ARTICLE

CHILDREN, CURFEWS, AND THE CONSTITUTION

KATHERINE HUNT FEDERLE*

I. INTRODUCTION

Rights theorists have struggled to articulate the meaning of having and exercising rights. For children, this problem is a fundamental one: whether they have status as rights holders and thus may make rights claims largely turns on how we construct rights. Two such constructions—one acknowledging the primacy of self-determination, the other emphasizing nurturance—are the dominant theories for supporting the rights claims of children.[1] When we equate rights with the exercise of free will and choice and with the ability to demand performance of a duty, defining the child as a rights holder will turn on the child's capacity to demand performance of the obligation.[2] But if rights are seen in terms of interests deemed worthy of protection by the imposition of some obligation, then it is the

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* Associate Professor of Law, Tulane Law School. B.A. Pomona College (1980); J.D. University of Puget Sound (1983); LL.M. Georgetown University Law Center (1986). My thanks to John Coons and my colleagues at Tulane Law School, Alan Childress, Ray Diamond, Steve Griffin, and Terry O'Neill, for their comments. I also want to thank my student researchers, Rebecca Hozubin, David Sochia, and Alistair Ward, for their assistance. Finally, I wish to thank Dean John Kramer for his generous support.

1. *See, e.g.*, Michael Freeman, *The Limits of Children's Rights*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 29, 30 (Michael Freeman & Philip Veerman eds., 1992). Freeman argues that rights are important because those who lack rights are slaves. *Id.* at 31. Freeman, however, believes in a form of limited paternalism, in which interventions into the lives of others would be permissible to protect them against "irrational" actions. *Id.* at 38. Although Freeman acknowledges that it may be difficult to define irrationality, *id.*, it is for precisely this reason that I believe such an account of rights would ultimately disadvantage children. Katherine H. Federle, *Rights Flow Downhill*, 2 INT'L J. CHILDREN'S RTS. 343, 343 n.3 (1994).

2. Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1529-30 (1994). I contend in that article that a weak rights theory disadvantages children in the divorce custody context. Specifically, I note that the indeterminacy of the best interests standard, the conceptual confusion about the roles and responsibilities of the child's representative, and the use of custody as a bargaining chip in the resolution of property and financial issues are the negative consequences of an impoverished account of rights. *Id.* at 1525.

child's needs and wants rather than her capacity to demand performance of some obligation that accords the child rights-holder status.[3]

Neither approach, however, ultimately provides a coherent account because of the failure to challenge the notion of capacity as a prerequisite to having rights. Capacity is central to Western theories of individual liberty.[4] Consequently, a rights holder has the power to compel performance of some duty owed to her because the rights holder has the ability to compel that performance as an autonomous, rational, competent being. Without the power to obligate others, that being lacks rights-holder status.[5] Although identifying a right as an interest that is worthy of protection, rather than as the power to compel performance of a duty, would mean that the right is not correlative to the duty, the right conferred inevitably emphasizes the rights holder's present incompetencies.[6] In this sense, it is virtually impossible to recognize children as rights holders without some reference to their capacities.[7]

If having a right is contingent upon some characteristic, like capacity, then holding a right becomes exclusive and exclusionary because only the claims made by those with the requisite characteristic will be recognized. Consequently, this kind of rights talk has a confining effect. The claims made by those without the requisite characteristics of a rights holder *need not be recognized*, although in any specific instance they may be acknowledged, particularly if they reinforce existing hierarchies. Thus, powerful elites decide which, if any, of the claims made by those without rights-holder status they will recognize. The experience of women and people of color, for example, suggests that rights may evolve from paternalistic notions of the need to protect the weak and ignorant to recognition of capacity and autonomy.[8] Children, however, have been unable to redefine themselves as competent beings,[9] so powerful elites continue to define which, if any, of the claims made by children they will recognize.

Having a right means having the power to command respect, to make

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3. *Id.* at 1531-32. This account of rights, however, also disadvantages children.

4. *Id.* at 1527. For a more complete analysis of the role of capacity in our rights talk, see Katherine H. Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993).

5. *Id.* at 987-1011.

6. Federle, *supra* note 2, at 1531-32.

7. *Id.* at 1524; Federle, *supra* note 4, at 985.

8. Federle, *supra* note 2, at 1533. Ostensibly, women and people of color benefitted from this evolutionary process because white male hierarchies were forced to consider their interests.

9. *Id.* For a survey of the literature on capacity and children's rights, see *infra* note 45.

claims, and to have them heard. If children's claims may be ignored, or if only a few of those claims may be recognized, then those deciding which claims are worthy of attention have tremendous power. The exercise of that power, even if motivated by well-intentioned considerations, has had negative consequences for children. For example, in constitutional law, our impoverished rights talk permits anomalous interpretations of children's constitutional rights. Within the specific context of curfew laws, the reluctance to equate children's constitutional rights with those of adults, the inconsistent application of a strict scrutiny test, and the use and abuse of curfews as a law enforcement tool illustrate the level of incoherence in existing rights theory.

The construction and implementation of juvenile curfew ordinances illustrates some fundamental features of our rights talk and provides insights into the nature and extent of children's rights. Harried by a frightened citizenry, local officials are once again looking to curfew ordinances as a means to reduce juvenile crime and victimization.[10] Although the efficacy of these statutes is questionable[11] and the intrusion into liberty interests significant,[12] curfew laws are enjoying a resurgent utility. The courts, too, have seemingly condoned the use of curfews, even when finding a particular statute constitutionally invalid.[13] Judicial response to curfew ordinances, however, has provoked surprisingly little commentary from legal scholars.[14] This is due, in large part, to the

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10. *See, e.g.*, Kevin Bell, *Council Approves Curfew on City's Youth*, N.O. TIMES-PICAYUNE, May 24, 1994, at B1; Diana Balazs, *Peoria Cracking Down on Curfew*, PHOENIX GAZETTE, Aug. 2, 1993, at 1; Rich Connell, *Safety Hopes in Inglewood Rest on Curfew*, L.A. TIMES, Apr. 8, 1994, at A1; Dexter Filkins, *Dade County OK's Curfew for Juveniles*, MIAMI HERALD, Jan. 20, 1994, at B2; Efrain Hernandez, Jr., *Not Here, Boston Youths Say*, BOSTON GLOBE, June 1, 1994, at 26; Robert Honley, *Authorities Turn to Curfews to Clean the Streets of Teenagers*, N.Y. TIMES, Nov. 8, 1993 at B1; Sari Horwitz, *"The Ghosts Are Always Around a Little Bit"*, WASHINGTON POST, June 30, 1991, at W11; Richard A. Keller, *Teen Curfews—Way to Curb Crime? Yes: Our Community Can't Sit Back and Ignore the Troubling Trend of Kids Involved in Violence*, ORLANDO SENTINEL, Mar. 20, 1994, at G1; Neil Morgan, *Is Curfew Too Tough on San Diego Juveniles?*, SAN DIEGO UNION TRIBUNE, July 31, 1994, at A2; Patti Muck, *Fort Bend Police to Consider Teenage Curfews*, HOUSTON CHRON., May 12, 1994, at A18; David Rossmiller & Ryan Konig, *Residents Back Aim of Youth Curfew, Community's Rights Come First, Some Say*, PHOENIX GAZETTE, Feb. 16, 1993, at B1; Jody Temkin, *It's Midnight, Are Your Children at Home? Municipal Curfews Aims to Keep Teenagers Safe From Crime and Out of Mischief*, CHICAGO TRIB., Dec. 5, 1993, at 3; Paul W. Valentine, *New Curfew in Baltimore: Parents of Violators Favor Tougher Penalties*, WASHINGTON POST, July 29, 1994, at A1.

11. *See infra* note 68 and accompanying text.

12. *See infra* notes 214-65, 312-27 and accompanying text.

13. *See infra* notes 199-340 and accompanying text.

14. Only one law professor has written on the subject of juvenile curfew laws. Michael Jordon, *From the Constitutionality of Juvenile Curfew Ordinances to a Children's Agenda for the 1990's: Is*

powerlessness of children and to the failure of our rights talk to advantage them.

In this Article, I propose an account that redresses the powerlessness of children. Any such account must approach the problem of children's rights by rejecting capacity as an organizing principle. Furthermore, this approach acknowledges that rights have value because they have empowering effects which reduce victimization and marginalization and permit challenges to hierarchy and inequality. This approach takes power as a central principle and contends that in any given dynamic, power is the organizing force. From this perspective, a right, in its most fundamental sense, is power accorded to the least powerful party in any given dynamic.

I propose to demonstrate the need for a new account of children's rights by articulating the negative implications of existing rights theories and reconceiving rights in terms of power. This Article begins by examining the relationship between children's rights, rights theory, and capacity. I then propose the outlines of an account of children's rights, which I call an empowerment rights perspective, that rests on notions of power and mutual respect for power. This Article then reviews and analyzes judicial constructions of the constitutional rights of minors within the context of challenges to curfew laws and tests the claim that children present a special case by examining the use of curfew laws to control slave populations in

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It Really A Simple Matter of Supporting Family Values and Recognizing Fundamental Rights?, 5 ST. THOMAS L. REV. 389 (1993). There are, however, several student pieces on the same subject. *See, e.g.*, Paul M. Cahill, Note, *Nonemergency Municipal Curfew Ordinances and the Liberty Interest of Minors*, 12 FORDHAM URB. L.J. 513 (1983); Richard T. Ford, Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693 (1994); Murray Goldman, Note, *Constitutional Law—Due Process—Curfew Ordinances*, 12 U. MIAMI L. REV. 257 (1957); Donald Hall, Note, *Constitutional Law—"Locomotion" Ordinances as Abridgment of Personal Liberty*, 32 TUL. L. REV. 117 (1957); Martin P. Hogan, Note, *Waters v. Barry: Juvenile Curfews—The D.C. Council's "Quick Fix" for the Drug Crisis*, 1 GEO. MASON U. CIV. RTS. L. J. 313 (1990); Susan M. Horowitz, Comment, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J. L. & SOC. PROBS. 381 (1991); Martin E. Mooney, Note, *Assessing the Constitutional Validity of Juvenile Curfew Statutes*, 52 NOTRE DAME L. REV. 858 (1977); Peter L. Scherr, Comment, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163 (1992); Regina M. Ward, Comment, *Constitutional Law—Police Power—Municipal Ordinance—Philadelphia Curfew Law*, 1 VILL. L. REV. 51 (1956); John A. Ziegler, Recent Decision, 55 MICH. L. REV. 1026 (1957); Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163 (1984); Note, *Constitutional Law—Juvenile Rights—Juvenile Curfew Ordinance Does Not Violate Constitutional Rights of Minors*, 54 TEX. L. REV. 812 (1976); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66 (1958); Note, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109 (1977). For an overview of cases assessing the validity of juvenile curfew laws, see Danny R. Veilleux, Annotation, *Validity, Construction, and Effect of Juvenile Curfew Regulations*, 83 A.L.R. 4th 1056 (1993).

the United States before the Civil War. Finally, I conclude by discussing the ways in which a weak notion of rights has disadvantaged children by analyzing the outcome of their constitutional challenges to curfew laws and by reconsidering those results from an empowerment rights perspective.

II. AN EMPOWERMENT RIGHTS PERSPECTIVE

A. The Problem of Capacity

There are important connections between maturity, judgment, and choice in rights theory, connections which order our rights talk and explain the exclusion of children from the class of rights holders.[15] Social contract theory, for example, holds that individual liberty and state power may coexist because of the presence of a social compact between a competent, consenting individual and the state.[16] Consequently, social contract theorists like Hobbes, Locke, and Rousseau claimed that the irrationality of children precludes their participation in the social contract.[17] Children were also excluded from the social contract because they lack the capacity for self-preservation which motivates the formation of the contract in the first instance; until they are able to care for themselves, they must depend upon their parents.[18] Because of their incapacities, children are subject to parental governance and have a corresponding duty to obey and honor their parents.[19]

Other theories of individual liberty also exclude children from the class of rights holders. Utilitarian theorists contended that governmental

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15. Federle, *supra* note 2, at 1525; Federle, *supra* note 4, at 985-86.

16. Federle, *supra* note 2, at 1527. For a more complete discussion of the relationship between capacity and social contract theory, see Federle, *supra* note 4, at 987-95.

17. Federle, *supra* note 4, at 987-95.

18. Rousseau asserted that a child is subjugated to adults "because others know better than himself what is good for him and what does or does not conduce to his preservation." JEAN JACQUES ROUSSEAU, HIS EDUCATIONAL THEORIES SELECTED FROM EMILE, JULIE AND OTHER WRITINGS 92 (R.L. Archer ed., 1964).

19. Hobbes, for example, stated that children did not have the power to enter into the social contract because they lacked reason. Therefore, they had an obligation to obey their parents who could teach them the difference between good and evil. THOMAS HOBBES, LEVIATHAN 73 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651). "Over . . . children . . . there is no Law, . . . because they had never power to make any covenant, or to understand the consequences thereof; and consequently never took upon them to authorise the actions of any Soveraign, as they must do that make to themselves a Common-wealth." *Id.* at 187. Locke claimed that the child existed in a temporary state of inequality because her irrationality required that she be restrained by her parents until she attained reason. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 45, 49 (Henry Regnery Co. 1955) (1689).

interference with an individual's pursuit of happiness is permissible only when the individual lacks the capacity to make rational choices.[20] By most accounts, children lack the capacity to know and to pursue their own happiness.[21] Moreover, the state is justified in restricting the choices of children because, unlike adults, they cannot be dissuaded from certain choices through rational discourse.[22] Even under a more current articulation of the rights of individuals, the power to undertake duties and impose obligations is dependent upon the capacity of the individual.[23] Thus, rights are the exclusive province of the rational adult.[24]

Even if children have moral rights, those rights spring from children's incapacities. Kant, for example, argued that we have an innate right to freedom from which springs our moral worth as human beings;[25] in turn, this moral worth creates rights recognized by the political state.[26] Having a right, therefore, means having "the capacity to obligate others"[27] and the power to compel performance of that obligation.[28] Although children have certain moral rights, like the right to be cared for by their parents which

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20. Federle, *supra* note 2, at 1527. For a more complete discussion, see Federle, *supra* note 4, at 995-99.

21. Bentham argues that children suffer a "palpable and very considerable deficiency . . . in point of knowledge or understanding" that leaves them incapable "of directing [their] own inclination in the pursuit of happiness." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 244-45 (J.H. Burns & H.L.A. Hart eds., 1970) (n.d.).

22. John Stuart Mill also excluded children from the class of rights holders. "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children . . . ." JOHN STUART MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM 13-14 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

23. "Thus behind the power to make wills or contracts are rules relating to *capacity* or minimum personal qualification (such as being adult or sane) which those exercising the power must possess." H.L.A. HART, THE CONCEPT OF LAW 28 (1961).

24. In arguing about the existence of moral rights, Hart contends that children are excluded from the class of moral rights holders. H.L.A. Hart, *Are There Any Natural Rights?, in* HUMAN RIGHTS 61-62 (A.I. Melden ed., 1970). Hart argues that if a moral right exists at all, it must be a moral right to be free, and it is from this freedom that man may voluntarily limit his liberty to create moral rights. *Id.* But because only adults are capable of limiting their freedom, children cannot have any moral rights. *Id.*

25. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 54 (Lewis White Beck trans., The Bobbs-Merrill Co. 1959) (1785).

26. John Ladd, *Introduction* to IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE xxi-xxii (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797).

27. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 45 (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797).

28. *Id.*

springs from the innate right to freedom,[29] they lack the moral capacity to obligate others and the power to compel performance of those obligations.[30] Thus, children have neither the full panoply of rights accorded to adults because of their incapacity to obligate others, nor the ability to demand the rights they do have as children, and must rely on others to enforce performance of the obligations owed to them.[31]

Drawing on the theories of Kant, as well as the social contractarians, Locke and Rousseau, Rawls contends that children are potential rights holders.[32] For Rawls, justice is the governing principle of any political society.[33] Every individual in society is entitled to equal justice if she has the capacity to acquire a sense of justice and to have a rational life plan expressing a conception of personal "good."[34] Rawls recognizes that children have this potential and contends that they must be treated in accordance with the principles of justice.[35] But, according to Rawls, because children are morally primitive, they must be protected from "the weakness and infirmities of their reason and will in society."[36] Justice, therefore, requires that others act on behalf of children in a manner most likely to secure some future, but as yet unexpressed, conception of the

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29. IMMANUEL KANT, THE PHILOSOPHY OF LAW 114 (W. Hastie trans., Augustus M. Kelley ed., 1974) (1887).

30. Federle, *supra* note 2, at 1529. *See also* Federle, *supra* note 4, at 1000-01 (discussing Kant's contribution to children's rights talk).

31. LESLIE A. MULHOLLAND, KANT'S SYSTEM OF RIGHTS 8, 229 (1990). Mulholland attempts to show how Kantian claims of rights may be justified.

32. JOHN RAWLS, A THEORY OF JUSTICE 509 (1971).

33. *Id.* at 3-4. Rawls claims that "[j]ustice is the first virtue of social institutions, as truth is of systems of thought," without which any legal institution must be abolished. *Id.* He proposes a notion of justice as fairness, whereby individuals, who are hypothetically equal and who cannot know their future role or status in society, select two principles of justice which form the basis of a social contract. *Id* at 11-15.

In POLITICAL LIBERALISM, Rawls continues to recognize the centrality of justice, although his articulation of the two principles of justice differs from that in A THEORY OF JUSTICE. JOHN RAWLS, POLITICAL LIBERALISM 5 n.3, 5-6 (1993). For Rawls, justice as fairness offers citizens the possibility of a shared conception of justice, but it must be independent of individually held philosophical and religious views. *Id.* at 10. Rawls contends that what is needed is some political conception of justice that is supported by an overlapping consensus of reasonable moral, religious, and philosophical views within a particular society. *Id.*

34. A THEORY OF JUSTICE, *supra* note 32, at 505; POLITICAL LIBERALISM, *supra* note 33, at 19, 81.

35. A THEORY OF JUSTICE, *supra* note 32, at 509. Even though children are thought to have rights, their rights are exercised on their behalf by their parents or guardians. Similarly, Rawls notes that a person is a being who can be a citizen over a complete life. POLITICAL LIBERALISM, *supra* note 33, at 18 This implies that children, too, are persons.

