Juvenile Curfew: Legal Perspectives and Beyond

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INTRODUCTION

The ever increasing problem of crime in America dominates today's political platforms. Politicians are scrambling to show voters that they are aware of, and concerned with, this growing crisis. But the real crime is not just crime per se, it is a violent rage against basic societal values of decency. And more often than not, we are stunned by the age of the perpetrators.

Three teens barged into a classroom in April of 1993 and beat and stabbed a 16-year-old to death while a horrified class looked on. A 14-year-old student shot another student in the back as school was dismissed in Charlotte, North Carolina. Two students sprayed a school ground with fire from automatic weapons in Washington, D.C. And this violence is certainly not confined to the school grounds. Five children in Dallas, raped a woman and then shot her.

*The author is a 1996 J.D./M.A. candidate at the University at Buffalo. This paper is dedicated to Eugene Fahey for continuing outstanding public service in the Western New York area. The author wishes to thank the office of Eugene Fahey for their research assistance; and Susan Branagan for her support and gentle criticism.


3 Id.
repeatedly, leaving her paralyzed. And 11-year-old Robert Sandifer (a.k.a. Yummy), in September of 1994, was executed by the gang he was attempting to join.

Since the mid-1980's the murder arrest rate of young people has doubled. The rate of homicides committed by 18 to 24-year-olds increased 62% from 1986 to 1991, and the rates for adolescents ages 14 to 17 increased by 124% in the same time period. US News & World Reports printed the results of a survey showing that 5% of twelfth graders had been injured by a weapon during the 1991-92 school year, 14% had been threatened with a weapon and at least 13% had been injured without a weapon. A recent survey asked public school teachers what they considered to be the most serious disciplinary problems. The results of this survey, disturbing in and of

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5 Nancy R. Gibbs, Murder in Miniature, TIME, Sept. 19, 1994, at 55. The story of Robert Sandifer is probably the most disturbing recent event in the area of juvenile crime. Gibbs' article is an excellent portrayal of the event and I strongly recommend it to everyone at all interested in the plight of American youth. The story of "Yummy" begins "On a bright September afternoon last week, the mothers of Chicago's south side brought their children to a vigil for a dead boy they had never met. They wanted their kids to see the scrawny corpse in the loose tan suit lying in a coffin, next to his stuffed animals, finally harmless. ... [No one] it seems, was ... surprised. The neighborhood was still grieving its other dead child, the girl Yummy allegedly killed two weeks ago, when he was supposed to fire on some rival gang members but shot 14-year-old Shavon Dean instead. Police descended on the gang and Yummy became a liability." Id. at 55-56.


8 Id.

9 Id. (reprinting a survey conducted by Michigan St. University and Tulane University).
themselves, become almost humorous when compared to the results of a similar survey conducted in 1940.\textsuperscript{10}

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<th>1940</th>
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<tr>
<td>Talking out of turn</td>
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<td>Running in the hall</td>
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<td>Cutting in line</td>
<td>Rape</td>
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The problem is real and growing.\textsuperscript{11} What can be done to stem the tide of adolescent violence and juvenile delinquency?

\textsuperscript{10} Id. Former Chief Justice Burger has been quoted as saying "The serious challenge of restoring a safe school environment has begun to reshape the law. Days in school with dedicated teachers and eager students struggling to master their lessons have given way, all too often, to disorder and gripping fear of violence by teachers and students alike." Kevin S. Washburn, \textit{Crime in the Schools}, \textit{L.A. DAILY J.}, April 14, 1992, at 6.

Attempts are being made by private groups and governments, both local and national, to address this question. In many areas of the country, legislatures and other government agencies and officials are considering more stringent penalties for juvenile offenders. In addition, schools are instituting new regulations in order to curb the threat of violence. Private efforts to help attack the problem include

