African-American plaintiffs' claim that discriminatory police enforcement violated their Fourteenth Amendment equal protection rights).

175. The author realizes that mandatory requirements would, understandably, face serious opposition. Police resources would undoubtedly be strained. Nonetheless, this drawback must be weighed against the possibility of the curfew being held to violate the Equal Protection Clause. *See supra* note 174.

176. Obviously, if a juvenile falls within a curfew exemption by, for example, accompanying a parent or playing on his or her front steps, a police officer should not stop and question the juvenile.

177. *See Appendix, infra.*

178. For example, the *Qutb* court explicitly noted that it could "envision the constitutionality of a narrowly drawn nocturnal juvenile curfew ordinance that applies only in a municipality's high risk, high crime areas or danger zones." *Qutb v. Strauss*, 11 F.3d 488, 496 n.11 (5th Cir. 1993). However, limiting

curfews have confined their scope to municipal areas that experience the highest crime rates.¹⁷⁹ However, such territorial curfews could force crime to migrate to municipal areas outside the curfew's jurisdiction. Presumably, the likelihood of such an occurrence is alleviated by city-wide curfews, particularly in large cities,¹⁸⁰ because of the burdens associated with having to travel outside the city.

Also, legislators should consider drafting curfews that contain provisions for automatic repeal.¹⁸¹ "Sunset provisions,"¹⁸² which limit laws to specific time periods, would deflect arguments that municipalities should enact curfews only to quell temporary emergency situations. Automatic repeal provisions would also rebut claims that legislators who draft permanent curfews in response to emergency situations allow these ordinances to remain on the books as unenforced, obsolete laws. Further,

curfews to these high crime regions would probably increase the risk of discriminatory enforcement claims under the Fourteenth Amendment equal protection clause. *See also* Federle, *supra* note 54, at 1366 (discussing curfews used "as policing tool[s] in certain 'high crime' areas" and suggesting "that the enactment and enforcement of curfew laws may be racially motivated."). *See also supra* note 170.

179. *See, e.g.*, Austin, Tex., Ordinance 900531-C (Apr. 9, 1992) (demarcating boundaries, specifically by street names, in two different downtown areas); ORLANDO, FL., CODE § 43-80 (1994) (restricting an ordinance to the downtown areas including a garage, sidewalks, and "rights-of-way abutting" streets). *See also supra* note 174.

180. In sprawling cities like Chicago or Los Angeles, especially considering the latter's transportation problems, a city-wide curfew would be particularly effective in regulating and reducing crime in specific areas without it migrating to other locales.

181. *See* Cahill, *supra* note 98, at 558 (proposing that legislators draft a temporary curfew under a state's emergency police powers). However, temporary laws are problematic because, as opposed to laws incorporating automatic repeal, they could become permanent legislation if the legislature fails to affirmatively intervene after the temporary period has elapsed.

182. Sunset provisions automatically repeal legislation on a specific date. BLACK'S LAW DICTIONARY defines a sunset law as:

A statute or provision in a law that requires periodic review of the rationale for the continued existence of the particular law or the specific administrative agency or other governmental function. The legislature must take positive steps to allow the law, agency, or functions to continue in existence by a certain date or such will cease to exist.

BLACK'S LAW DICTIONARY 1436 (6th ed. 1990). *See, e.g.*, Dade County, Fla., Ordinance 94-1, § 15 (Jan. 18, 1994) (mandating that the ordinance expire five years from its inception) (held unconstitutional in *Pred v. Dade County*, No. 94-03203-CA-21 (Fla. Cir. Ct. 1994); WASHINGTON, D.C., Juvenile Curfew Amendment Act of 1995 (to be codified at D.C. CODE ANN. § 11-48 (1996)) (requiring automatic repeal two years after enactment). Sunset provisions should probably be limited to between six and eighteen month periods. This limitation would increase curfew viability by adhering to the rationale for temporary curfews—that legislators need to enact curfews only to control juvenile crime and victimization problems that have burgeoned into epidemic emergencies. *See supra* note 3 and accompanying text.

sunset provisions would permit legislatures to obtain community feedback,¹⁸³ review curfew effectiveness, and ultimately, require a new vote to retain or amend an existing curfew.¹⁸⁴

Furthermore, curfew ordinances should protect juveniles from police and parental abuse. Curfews should include provisions prohibiting officers from handcuffing¹⁸⁵ juveniles unless the officer has reason to believe the juvenile may be violent or dangerous.¹⁸⁶ A "no handcuffing" provision would send a clear message to police officers to treat juveniles appropriately and would mollify curfew opponents who are concerned that officers would treat juvenile curfew offenders like adult arrestees. Additionally, ordinances should impose sanctions upon parents who negligently or purposefully allow their children to remain in juvenile detention centers.¹⁸⁷ Otherwise, irresponsible parents could evade contact with law enforcement officials and take advantage of the curfew by permitting their children to remain in custody indefinitely.