36. A THEORY OF JUSTICE, *supra* note 32, at 249, 462.

good.[37]

Issues pertaining to the capacity of minors are also central to notions of children's rights because theorists draw on this prior rights tradition when constructing their own accounts of juvenile liberty. Some theorists do not reject capacity as a prerequisite to having and exercising rights but question when and under what circumstances children may be deemed competent.[38] Others suggest that children's incompetencies themselves give rise to certain moral rights that command the protection and care of children.[39] Even feminist accounts, which emphasize relationships rather than rights, envision children as "needing" relationships because of their dependencies.[40] Thus, whether the child will make important decisions affecting her life is the central contention in the children's rights debate.

These competing theories—one emphasizing freedom of choice, the other nurturance—are grounded in differing notions of the relationship between rights and duties.[41] The will, or choice, theory envisions a world in which rights holders are self-determining beings who may choose (or not) to compel the performance of a duty owed to the rights holder.[42] Because performance of the obligation is conditional upon the rights holder's decision to demand the obligor perform, the right or power to obligate preexists the duty.[43] The capacity for choice is central to this account of rights, for the rights holder must have the present ability to decide whether

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37. *Id.* at 249. The Rawlsian notion of future-oriented consent suggests that at some point in the future, the subject of our paternalism would approve of the choices made on her behalf in the past. *Id.* Of course, this is largely self-fulfilling for the person who consents in the future is the product of these earlier paternalistic interventions.

38. *See, e.g.*, Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445 (1984). For a discussion of these theorists, see Federle, *supra* note 4, at 1011-15.

39. *See, e.g.*, Neil MacCormick, *Children's Rights: A Test-Case for Theories of Right*, 62 ARCHIVES PHIL. L. & SOC. PHIL. 305 (1976). For a discussion of these theorists and their ideas, see Federle, *supra* note 4, at 1015-17; Federle, *supra* note 2, at 1531-32.

40. *See, e.g.*, Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986). *See also* Federle, *supra* note 4, at 1017-21 (discussing the work of Minow and others).

41. For a concise overview of the interest and will theories, see Jeremy Waldron, *Introduction* to THEORIES OF RIGHTS 1 (Jeremy Waldron ed., 1984).

42. *Id.* at 9. For a more complete account of the will or choice theory, see H.L.A. HART, THE CONCEPT OF LAW (1961); H.L.A. Hart, *Bentham on Legal Rights*, *in* OXFORD ESSAYS IN JURISPRUDENCE (A.W.B. Simpson ed., 1973); H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 L.Q.R. 37 (1954).

43. *See* Tom D. Campbell, *The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult*, *in* CHILDREN, RIGHTS, AND THE LAW 4 (Philip Alston et al. eds., 1992); MacCormick, *supra* note 39, at 306.

to compel performance of some duty or to waive the obligation.[44]

Because this account confines the class of rights holders to those with capacity, the central question becomes whether children have the requisite competencies to have and exercise rights. This theoretical difficulty is compounded by the absence of a definitive legal, psychological or sociological statement about the competence of children.[45] Thus, some children's rights advocates argue that children should have the same legal and political rights held by adults because children are competent.[46] Others suggest a legal presumption of capacity in the absence of some compelling proof that children are, in fact, incompetent.[47] Children's rights

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44. Campbell, *supra* note 43, at 17-18. Campbell argues that a rights theory is defective if it cannot recognize the value and distinctiveness of rights for children. *Id.* at 9. Additionally, challenging rights theories that cannot accommodate children's rights also may reveal how these accounts disadvantage other excluded groups. *Id.*

45. For a sense of the debate about the capacity of children, *see* THE CHILD AND OTHER CULTURAL INVENTIONS (Frank S. Kessel & Alexander W. Siegel eds., 1983); CHILDREN, RIGHTS AND THE LAW, *supra* note 43; HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN (1980); RICHARD FARSON, BIRTHRIGHTS (1974); JOHN H. FLAVELL ET AL., COGNITIVE DEVELOPMENT (3d ed. 1993); M.D.A. FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN (1983); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973); JOHN C. HOLT, ESCAPE FROM CHILDHOOD (1974); SARA MEADOWS, THE CHILD AS THINKER: THE DEVELOPMENT AND ACQUISITION OF COGNITION IN CHILDHOOD (1993); GARY B. MELTON, REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH (1987); LAURA M. PURDY, IN THEIR BEST INTEREST?: THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN (1992); ROSEMARY ROSSER, COGNITIVE DEVELOPMENT: PSYCHOLOGICAL AND BIOLOGICAL PERSPECTIVES (1994); WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT (Willard Gaylin & Ruth Macklin eds., 1982); Freeman, *supra* note 1, at 29; Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605; Irving R. Kaufman, *The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System*, 60 WASH. U. L.Q. 743 (1982); Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711 (1992); Raymond F. Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, 39 LAW & CONTEMP. PROBS. 78 (Summer 1975); Melton, *supra* note 38; Onora O'Neill, *Children's Rights and Children's Lives*, 98 ETHICS 445 (1988); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973); Ferdinand Schoeman, *Childhood Competence and Autonomy*, 12 J. LEGAL STUD. 267 (1983); Lee E. Teitelbaum, *Foreword: The Meanings of Rights of Children*, 10 N.M. L. REV. 235 (1980).

46. *See* FARSON, *supra* note 45, at 16; HOLT, *supra* note 45, at 18-19.

47. Hillary Rodham, *Children's Rights: A Legal Perspective, in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21, 33 (Patricia A. Vardin & Ilene N. Brody eds., 1979). Rodham argues that we should rely on a more discriminating set of assumptions about children based on their variable capacities at certain ages. *See also* Bob Franklin, *Introduction* to THE RIGHTS OF CHILDREN 1, 7 (Bob Franklin ed., 1986) (arguing that the existing division between children and adults is arbitrary and incoherent and that different qualifying ages for different activities are needed); Kenneth Henley, *The Authority to Educate, in* HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 254, 259 (Onora O'Neill & William Ruddick eds., 1979) (arguing that once a child is capable of rational deliberation and understands the rights of others, he cannot be educated against his

opponents, however, contend with equal force that we should not extend political and legal rights to children because they lack the capacity for free choice associated with a rights holder.[48]

However, if rights do not preexist duties, then the capacity to obligate is not a necessary prerequisite to having rights. The interest theory holds that rights are not correlative to duties, but rather, that rights are merely interests we have identified as being worthy of protection by the imposition of some obligation.[49] However, not all interests are important enough to require the imposition of a duty upon another, and the question of how to identify those interests that do generate rights is left open by the interest theory.[50] It is, therefore, possible to say that someone has a right without having to identify the obligor[51] and without specifying all the duties imposed by the right.[52] A substantive theory about which interests generate rights nevertheless may determine who is the obligor, the nature of the obligation, and whether the rights holder may waive performance of the right given the nature of the identified interest.[53]

Although an interest theory does have the advantage of permitting us to speak about the rights of children without reference to their power to obligate others, those interests specified as creating rights also hinder the articulation of children's rights theories. Interest theorists invariably identify the child's interests in being loved, nurtured, sheltered, fed, and clothed as the sort of interests which give rise to rights.[54] These are the sort of interests, however, we associate with incapacitated individuals, not with

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will); Pat Wald, *Making Sense Out of the Rights of Youth*, 55 CHILD WELFARE 379, 389 (1976) (supporting a general presumption that children be allowed the same rights as adults unless there is a significant risk of irreversible damage from exercising such rights or a general consensus backed by empirical data that at a certain age children do not possess sufficiently developed physical or emotional skills to allow them to exercise those rights).

48. *See* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 645 (1977); Hafen, *supra* note 45, at 657-58.

49. *See* Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 YALE L.J. 1441, 1447 (1988) (book review). Waldron notes that the interest theory, as developed by Joseph Raz, does not imply that all interests give rise to rights. Only some interests are important enough to create rights. *Id.* Both Raz and MacCormick are critical of a positivist rights theory that sees legal rights in terms of legal duties. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 165-92 (1988); D. N. MacCormick, *Rights in Legislation*, *in* LAW, MORALITY, AND SOCIETY 189-209 (John Hacker & Joseph Raz eds., 1979).

50. Waldron, *supra* note 49, at 1447.

51. MacCormick, *supra* note 49, at 200-04.

52. RAZ, *supra* note 49, at 170-71.

53. Waldron, *supra* note 49.

54. *See* MacCormick, *supra* note 39, at 305.

competent, self-determining beings.[55] The satisfaction of these interests, therefore, depends upon some other capable being, usually a parent or some unspecified adult. Interests, then, at least as they are defined by children's rights theorists, are little more than a reaffirmation of the incompetencies of children.

But what is wrong with a rights theory that acknowledges the vulnerability and immaturity of children, particularly when so much of what we believe about childhood seems ineluctably true? It is simply this: by focussing on the incapacities and helplessness of children, our rights talk promotes their powerlessness. This is problematic if the value we accord rights lies in their empowerment of the rights holder and the enablement of claims. If having a right enables the rights holder to make claims and to have them heard, then children are disabled for their claims need not be recognized. Consequently, if children cannot make claims, then those deciding which claims merit attention have tremendous power.

Furthermore, using paternalism as a proxy for rights disadvantages children. Paternalistic practices do not necessarily protect minors, even when undertaken with the best of intentions. Without a principled rule for ascertaining the well-being of children, a paternalistic approach is groundless because it is not rooted in any strong sense of rights and is restrained only by some notion of what is beneficial for children. Without the limitations imposed by rights, a paternalistic approach may also consider and accommodate adult interests and concerns. In this sense, paternalism may have negative consequences for children.[56]

Thus, a coherent rights theory acknowledges the exclusionary effects of capacity and the centrality of power.[57] A coherent rights theory enables the weak and the marginalized and empowers the powerless. If we think of rights theory in this way, then the choice theory is incoherent because it promotes the exclusion of children by emphasizing capacity as a prerequisite to having and exercising rights. Nor would an interest theory of rights enable children because it promotes their powerlessness. But an empowerment rights perspective would provide us with a different vantage point from which we may reconsider the rights of children.

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55. Federle, *supra* note 2, at 1531-33.
56. Federle, *supra* note 2, at 1559-62.
57. *See* Federle, *supra* note 4, at 986.

B. Empowerment Rights

What are empowerment rights? They are the peculiar province of the disabled (in the broadest sense of the word). They shift power away from those who have it in any given dynamic to those who do not. Furthermore, empowerment rights are concerned exclusively with the dynamics of power and with equalizing power in any given relationship. Consequently, they are rights which enable the powerless to make claims, to command the respect of other powerful beings, and to be treated nonpaternalistically. In this sense, to obtain a right is to be powerless, but to have a right is to become powerful.

Paternalistic justifications are unacceptable from an empowerment rights perspective because they disempower children. When we intervene on behalf of children to protect them from others, we implicitly acknowledge their powerlessness, but rather than enabling children to protect themselves through rights claims, we empower ourselves as adults to intervene in their lives. Consequently, paternalistic practices perpetuate existing relationships of power and dominance by reaffirming the vulnerability and helplessness of children. What is good or right or best for children is thus restrained only by our own sense of what is beneficial or by reference to the rights of some other adult. This is especially true in the case of a dispute over the child involving the parents or the state. Although paternalism relies upon the seemingly good intentions of its proponents, it nevertheless has negative consequences for those it seeks to protect.

Empowerment rights also inhibit the exercise of power by the powerful by rejecting the centrality of capacity in rights talk. In this sense, empowerment rights create zones of mutual respect that limit the kinds of things we may do to one another. From this perspective, acting protectively would not only be an unwarranted assertion of power but it would also be disrespectful. Empowerment rights have a transformative aspect as well, for the enabling effects of rights reduce the victimization of children whom we would no longer see as powerless and dependent beings. Although it would be naive to assert that by giving children rights they would no longer experience abuse, there is a fundamental difference between protecting children because they are dependent and respecting children because they are powerful.

Power is central to an empowerment rights perspective because it fundamentally governs our interactions with one another. If, for a moment, we may imagine a world before law, in which there is no organized state or society, then the interactions between individuals will largely be

governed by the exercise of power in its most basic form. It is self-evident, I think, that in our most natural state, we protect ourselves by controlling others around us, using whatever means we have at our disposal. Imposing a set of laws, rules, or morals upon these interactions may alter the way in which we exercise that power but it still does not change the fact that we exert some form of power over others. In this sense, power preexists our notions of right and wrong, our sense of morality and law.

If, as I contend, power is primary, then rights would have value to the extent that they recognize and counter the effects of disempowerment. From an empowerment rights perspective, rights have value precisely because they acknowledge the centrality of power. As a consequence, empowerment rights would mitigate the exclusionary effects of power by enabling the disempowered to make rights-based claims and to have those claims recognized by existing political and legal structures. Recognition of claims not only enables the disabled but also provokes an institutional response to those claims. Furthermore, that institutional response would stem from respect for the power held by the rights holder.

When powerful elites control the language of rights, however, these kinds of rights claims become meaningless. If having a right is contingent upon some characteristic, like capacity, then only competent beings will have rights and only their claims need be recognized. This kind of rights talk advantages powerful elites[58] who may decide which, if any, of the demands made by nonclaimants they will recognize. Furthermore, those deciding which claims and claimants are worthy of attention have tremendous power. This has a disabling effect upon those who cannot demand the attentions of the existing political and institutional structures on their own behalf. Reconceptualizing rights in terms of power, then, is an effort to open up our rights talk to all those who are disempowered and disadvantaged.

Our rights talk can only be enriched by a variety of perspectives and experiences that are unique to those who have been excluded and marginalized. Children's thoughts and voices are an essential part of this endeavor. But if we envision a rights holder as a being with the power to compel another to perform an obligation, then we exclude children. Even

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58. For a discussion of the role of power in family law, see, for example, Nikolas Rose, *Beyond the Public/Private Division: Law, Power, and the Family*, *in* CRITICAL LEGAL STUDIES 61 (Peter Fitzpatrick & Alan Hunt eds., 1987); M.D.A. Freeman, *Towards a Critical Theory of Family Law*, 38 CURRENT LEGAL PROBS. 153 (1985); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

if we claim rights flow from certain interests, those interests inevitably relate to the dependency and vulnerability of children. Thus, thinking about the rights of minors is circumscribed by the limits of our rights talk and has negative consequences for children.

The next section of this Article illustrates the negative consequences of a rights theory which cannot accommodate the powerlessness of children. The courts' characterization of children's constitutional rights in the context of juvenile curfew laws and the application of constitutional doctrine reflect the incoherency of a rights theory premised upon capacity. Furthermore, the powerlessness of children unites them with other marginalized and disempowered groups, suggesting that children are not a special case. The section concludes by discussing the likely outcomes of children's constitutional claims from an empowerment rights perspective.

III. CONSIDERING EMPOWERMENT RIGHTS IN CONTEXT: CURFEW LAWS

A. Judicial Constructions of the Constitutional Rights of Children within the Context of Curfew Laws

Juvenile curfew laws are enjoying a resurgence despite the unconstitutionality of most curfew laws applicable to adults.[59] Municipal and county governments promulgate a majority of the juvenile curfew laws through the

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59. Curfew ordinances have been overturned in the following cases: Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977); Territory of Haw. v. Anduha, 31 Haw. 459 (Haw. 1930), *aff'd*, 48 F.2d 171 (9th Cir. 1931); People v. Smith, 254 N.W.2d 654 (Mich. Ct. App. 1977); Hayes v. Mun. Ct. of Oklahoma City, 487 P.2d 974 (Okla. Crim. App. 1971); City of Portland v. James, 444 P.2d 554 (Or. 1968); City of Seattle v. Drew, 423 P.2d 522 (Wash. 1967). *But see* Guidoni v. Wheeler, 230 F. 93 (9th Cir. 1916) (upholding general vagrancy and curfew statute); Lutz v. City of York, 692 F. Supp. 457 (M.D. Pa. 1988) (upholding cruising ordinance); City of Milwaukee v. Nelson, 439 N.W.2d 562 (Wis. 1989) (upholding general loitering statute); Scheunemann v. City of West Bend, 507 N.W.2d 163 (Wis. Ct. App. 1993) (upholding cruising ordinance).

Emergency curfews, however, have been upheld. Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), *cert. denied*, 404 U.S. 943 (1971); ACLU v. Chandler, 458 F. Supp. 456 (W.D. Tenn. 1978); People v. McKelvy, 100 Cal. Rptr. 661 (Cal. Ct. App. 1972); Davis v. Justice Ct., 89 Cal. Rptr. 409 (Cal. Ct. App. 1970); State v. Boles, 240 A.2d 920 (Conn. Cir. Ct. 1967); Glover v. District of Columbia, 250 A.2d 556 (D.C. 1969); State v. Dobbins, 178 S.E.2d 449 (N.C. 1971); Ervin v. State, 163 N.W.2d 207 (Wis. 1986). *But see* People v. Kearse, 295 N.Y.S.2d 192 (Onandaga County Ct. 1968).

Park curfews also have been upheld. Peters v. Breier, 322 F. Supp. 1171 (E.D. Wis. 1971); People v. Trantham, 208 Cal. Rptr. 535 (Cal. App. Dep't Super. Ct. 1984); Chicago Park Dist. v. Altman, 262 N.E.2d 373 (Ill. App. Ct. 1970); City of Portland v. Ledwidge, 622 P.2d 1150 (Or. Ct. App. 1981).

exercise of their general police powers[60] and, in recent years, the number of such ordinances has proliferated.[61] Although a few states have implemented state-wide curfew laws,[62] the statutes generally defer to local governmental authorities by authorizing counties and municipalities to enact their own ordinances in lieu of state law[63] or to modify the state regulation as they deem appropriate.[64] Several of these state statutes also accord local authorities the discretion to implement state law.[65] At least nine state statutes permit local authorities to promulgate juvenile curfew ordinances of their own devise pursuant to their special powers.[66]

Most state statutes, however, are silent as to the authority of local governments to implement juvenile curfew ordinances.[67] Historically, the enforcement of juvenile curfew laws has been sporadic.[68] Nevertheless,

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60. *See* OSBORNE REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 165 n.3 (1982); CHARLES S. RHYNE, MUNICIPAL LAW § 26-59; SANDS & LIBONATI, LOCAL GOVERNMENT LAW § 14.11 (1993); E.C. YOKLEY, MUNICIPAL CORPORATIONS § 73 (1991).