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12 Vincent Shiraldi, *Dumb on Crime: Trying 14-year olds as Adults is Costly, Ineffective*, L.A. DAILY J. April 8, 1993, at 6 (reporting that the Californian Attorney General is proposing a lowering of the age at which a juvenile can be tried for murder); Bill Bryan, *Attack Crime with a Vengeance, Board Suggests*, ST. LOUIS DISPATCH, Nov. 26 1993 at b 1, (reporting that the Board of Police Commissioners recommends more prison space and more prison time for juvenile offenders); Elaine S. Povich, *Senate OKs Teen Crime Amendment*, CHI. TRIB., Nov. 6, 1993, at 1 3 (reporting that the United State's Senate overwhelmingly approved a bill to treat 13 year olds as adults if they commit a serious crime with a gun); Gerard F. Russell, *Worcester Officials Urge Steps to Combat Violence*, BOSTON GLOBE, Sep 18, 1993, at 19:5 (reporting that city officials of Worcester, Massachusetts are advocating prosecuting juveniles as adults); Wise, supra note 11 ("We need to change an antiquated law that was designed for kids of 30 years ago," said Queens District Attorney Richard A. Brown. "Today it's a wholly different world where kids are committing acts that were unheard of a few years ago."). For an examination of the changes occurring in the juvenile justice system see Martin L. Frost & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 323 (1991). Frost and Blomquist argue that the two major changes that have occurred within the system are that the "serious juvenile offender" has been removed from the juvenile court and that sanctions have become more punitive. *Id*. The general attitude of the country has become more punitive and legislators are capitalizing on this mood employing what has been called the "3 R's" of criminal law: retribution, retaliation and revenge. Fox, supra note 7.

13 Gail Diane Cox, *Back-to-School Clothing Guide*, NAT'L L. J., Sept. 6 1993, at 6 (reporting that the Southern California's San Jacinto Unified School District has instituted a dress code in order to diminish the threat of gang conflict); Dan Lungren, *Some Schools are War Zones*, L.A. DAILY J., April 14, 1992, at 6 (advocating the use of metal detectors in schools for screening all incoming students, as well as drug-free and gun-free zones around schools); John E. Jacob, *With Cheap Guns Flooding the Streets, There will Be No Refuge in Classrooms*, L.A. DAILY J., April 14, 1992, at 6.
midnight basketball leagues,\textsuperscript{14} programs geared towards violence prevention that help students deal with problems of self esteem,\textsuperscript{15} and programs that expose juveniles to adult offenders in an attempt to steer youths away from crime.\textsuperscript{16}

This paper will discuss one of the many government attempts to curb juvenile crime: the nocturnal juvenile curfew.\textsuperscript{17} Part I will briefly explain the purpose of curfews, as well as their construction and implementation. Some of the more general arguments levied against curfews will also be addressed. Part II will discuss the constitutionality of a juvenile nocturnal curfew. It will present an analysis of juvenile rights including a discussion of \textit{Bellotti v. Baird} as it relates to juvenile curfews. This section will present the argument that although the Supreme Court has not addressed the curfew issue nor specifically laid out the rights of juveniles, there has been consistency among the lower courts when assessing the constitutionality of curfews. The discussion will then focus on the specific constitutional issues which arise in a juvenile curfew

\textsuperscript{14} Michael Murphy, \textit{A Midnight Oasis}, \textsc{Hou. Chron.}, May 2, 1993, at B 21.

\textsuperscript{15} Aileen Streng, \textit{Alternate Program Gives Hope to Suspended Students}, \textsc{Detroit News}, May 20, 1993, at 6N.


\textsuperscript{17} This discussion works on a number of assumptions. First, though I advocate a juvenile curfew, I in no way mean to suggest that a curfew is the only method available. No one program can completely eliminate the problem of juvenile crime. A nocturnal juvenile curfew will work only in conjunction with other reform measures. Such other measures include educational reform, gun control, drug rehabilitation and prevention, welfare reform and juvenile justice reform. Juvenile crime can only be attacked through a comprehensive approach. This paper discusses one tool in that approach.

A second assumption I make is that a curfew will be written properly. This includes a reasonable curfew time and punishment, as well as numerous exceptions to the curfew including going to and from work, direct parental supervision, remaining on one's own property, attending a church or community event, etc. \textit{See Appendix A} for an example of a properly constructed curfew.
challenge. Part III will be an examination of the major sociological work done with respect to juvenile delinquency. It is my belief that those theorists who argue against the efficacy of a curfew do so without having considered any of the research done in the area. I will show that curfews arguably fit into their general analysis.

PART I. A GENERAL WORD ABOUT CURFEWS

Generally speaking, a curfew is a law that restricts the times when a juvenile can be away from home and unsupervised.\(^{18}\) A curfew has three goals: (1) to protect children from nighttime violence; (2) to prevent reckless and mischievous youth from engaging in delinquent activity at night, thereby reducing crime; and (3) to assist parental supervision.\(^{19}\) The first and second goals listed are, perhaps, intuitive. Juveniles will be unable to commit street crimes at night if they are not on the street. Likewise, children are far less likely to be victims of street crime if they are not on the streets. It is the third goal that needs more explanation.