Finally, municipalities should develop programs that facilitate enforcement of the curfew. Public officials should work with police to design interactive programs, possibly in connection with local parent-teacher

183. Hearings would effectively obtain feedback from law enforcement officials, parents, school officials, and most importantly, affected juveniles. Indeed, some curfews contain reporting requirements to keep legislators informed about curfew effectiveness. *See* DENVER, COLO., CODE § 34-62.5 (1994) (requiring the city attorney's office to provide the city council with bi-monthly reports, including the number of curfew citations, sentence imposed, offender ethnicity, sex, and age, and a map depicting the geographic location of arrests).

184. *See supra* note 179.

185. A "no-handcuffing" provision surfaced in an early draft of Washington D.C.'s curfew but the city council inexplicably deleted it from the final version. WASHINGTON, D.C., Juvenile Curfew Amendment Act of 1995 (to be codified at D.C. CODE ANN. § 11-48 (1996)).

186. Police could determine whether a juvenile posed a threat by observing an offender's conduct, or upon a finding that the juvenile has been arrested for prior violent offenses or has outstanding arrest warrants.

187. *See, e.g.,* New Orleans, La., Ordinance 16,498 (May 31, 1994) (establishing a fine up to \$500 for a custodian to "unreasonably permit a minor to remain in city custody for more than twenty-four hours after the minor has been detained"). The New Orleans curfew, in addition to including possible \$500 fines and 60 hours of community service for custodians, uses the curfew as a vehicle for intervention with parents who allow their children to violate the curfew. *See id.* The ordinance permits judges to mandate that parents "obtain counseling or attend classes or programs to improve parenting and child-raising skills." *Id.* § 1(e)(2). After three offenses by custodians, the ordinance requires that the "record of the prosecution . . . be transmitted by the City Attorney to the District Attorney, for review for possible action under the Louisiana Children's Code." *Id.* § 1(e)(3). *See also* San Antonio, Tex., Ordinance 76,419 (Sept. 3, 1992) (requiring, after a minor's second curfew violation, that the Youth Services Division of the Community Initiatives Department schedule a conference with the parents and the child concerning the curfew and the "[c]ity's expectation and requirement for parental control").

organizations, aimed at informing juveniles about curfew restrictions and, more importantly, the underlying purpose of protecting juveniles from crime. Sending police into schools to educate juveniles about curfew purposes, crime reduction, and juvenile protection would mitigate apprehension about the curfew and reduce animus towards police. Additionally, to reduce travel costs and increase efficiency,¹⁸⁸ municipalities should develop strategically located juvenile holding centers.¹⁸⁹

VI. CONCLUSION

Juvenile curfews will never extinguish juvenile or nocturnal crime. However, if legislators prudently draft constitutional provisions and collaborate with police to enforce curfews, municipalities can utilize these ordinances as effective crime-fighting tools. Thus, before hastily adopting and enforcing curfews municipality officials should at least consider three concerns: first, the tenuous constitutionality of nocturnal juvenile curfews; second, the burdensome financial and societal costs of enacting and enforcing curfews; and third, the need to implement curfews with other programs designed to reduce juvenile crime.¹⁹⁰ Collectively these steps will increase the possibility of achieving curfews' stated ends: crime reduction and juvenile protection.

Kevin C. Siebert

188. A poorly structured detention program would serve as a disincentive for police enforcement if most juvenile arrests lead to time-consuming drives and parent tracking expeditions.

189. For example, in Phoenix, it takes police only twenty minutes or so to transport juveniles to one of the four detention centers staffed by "police officers and city recreation employees." Laura Laughlin, *Curfew Cuts Crime by Phoenix Juveniles: Violence is Down Under New Program*, S.F. CHRON., Sept. 11, 1993, at A9. At the center, police photograph, fingerprint, and file reports on juveniles, and attempt to contact a parent or custodian. *Id.* Additionally, police interview juveniles regarding their personal lives and if warranted, "direct them toward appropriate social services agencies or programs." *Id.* However, Phoenix experienced severe human resource utilization problems because police haphazardly scattered detention centers throughout the city. Telephone Interview with Marvin Sondag, Assistant City Attorney, Phoenix, Ariz. (June 15, 1994). Phoenix police quickly rectified their ill-advised plans and strategically located holding centers to ensure efficient curfew citation and detention. *Id.*

190. For a discussion of programs municipalities have adopted to combat juvenile crime see *supra* note 6. For a discussion of programs that could facilitate curfew enforcement see *supra* Section V.

APPENDIX

The Dallas Curfew ordinance provides:

ORDINANCE NO. 21309

An ordinance amending Sections 31-33, "Curfew Hours for Minors," of CHAPTER 31, "OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended; repealing Section 2 of Ordinance No. 20966; defining terms; creating offenses for minors, parents and guardians of minors, and business establishments violating curfew regulations; providing defenses; providing for enforcement by the police department; providing for waiver by the municipal court of jurisdiction over a minor when required under the Texas Family Code; providing for review of this ordinance in lieu of Ordinance No. 20966 within six months after the date of initial enforcement; providing a penalty not to exceed \$500; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city council has determined that there has been an increase in juvenile violence, juvenile gang activity, and crime by persons under the age of 17 in the city of Dallas; and