61. One reporter estimates that nearly 1,000 municipalities have enacted juvenile curfew ordinances in the last five years. Sue Anne Pressley, *America on Curfew: Even Small, Quiet Towns Are Clamping Down on Teens*, WASH. POST NAT'L WKLY., Aug. 8-14, 1994, at 9.

62. *See, e.g.*, FLA. STAT. ANN. §§ 877.20 - .25 (West 1994); HAW. REV. STAT. §§ 577-16 to 577-16.5 and 577-18 to 577-21 (1993); ILL. ANN. STAT. ch. 720, paras. 555/1 to 555/2 (Smith-Hurd 1994); IND CODE ANN. § 31-6-4-2 (Burns 1994); MICH. COMP. LAWS ANN. §§ 722.751 - .754 (West 1994); N.H. REV. STAT. ANN. §§ 31:43-a to 31:43-g (1992); N.J. STAT. ANN. § 40:48-2.52 (West 1994); OR. REV STAT. § 419C.680 (1993); R.I. GEN. LAWS §§ 11-9-11 to 11-9-12 (1993).

63. *See* HAW. REV. STAT. § 577-21; ILL. ANN. STAT. ch. 65, para. 5/11-1-5 (Smith-Hurd 1994).

64. *See* FLA. STAT. ANN. § 877.25; ILL. ANN. STAT. ch. 720, para. 555/2; IND. CODE ANN. § 31-6-4-2(d); MICH. COMP. LAWS ANN. § 722.754; OR. REV. STAT. §§ 419C.680(3), 419C.680(4); R.I. GEN. LAWS § 11-9-11.

65. *See* FLA. STAT. ANN. § 877.25; ILL. ANN. STAT. ch. 720, para. 555/2; N.H. REV. STAT. ANN. § 31:43-a; N.J. STAT. ANN. § 40:48-2.52(b).

66. ARIZ. REV. STAT. ANN. § 11-251(40) (1994); COLO. REV. STAT. ANN. § 30-15-401(1)(d.5) (West 1994); CONN. GEN. STAT. ANN. § 7-148(c)(7)(F)(iii) (West 1994); MASS. GEN. LAWS ANN. ch. 40, § 37A (West 1994); MONT. CODE ANN. § 7-32-2302 (1993); OHIO REV. CODE ANN. § 307.71(A) (Anderson 1993); VT. STAT. ANN. tit. 24, § 2151 (1993); VA. CODE ANN. §§ 15.1-514; 15.1-33.4 (Michie 1994); W. VA. CODE § 7-1-12 (1993).

67. *See supra* note 59.

68. *See, e.g.*, Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, *supra* note 14, at 1164; Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, *supra* note 14, at 66-68 & n.5; Jeffrey Ghent, Annotation, *Validity and Construction of Curfew Statute, Ordinance, or Proclamation*, 59 A.L.R. 3d 321, 326 (1974). For more recent accounts of sporadic enforcement, see Julie Gould, *Curfew Siren Sounds Alarm for ACLU*, CHICAGO DAILY BULL., July 21, 1994, at 3; Chip Johnson, *Street Beat: The Fight Against Crime: Notes From the Front; Deputies Hope Curfews Keep Lid on Trouble*, L.A. TIMES, June 29, 1994, at B2; Indira A.R. Lakshmanan & Michael Grunwald, *Violating Curfew; Chelsea Ordinance Seldom Enforced*, BOSTON GLOBE, June 5, 1994, at 29; Stephen Lee, *Teen Curfew Idea Gains Supporters; Police Chief Cites Rise in Juvenile Offenses*, DALLAS MORNING NEWS, July 8, 1994, at 1K; Neil Morgan, *Is Curfew Too Tough on San Diego Juveniles?*, SAN DIEGO UNION-TRIB., July 31, 1994, at A2; Nancy San Martin, *Curfew*

there is some evidence to suggest that local law enforcement officials rely on official and "unofficial" curfew ordinances to justify their initial encounters with children.[69] While many ordinances purport to reduce criminal activity and the victimization of children, curfews seemingly have little impact on delinquency and victimization rates.[70] Despite the questionable efficacy of juvenile curfews, several cities recently enacted such ordinances in response to concerns about children's safety and youth crime.[71]

Only a few of these ordinances have been challenged in the courts. These cases have dealt primarily with the constitutionality of juvenile curfew laws under the First and Fourteenth Amendments,[72] and occasionally, the Fourth Amendment.[73] State trial and intermediate appellate courts have resolved most of these challenges,[74] with state supreme courts hearing

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Advances in Dade; County Commissioners Gave a Tentative OK to the Measure to Get Those Under 16 Off the Streets at Night, ORLANDO SENTINEL, Dec. 17, 1993, at D1.

69. *See, e.g.*, Ghent, *supra* note 68, at 326; Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, *supra* note 14, at 69.

70. *See*, Note, *Juvenile Curfew Ordinances and the Constitution*, *supra* note 14, at 112, n.14. *See also Are Curfews Crime Cure or Martial Law?*, ARIZONA REPUBLIC, Mar. 13, 1994, at F1; Kevin Bell, *Curfew Crackdown*, N.O. TIMES-PICAYUNE, June 1, 1994 at A1; Michael Cassell, *City Considering Youth Curfew for Summer*, HARTFORD COURANT, June 9, 1994, at B3; Grunwald, *supra* note 68, at 29. *But see* Christopher Cooper, *N.O. Credits Its Curfew for June's Drop in Crime*, N.O. TIMES-PICAYUNE, July 1, 1994, at A1. Despite the claims of the Mayor of New Orleans that the juvenile curfew ordinance has reduced crime, the statistics provided do not identify the actual decrease in juvenile crime or the decrease in nocturnal crime. *Id.*

71. *See, e.g.*, DADE COUNTY, FLA., ORDINANCE 94-1 (Jan. 18, 1994); TAMPA, FLA., CODE § 14-26 (1993); ATLANTA, GA., CODE §§ 17-7001 to 17-7003 (1991); CHICAGO, ILL., CODE § 8-16-020 (1992); NEW ORLEANS, LA., CODE § 42-80.2 (1994); KANSAS CITY, MO., CODE § 26.138 (1991); DALLAS, TEX., CODE § 31-33 (1993).

72. *See infra* notes 210-300 and accompanying text.

73. *See infra* notes 312-27 and accompanying text.

74. *See, e.g.*, *In re* Frank O., 247 Cal. Rptr. 655 (Cal. Ct. App. 1988); *In re* Arthur J., 238 Cal. Rptr. 523 (Cal. Ct. App. 1987); *In re* Francis W., 117 Cal. Rptr. 277 (Cal. Ct. App. 1974); *In re* Nancy C., 105 Cal. Rptr. 113 (Cal. Ct. App. 1972); People v. Horton, 92 Cal. Rptr. 666 (Cal. Ct. App. 1971); Davis v. Justice Ct. of Pittsburgh Judicial Dist., 89 Cal. Rptr. 409 (Cal. Ct. App. 1970); Alves v. Justice Ct. of Chico Judicial Dist., 306 P.2d 601 (Cal. Ct. App. 1957); People v. Walton, 161 P.2d 498 (Cal. Ct. App. 1945); K.L.J. v. State, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); S.W. v. State, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983); T.F. v. State, 431 So. 2d 342 (Fla. Dist. Ct. App. 1983); W.J.W. v. State, 356 So. 2d 48 (Fla. Dist. Ct. App. 1978); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990); People v. Coleman, 364 N.E.2d 742 (Ill. App. Ct. 1977); *In re* N.J.R., 439 N.E.2d 725 (Ind. Ct. App. 1982); Brown v. Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688 (Md. Ct. Spec. App. 1964); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); City of Wadsworth v. Owens, 536 N.E.2d 67 (Ohio Mun. Ct. 1987); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C.P. 1978); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); City of Eastlake v. Ruggiero, 220 N.E.2d 126

only a minority of these cases.[75] The federal courts have seldom ruled on the constitutionality of juvenile curfews: only eight cases in five circuits have been reported since 1975.[76] The United States Supreme Court has never granted certiorari in any of these cases and consequently, has never ruled on the constitutionality of any juvenile curfew ordinance.[77]

Challenges based on alleged violations of constitutional rights inevitably raise questions about the nature and extent of individual liberties. While these are difficult questions at best, in the context of juvenile curfew laws the child's status as a rights holder is central to the resolution of constitutionality.[78] Thus, by characterizing the child's right as different,[79] the reviewing courts acknowledge that the child is not the same kind of rights holder as an adult because the child lacks the requisite capacity.[80] Accordingly, children must be protected from their inability to make sound judgments.[81] The general populace, too, must be shielded from the bad choices children make, and the state is justified in imposing restrictions on

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(Ohio Ct. App. 1966); State v. Morris, 641 P.2d 77 (Or. Ct. App. 1982); Baker v. Borough of Steelton, 17 Dauphin County Rep. 17 (Pa. C. 1912); *Ex parte* McCarver, 46 S.W. 936 (Tex. Crim. App. 1898); *In re* J.F.F., 473 N.W.2d 546 (Wis. Ct. App. 1991).

75. *See, e.g.*, People v. Teresinski, 640 P.2d 753 (Cal. 1982); *In re* J.M., 768 P.2d 219 (Colo. 1989); *In re* John Doe, 513 P.2d 1385 (Haw. 1973); People v. Chambers, 360 N.E.2d 55 (Ill. 1977); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); City of Seattle v. Pullman, 514 P.2d 1059 (Wash. 1973); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

76. Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3792 (1994); Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989); McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381 (D.N.H. 1984); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); Naprstek v. City of Norwich, 545 F.2d 815 (2d Cir. 1976); Ruff v Marshall, 438 F. Supp. 303 (M.D. Ga. 1977); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

77. The United States Supreme Court has denied certiorari in the only two curfew cases to come before the court. *Qutb*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3792 (1994); *Bykofsky*, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

78. *See infra* notes 84-157 and accompanying text.

79. *See infra* notes 84-123 and accompanying text.

80. *See, e.g.*, *Qutb*, 11 F.3d at 492; *Bykofsky*, 401 F. Supp. at 1254; People v. Walton, 161 P.2d 498, 501-02 (Cal. Ct. App. 1945); *In re* J.M., 768 P.2d 219, 223 (Colo. 1989); People v. Chambers, 360 N.E.2d 55, 58 (Ill. 1977); Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d at 693 (Md. Ct. Spec. App. 1964); Allen v. City of Bordentown, 524 A.2d 478, 485 (N.J. Super. Ct. 1987).

81. *See, e.g.*, *Qutb*, 11 F.3d at 492; *Bykofsky*, 401 F. Supp. at 1256-57; *In re* Nancy C., 105 Cal. Rptr. 113, 119 (Cal. Ct. App. 1972); *Walton*, 161 P.2d at 501-02; Brown v. Ashton, 611 A.2d 599, 608 (Md. Ct. Spec. App. 1992); Baker v. Borough of Steelton, 17 Dauphin County Rep. 17, 22 (1912); Seattle v. Pullman, 514 P.2d 1059, 1067 (Wash. 1973).

minors for the safety of the larger community.[82] Although many of these courts concede that these limitations may be unconstitutional if imposed upon adults, the state's greater interest in the well-being of children vitiates many constitutional objections raised by state legislation aimed only at minors.[83] For the courts, childhood is a time of increased vulnerability, immaturity, and bad choices.

Apparently, children stand in a different relation to the Constitution. In 1975, the first federal court to address the constitutionality of a juvenile curfew ordinance explicitly acknowledged that the rights of children and adults differ. In *Bykofsky v. Borough of Middletown*,[84] the United States District Court for the Middle District of Pennsylvania upheld the validity of a municipal ordinance that imposed a nocturnal curfew on all minors under the age of eighteen.[85] Children accompanied by a parent or an authorized adult, or those engaged in certain activities, were exempted from the ordinance.[86] In responding to the constitutional rights claims of the affected minors, the court held that the "constitutional rights of adults and juveniles are not coextensive,"[87] although children are "persons" within the meaning of the Constitution.[88]

Six years later, the United States District Court for the District of New Hampshire also acknowledged the peculiar constitutional status of children. At issue in *McCollester v. City of Keene* (*McCollester I*)[89] was a municipal juvenile curfew ordinance that restricted the movements of minors under the age of sixteen years during certain hours, but exempted minors who were accompanied by a parent or an authorized adult or who were travelling to or from a specified activity.[90] The court, in invalidating the ordinance, noted that while minors are constitutional persons "possessed of fundamental rights which the State must respect,"[91] those "personal freedoms are not absolute"[92] and conceded that children's "constitutional

82. *See, e.g.*, *Qutb*, 11 F.3d at 494 n.8; *Bykofsky*, 401 F. Supp. at 1257.

83. *See* notes 121-57 and accompanying text.

84. 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

85. *Id.* at 1246.

86. *Id.*

87. *Id.* at 1254.

88. *Id.* at 1253 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969)).

89. 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1982).

90. *Id.* at 1048.

91. *Id.* at 1049.

92. *Id.* (citing Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1255 (M.D. Pa. 1975)).

rights are in some instances not co-extensive with those of adults."[93] In 1984, the New Hampshire district court again invalidated the Keene municipal ordinance on constitutional grounds, even though it had been amended after the court's decision in *McCollester I*.[94] Nevertheless, the court reaffirmed that juveniles do "not enjoy the full measure of personal liberties enjoyed by adults."[95]

A few months after the *McCollester I* decision, the Court of Appeals for the Fifth Circuit noted the differences between the rights of minors and adults. In *Johnson v. City of Opelousas*,[96] the plaintiffs challenged a nocturnal juvenile curfew ordinance that permitted unemancipated minors to be in public during specified hours only if they were accompanied by a parent or an authorized adult, or if they were on an emergency errand.[97] The *Johnson* court acknowledged that although children are constitutional persons, their rights "are not coextensive with those of adults."[98] The *Johnson* court nevertheless invalidated the curfew ordinance on constitutional grounds.[99] Citing to *Bykofsky*, however, the court stated that it was expressing "no opinion on validity [sic] of curfew ordinances narrowly drawn to accomplish proper social objectives."[100]

The Fifth Circuit recently reaffirmed its views on the constitutional status of children. In *Qutb v. Strauss*,[101] the court considered the constitutionality of a Dallas municipal ordinance that prohibited minors under the age of seventeen from remaining in a public place or on the premises of any establishment during particular hours.[102] The ordinance recognized certain defenses to prosecution and imposed a fine on parents or their children for each violation.[103] In assessing the validity of the ordinance, the court assumed that the curfew implicated a minor's fundamental right to move freely. But the court refused to decide whether such a right actually was fundamental, noting that, "under certain circumstances, minors may be treated differently from adults."[104]

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93. *Id.* (citing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969)).
94. McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381, 1383 (D.N.H. 1984).
95. *Id.* at 1385.
96. 658 F.2d 1065 (5th Cir. 1981).
97. *Id.* at 1067 n.1.
98. *Id.* at 1072.
99. *Id.* at 1074.
100. *Id.* at 1072.
101. 11 F.3d 488 (5th Cir. 1993).
102. *Id.* at 497.
103. *Id.* at 498.
104. *Id.* at 492.

Only one federal court has rejected the contention that the rights of children differ from adults in this context. In *Waters v. Barry*,[105] children and their parents challenged a District of Columbia ordinance that prohibited minors from remaining in a public place during certain hours unless they were engaged in some activity specifically exempted by the ordinance.[106] The United States District Court for the District of Columbia invalidated the curfew regulation on First and Fifth Amendment grounds.[107] The court rejected *Bykofsky*'s contention that the rights of children were less compelling in the context of curfew laws, noting the relationship between *Bykofsky*'s characterization of the rights involved and *Bykofsky*'s conclusion that the challenged ordinance was constitutional.[108] The *Waters* court then held that, under the circumstances of the case at bar, the rights of minors are not less deserving of constitutional protection.[109]

State courts, too, acknowledge that children's rights are not coextensive with those of adults. The Supreme Court of Illinois, for example, stated that children do not have an unlimited right to associate when and with whom they please[110] and upheld a state-wide curfew law.[111] The Wisconsin Supreme Court also upheld a nocturnal juvenile curfew ordinance, noting that "while juveniles possess fundamental rights entitled to constitutional protection, they are not 'automatically coextensive with the rights of adults.'"[112] Similarly, the Colorado Supreme Court specifically found that "a child's liberty interest in being on the streets after 10:00 o'clock at night is not co-extensive with that of an adult."[113] In *City of Panora v. Simmons*,[114] the Iowa Supreme Court also recognized that the rights of children differ from those of adults.[115]

Even in those cases in which a juvenile curfew ordinance is found unconstitutional, children's rights are distinguished from the rights held by adults. In *City of Maquoketa v. Russell*,[116] decided three years after *Simmons*, the Iowa Supreme Court invalidated a different nocturnal juvenile

105. 711 F. Supp. 1125 (D.D.C. 1989).
106. *Id.* at 1141.
107. *Id.* at 1140.
108. *Id.* at 1136.
109. *Id.*
110. People v. Chambers, 360 N.E.2d 55, 57-58 (Ill. 1976).
111. *Id.* at 55.
112. City of Milwaukee v. K.F., 426 N.W.2d 329, 338 (Wis. 1988).
113. *In re* J.M., 768 P.2d 219, 223 (Colo. 1989).
114. 445 N.W.2d 363 (Iowa 1989).
115. *Id.* at 368-69.
116. 484 N.W.2d 179 (Iowa 1992).

curfew ordinance.[117] Distinguishing its ruling from the decision in *Simmons*, the court nevertheless conceded that the rights of children are not coextensive with the rights of adults.[118] A New Jersey Superior Court also invalidated a nocturnal juvenile curfew ordinance that, with certain exceptions, prohibited minors under the age of eighteen from being in public during specified hours.[119] The trial court, while finding that the Constitution had been violated, nevertheless held that the "rights of minors are not as extensive as those of adults."[120]

Acknowledging that the rights of children differ from those of adults justifies the courts' acceptance of the state's claim that it may regulate the conduct of children in ways that would be impermissible in the case of adults. The *Bykofsky* court, for example, noted that the state's broad authority over children's activities reached beyond the scope of its power over adults.[121] Interestingly, the *Bykofsky* court cited to *Prince v. Massachusetts*,[122] decided by the United States Supreme Court in 1944, as authority for the court's position.[123] At issue in *Prince* was the validity of a state statute that penalized a parent or guardian for permitting any boy or girl under her control to sell magazines, newspapers, or other merchandise in public.[124] The *Prince* Court acknowledged that children have rights "in the primary use of highways" but they also are exposed to dangers in that use which do not affect adults,[125] and may be prohibited by the state from engaging in certain activities that adults may freely pursue.[126]

Prior to the *Bykofsky* decision, several courts acknowledged the state's

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117. *Id.* at 180.