Although it may be argued that curfews infringe upon the rights of parents to allow their children the freedom to do what they want, it must also be recognized that this parental right is not beyond regulation. In Bykofsky v. Borough of Middletown the federal district court stated that

\(^{18}\) See Appendix A for an example of a working curfew.

\(^{19}\) People In the Interest of J.M., 768 P.2d 219, 223 (Colo. 1989). The court actually explained a curfew in terms of four separate purposes, but I have condensed the purposes into only three. See also Waters v. Barry, 711 F.Supp. 1125 (D.D.C. 1989) (listing the same three purposes for a curfew). Other courts have also discussed the general purpose of a curfew in these terms but have not listed them in the same succinct manner as did the court in J.M. or in Waters. See e.g., Village of Deerfield v. Greenberg 550 N.E.2d 12, 16 (Ill. App. Ct. 1990); People v. Chambers, 360 N.E.2d 55 (III. 1977); City of Eastlake v. Ruggiero, 220 N.E.2d. 126 (Ohio Ct. App. 1966).
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When actions concerning the child have a relation to the public welfare or the well-being of the child, the state may act to promote these legitimate interests....[T]hus, in cases in which harm to the physical or mental health of the child or to the public safety, peace, order, or welfare is demonstrated, these legitimate state interests may override the parents' qualified right to control the upbringing of their children.20

Therefore, the rights of parents may be limited to a certain extent21 in order to protect children as well as the community. Furthermore, it must be acknowledged that a curfew will, in fact, assist parents in supervising their children and force those parents who are otherwise neglectful to provide adequate supervision. "By providing a sanction against the parent [and child] who knowingly permits a child to violate the statute, the cooperation of the parent is commanded."22 In other words, parents who can not keep their children at home at night will be assisted and those parents who do not wish to keep their children home at night will be forced to do so.

A properly constructed curfew will limit the hours of prohibition from about 11:00 p.m. until 6:00 a.m.23 These hours may be diminished on the weekend. The punishment for a curfew violation can be as light as simply returning the child to his or her...


21 See Qutb v. Strauss, 11 F.3d. 488 (5th Cir. 1993) (stating that the only parental right that a curfew infringes upon is the right of the parent to allow their child to wander away from home at night without supervision or a legitimate purpose).


23 In Naprstek v. City of Norwich, 545 F.2d. 815 (2d Cir. 1976), the court was forced to invalidate a curfew because it had no cut off time. It began at 11:00 p.m. and never ended. Id. at 818. See Appendix A for an example of a properly constructed curfew.
home, or as heavy as imposing a fine on the juvenile. The most severe punishment should only be a minimal fine paid by the parents. Most importantly, a curfew should provide ample exceptions to enforcement. These exceptions include emergencies, accompaniment by a guardian or parent, returning to and from work, and attending an officially organized community event such as school or church activities. A curfew that does not have these exceptions is far too severe and may not be upheld by the courts.

Several arguments have been levied against curfews. Many of these arguments come from legal scholars and courts and will be discussed later in the discussion. Other arguments, however, come from concerned citizens. The first such argument, and the most often voiced, comes from those who believe curfews are racially discriminatory. Those opposed to curfews for this reason claim that the enforcement of curfews, and the entire spirit of such regulation, tends to be aimed at only inner city areas and not the "safer" white neighborhoods. This argument is weak, at best, for those most often calling for new curfews, or enforcement of existing ones, tend to be black leaders. In fact, one black leader has argued that those opposed to curfews are the most discriminating. He claims that white leaders are hesitant to institute a curfew because black kids are those

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24 In City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989), the court upheld a curfew chiefly because the only sanction was to return the juveniles to their homes. Id. at 364.


26 See Papachristou v. City of Jacksonville, 405 U.S. 156, 160 (1972) (arguing that a curfew aimed at adult vagrants contained racial undertones).


most affected and victimized by crime.\textsuperscript{29} Even more to the point was Buffalo Councilman Archie Amos' comment in defending his stand for a curfew: "I found it interesting that the NAACP took a position to make it a black-white issue. In fact, crime is being committed by teen-agers both black and white. It's a youth thing not an issue of color."\textsuperscript{30}

Related to this argument is the concern that police officers are given too much discretion when determining whether to enforce the curfew.\textsuperscript{31} Community residents fear, and perhaps rightly so, that even the most equitably written curfew may result in inequitable enforcement by police officers. They fear that only minority juveniles will be arrested. While this argument may seem reasonable, evidence suggests that curfews can be, and are, equitably enforced.