WHEREAS, persons under the age of 17 are particularly susceptible by their lack of maturity and experience to participate in unlawful and gang-related activities and to be victims of older perpetrators of crime; and

WHEREAS, the city of Dallas has an obligation to provide for the protection of minors from each other and from other persons, for the enforcement of parental control over and responsibility for children, for the protection of the general public, and for the reduction of the incidence of juvenile criminal activities; and

WHEREAS, a curfew for those under the age of 17 will be in the interest of the public health, safety, and general welfare and will help to attain the foregoing objectives and to diminish the undesirable impact of such conduct on the citizens of the city of Dallas; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Section 31-33, "Curfew Hours for Minors," of CHAPTER 31, "OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended, is amended to read as follows:

"SEC. 31-33. CURFEW HOURS FOR MINORS.

(a) Definitions. In this section:

(1) CURFEW HOURS means:

(A) 11:00 p.m. on any Sunday, Monday, Tuesday, Wednesday, or

Thursday until 6:00 a.m. of the following day; and

(B) 12:01 a.m. until 6:00 a.m. on any Saturday or Sunday.

(2) **EMERGENCY** means an unforeseen combination of circumstances or the resulting state that calls for immediate action. The term includes, but is not limited to, a fire, a natural disaster, or automobile accident, or any situation requiring immediate action to prevent serious bodily injury or loss of life.

(3) **ESTABLISHMENT** means any privately-owned place of business operated for a profit to which the public is invited, including but not limited to any place of amusement or entertainment.

(4) **GUARDIAN** means:

(A) a person who, under court order, is the guardian of the person of a minor; or

(B) a public or private agency with whom a minor has been placed by a court.

(5) **MINOR** means any person under 17 years of age.

(6) **OPERATOR** means any individual, firm, association, partnership, or corporation operating, managing, or conducting any establishment. The term includes the members or partners of an association or partnership and the officers of a corporation.

(7) **PARENT** means a person who is:

(A) a natural parent, adoptive parent, or step-parent of another person; or

(B) at least 18 years of age and authorized by a parent or guardian to have the care and custody of a minor;

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

(9) **REMAIN** means to:

(A) linger or stay; or

(B) fail to leave premises when requested to do so by a police officer or the owner, operator or other person in control of the premises.

(10) **SERIOUS BODILY INJURY** means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(b) **Offenses.**

(1) A minor commits an offense if he remains in any public place or on the premises of any establishment within the city during curfew hours.

(2) a parent or guardian of a minor commits an offense if he knowingly permits, or by insufficient control allows, the minor to remain in any public place or on the premises of any establishment within the city during curfew hours.

(3) The owner, operator, or any employee of an establishment commits an offense if he knowingly allows a minor to remain upon the premises of the establishment during curfew hours.

(c) Defenses.

(1) It is a defense to prosecution under Subsection (b) that the minor was:

(A) accompanied by the minor's parent or guardian;

(B) on an errand at the direction of the minor's parent or guardian, without any detour or stop;

(C) in a motor vehicle involved in interstate travel;

(D) engaged in an employment activity, or going to or returning home from an employment activity, without any detour or stop;

(E) involved in an emergency;

(F) on the sidewalk abutting the minor's residence or abutting the residence of a next-door neighbor if the neighbor did not complain to the police department about the minor's presence;

(G) attending an official school, religious, or other recreational activity supervised by adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the minor, or going to or returning home from, without any detour or stop, an official school, religious or other recreational activity supervised by adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the minor;

(H) exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly; or

(I) married or had been married or had disabilities of minority removed in accordance with Chapter 31 of the Texas Family Code.

(2) It is a defense to prosecution under Subsection (b)(3) that the owner, operator, or employee of an establishment promptly notified the police department that a minor was present on the premises of the establishment during curfew hours and refused to leave.

(d) Enforcement.

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 in Subsection (c) is present.

(e) Penalties.

(1) A person who violates a provision of this chapter is guilty of a separate offense for each day or part of a day during which the violation is committed, continued, or permitted. Each offense, upon conviction, is punishable by a fine not to exceed \$500.

(2) When required by Section 51.08 of the Texas Family Code, as amended, the municipal court shall waive original jurisdiction over a minor who violates Subsection (b)(1) of this section and shall refer the minor to juvenile court.

SECTION 2. That Section 2 of Ordinance No. 20966, passed by the city council on June 12, 1991, is repealed.

SECTION 3. That within six months after the initial enforcement of this ordinance, the city manager shall review this ordinance and report and make recommendations to the city council concerning the effectiveness of and the continuing need for the ordinance. The city manager's report shall specifically include the following information:

(A) the practicality of enforcing the ordinance and any problems with enforcement identified by the police department;

(B) the impact of the ordinance on crime statistics;

(C) the number of persons successfully prosecuted for a violation of the ordinance; and

(D) the city's net cost of enforcing the ordinance.

SECTION 4. That CHAPTER 31 of the Dallas City Code, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 5. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 6. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

SAM A. LINDSAY, City Attorney

By /s/ Lisa Christopherson

Assistant City Attorney

Passed June 10, 1992