118. *Id.* at 186.

119. Allen v. City of Bordentown, 524 A.2d 478, 480 (N.J. Super. Ct. Law Div. 1987).

120. *Id.* at 484. *See also* City of Wadsworth v. Owens, 536 N.E.2d 67, 68 (Ohio Mun. Ct. 1987) (holding minors have certain constitutional rights).

121. People v. Bykofsky, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975).

122. 321 U.S. 158 (1944).

123. *Bykofsky*, 401 F. Supp. at 1254.

124. *Prince*, 321 U.S. at 160-61. In *Prince*, the Court did not assess the constitutionality of a juvenile curfew ordinance. The regulation was challenged by a Jehovah's Witness, who was convicted under the statute for allowing a child in her custody to sell church publications on the street. *Id.* at 161-62. The Court rejected the claim that the statute violated the Fourteenth Amendment, noting that although the state must respect family privacy, it also has the power to limit parental autonomy when the child's well-being is implicated. *Id.* at 166-67. Thus, the statute constituted an appropriate exercise of the state's broader authority over minors' activities in light of the government's interest in safeguarding children from abuses. *Id.* at 165, 168.

125. *Id.* at 169.

126. *Id.* at 170.

greater authority to regulate the conduct of children. The Maryland Court of Appeals upheld a municipal curfew ordinance imposed on persons under the age of twenty-one during the Labor Day weekend[127] as an appropriate restriction on the activities and conduct of minors.[128] The Ohio Court of Appeals, citing the Maryland decision, upheld an even more restrictive nocturnal juvenile curfew ordinance as an appropriate exercise of the police power to regulate the conduct of children.[129] The Washington Supreme Court invalidated a municipal juvenile curfew ordinance but, citing to *Prince*, conceded that the government has an interest in protecting children from abuses.[130] The dissent in the Washington case also cited to *Prince* for the proposition that the state has broader authority over the activities of juveniles.[131]

Several cases decided after *Bykofsky* also rely on *Prince* to justify restrictions on the conduct of minors, but these and other more recent decisions assessing the validity of curfew ordinances articulate additional reasons for the differential treatment of children.[132] The majority of these courts rely on a 1979 United States Supreme Court case, *Bellotti v. Baird* (*Bellotti II*).[133] The Court in *Bellotti II* dealt not with a challenged juvenile curfew ordinance but with the constitutionality of a state statute requiring physicians to obtain the consent of the pregnant girl and both her parents before performing an abortion.[134] In its analysis of the statute's validity, a plurality of the Court stated that although children are protected

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127. Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688, 689 (Md. Ct. Spec. App. 1964).

128. *Id.* at 693. The curfew ordinance in question was characterized as an emergency measure; nevertheless, the court felt compelled to note that the city had the authority to regulate the activities of minors. *Id.* at 693.

129. City of Eastlake v. Ruggiero, 220 N.E.2d 126, 128 (Ohio Ct. App. 1966). *See also In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972) (citing *Ruggiero*, 220 N.E.2d 126).

130. City of Seattle v. Pullman, 514 P.2d 1059, 1064 (Wash. 1973) (citing Prince v. Massachussetts, 321 U.S. 158 (1944)).

131. *Id.* at 1066 (Hunter, J. dissenting).

132. *See* Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3792 (1994); Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989); McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381 (D.N.H. 1984); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); *In re* J.M., 768 P.2d 219 (Colo. 1989); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Brown v. Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

133. 443 U.S. 622 (1979).

134. *Id.* at 624-26.

by the Constitution, the position held by children and their families is unique and requires a sensitive and flexible application of constitutional principles that will account for the "special needs" of both parents and children.[135] The Court's plurality then held that the rights of children cannot be equated with those of adults for three reasons: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[136]

The *Bellotti II* plurality asserted that the Court's prior decisions affecting children justify the conclusion that minors are not entitled to all constitutional protections afforded adults. Because juveniles charged with crimes may be treated differently by the states out of concern for their vulnerability and needs, and because a separate justice system for children need not conform with all aspects of due process, the rights of minors are not as extensive as those of adults.[137] Additionally, in prior cases like *Prince*, the Court confirmed that the state has the authority to regulate the activities of children because they "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[138] Lastly, the plurality noted that parents are primarily responsible for preparing their children for their future obligations.[139] Because the state cannot adequately prepare children for these responsibilities, the state should defer to, but may enhance, parental authority through legislation.[140] Thus, "the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors."[141]

The *Bellotti II* decision has structured much of the subsequent judicial analysis of juvenile curfew laws. Of the sixteen cases decided after 1979 that address the constitutional validity of juvenile curfew ordinances, twelve have cited to *Bellotti II*.[142] All but one of these decisions found the

135. *Id.* at 633-34.
136. *Id.* at 634.
137. *Id.* at 635.
138. *Id.* at 635-36.
139. *Id.* at 638.
140. *Id.* at 637.
141. *Id.*
142. Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3792 (1994); Johnson v City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); Waters v. Barry, 711 F. Supp. 1125 (D.D.C 1989); McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381 (D.N.H. 1984); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F 2d 617 (1st Cir. 1982); *In re* J.M., 768 P.2d 219 (Colo. 1989); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); City of

reasons cited by the *Bellotti II* plurality differentiating the rights of minors dispositive.[143] Yet even in that case, the court engaged in a *Bellotti II*-type analysis.[144] Of the four cases that fail to cite *Bellotti II*,[145] one acknowledged the state's authority to implement laws for the protection of minors[146] while another suggested that the state may have certain interests justifying the restriction of children's rights.[147] A third case recognized that children have only certain rights guaranteed by the Constitution.[148]

The *Bellotti II* decision nevertheless fails to provide lower courts with any guidance as to how an inquiry should be conducted into the state's proposed restrictions on the activities of minors. When determining whether the government's actions are justified, most courts simply consider the three reasons articulated by the *Bellotti II* Court for distinguishing between the rights of minors and those of adults.[149] Two courts have used the *Bellotti II* analysis to ascertain the nature of the right implicated by the ordinance.[150] One court, however, found such an inquiry unnecessary in light of the court's conclusion that the *Bellotti II* reasoning was inapplicable to the juvenile curfew ordinance at issue,[151] while another court asserted that *Bellotti II* does not pertain to cases in which the minor's conduct created no risk of delinquent activity.[152] Although most courts after 1979 assess the validity of a juvenile curfew ordinance in light of the *Bellotti II* decision, it is unclear whether all three reasons must apply if the curfew

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Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Brown v. Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

The following cases, decided after 1979, did not cite to *Bellotti II*: *In re* Frank O., 247 Cal. Rptr. 655 (Cal. Ct. App. 1987); K.L.J. v. State, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); S.W. v. State, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983); City of Wadsworth v. Owens, 536 N.E.2d 67 (Ohio Mun. Ct. 1987).

143. *Qutb*, 11 F.3d at 492 n.6.

144. *Id.*

145. *Frank O.*, 247 Cal. Rptr. 655; *K.L.J.*, 581 So. 2d 920; *S.W.*, 431 So. 2d 339; *Owens*, 536 N.E.2d 67.

146. *S.W.*, 431 So. 2d at 341.

147. *Frank O.*, 247 Cal. Rptr. at 658.

148. *Owens*, 536 N.E.2d at 68.

149. *See* Qutb v. Strauss, 11 F.3d 488, 492 n.6 (5th Cir. 1993); Waters v. Barry, 711 F. Supp. 1125, 1136-37 (D.N.H. 1984); Village of Deerfield v. Greenberg, 550 N.E.2d 12, 15-16 (Ill. App. Ct. 1990); Brown v. Ashton, 611 A.2d 599, 607-08 (Md. Ct. Spec. App. 1992); Allen v. City of Bordentown, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987).

150. *In re* J.M., 768 P.2d 219, 223 (Colo. 1989); City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989).

151. Johnson v. City of Opelousas, 658 F.2d at 1073.

152. *McCollester II*, 586 F. Supp. at 1386.

ordinance is to be upheld.[153]

These courts, nevertheless, have concluded that children's rights are not coextensive with those of adults and that the state has greater authority to restrict the conduct of minors. All of the cases citing to *Bellotti II* have acknowledged that children are peculiarly vulnerable and lack the ability to make mature and informed judgments.[154] Additionally, courts have recognized the importance of the parental role in the child's upbringing and the necessity for concomitant parental authority.[155] Consequently, courts have endorsed those laws which respect yet enhance parents' care, custody, and control of their children.[156] Lastly, some courts have found the government's interest in reducing juvenile crime a sufficient justification for the state's restrictions on minors' activities.[157]

A particular conception of rights animates the courts' discussion about the constitutional validity of juvenile curfew laws. Although children do

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153. *Compare, e.g., McCollester I*, 514 F. Supp. at 1050-53 (one of three *Bellotti II* factors inapplicable, so ordinance invalid) *with* Village of Deerfield v. Greenberg, 550 N.E.2d at 17 (two of three *Bellotti II* factors apply, so ordinance constitutional).

154. Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993); Johnson v. City of Opelousas, 658 F.2d 1065, 1073 (5th Cir. 1981); Waters v. Barry, 711 F. Supp. 1125, 1136 (D.D.C. 1989); *McCollester II*, 586 F. Supp. at 1386; *McCollester I*, 514 F. Supp. at 1050-51; *In re* J.M., 768 P.2d 219, 223 (Colo. 1989); *Greenberg*, 550 N.E.2d at 15-16; City of Maquoketa v. Russell, 484 N.W.2d 179, 183 (Iowa 1992); City of Panora v. Simmons, 445 N.W.2d 363, 368 (Iowa 1989); Brown v. Ashton, 611 A.2d 599, 607 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); Allen v. City of Bordentown, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987).

155. *Qutb*, 11 F.3d at 495; *Johnson*, 658 F.2d at 1073-74; *Waters*, 711 F. Supp. at 1137; *McCollester II*, 586 F. Supp. at 1386; *McCollester I*, 514 F. Supp. at 1051-53; *In re* J.M., 768 P.2d at 223; *Greenberg*, 550 N.E.2d at 16; *Russell*, 484 N.W.2d at 183-84; *Simmons*, 445 N.W.2d at 368; *Brown*, 611 A.2d at 607; *Allen*, 524 A.2d at 486; City of Milwaukee v. K.F., 426 N.W.2d 329, 338-39 (Wis. 1988).

156. *Qutb*, 11 F.3d at 495; *McCollester II*, 586 F. Supp. at 1386 (recognizing that although an ordinance may aid in parental supervision or qualify as justified usurpation of parental authority, ordinance in question does not satisfy these requirements); *McCollester I*, 514 F. Supp. at 1051-53 (noting the validity of certain types of legislation which enhances or usurps the parental role but court nevertheless concludes this ordinance invalid); *In re* J.M., 768 P.2d at 222-23; *Greenberg*, 550 N.E.2d at 16-17; *Russell*, 484 N.W.2d at 185-86 (invalidating curfew ordinance nevertheless); *Simmons*, 445 N.W.2d at 367-68; *Brown*, 611 A.2d at 609; *Allen*, 524 A.2d at 486 (invalidating curfew); *K.F.*, 426 N.W.2d at 339.

157. *Qutb*, 11 F.3d at 492; *McCollester II*, 586 F. Supp. at 1386 (ruling public safety legitimate state concern); *In re* Frank O., 247 Cal. Rptr. 655, 657 (Cal. Ct. App. 1988) (noting but not deciding whether this is sufficient justification); *In re* J.M., 768 P.2d at 223 (recognizing state's interest in protecting public from juvenile mischief); *Simmons*, 445 N.W.2d at 369 (recognizing state's legitimate interest in reducing drug use); *K.F.*, 426 N.W.2d at 339.

Some courts recognized the state's interest in reducing juvenile crime even before *Bellotti II* was decided. *See, e.g., In re* Nancy C., 105 Cal. Rptr. 113, 119 (Cal. Ct. App. 1972); People v. Walton, 161 P.2d 498, 501 (Cal. Ct. App. 1945); People v. Chambers, 360 N.E.2d 55, 58-59 (Ill. 1977).

have some constitutional rights, their rights and those of adults are not coextensive. The courts attribute the diminished constitutional status of children to their peculiar vulnerability and immaturity as well as to the limitations imposed by parental authority. The state, then, may regulate the activities and conduct of minors to a far greater extent than would be permissible in the case of adults. This connection between children's helplessness and immaturity, and their subjugation to parental or state control suggests that rights are tied to the capacities of the rights holder.

This focus on the vulnerability and immaturity of children underscores the centrality of capacity to Western theories of individual liberties. As I have noted before, these conceptions envision capacity as a prerequisite to having and exercising rights.[158] But as an organizing principle, capacity limits our rights talk because it excludes children and other incompetent beings from the class of rights holders. Rights tied to the capacity of the rights holder also allow us to act paternalistically towards children, thereby enhancing their powerlessness. As the next section of this Article will illustrate, this weak version of rights has universally disadvantaging consequences.

B. Rebutting the Claim of Uniqueness: Curfews Laws and Slavery

When our rights talk cannot accommodate notions of power, we perpetuate structures which may disadvantage and oppress those who are weak and marginalized in our society. The rights of African Americans prior to the Civil War, for example, suggest that children are not a special case, that a rights theory which cannot adequately account for power has universally disadvantaging effects. As slaves, African Americans were not recognized as persons but as property;[159] they had no standing as constitutional persons.[160] Although there were free blacks in the North and the South prior to the Civil War,[161] their legal and constitutional status was

158. Federle, *supra* note 2, at 1525; Federle, *supra* note 4, at 985.

159. *See, e.g.*, JAMES H. DORMON & ROBERT R. JONES, THE AFRO-AMERICAN EXPERIENCE: A CULTURAL HISTORY THROUGH EMANCIPATION 148 (1974); PHILIP S. FONER, HISTORY OF BLACK AMERICANS: FROM AFRICA TO THE EMERGENCE OF THE COTTON KINGDOM 258 (1975); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (7th ed. 1994); KENNETH M. STAMPP, THE PECULIAR INSTITUTION 192-236 (1956).

160. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) (*Dred Scott*). For an abolitionist's account of the legal status of slaves, see WILLIAM GOODELL, THE AMERICAN SLAVE CODE (James M. McPherson & William L. Katz, eds., Arno Press 1969) (1853).

161. Shortly before the Civil War, there were approximately 488,000 free blacks living in the United States. IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH

uncertain.[162] Nevertheless, the United States Supreme Court affirmed that free blacks were not constitutional persons and that they lacked the privileges and immunities of citizenship.[163]

Slave codes and laws aimed at free blacks illustrate the peculiar legal status of African Americans prior to the Civil War. Slave codes, adopted by every slave state, were remarkably similar;[164] generally, they defined the property rights of slave owners, established rules and penalties governing the discipline of slaves, and reaffirmed the complete subjugation of African Americans.[165] The codes prohibited slaves from marrying, possessing firearms, learning to read and write, and suing their owners.[166] The slave codes also restricted the rights of free blacks whom many white Southerners regarded with suspicion and distrust;[167] consequently, free

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136 (1974). Roughly half lived in the South. EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 400 (1974). For accounts of those free blacks who lived in the North, see LEONARD P. CURRY, THE FREE BLACK IN URBAN AMERICA, 1800-1850 (1981); JAMES O. HORTON, FREE PEOPLE OF COLOR: INSIDE THE AFRICAN AMERICAN COMMUNITY (1993); LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1791-1860 (1961); V. JACQUE VOEGLI, FREE BUT NOT EQUAL: THE MIDWEST AND THE NEGRO DURING THE CIVIL WAR (1967); Robert J. Cottrol, *The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage*, 11 NAT'L BLACK L.J. 198 (1989); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986).

162. *See, e.g.*, FONER, *supra* note 159, at 265; GENOVESE, *supra* note 161, at 398-413; GOODELL, *supra* note 160, at 355-71; STAMPP, *supra* note 159, at 193-94; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 333-38 (1991); A. Leon Higginbotham & Greer C. Bosworth, *"Rather than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17 (1991).

See also Robert J. Cottrol, *Static History and Brittle Jurisprudence: Raoul Berger and the Problem of Constitutional Methodology*, 26 B.C. L. REV. 353 (1985) (examining the history of the Court's constitutional interpretation, including *Dred Scott*); Raoul Berger, *Cottrol's Failed Rescue Mission*, 27 B.C L. REV. 481 (1986) (rebutting Cottrol's critique of Berger's earlier works and arguing for a jurisprudence favoring the founders' intentions).

163. *Dred Scott*, 60 U.S. at 404. Blacks "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." *Id.* At least one author, however, contends that only three justices held that free blacks were outside the Constitution. The *Dred Scott* opinion, therefore, should be regarded as little more than dicta. Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 112 n.108 (1989).

164. DORMON & JONES, *supra* note 159, at 148; STAMPP, *supra* note 159, at 206.

165. DORMON & JONES, *supra* note 159, at 148-49; FRANKLIN & MOSS, *supra* note 159, at 186-89; STAMPP, *supra* note 159, at 22-23.

166. DORMON & JONES, *supra* note 159, at 148; FONER, *supra* note 159, at 186-258; GENOVESE, *supra* note 161, at 41; GOODELL, *supra* note 160, at 105, 239; Cottrol & Diamond, *supra* note 162, at 324

167. STAMPP, *supra* note 159, at 216.

blacks could not testify against whites,[168] were required to carry proof of their status,[169] and could not teach slaves to read.[170] Other laws limited the right of free blacks to obtain an education,[171] to possess firearms,[172] and to vote or hold political office.[173]

Antebellum legislation also restricted the free movement of slaves. Slave codes, for example, required slaves to carry passes when they were travelling off the plantation.[174] A pass contained information about a particular slave's destination and the time he was to return to the estate[175] and was to be shown to any white man who requested to see it.[176] Passes would be withheld as punishment[177] and any slave caught with a forged pass was guilty of a felony.[178] Slave owners also enforced curfews on the estate, requiring slaves to be in their cabins by a certain hour each evening.[179]

Nor could free blacks travel freely and associate with whom they pleased. State laws prohibited the movement of free blacks from state to state and often barred their reentrance once they had left.[180] Some states even adopted laws authorizing the enslavement of free blacks upon certain conditions.[181] Furthermore, many white Southerners argued that free blacks should be expelled from the country or enslaved if they would not leave.[182] Free blacks were required to submit to the inquiries of slave patrollers who enforced the slave codes,[183] could not associate with

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168. GENOVESE, *supra* note 161, at 402; GOODELL, *supra* note 160, at 300.

169. FONER, *supra* note 159, at 208, 216, 242; Higginbotham & Bosworth, *supra* note 162, at 28-29.

170. GENOVESE, *supra* note 161, at 561-66; GOODELL, *supra* note 160, at 319-25.

171. GENOVESE, *supra* note 161, at 565-66; Higginbotham & Bosworth, *supra* note 162, at 28-29.

172. Cottrol & Diamond, *supra* note 162, at 333-49; Higginbotham & Bosworth, *supra* note 162, at 27-28.

173. GENOVESE, *supra* note 161, at 401-02; Higginbotham & Bosworth, *supra* note 162, at 25.

174. DORMON & JONES, *supra* note 159, at 150; FONER, *supra* note 159, at 221; FRANKLIN & MOSS, *supra* note 159, at 58, 61; STAMPP, *supra* note 159, at 208.

175. STAMPP, *supra* note 159, at 149.

176. *Id.* at 208.

177. *Id.* at 172.

178. *Id.* at 208.

179. *Id.* at 149.

180. *Id.* at 215-16; Higginbotham & Bosworth, *supra* note 162, at 28-32.

181. STAMPP, *supra* note 159, at 216; Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2092 (1993).

182. DORMON & JONES, *supra* note 159, at 151-52; STAMPP, *supra* note 159, at 216; Higginbotham & Bosworth, *supra* note 162, at 31-32.

183. Finkelman, *supra* note 181, at 2069.

slaves,[184] and were subject to nocturnal curfews.[185]

Only two cases reported before the Civil War addressed the legitimacy of curfews imposed upon free blacks. In *Jennings v. Washington*,[186] the court upheld, without discussion, a District of Columbia curfew ordinance that authorized the District to "restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes."[187] In *Mayor of Memphis v. Winfield*,[188] however, the court invalidated a curfew law authorizing the arrest of any free black found on the streets after ten o'clock at night.[189] The court noted that the imposition of such an ordinance on a free white person would have aroused "public indignation," and the city would have been sued for false imprisonment.[190] While acknowledging that free blacks do not have all the privileges of full citizenship, the court nevertheless held that the ordinance was an unnecessary restriction of liberty.[191]

Despite the seemingly enlightened opinion in *Winfield*, African Americans were treated paternalistically by most whites. Although some slave owners were willing to indulge their slaves, much as they would a favored pet,[192] they could never treat their slaves as equals for fear of losing control over them.[193] Many characterized the relationship between owner and slave as that of parent and child: The slave had a "vacant mind"[194] and, consequently, was dependent upon his white owner who provided much-needed guidance and protection, as well as affection.[195] Apologists for slavery claimed that this dependence fostered peace and good will and promoted true affection between slaves and their owners:

> A man loves his children because they are weak, helpless and dependent; he loves his wife for similar reasons. When his children grow up and assert their independence, he is apt to transfer his affection to his grand-children. He

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184. Higginbotham & Bosworth, *supra* note 162, at 32.

185. FONER, *supra* note 159, at 235, 248, 254; Finkelman, *supra* note 181, at 2102-03; Higginbotham & Bosworth, *supra* note 162, at 28; Note, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560, 1562 n.13 (1968).

186. 13 F. Cas. 547 (1838).

187. *Id.*

188. 27 Tenn. 707 (1848).

189. *Id.* at 708.

190. *Id.* at 709.

191. *Id.*

192. STAMPP, *supra* note 159, at 327.

193. *Id.* at 162-63.

194. *Id.* at 168.

195. *Id.* at 327.

> ceases to love his wife when she becomes masculine or rebellious; but slaves are always dependent, never the rivals of their master. Hence, though men are often found at variance with wife or children, we never saw one who did not like his slaves, and rarely a slave who was not devoted to his master.[196]

It is obvious to most of us today that the infantilization of African Americans was nothing more than an attempt to control and oppress an entire race. Clearly, slaves lacked rights and the notion that slaves would have been able to exercise those rights had they been conferred would have been inconceivable to many whites. Certainly, the perceived incapacity of slaves and free blacks excluded them from the class of rights holders. Furthermore, paternalistic practices engendered feelings of inferiority while undermining the creation of a separate racial identity.[197] But denying rights to slaves and free blacks also allowed many whites to maintain positions of control and dominance which they felt were essential to the maintenance of the institution of slavery.

Theories which cannot accommodate the rights of children perpetuate these traditions of power and dominance. The experience of African Americans teaches us that rights must be able to challenge existing hierarchies to have value; yet the rights we accord children do little more than insure their powerlessness. Nor may we claim that children benefit from our paternalism, for children, like slaves, are disadvantaged by such accounts.[198] The next section of this Article examines the negative consequences of a rights theory which cannot accommodate the powerlessness of children. In the context of juvenile curfew laws, the courts' application of constitutional doctrine reflects the incoherence of a rights theory premised upon capacity.

C. *Reconsidering Rights Claims from an Empowerment Perspective*

The nature and extent of children's constitutional rights are linked explicitly to notions of constitutional personhood. Although the United

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196. GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH 247 (1850).

197. GENOVESE, *supra* note 161, at 6. Genovese also notes that paternalism undermines solidarity by linking the oppressed with their oppressors. *Id.* at 5. Nevertheless, this had a beneficial humanizing effect on the relationships between masters and slaves and allowed slaves to overcome their oppression. *Id.* at 7.

198. For an argument that the oppression of children is not analogous to that of African Americans before the Civil War because children will grow out of their dependence and those who have power over them have an interest in seeing their dependence end, see O'Neill, *supra* note 45, at 462. I think this misses a fundamental point: Any form of oppression has negative consequences and should be intolerable in a rights-oriented society.

States Supreme Court has held that children are constitutional "persons," the Court has indicated that minors comprise a unique class of rights holders to whom constitutional protections have variable application.[199] While this presupposes that children have rights—and clearly they may claim they do under constitutional principles—which rights claims will be recognized as valid is left largely to judicial interpretations structured primarily by power and dominance. Courts purport to sanction extensive governmental controls on children's behavior because of their immaturity and vulnerability while upholding curfew laws as protective legislation for the benefit of children and as valid limitations on their liberty.[200] Nevertheless, these restrictions are compatible with theories in which capacity is central to notions of rights.

The interest and choice theories intersect in the courts' assessment of juvenile curfew ordinances. For these courts, the lack of capacity clearly distinguishes children from adults and explains the greater permissible regulation of their activities. These restrictions, however, are justified by referencing two distinct yet related notions of rights. Thus, by acknowledging that the state may regulate the conduct of children because they lack the maturity to make sound judgments, the courts apply choice theory concepts. The courts also reference interest theory when they recognize the state's authority to enact curfews for the protection of minors. Consequently, these notions of rights create a dilemma for children because capacity is central to both rights theories and has negative effects on their rights claims.

One of the negative consequences of a weak rights theory is the development of a separate constitutional jurisprudence for children. Constitutional theory recognizes that the incapacities of childhood alter the relationship between juveniles and the state, which broadens the scope of constitutionally permissible governmental regulation.[201] The limits of state authority, however, are amorphous in the absence of a coherent rights

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199. *See, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel School Dist. No 403 v. Fraser, 478 U.S. 675, 682 (1986); New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring); Schall v. Martin, 467 U.S. 253, 263 (1984); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 633 (1979); Carey v. Population Services Int'l, 431 U.S. 678, 692 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976); McKeiver v. Pennsylvania, 403 U.S. 528, 533-34 (1971); Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969); Ginsberg v. New York, 390 U.S. 629, 638 (1968); *In re* Gault, 387 U.S. 1, 30 (1967); Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

200. *See supra* notes 132-54 and accompanying text.

201. *Id.*

theory, and this generates inconsistencies in the courts' disposition of rights claims. In the context of juvenile curfew laws, it may be tempting to account for these inconsistencies in factual terms: The variance in language and wording may explain why some curfew ordinances are upheld while others are found invalid. Any attempt to categorize these cases by the scope and clarity of the disputed ordinance, however, would be unenlightening given the lack of consensus among the courts about the extent to which government may impose certain restrictions on children.[202]

A weak rights theory nevertheless does account for the inconsistent application of constitutional principles to curfew laws. Curfew ordinances have been challenged on substantive and procedural grounds under the Fourteenth Amendment,[203] the First and Fourth Amendments,[204] and at least once under the Ninth Amendment.[205] Although there is no consensus among the courts as to the constitutionality of juvenile curfew laws,[206] most recognize the state's authority to impose some restrictions upon the

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202. *See infra* notes 208-333 and accompanying text.

203. *See infra* notes 208-65, 283-94 and accompanying text.

204. *See infra* notes 267-82, 312-27 and accompanying text.

205. City of Wadsworth v. Owens, 536 N.E.2d 67, 69 (Ohio Mun. Ct. 1987).

206. The following courts have found curfew ordinances unconstitutional: Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); Naprstek v. City of Norwich, 545 F.2d 815 (2d Cir. 1976); Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989); McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381 (D.N.H. 1984); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); *In re* Frank O., 247 Cal. Rptr. 655 (Cal. Ct. App. 1988); Alves v. Justice Ct. of Chico Judicial Dist., 306 P.2d 601 (Cal. Ct. App. 1957); K.L.J. v. State, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); S.W. v. State, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983); W.J.W. v. State, 356 So. 2d 48 (Fla. Dist. Ct. App. 1978); *In re* John Doe, 513 P.2d 1385 (Haw. 1973); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); Brown v Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); City of Wadsworth v. Owens, 536 N.E.2d 67 (Ohio Mun. Ct. 1987); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978); Hayes v. Mun. Ct. of Oklahoma City, 487 P.2d 974 (Okla. Crim. App. 1971); *Ex parte* McCarver, 46 S.W. 936 (Tex. Crim. App. 1898); City of Seattle v. Pullman, 514 P.2d 1059 (Wash. 1973).

In the following cases, the courts have validated juvenile curfew ordinances: Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3792 (1994); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); *In re* Nancy C., 105 Cal. Rptr. 113 (Cal. Ct. App. 1972); People v. Walton, 161 P.2d 498 (Cal. Ct. App. 1945); *In re* J.M., 768 P.2d 219 (Colo. 1989); People v. Chambers, 360 N.E.2d 55 (Ill. 1977); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688 (Md. Ct. Spec. App. 1964); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); City of Eastlake v. Ruggiero, 220 N.E.2d 126 (Ohio Ct. App. 1966); Baker v. Steelton Borough, 17 Dauphin County Rep. 17 (Pa. C. 1912); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

free movement of minors at night.[207] Thus, some courts have concluded that because of the incapacity and immaturity of juveniles, governmental restrictions on their activities do not implicate any rights that are fundamental to children.[208] Other courts, however, have found these rights fundamental but acknowledge that the state may have a compelling interest in regulating the conduct of minors because of their inability to make informed choices.[209] Either doctrinal mechanism has the same effect: that is, acknowledgment of the state's broader authority to regulate the conduct of children.

In the courts' application of equal protection principles, it is especially apparent how a weak rights theory premised upon capacity disadvantages children. Under equal protection doctrine,[210] the state must treat similarly situated persons in the same manner unless there is some legitimate reason for treating them differently.[211] The validity of the state's interest hinges on the nature of the right infringed or the class burdened. Thus, the state need articulate only a rational basis for the classification unless a fundamental right or a suspect class is affected; under these circumstances, the state must show it has a compelling interest in the legislation.[212] The degree to which the courts will scrutinize the classification also depends upon whether a suspect class or a fundamental right is implicated. If so, the courts will strictly scrutinize the law, and the government must establish

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207. *See, e.g.*, *Qutb*, 11 F.3d at 495; *Johnson*, 658 F.2d at 1072; *McCollester II*, 586 F. Supp. at 1385; *McCollester I*, 514 F. Supp. at 1053; *Bykofsky*, 401 F. Supp. at 1256-57; *In re* Nancy C., 105 Cal. Rptr. at 118-19, 120; *Walton*, 161 P.2d at 502; *In re* J.M., 768 P.2d at 223; *In re* Doe, 513 P.2d at 1389 (Richardson, C.J., dissenting); *Chambers*, 360 N.E.2d at 57-58; *Greenberg*, 550 N.E.2d at 15; *Russell*, 484 N.W.2d at 185-86; *Simmons*, 445 N.W.2d at 367-68; *Ruggiero*, 220 N.E.2d at 128; *Baker*, 17 Dauphin County Rep. at 23-24; *Pullman*, 514 P.2d at 1065; *K.F.*, 426 N.W.2d at 340.

208. *See, e.g.*, *Bykofsky*, 401 F. Supp. at 1253-58; *In re* J.M., 768 P.2d at 223; *Chambers*, 360 N.E 2d at 57; *Simmons*, 445 N.W.2d at 369.

209. *See, e.g.*, *Qutb*, 11 F.3d at 492-93; *Waters*, 711 F. Supp. at 1136-37; *McCollester II*, 586 F. Supp. at 1385; *Russell*, 484 N.W.2d at 185-86; *Brown*, 611 A.2d at 606-08; *Allen*, 524 A.2d at 485; *In re* Mosier, 394 N.E.2d at 372-73; *K.F.*, 426 N.W.2d at 338-39.

210. The equal protection doctrine derives largely from the Fourteenth Amendment. U.S. CONST. amend. XIV § 1. However, as Tribe notes, "no single clause or provision is the exclusive fount of doctrine in this area, and . . . principles of equal treatment have emerged in ways fairly independent of particular constitutional phrases." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1437 (2d ed. 1988).

211. For a general discussion of equal protection, see TRIBE, *supra* note 210, at 1436-672; Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV 341 (1949).

212. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); City of New Orleans v. Dukes, 427 U.S. 297 (1976); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). For a general discussion of the rational basis test, see TRIBE, *supra* note 210, at 1439-51.

that it serves a compelling state interest.[213]

Children, however, have had no success establishing that a classification based on age is somehow suspect.[214] Of the ten cases assessing the constitutionality of juvenile curfew laws under the equal protection clause,[215] six addressed and rejected the claim that age was a suspect classification.[216] Earlier decisions specifically tied the classification of minors to their immaturity and vulnerability[217] and to the state's broader authority to regulate the activities of children.[218] For these courts, minors constitute "a class founded upon a natural and intrinsic distinction from adults"[219] ("notably their degree of maturity"[220]), and the "law has long recognized the validity of classifications based upon age."[221] Later decisions treat the proposition as self-evident.[222]

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213. *See, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969); Korematsu v. United States, 323 U.S. 214 (1944). For a general discussion of strict scrutiny, see TRIBE, *supra* note 210, at 1451-66.

The United States Supreme Court has articulated an additional test for assessing equal protection claims in gender discrimination cases. The Court has found gender a semi-suspect classification and has adopted an intermediate test for scrutinizing the legitimacy of the government's interest in the legislation. Although the state need not show it has a compelling interest, the government nevertheless must prove that the proposed classification actually furthers the state's asserted interests. Mississippi University for Women, et al., v. Hogan, 458 U.S. 718, 722-32 (1982).

214. *See* Carey v. Population Services Int'l, 431 U.S. 678, 693 (1977); Craig v. Boren, 429 U.S. 190 (1976); Oregon v. Mitchell, 400 U.S. 112 (1970). For a discussion of age and suspect classifications, see Laurence Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROBS. 8 (1975).

215. Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3792 (1994); Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); *In re* Nancy C., 105 Cal. Rptr. 113 (Cal. Ct. App. 1972); People v. Walton, 161 P.2d 498 (Cal. Ct. App. 1945); *In re* J.M., 768 P.2d 219 (Colo. 1989); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); Baker v. Borough of Steelton, 17 Dauphin County Rep. 17 (Pa. C. 1912).

See also Hayes v. Mun. Ct. of Oklahoma City, 487 P.2d 974 (Okla. Crim. App. 1971) (arguing that the equal protection clause is violated on the grounds that it permits police to selectively enforce a loitering provision against minorities).

216. *Qutb*, 11 F.3d at 492; *Bykofsky*, 401 F. Supp. at 1265; *In re* Nancy C., 105 Cal. Rptr. at 120; *In re* Carpenter, 287 N.E.2d at 404; *Walton*, 161 P.2d at 501; *In re* J.M., 768 P.2d at 223, n.3.

217. *Bykofsky*, 401 F. Supp. at 1265; *Walton*, 161 P.2d at 501.

218. *Bykofsky*, 401 F. Supp. at 1265; *In re* Carpenter, 287 N.E.2d at 404; *Walton*, 161 P.2d at 501.

219. *Bykofsky*, 401 F. Supp. at 1265; *see also In re* Nancy C., 105 Cal. Rptr. at 120; *Walton*, 161 P.2d at 501.

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

221. *In re* Nancy C., 105 Cal. Rptr. at 120.

222. *See* Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993); *In re* J.M., 768 P.2d 219, 223 n.3 (Colo. 1989).

Furthermore, children have been unable to persuade the courts that curfew laws violate fundamental rights under the equal protection clause. Thus, seven of the ten cases assessing the constitutionality of these ordinances found no Fourteenth Amendment violation.[223] But the issue presented is not merely whether a particular ordinance violates minors' fundamental rights, for the courts question whether children have such rights in the first instance. In most cases, the answer has been implicitly negative: The state need establish only a rational relationship between its legitimate interest and the proposed classification.[224] Nevertheless, noting that minors' rights are less extensive because of their vulnerability and immaturity, two courts have upheld curfew ordinances precisely because they do not impinge on any fundamental right.[225]

When courts recognize that a curfew ordinance infringes upon minors' fundamental rights, they generally find an equal protection violation. Of course, the infringement of fundamental rights triggers strict scrutiny and demands that the state produce a compelling interest in the legislation. Thus, two courts have found a juvenile curfew ordinance violative of the equal protection clause because the state failed to establish a compelling interest.[226] Nevertheless, in the most recent federal case addressing the constitutionality of a juvenile curfew, *Qutb v. Strauss*,[227] the court rejected an equal protection challenge by finding that the state had created an ordinance which satisfied strict scrutiny.[228] Noting that no one had "argued, and correctly so, that age is a suspect classification," the court assumed, without deciding, that the ordinance implicated a minor's

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223. *Qutb*, 11 F.3d 488; *Bykofsky*, 401 F. Supp. 1242; *In re* Nancy C., 105 Cal. Rptr. 113; *Walton*, 161 P.2d 498; *In re* J.M., 768 P.2d 219; *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); Baker v Steelton Borough, 17 Dauphin County Rep. 17 (Pa. C. 1912).

At least one court has found that classifications between minors may constitute an equal protection violation. *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978). In *Mosier*, the court found that a provision which exempted minors from the curfew ordinance who had graduated from high school was an irrational classification. *Id.* at 376.

224. *Bykofsky*, 401 F. Supp. at 1255; *In re* Nancy C., 105 Cal. Rptr. at 118-19 ("real and substantial relationship"); *Walton*, 161 P.2d at 501; *In re* J.M., 768 P.2d at 223; *In re* Carpenter, 287 N.E. 2d at 402 ("real and substantial relationship"); *Baker*, 17 Dauphin County Rep. at 23 (holding means adopted "manifestly related" to ends promoted); *Pullman*, 514 P.2d at 1068 (Hunter, J., dissenting).

225. *Bykofsky*, 401 F. Supp. at 1254, 1265; *In re* J.M., 768 P.2d at 223 (citing Bellotti v. Baird, 443 U.S. 622 (1979)).

226. Waters v. Barry, 711 F. Supp. 1125, 1139 (D.D.C. 1989); Allen v. City of Bordentown, 524 A 2d 478, 486 (N.J. Super. Ct. Law Div. 1987).

227. *Qutb*, 11 F.3d 488.

228. *Id.* at 494.

fundamental right.[229] The court then held that the government had a compelling interest in the protection of children and the reduction of juvenile crime and that the ordinance was the least restrictive means of accomplishing these goals.[230] Although the significance of *Qutb* is unclear,[231] the case does suggest that even under heightened scrutiny, courts may be willing to uphold curfew ordinances on equal protection grounds.

However, a theory that cannot account for children as rights holders is fundamentally incoherent. One legitimately may suspect that the courts proceed upon the assumption that children are not the same as adults and, therefore, are not similarly situated. Certainly, at least for these courts and within current legal constructs of rights, children are indisputably less mature and lack the capacity for choice that we associate with adults. Nevertheless, even if the courts are able to surmount the difficult question posed at the outset, it seems impossible under existing rights theories to find that the state lacks a legitimate reason to treat children differently, if only because they are so vulnerable. The courts' analysis, then, collapses into a tautology: Children's fundamental rights are not violated because the state may treat them differently, and the state has greater authority to regulate their activities because children's rights are not as extensive as those held by adults.

From an empowerment rights perspective, the courts would treat equal protection challenges very differently. If capacity were no longer central to our rights talk, then claims that children are not similarly situated because of their immaturity would have no persuasive force. Additionally, children would be rights holders under an empowerment theory because they are powerless as to the state, so claims that their fundamental rights have been infringed would be taken seriously. Furthermore, by removing capacity as a prerequisite to having and exercising rights, paternalistic interventions based on the vulnerability and helplessness of children would be unacceptable and could no longer justify the state's supposedly broader authority to regulate the activities of minors. Consequently, equal protection claims would have validity because age would be a suspect classification, children would have fundamental rights, and paternalistic justifications proffered by

229. *Id.* at 492 (citing Bellotti v. Baird, 443 U.S. 622 (1979)).

230. *Qutb*, 11 F.3d at 493.

231. The United States Supreme Court denied certiorari. 62 U.S.L.W. 3693 (1994). Although the denial of a writ of certiorari in itself has no precedential value, it does suggest that the Court did not find a sufficiently compelling reason to grant the writ.

the state would not be compelling.

Identifying which rights are fundamental for children and when they may be permissibly infringed has implications for other substantive rights claims. Under the due process clause of the Fourteenth Amendment, the courts have considered substantive challenges to governmental policies and actions. As with equal protection, substantive due process[232] focuses on the relationship between the governmental interest, the proposed legislation, and the individual right affected. Whereas equal protection is concerned with equality, substantive due process addresses the nature and extent of individual liberty.[233] The question, then, is not one of classification and disparate treatment but of governmental respect for spheres of personal autonomy.[234] If the legislation burdens some fundamental right, then the state must establish that the law is narrowly tailored to serve a compelling governmental interest.[235] Otherwise, only a rational relationship is necessary between the law in question and the governmental purpose to be achieved.[236] The Supreme Court, however, has applied an "intermediate-intermediate" level of scrutiny in those cases involving an infringement of a minor's privacy rights and has required the government to show only a "significant state interest" to justify the restriction.[237]

With the difficult issue of classification moot, many courts have been persuaded by claims that curfew ordinances violate substantive due process principles. Some curfew laws have been struck down on the grounds that the legislation was unreasonable insofar as the government failed to

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232. This is not the substantive due process of the *Lochner* Court but the doctrine of substantive rights incorporated into the due process clause. For a discussion of the evolution of the incorporation doctrine, see TRIBE, *supra* note 210, at 772-80.

233. TRIBE, *supra* note 210, at 1302-08.

234. *Id.*

235. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973).

236. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

237. In *Carey v. Population Services Int'l*, the Supreme Court held that the state may impinge upon the privacy interests of minors only if the state establishes a significant interest in the proposed legislation. 431 U.S. 678, 693 (1977) (citing Planned Parenthood of Central Missouri, 428 U.S. 52 (1976)).

This notion of a different intermediate level of scrutiny has been criticized in another context. Madsen v. Women's Health Center, 114 S.Ct. 2516 (1994). In *Madsen*, Justice Scalia scathingly notes that the Court has created a new test, which he calls an "intermediate-intermediate" test. This test requires that the restriction be "narrowly tailored to serve a significant government interest." *Id.* at 2538 (Scalia, J., dissenting). Although the test sounds suspiciously like that articulated by the Court in *Planned Parenthood of Central Missouri* and *Carey*, the Court relies on its First Amendment analysis in prior cases for the proposition. *Id.* at 2524.

establish a real or substantial relationship between the ordinance and the asserted governmental interest.[238] As with equal protection claims, the courts have subjected legislation to stricter scrutiny when fundamental rights were burdened and have found the absence of a compelling state interest fatal to the government's claim of constitutionality in several cases.[239] Nevertheless, an equal number of courts have rejected substantive due process challenges to juvenile curfew laws.[240] Although the inquiry is the same—whether the legislation may be deemed reasonable in light of its objectives—these cases upheld the disputed ordinances as a valid exercise of the government's police power.[241] The courts found this exercise neither irrational nor violative of any fundamental right.[242]

Some courts have considered whether a significant state interest will suffice to legitimate the imposition of a juvenile curfew. In one case, a New Jersey Superior Court declined to apply the intermediate test, noting that where a fundamental right is implicated the state must justify any infringement by showing a compelling interest in the restriction.[243] The Wisconsin Supreme Court, however, held that the state had established a compelling interest in the legislation and found it unnecessary to determine whether a significant state interest would suffice.[244] Only one court, the United States Court of Appeals for the Fifth Circuit, has ruled that a significant state interest may justify the imposition of a juvenile curfew. In *Johnson v. City of Opelonsas*,[245] the Fifth Circuit noted that the state may

238. *See* Alves v. Justice Ct. of Chico Judicial Dist., 306 P.2d 601, 605 (1957); W.J.W. v. State, 356 So. 2d 48, 50 (1978) (finding a curfew ordinance violated a Florida state constitutional provision); *Ex parte* McCarver, 46 S.W. 936, 937 (1898); City of Seattle v. Pullman, 514 P.2d 1059, 1063 (1973).

239. Waters v. Barry, 711 F. Supp. 1125, 1137 (D.D.C. 1989); S.W. v. State, 431 So. 2d 339, 341 (Fla. Dist. Ct. App. 1983); Brown v. Ashton, 611 A.2d 599, 609 (Md. Ct. Spec. App. 1992); City of Wadsworth v. Owens, 536 N.E.2d 67, 69 (Ohio Mun. Ct. 1987).

240. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied* 429 U.S. 964 (1976); *In re* Nancy C., 105 Cal. Rptr. 113 (Cal. Ct. App. 1972); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688 (Md. Ct. Spec. App. 1964); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); City of Eastlake v. Ruggiero, 220 N.E.2d 126 (Ohio Ct. App. 1966); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

241. *Bykofsky*, 401 F. Supp. at 1255; *In re* Nancy C., 105 Cal. Rptr. 113; *Simmons*, 445 N.W.2d 363; *Thistlewood*, 204 A.2d 688; *Ruggiero*, 220 N.E.2d 126; *K.F.*, 426 N.W.2d 329.

242. *Bykofsky*, 401 F. Supp. at 1255, 1265; *In re* Nancy C., 105 Cal. Rptr. 113; *Simmons*, 445 N.W.2d at 369; *Thistlewood*, 204 A.2d at 693; *Ruggiero*, 220 N.E.2d at 128; *K.F.*, 426 N.W.2d at 339.

243. Allen v. City of Bordentown, 524 A.2d 478, 485-86 (N.J. Super. Ct. Law Div. 1987).

244. *K.F.*, 426 N.W.2d at 339.

245. 658 F.2d 1065 (5th Cir. 1981).

justify limitations on the conduct of minors if such restrictions served a significant interest not present in the case of an adult;[246] nevertheless, the court invalidated the curfew ordinance because the state had not shown a significant interest.[247]

It is, of course, conceivable that this lack of consensus is merely reflective of the larger difficulty posed by the uncertain parameters of the liberty interest under the Fourteenth Amendment. For decades courts have struggled to articulate what rights are fundamental for adults.[248] Despite this struggle, the issue of whether freedom of movement is a fundamental liberty interest seemingly has been answered in the affirmative by the United States Supreme Court. In *Papachristou v. City of Jacksonville*,[249] the Court upheld a procedural due process challenge to a vagrancy ordinance which prohibited all persons from engaging in certain activities, including walking, wandering, strolling, or loafing.[250] The Court was unpersuaded by the possibility that the ordinance would deter future criminality.[251] Noting that even though the prohibited activities are not explicitly protected by the Constitution, the Court stated that they are "part of the amenities of life" which have "encouraged lives of high spirits rather than hushed, suffocating silence."[252]

Yet when children claim a right to freedom of movement, the courts' rights talk is transformed: the inquiry is not simply whether the right is fundamental but what, if anything, children may demand. None of the courts validating curfew ordinances on substantive due process grounds have required the state to establish a compelling interest for the regulation.[253] The child's interest in freedom of movement is characterized as less "important to the social, economic, and healthful well-being of the

246. *Id.* at 1073.

247. *Id.* at 1074.

248. *See* TRIBE, *supra* note 210, at 1464. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (reviewing an Oklahoma statute requiring the sterilization of criminals).

249. 405 U.S. 156 (1972).

250. *Id.* at 158 n.1.

251. *Id.* at 171.

252. *Id.* at 164.

253. *See* Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1255-56 (M.D. Pa. 1975); *In re* Nancy C., 105 Cal. Rptr. 113, 118-19 (Cal. Ct. App. 1972); *In re* J.M. 768 P.2d 219, 223 (Colo. 1989); City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989).

In *City of Milwaukee v. K.F.*, the Wisconsin Supreme Court left open the question whether a compelling state interest was necessary to justify legislation restricting the rights of minors. 426 N.W.2d 329, 339 (Wis. 1988).

community."[254] Thus, the minor has no fundamental right to freedom of movement and the state must establish only that a rational relationship exists between the ordinance and its avowed purpose.[255] Moreover, because children's rights are not coextensive with those of adults, the challenged ordinance is considered a reasonable exercise of the government's police power in light of the state's greater authority to regulate children.[256] In this sense, much of the courts' substantive due process analysis collapses into the equal protection doctrine because the courts distinguish between rights by reference to the rights holder.[257]

Even when the courts overturn an ordinance on substantive due process grounds, they distinguish children from the class of adult rights holders.[258] Citing *Papachristou*, these cases recognize that minors do have fundamental liberty interests.[259] The state may burden the exercise of these rights only upon a showing of a "real and substantial"[260] or compelling governmental interest;[261] these courts, however, have found the government's articulated purposes singularly noncompelling.[262] Neverthe-

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254. *Bykofsky*, 401 F. Supp. at 1256; *In re* Nancy C., 105 Cal. Rptr. at 118; *Simmons*, 445 N.W.2d at 368.

255. *Bykofsky*, 401 F. Supp. at 1255, 1261, 1265; *In re* J.M., 768 P.2d at 223; *Simmons*, 445 N.W.2d at 369.

256. *Bykofsky*, 401 F. Supp. at 1258; *In re* Nancy C., 105 Cal. Rptr. at 120; *In re* J.M., 768 P.2d at 222-23; Village of Deerfield v. Greenberg, 550 N.E.2d 12, 16 (Ill. App. Ct. 1990); *Simmons*, 445 N.W.2d at 367-69.

257. TRIBE, *supra* note 210, at 1676. For an example, see *In re* J.M., 768 P.2d 219 (Colo. 1989).

258. Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989); McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381 (D.N.H. 1984); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st cir. 1982); S.W. v. State, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983); W.J.W. v. State, 356 So. 2d 48 (Fla. Dist. Ct. App. 1978); Brown v. Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); City of Wadsworth v. Owens, 536 N.E.2d 67 (Ohio Mun. Ct. 1987); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978); City of Seattle v. Pullman, 514 P.2d 1059 (Wash. 1973).

259. Waters v. Barry, 711 F. Supp. at 1134; *McCollester II*, 586 F. Supp. at 1384; *McCollester I*, 514 F. Supp. at 1049; S.W. v. State, 431 So. 2d at 341; W.J.W. v. State, 356 So. 2d at 50; Brown v. Ashton, 611 A.2d at 607; Allen v. City of Bordentown, 524 A.2d at 483; City of Wadsworth v. Owens, 536 N.E.2d at 69; *In re* Mosier, 394 N.E.2d at 372; City of Seattle v. Pullman, 514 P.2d at 1063.

260. W.J.W. v. State, 356 So. 2d at 50; City of Seattle v. Pullman, 514 P.2d at 1063.

261. S.W. v. State, 431 So. 2d at 341; Brown v. Ashton, 611 A.2d at 607; City of Wadsworth v. Owens, 536 N.E.2d at 69; *In re* Mosier, 394 N.E.2d at 372.

262. S.W. v. State, 431 So. 2d at 341; *W.J.W.*, 356 So. 2d at 50; Brown v. Ashton, 611 A.2d at 606; City of Wadsworth v. Owens, 536 N.E.2d at 69; *In re* Mosier, 394 N.E.2d at 372-73; City of Seattle v. Pullman, 514 P.2d at 1063. *But see In re* Nancy C., 105 Cal. Rptr. 113, 121 (Cal. Ct. App. 1972) (ruling a curfew ordinance had real and substantial relationship to protection of children and community).

less, children's rights are not as extensive as those of adults,[263] and while they may claim a right to freedom of movement, the state may have a greater interest in restricting the exercise of that right.[264] Consequently, what may be unconstitutional as to adults may be compelling for children, and these courts concede that a carefully crafted juvenile curfew ordinance may be constitutional.[265]

From an empowerment rights perspective, however, capacity would no longer be central to our inquiry, and the immaturity of children would be irrelevant to their rights claims. Nor would paternalistic concerns justify the state's restriction on their liberties because these interests mask attempts to control and dominate children. Furthermore, because rights flow to the powerless, children would be the rights holders, and the state could not attempt to minimize their rights by reference to the vulnerability of children or to parental interests in their care and control.[266] It would seem, then, that under a rights theory premised upon principles of power, there would be no basis for distinguishing children's rights from those of adults; children would have fundamental rights.

The courts, then, could no longer reject constitutional challenges on the grounds that no fundamental rights were implicated, unless they were prepared to hold that the rights were not fundamental for any constitutional person or that the state had a compelling interest unrelated to the purported immaturity and vulnerability of children. Because an empowerment rights perspective rejects capacity as an organizing principle in our rights talk, claims that children's rights are not coextensive with those of adults would be incoherent. Consequently, whether children have rights would turn on their powerlessness. Although some courts now recognize the fundamental rights of minors, the infringement of those rights could not be justified by reference to the state's greater interest in restricting the liberties of children. Empowerment rights enable the powerless and protect them from well-intentioned yet ultimately detrimental paternalism. Thus, the state's interest

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263. *McCollester II*, 586 F. Supp. 1381, 1385 (D.N.H. 1984); *McCollester I*, 514 F. Supp. 1046, 1049 (D.N.H. 1981); *Brown*, 611 A.2d at 607.

264. *McCollester II*, 586 F. Supp. at 1385; *McCollester I*, 514 F. Supp. at 1050; *Brown*, 611 A.2d at 607; *In re* Mosier, 394 N.E.2d at 372; *Pullman*, 514 P.2d at 1065.

265. *Waters*, 711 F. Supp. at 1135; *McCollester II*, 586 F. Supp. at 1385; *McCollester I*, 514 F. Supp. at 1053; S.W. v. State, 431 So. 2d at 341; *Brown*, 611 A.2d at 607; *Pullmam*, 514 P.2d at 1065.

266. Although beyond the scope of this article, I do believe that empowering children will minimize their victimization, even at the hands of their parents. For an interesting discussion of the relationship between power and abuse, see David G. Gil, *Unraveling Child Abuse*, 45 AMER. J. ORTHOPSYCHIATRY 346 (1975).

could not be compelling if it were justified by paternalistic concerns. In the absence of a compelling state interest grounded in some principle other than the incompetencies of children, these curfew laws would be invalidated.

There also is no consensus among the courts as to the validity of curfew laws under the First Amendment. Most claims allege that the disputed ordinance is unconstitutionally overbroad: the law reaches so deeply that it affects both protected and unprotected expressive or associative rights, chilling the exercise of constitutionally protected freedoms.[267] Several courts have sustained overbreadth challenges because the ordinances infringed on minors' associational activities.[268] Nevertheless, the state's broader power to regulate children may not implicate First Amendment protections.[269] For this reason, other courts have rejected overbreadth challenges in light of the state's greater authority to regulate minors[270]

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267. *See, e.g.*, Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381 (D.N.H. 1984); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); *In re* J.M., 768 P.2d 219 (Colo. 1989); K.L.J. v. State, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); People v. Chambers, 360 N.E.2d 55 (Ill. 1977); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

In *Waters*, the court rejected plaintiffs' claim that the ordinance was overbroad, finding that the appropriate challenge was to the facial validity of the ordinance. 711 F. Supp. 1125, 1133-34. In *K.L.J. v. State*, the court's finding that the statute was overbroad turned primarily on its conclusion that the statute was impermissibly vague. 581 So. 2d at 921-22. In *City of Milwaukee v. K.F.*, the court rejected plaintiffs' claims that the statute was vague on the grounds that the plaintiffs lacked standing. 426 N.W.2d at 335.

268. *Waters*, 711 F. Supp. at 1134-35 (sustaining a challenge to the facial validity of the curfew ordinance and finding that the ordinance violated minors' associational rights); Johnson v. City of Opelousas, 658 F.2d at 1074; K.L.J. v. State, 581 So. 2d at 922; *Russell*, 484 N.W.2d at 186 (also finding the ordinance vague); *Allen*, 524 A.2d at 483; *In re* Mosier, 394 N.E.2d 368 (holding curfew law violated First Amendment). *See also* Hayes v. Mun. Ct. of Oklahoma City, 487 P.2d 974, 981 (Okla. Crim. App. 1971) (ruling a loitering ordinance containing juvenile curfew provision overbroad).

269. Qutb v. Strauss, 11 F.3d 488, 495 (5th Cir. 1993); *Johnson*, 658 F.2d at 1072-74; *Russell*, 484 N.W.2d at 183. The court in *Qutb* notes that it is questionable whether the curfew ordinance implicates a fundamental right of association. 11 F.3d at 495 n.9. Citing to *City of Dallas v. Stanglin*, the court in *Qutb* states that the Supreme Court seemingly rejected the notion of a generalized right of social association. *Id.* (citing 490 U.S. 19 (1989)). Therefore, because this is the kind of right implicated by the curfew ordinance, the *Qutb* court doubted that such a right was impermissibly infringed. *Id.* The following cases assessing the validity of curfew ordinances also cite to *Stanglin*: Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989); Brown v. Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989).

270. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1259 (M.D. Pa. 1975); People v. Chambers, 360 N.E.2d 55, 57 (Ill. 1977); City of Milwaukee v. K.F., 426 N.W.2d 329, 338 (Wis.

and the legitimacy of the statute's sweep.[271] Curfew laws also have been held to regulate only conduct and not speech,[272] to effect no prior restraint of First Amendment activities,[273] and to advance a legitimate governmental interest which outweighs the child's First Amendment rights.[274]

This dichotomy is explicable only in terms of the courts' application of a weak rights theory. The curfew laws in question are remarkably similar: they prohibit children from loitering, wandering, playing, strolling or being on the streets during certain hours unless accompanied by a parent or some other adult.[275] These regulations also exempt minors who are on an emergency errand[276] or other legitimate business,[277] but only one curfew ordinance specifically exempts children who are "exercising [F]irst [A]mendment rights protected by the Constitution."[278] Interestingly, the less restrictive ordinances—those which provide more exemptions—have been invalidated by the courts,[279] but it is in these cases that the courts

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271. *See, e.g., In re* J.M., 768 P.2d at 225.

272. *Bykofsky*, 401 F. Supp. at 1260 ("ordinance plainly does not regulate speech at all—incidental"); *In re* J.M., 768 P.2d at 224 ("ordinance regulates conduct and does not prevent minors from exercising their first amendment rights"); *Chambers*, 360 N.E.2d at 57 (finding statute concerned with conduct of children and their conduct only between specified hours and not aimed at any values of First Amendment); *In re* Carpenter, 287 N.E.2d 399, 405 (Ohio Ct. App. 1972) (finding "no evidence of speech of any kind" and minor "on the street, out of pure 'cussedness'").

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

274. *Bykofsky*, 401 F. Supp. at 1260; *Chambers*, 360 N.E.2d at 57. *But see* Qutb v. Strauss, 11 F.3d 488, 495 n.9 (5th Cir. 1993) (holding even if there is right of social association, state had established compelling interest); *In re* Mosier, 394 N.E.2d 368, 372 (Ohio Ct. C. P. 1978) (noting that state did not establish compelling state interest justifying ordinance).

275. Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); *In re* J.M., 768 P.2d 219 (Colo. 1989); K.L.J. v. State, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); People v. Chambers, 360 N.E.2d 55 (Ill. 1977); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div 1987); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

276. *Johnson*, 658 F.2d at 1067, n.1; *Allen*, 524 A.2d at 482.

277. *Bykofsky*, 401 F. Supp. at 1270 (allowing minor to be in public when carrying certified card of employment); K.L.J. v. State, 581 So. 2d at 921; *Chambers*, 360 N.E.2d at 56 (holding harmless minors engaged in business or occupation); *Russell*, 484 N.W.2d at 181 (carving exceptions for those traveling to or from job or parentally supervised activity); *Allen*, 524 A.2d at 482.

278. *Bykofsky*, 401 F. Supp. at 1247, 1269.

279. *Johnson*, 658 F.2d 1065 (5th Cir. 1981) (finding two exemptions); *K.L.J.*, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991) (finding two exemptions); *Russell*, 484 N.W.2d 179 (Iowa 1992) (finding three exemptions); *Allen*, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987) (finding three exemptions); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978) (finding four exemptions).

have been willing to recognize the constitutional rights of children.[280] Only one case, *Bykofsky*, upheld a less restrictive ordinance.[281] However, in light of the court's holding that the curfew regulation did not implicate any fundamental rights,[282] it is possible that a more restrictive ordinance would have been upheld.

When curfew laws implicate the procedural rights of children, however, the courts have sustained constitutional challenges. Primarily, these challenges are based on vagueness.[283] The courts have held curfew laws void when the words used fail to apprise children or their parents of the nature of the prohibited conduct.[284] Thus, certain phrases like "loiter,"[285] "play,"[286] "bona fide organization,"[287] "emergency errand"[288] and "legitimate business,"[289] and "minor well along the road to maturity,"[290] lack sufficient clarity to satisfy procedural due process requirements. If the ordinance also delegates legislative authority to the police or

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280. *Johnson*, 658 F.2d 1065; *K.L.J.*, 581 So. 2d 920; *In re* Mosier, 394 N.E.2d 368; *Allen*, 524 A.2d 478; *Russell*, 484 N.W.2d 179.

281. *Bykofsky*, 401 F. Supp. at 1261.

282. *Id.* at 1260.

283. *See* Naprstek v. City of Norwich, 545 F.2d 815 (2d Cir. 1976); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); *In re* Frank O., 247 Cal. Rptr. 655 (Cal. Ct. App. 1988); *In re* Nancy C., 105 Cal. Rptr. 113 (Cal. Ct. App. 1972); People v. Walton, 161 P.2d 498 (Cal. Ct. App. 1945); S.W. v. State, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983); *In re* John Doe, 513 P.2d 1385 (Haw. 1973); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Brown v Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C. P. 1978); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972); Hayes v. Mun. Ct. of Oklahoma City, 487 P.2d 974 (Okla. Crim. App. 1971); City of Seattle v. Pullman, 514 P.2d 1059 (Wash. 1973).

284. *Naprstek*, 545 F.2d at 818 (holding statute vague for failure to specify time at which curfew ends); *In re* Frank O., 247 Cal. Rptr. at 657-58 (ruling the word "loiter" vague); *In re* John Doe, 513 P.2d at 1388 (ruling the word "loiter" vague); *Brown*, 611 A.2d at 610-11 (finding "bona fide organization" vague); *Allen*, 524 A.2d at 482 (ruling "emergency errand" and "legitimate business" vague); *Pullman*, 514 P.2d at 1063 (ruling the terms "loiter," "wander," "idle," and "play" vague).

285. *In re* Doe, 513 P.2d at 1388; *In re* Frank O., 247 Cal. Rptr. at 657-658; *Pullman*, 514 P.2d at 1062.

286. *Pullman*, 514 P.2d at 1062.

287. *Brown*, 611 A.2d at 609-10.

288. Allen v. City of Bordentown, 524 A.2d 478, 482 (N.J. Super. Ct. Law Div. 1987).

289. *Id.*

290. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1250 (M.D. Pa. 1975). But a severability clause saved the ordinance from invalidation. The *Bykofsky* court also found several other terms vague. *Id.* at 1250-52.

grants them too much discretion, the courts will invalidate the regulation.[291] Curfew laws nevertheless have withstood similar vagueness challenges,[292] and at least one federal court has severed the unconstitutionally vague sections of an ordinance to save the law from invalidation.[293]

Sustaining vagueness challenges to curfew ordinances is consistent with the courts' general willingness to accord some procedural protections to children.[294] But vagueness challenges also implicate adult concerns, and the courts may invalidate curfew ordinances because they inadequately apprise parents of the prohibited conduct. Many of these laws require some degree of parental involvement in the enforcement of curfews, either by mandating that minors be accompanied by a parent or some other adult[295] or by penalizing a parent for a curfew violation.[296] The courts, therefore, may consider the adequacy of parental notice because these ordinances impose responsibility upon the child's parents or guardian.[297] Neverthe-

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291. *In re* Frank O., 247 Cal. Rptr. 655 (Cal. Ct. App. 1988); S.W. v. State, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C.P. 1978); Hayes v. Mun. Ct. of Oklahoma City, 487 P.2d 974 (Okla. Crim. App. 1971) (also finding equal protection violation).

292. McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976) (allowing severability clause to save ordinance from invalidation); *In re* Nancy C., 105 Cal. Rptr 113 (Cal. Ct. App. 1972); People v. Walton, 161 P.2d 498 (Cal. Ct. App. 1945); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989) (ruling plaintiffs lacked standing to raise vagueness claim); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972).

293. *Bykofsky*, 401 F. Supp. at 1250-52.

294. *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

295. Naprstek v. City of Norwich, 545 F.2d 815 (2d Cir. 1976); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op*., 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); *In re* Frank O., 247 Cal. Rptr. 655 (Cal. Ct. App. 1988); *In re* Nancy C., 105 Cal. Rptr. 113 (Cal. Ct. App. 1972); People v. Walton, 161 P.2d 498 (Cal. Ct. App. 1945); *In re* John Doe, 513 P.2d 1385 (Haw. 1973); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Brown v Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert granted*, 615 A.2d 262 (1992); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div 1987); *In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C.P. 1978); City of Seattle v. Pullman, 514 P.2d 1059 (Wash. 1973).

296. *Naprstek*, 545 F.2d at 817; *Bykofsky*, 401 F. Supp. at 1272; *Walton*, 161 P.2d at 500; S.W. v. State, 431 So.2d at 340; *Simmons*, 445 N.W.2d at 364; *Brown*, 611 A.2d at 601; *Allen*, 524 A.2d at 480; *In re* Mosier, 394 N.E.2d at 370.

297. *See Naprstek*, 545 F.2d at 818; *Allen*, 524 A.2d at 481 (finding ordinance so vague it violates parents' constitutional rights).

less, the courts have upheld curfew ordinances against vagueness challenges which implicate the due process rights of adults.[298]

Parents' constitutional challenges to curfew ordinances on other grounds have also met with limited success. The most common claim alleges that the regulation impermissibly infringes upon parents' liberty and privacy interests guaranteed by the Fourteenth Amendment. Specifically, parents have claimed that these ordinances unconstitutionally impinge upon parental authority and family autonomy by usurping or unduly restricting parental decisionmaking.[299] In addition to procedural due process challenges, the courts have also considered claims based on violations of parents' First Amendment rights.[300] Parental opposition to curfews, nevertheless, does not seem to be a sufficient basis for invalidating these regulations.

Despite judicial deference to parental authority and familial privacy,[301] courts are divided on the issue of whether curfew ordinances violate family autonomy. Interestingly, these courts uniformly recognize that parents have a fundamental right to rear their children as they see fit, subject to reasonable limitations imposed by the state.[302] They differ, however, as to the degree of acceptable governmental intrusion. For those courts rejecting parents' constitutional claims, parental authority is necessary but not absolute, and the state retains some power to direct parental decisions

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298. *Bykofsky*, 401 F. Supp. at 1252; *McCollester I*, 514 F. Supp. at 1049; *Walton*, 161 P.2d at 503; *Simmons*, 445 N.W.2d at 366 (no standing); *In re* Carpenter, 287 N.E.2d at 403.

299. Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3792 (1994); Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); McCollester v. City of Keene (*McCollester II*), 586 F. Supp. 1381 (D.N.H. 1984); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); Baker v. Steelton Borough, 17 Dauphin County Rep. 17 (Pa. C. 1912); *Ex parte* McCarver, 46 S.W. 936 (Tex. Crim. App. 1898); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

300. *McCollester I*, 514 F. Supp. at 1051; *Bykofsky*, 401 F. Supp. at 1262; *Allen*, 524 A.2d at 483.

301. *See* TRIBE, *supra* note 210, at 1414-20.

302. Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993); *cert denied*, 62 U.S.L.W. 3693 (1994); Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); McCollester v. City of Keene (*McCollester I*), 514 F. Supp. 1046, 1051 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D.Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976); City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989); Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987); City of Eastlake v. Ruggiero, 220 N.E.2d 126 (Ohio Ct. App. 1966); Baker v. Borough of Steelton, 17 Dauphin County Rep. 17 (Pa. C. 1912); *Ex parte* McCarver, 46 S.W. 936 (Tex. Crim. App. 1898); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).

regarding the child's upbringing.[303] Thus, the state may impinge upon a parent's right to the care and custody of her children when it promotes the public welfare or the child's well-being.[304] According to these courts, curfew ordinances which control children's behavior for their own protection and that of the community, either because parents cannot or will not direct their conduct, do not infringe unnecessarily upon parental rights.[305]

Curfew laws, however, raise difficult questions about the boundaries of state and parental power. Courts will sustain parents' constitutional challenges when the ordinances inhibit parental supervision or unduly usurp the parental role.[306] There is, however, no consensus among the courts as to when the state reaches the outer limits of its authority, and resolution of this question seems to turn on some concept of what activities are appropriate for children. Significantly, notions of children's rights do not restrict state and parental powers, but justify their exercise by allowing some powerful other to claim that the proposed regulation actually protects children. Because parents and the state determine what benefits children, children's rights concepts ultimately cannot define the limits of control. A few courts, however, have responded creatively by invalidating curfew ordinances which interfered with a parent's right to have her children exercise their constitutional rights.[307]

Clearly, the central issue is one of power and control. Both the state and parents have the authority to regulate the activities of children, but that

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303. *Qutb*, 11 F.3d at 495; *Bykofsky*, 401 F. Supp at 1262-1263; *Simmons*, 445 N.W.2d at 369; *Ruggiero*, 220 N.E.2d at 129; *Baker*, 17 Dauphin County Rep. at 21-22; *K.F.*, 426 N.W.2d at 339.

304. *Qutb*, 11 F.3d at 495-96; *Bykofsky*, 401 F. Supp. at 1262; *Simmons*, 445 N.W.2d at 369; *Ruggiero*, 220 N.E.2d at 129; *Baker*, 17 Dauphin County Rep. at 21-22; *K.F.*, 426 N.W.2d at 339.

305. *Qutb*, 11 F.3d at 496; *Bykofsky*, 401 F. Supp. at 1264; *Simmons*, 445 N.W.2d at 370; *Ruggiero*, 220 N E.2d at 129; *Baker*, 17 Dauphin County Rep. at 21-23; *K.F.*, 426 N.W.2d at 339.

306. *See* Johnson v. City of Opelousas, 658 F.2d at 1073-74 (ordinance "inhibits parental role in child-rearing"); *McCollester II*, 586 F.Supp at 1386 ("ordinance neither aids in discharge of parental supervision duties nor qualifies as justified usurpation of parental role in situation where parental control cannot otherwise be provided"); *McCollester I*, 514 F. Supp. at 1051 (finding ordinance not an aid to parent in discharge of parental duty nor the kind of circumstance where state may usurp parental decision); Allen v. City of Bordentown, 524 A.2d at 487 ("law supporting the parental role advances a strong state interest while one which inhibits that role does the opposite"); *Ex parte* McCarver, 46 S.W. at 937 (holding ordinance usurps parental functions).

307. *See Johnson*, 658 F.2d at 1072 ("same inhibition prohibits parents from urging and consenting to such protected associational activity by their minor children"); *McCollester I*, 514 F.Supp. at 1047 (ruling on plaintiff's allegations that curfew prohibits parent from allowing minor to exercise rights); *Allen*, 524 A.2d at 487 ("by preventing children from exercising their fundamental constitutional rights," curfew ordinance interferes with the right of parents to have their children exercise those rights).

power is limited only by some notion of protective rights. Acting on behalf of children without a correspondingly strong version of their rights redounds to their disadvantage[308] and has negative consequences for children even when parents support their rights claims. Because the limits of state control are more amorphous in the absence of any clear boundaries established by rights, conflicting notions of adequate and appropriate parental supervision are inevitable. Consequently, the fact that parents may support their children's rights claims is irrelevant if the courts believe that curfew laws provide necessary restrictions upon the activities of children.

Empowering children, however, would resolve many of these conflicts. Respecting children because they are powerful rather than protecting them because they are vulnerable would prevent the state from intervening in the private lives of families on paternalistic grounds. Nor could the state act paternalistically towards children, for to do so would be antithetical to the meaning and value of rights. Empowering children also would provide boundaries for assessing the legitimacy of any state-proposed legislation and would offer courts a principled framework from which to resolve the claims of children. Thus, the state could not burden the procedural and First Amendment rights of children by claiming that the rights of minors are different or that their incapacities mandate their protection.

The adjudication and disposition of curfew violations is yet another negative consequence of an incoherent rights theory. Juvenile curfew violations defy easy categorization, and it is not always clear whether these violations fall within a juvenile court's delinquency or status offense jurisdiction.[309] Nevertheless, in most of the reported cases, minors have

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308. *See infra* notes 207-300 and accompanying text. For a discussion of the ways in which an incoherent rights theory disadvantages children in the context of custody disputes, see Federle, *supra* note 2.

309. ALA. CODE § 12-15-1 (1993); ALASKA STAT. § 47.10.080 (1993); ARIZ. REV. STAT. ANN. § 13-3612 (1993); ARK. CODE ANN. § 9-27-303 (Michie 1993); CAL. WELF. & INST. CODE § 256 (West 1993); COLO. REV. STAT. § 13-1-135 (1993); CONN. GEN. STAT. § 46b-121 (1994); DEL. CODE ANN. tit. 10, § 928 (1993); D.C. CODE ANN. Fam. Div. Rule A (1993); FLA. STAT. ch. 39.045 (1994); GA. CODE ANN. § 15-11-2 (Michie 1994); HAW. REV. STAT. § 571-1 (1992); IDAHO CODE § 1-2223 (1994); ILL. REV. STAT. ch. 705 para. 405/5-1 (Smith-Hurd 1994); IND. CODE ANN. § 31-6-4-13 (West 1994); IOWA CODE § 232.8 (1994); KAN. STAT. ANN. § 75-5398 (1993); KY. REV. STAT. ANN. § 630.020 (Baldwin 1993); LA. CHILDREN'S CODE ANN. art. 303 (West 1994); MD. FAM. LAW CODE ANN. § 913 (1993); MASS. GEN. LAWS ANN. ch. 712 § a.2 (West 1993); MICH. COMP. LAWS § 218-60 (1993); MINN. STAT. § 260.111 (1994); MISS. CODE ANN. § 43-21-157 (1994); MO. REV. STAT. § 211.031 (1993); MONT. CODE ANN. § 41-5-523 (1993); NEB. REV. STAT. § 43-247 (1993); NEV. REV. STAT. § 62.040 (1993); N.H. REV. STAT. ANN. § 169-b:4 (1994); N.J. REV. STAT. § 2A:4A-24 (1994); N.M. STAT. ANN. § 32a-9-3 (Michie 1994); N.Y. FAM. CT. ACT § 301.2 (McKinney 1994); N.C. GEN. STAT. 7a-289.6 (1994); N.D. CENT. CODE § 27-20-03 (1994); OHIO REV. CODE ANN. § 2151.11 (Anderson

been adjudicated delinquent for curfew violations,[310] although occasionally these children will be brought before the court as status offenders.[311] No court has specifically addressed the question of whether a curfew violation may be a delinquent act, but at least four courts have considered the extent of the state's authority to arrest minors for curfew violations.[312] Two courts have invalidated arrests for curfew violations on the grounds that the applicable state statutes did not authorize the police to detain children for these behaviors.[313] Despite statutory language permitting detentions only for criminal acts,[314] two other courts have interpreted the state's authority more broadly and have upheld arrests for curfew violations.[315]

The definition of a curfew violation as a delinquent act, however, is not particularly coherent. Certainly, many of the curfew laws impose sanctions upon children which seem consistent with the notion that a curfew violation is a criminal activity.[316] But it is clear that curfews apply only to minors,

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1993); OKLA. STAT. ANN. tit. 10. § 1102 (West 1993); OR. REV. STAT. § 419C.005 (1993); R.I. GEN. LAWS § 14-1-3 (1981); S.C. CODE ANN. § 20-7-736 (Law Co-op. 1993); S.D. CODIFIED LAWS ANN. § 26-86-2 (1994); TENN. CODE ANN. § 37-1-103 (1993); TEX. FAM. CODE ANN. § 51.04 (West 1994); UTAH CODE ANN. § 78-3a-16 (1994); VA. CODE ANN. § 16.1-241 (Michie 1994); VT. STAT. ANN. tit. 33, § 5503 (1993); WASH. REV. CODE § 13.04.030 (1994); W. VA. CODE § 49-5-1 (1993); WIS. STAT. § 48.12 (1993); WYO. STAT. § 14-6-203 (1993).

310. *See, e.g., Johnson*, 658 F.2d 1065; K.L.J. v. State, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); Brown v Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), *cert. granted*, 615 A.2d 262 (1992); *In re* J.F.F., 473 N.W.2d 546 (Wis. Ct. App. 1991).

311. *See In re* Mosier, 394 N.E.2d 368 (Ohio Ct. C.P. 1978); *In re* Carpenter, 287 N.E.2d 399 (Ohio Ct. App. 1972).

312. *See In re* B.M.C., 506 P.2d 409 (Colo. Ct. App. 1973); *In re* Michael G., 416 N.Y.S.2d 1016 (N Y. Fam. Ct. 1979); State v. Morris, 641 P.2d 77 (Or. Ct. App. 1982); *In re* J.F.F., 473 N.W.2d 546 (Wis. Ct. App. 1991).

313. In *In re* Michael G., the court held that a curfew violation is not a crime if committed by an adult. 416 N.Y.S.2d at 1017-18. Rather it is merely a petty offense. *Id.* at 1018. Therefore, police could not make an arrest and the minor could not be charged with resisting arrest. *Id.* In *In re* J.F.F., the Wisconsin court ruled that a juvenile may be taken into custody only for ordinances punishable by a forfeiture. 473 N.W.2d at 548. Because curfew violations are not so punishable, the juvenile could not be taken into custody. *Id.*

314. *In re* B.M.C., 506 P.2d at 411 (finding that a child may be taken into temporary custody without court order if reasonable grounds to believe he committed an act which would be a felony, misdemeanor, or municipal ordinance violation if committed by an adult); State v. Morris, 641 P.2d at 79-80 (holding that a police officer may stop a person on less than probable cause if this officer reasonably suspects the person has committed a crime).

315. *In re* B.M.C., 506 P.2d at 411; State v. Morris, 641 P.2d at 80-81. The statute in *B.M.C.* was subsequently amended. *See* COLO. REV. STAT. § 19-2-201(1) (1993).

316. *See, e.g.*, ILL. ANN. STAT. ch. 720, para. 555/1 (Smith-Hurd 1994); IND. CODE ANN. § 31-6-4-1 (Burns 1994); IOWA CODE ANN. § 232.8 (West 1994); MONT. CODE ANN. § 7-32-2302 (1994); N.H.

and this is troublesome for those jurisdictions in which delinquency is defined as a criminal act committed by children. Furthermore, the punitive and retributive features of the court's delinquency jurisdiction do not comport with the protective aspects of curfew legislation.[317] The state's willingness to criminalize behaviors that at best may be described as status offenses is particularly worrisome in light of the courts' restrictive approach to children's constitutional rights claims.

Certainly, the enforcement of curfew laws implicates children's Fourth Amendment rights. In only one case, *Waters*, has a court considered a Fourth Amendment challenge to a curfew ordinance, and that court rejected the plaintiffs' claim.[318] Although the court invalidated the ordinance on other constitutional grounds,[319] had the regulation been upheld it would have provided "valid, substantive references for determining the presence or absence of probable cause in a given case."[320] The court hypothesized that if a police officer reasonably concluded that an individual looked like a minor, then he would have probable cause to believe that the person had committed a curfew violation.[321] "So long as the officer could reasonably have believed that the individual looked 'young,' the search, seizure or arrest would take place on the basis of probable cause and no Fourth Amendment violation would occur."[322]

Other courts have upheld the detention, arrest, and subsequent search of an individual for a curfew violation. Several courts have justified the initial stop of youthful-looking minors as a legitimate investigation of possible curfew violations and have found probable cause for their arrests.[323]

REV. STAT. ANN. § 31:43-g (1992).

317. *See, e.g.*, Barry C. Feld, *Juvenile (In)Justice and the Criminal Court Alternative*, 39 CRIME & DELINQUENCY 403 (1993); Roger B. McNally, *The Juvenile Justice System: A Legacy or a Failure?* 48 FEDERAL PROBATION 29 (1984); Dean G. Rojek and Maynard L. Erickson, *Delinquent Careers: A Test of the Career Escalation Model*, 20 CRIMINOLOGY 5 (1982). *See also* State v. Morris, 641 P.2d at 81 (stating that the social objective of curfews is the well-being of children).

318. Waters v. Barry, 711 F. Supp. 1125, 1138 (D.D.C. 1989). *See also* City of Milwaukee v. Nelson, 439 N.W.2d 562, 571-72 (Wis. 1989) (upholding loitering statute on Fourth Amendment grounds).

319. Waters, 711 F. Supp. at 1138. The court held that the act violated the equal protection clause of the Fifth Amendment. *Id.* at 1140.

320. *Id.* at 1138.

321. *Id.*

322. *Id.*

323. *See* United States v. Landry, 903 F.2d 334, 339 (5th Cir. 1990); *In re* Hector R., 200 Cal. Rptr. 110, 113-14 (Cal. Ct. App. 1984); *In re* Francis W., 117 Cal. Rptr. 277, 281-83 (Cal. Ct. App. 1974); *In re* Nancy C., 105 Cal. Rptr. 113, 117-18 (Cal. Ct. App. 1972); Brown v. Ashton, 611 A.2d 599, 611-12 (Md. Spec. Ct. App. 1992), *cert. granted*, 615 A.2d 262 (1992); State v. Morris, 641 P.2d 77, 80-81

Although in an equal number of the reported cases the courts have invalidated the stop or the arrest,[324] the state's authority to investigate curfew violations has been sustained. The issue has been whether the child's conduct could reasonably be construed by the police as a violation of the curfew ordinance and the courts have held that the police acted unreasonably.[325] The constitutionality of the juvenile's detention by the police generally has determined whether a subsequent search or seizure will be upheld by the courts.[326] Even if the police may arrest curfew violators, it may be difficult to justify a subsequent search incident to the arrest because it is not clear what physical proof of the offense could be uncovered by such a search.[327]

The use of curfew ordinances as a legitimate policing tool permits extensive incursions into the individual liberty interests of adults as well as children. For example, the courts generally do not question the reasonableness of an investigatory detention based upon an assessment of age.[328] Nor are the courts unduly concerned when law enforcement officers detain youthful looking adults[329] or adults in the company of minors who may be violating curfew laws.[330] Consequently, it is conceivable that the

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(Or. Ct. App. 1982).

324. *See* People v. Teresinski, 640 P.2d 753, 757-58 (Cal. 1982); *In re* Frank O., 247 Cal. Rptr. 655, 661-62 (Cal. Ct. App. 1988); *In re* Arthur J., 238 Cal. Rptr. 523, 526 (Cal. Ct. App. 1987); People v Horton, 92 Cal. Rptr. 666, 668 (Cal. Ct. App. 1971); City of Columbus v. Watson, 580 N.E.2d 494, 495 (Ohio Ct. App. 1989); State v. Phipps, 429 So. 2d 445, 447 (La. 1983).

325. *See Teresinski*, 640 P.2d at 757-58; *In re* Frank O., 247 Cal. Rptr. at 661-62; *In re* Arthur J., 238 Cal. Rptr. at 526; *Horton*, 92 Cal. Rptr. at 668; *Watson*, 580 N.E.2d at 495; *Phipps*, 429 So. 2d at 447.

326. *Compare* United States v. Landry, 903 F.2d at 337 (validating an arrest for possession of cocaine); Brown v. Ashton, 611 A.2d at 612 (allowing detention for curfew violation); *In re* Francis W., 117 Cal. Rptr. at 283 (allowing detention for curfew and arrest for burglary); *In re* Hector R., 200 Cal. Rptr. at 114 (allowing detention for curfew and arrest for armed robbery); *with Teresinski*, 640 P.2d at 758 (invalidating search where defendant detained for curfew and arrested for robbery); *Horton*, 92 Cal. Rptr. at 668-69 (invalidating search where defendant was stopped for a curfew violation and arrested for possession of marijuana); *In re* Arthur J., 238 Cal. Rptr. at 527 (invalidating search where defendant was arrested for a curfew violation); *Watson*, 580 N.E.2d at 495 (invalidating search where defendant arrested for curfew).

327. *See, e.g., In re* B.M.C., 506 P.2d 409, 412 (Colo. Ct. App. 1973).

328. For a discussion of the validity of a stop based on race see Commonwealth v. Sams, 350 A.2d 788 (Pa. 1976).

329. *See Teresinski*, 640 P.2d at 755; *Brown*, 611 A.2d at 602, 611; People v. Smith, 276 N.W.2d 481, 483-84 (Mich. Ct. App. 1979).

330. *See* Alves v. Justice Ct. of Chico Judicial Dist., 306 P.2d 601, 602 (Cal. App. 1957); People v. Coleman, 364 N.E.2d 742, 744 (Ill. App. Ct. 1977); Brown v. Ashton, 611 A.2d at 602, 611; State v. Morris, 641 P.2d 77, 80-81 (Or. Ct. App. 1982); City of Seattle v. Pullman, 514 P.2d at 1061. *But see*, People v. Horton, 92 Cal. Rptr. at 668; State v. Smithers, 269 N.E.2d 874, 878 (Ind. 1971); City

police may establish "age checkpoints" to facilitate the enforcement of curfew ordinances.[331] Even if the curfew ordinance is subsequently invalidated, and that is by no means a certainty given the courts' assessment of the constitutionality of curfew laws, minors may be unable to seek redress unless the arresting officer should have known the curfew regulation was invalid.[332]

Furthermore, many accounts suggest that police use curfew ordinances to stop and detain racial and ethnic minorities or as a policing tool in certain "high crime" neighborhoods.[333] The courts have considered very few cases challenging curfew ordinances on racially discriminatory grounds,[334] but these cases suggest that the enactment and enforcement of curfew laws may be racially motivated.[335] In *Chase v. Twist*,[336] for example, the African-American plaintiffs alleged that a thirty-year-old Arkansas municipal curfew ordinance, which had seldom been used, was enforced against them because of their race.[337] Similarly, in *Qutb*, trial testimony suggested that police would selectively enforce the curfew ordinance in certain neighborhoods.[338] Surprisingly, these ordinances were upheld.[339] In dicta, the court in *Qutb* seems to sanction selective enforcement by stating 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."[340]

A theory which ties rights to power, however, would eradicate many of

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of Columbus v. Watson, 580 N.E.2d at 495.

331. *See Brown*, 611 A.2d at 602 (allowing police to set up age check points).

332. *See, e.g.*, United States v. Landry, 903 F.2d 334, 339 (5th Cir. 1990) (citing Michigan v. DeFillippo, 443 U.S. 31, 37 (1979)); *Brown*, 611 A.2d at 612 (citing *DeFillippo*, 443 U.S. 31); *In re* Arthur J., 238 Cal. Rptr. 523, 527 (Cal. Ct. App. 1987) (refusing to apply United States v. Leon's good faith exception to the case at bar); *In re* Hector R., 200 Cal. Rptr. 110, 113 (Cal. Ct. App. 1984) (citing *DeFillippo*, 443 U.S. 31); People v. Smith, 276 N.W.2d 481, 483 (Mich. Ct. App. 1979) (citing *DeFillippo* while case still pending before United States Supreme Court).

333. *See, e.g.*, Note, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109, 111 (1977). *See also* Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977) (failing to review African-American plaintiffs' challenge to the ordinance's application).

334. Qutb v. Strauss, 11 F.3d 488, 495 n.11 (5th Cir. 1993); *Ruff*, 438 F. Supp. at 304; Chase v. Twist, 323 F. Supp. 749, 766 (E.D. Ark. 1970); Hayes v. Mun. Ct. of Oklahoma City, 487 P.2d 974, 976 (Okla. Crim. App. 1971).

335. *Chase*, 323 F. Supp. at 766.

336. 323 F. Supp. 749.

337. *Id.* at 757.

338. *See* Kevin Bell, *Curfew Crackdown*, N.O. TIMES-PICAYUNE, June 1, 1994, at A1.

339. Qutb v. Strauss, 11 F.3d 488, 495-96; *Chase*, 323 F. Supp. at 765.

340. *Qutb*, 11 F.3d at 496 n.11.

the invidious effects of curfew laws. If rights flow to the powerless, then claims based on the unconstitutional infringement of privacy interests protected by the Fourth Amendment would be taken seriously. Furthermore, the enforcement of curfew laws targeted at racial and other ethnic minorities could not be justified under a theory which enables the disadvantaged. Adults' rights claims, too, would be seriously considered because the state's interests in stopping youthful looking persons could not be justified. Finally, reconsidering the rights of children from an empowerment perspective would suggest that children could be penalized for their criminal behavior assuming, of course, that a curfew law could pass constitutional muster. However, such punishment would have to be consonant with constitutional principles and would expose the negative consequences of paternalistic behavior.

IV. CONCLUSION

Children clearly have been disadvantaged by a rights theory premised upon capacity. In the context of juvenile curfew laws, the incapacities of children and their concomitant need to be protected from themselves and others permit the state to restrict the activities of children in ways that are impermissible in the case of adults. Furthermore, these incompetencies suggest that the rights children do have are somehow different, less fundamental, and more easily overridden by paternalistic concerns for their safety and well-being. Consequently, the courts have authorized significant restrictions on the constitutional interests of children as legitimate protective measures. Nevertheless, curfew laws may subject children, and even some adults, to selective and discriminatory law enforcement practices with concomitantly greater restrictions on their liberty than those originally envisioned.

An empowerment rights perspective offers a more coherent account of the rights of children. It is, in the first instance, a political theory grounded in a conception of power as an organizing force in our interactions with one another. From an empowerment perspective, children would have rights because they are powerless and would be able to make claims that must be treated seriously. Furthermore, empowerment rights prohibit others from defining the class of rights holders and the nature and extent of the rights held; they would require that the rights holder be treated nonpaternalistically. Capacity would be irrelevant.

How children would actually make such claims still poses a problem even if we do not tie having a right to the present ability to exercise that

right. It is difficult to assess the true extent of children's capabilities in a society that presumes their incompetence. Certainly, children recognize the limitations imposed upon them, and it is conceivable that their failure to assert their capacities is simply a recognition of its futility. I do think, however, that most children, given the opportunity in a society that truly respects them, can and will assert their rights if we are willing to listen and take them seriously. As for the youngest children, those who simply cannot communicate, some other must assert the rights claim. Again, I think this must be a very different kind of intervention than one premised upon paternalistic considerations.

Interestingly, the claims of parents as they are currently structured would not survive. Parental rights based on control and dominance would no longer be acceptable. Challenges based on the state's failure to respect the rights of children by controlling their activities would have continued legitimacy. Moreover, it is conceivable that such claims may be even more successful because they would not involve power struggles between parents and the state over children. In this sense, children's and parents' interests would truly be commensurate.

Lest this sound too utopian, I suggest that the state may have a continuing and legitimate interest in the imposition of a curfew. However, if we see rights as power for the powerless, the circumstances under which a curfew may be imposed are significantly curtailed. Furthermore, thinking of rights in this way allows us to expose inequities and to challenge existing hierarchies. Thus, curfews aimed exclusively at children because of their status would not survive constitutional scrutiny. This, I think, advantages us all.