For example, in the first six months of Buffalo's curfew, the arrest statistics showed no signs of unfair treatment by the police toward any particular ethnic or social group. As many juveniles were arrested in the more affluent areas as were arrested in the poorest neighborhoods.\textsuperscript{32} A comprehensive review of the Phoenix curfew also reveals that enforcement did not fall across racial or geographic lines. In nineteen weeks of enforcement, 39% of those arrested were Anglo-American, 9% were African-American, and 51% were Hispanic.\textsuperscript{33} While the numbers for the Hispanic community are higher, they are certainly not egregiously higher when considering the

\textsuperscript{29} See Craze, supra note 27, at 47. Robert Ford, a black Charlestown City Councilman said "I'm not going to wait for the white kid to get beat up."


\textsuperscript{31} Id.

\textsuperscript{32} Jane Kwiatkowski, Worst Fears, Highest Hopes Unrealized as Cities Youth Curfew Comes of Age, BUFF. NEWS, Nov. 11, 1994, at D1.

\textsuperscript{33} Dennis A. Garret - Police Chief, Comprehensive Review of the Citywide Juvenile Curfew Program - a report to Sheryl L. Sculley Assistant City Manager, CITY COUNCIL REPORT, Sep. 30, 1993.
population make-up of Phoenix. Furthermore, in that same nineteen week period, the number of arrests was evenly distributed across the city. There were 790 arrests in West Phoenix, 391 arrests in North Phoenix, 588 in South Phoenix and 423 in East Phoenix. These numbers simply do not confirm, and, in fact, undermine, the argument that police enforcement of a curfew will necessarily be racially motivated.

Police officer discretion can be viewed positively as well. Discretion will allow police officers to incarcerate groups of youth meandering through the streets at midnight while ignoring the child running to the store. The curfew is meant to be a tool to assist police officers, not a means to incarcerate every child on the street after dark. It is discretion that keeps the curfew from becoming the draconian measure feared by so many people.

The American Civil Liberties Union further claims that curfews interfere with the rights of parents. Parents around America, however, are generally supportive of juvenile curfews.

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34 Twenty percent of the people living in Phoenix are of Hispanic origins. BUREAU OF THE CENSUS, CENSUS OF THE POPULATION ARIZONA 1990 Table 6 at 19.

35 Garret, supra note 33.

36 Eldrin Bell - Police Chief, THE CITY OF ATLANTA JUVENILE EXPERIENCE June 2, 1991 (stating "[o]ften just a 'hello and why aren't you at home' by an officer is enough to direct a child off of a street corner and to their home.") Thus, the police officers can use their own discretion in determining when to arrest a youth.

37 Deputy Chief Taylor of Atlanta stated "We're not interested in locking up a lot of parents or kids. [The curfew] is a tool we can use to tell these young kids to go home." Gene Warner, Curfew Called Useful as Tool, Not as Panacea, BUFF. NEWS, Feb. 17, 1991, at B1.

38 The ACLU opposes a curfew for this reason. See Rosado, supra note 4.

39 Id. See also Shelley Emling, Curfew Idea Gathers Steam in DeKalb, ATLANTA CONSTITUTION July 23, 1993, G 6:2; Alma E. Hill Atlanta Curfew Keeping Youth off Streets, ATLANTA J. CONST., Feb. 16, 1991, at B 1:5. See also Garret, supra note 33.
Parents seem more concerned with effective enforcement of the curfew than they are with protecting their perceived sphere of control. Furthermore, curfews seem to be supported by a majority of the public. For example, a Phoenix poll showed that 93% of the people surveyed supported the curfew imposed in that city.

The arguments just presented in Part I represent the bulk of attacks against curfews coming from citizens and interest groups. Part II will focus on the arguments against curfews raised by the legal community.

PART II

A. Constitutional Rights of Juveniles and the Nocturnal Juvenile Curfew

The constitutional rights of juveniles have been firmly established since the 1960's. In Re Gault completely overhauled the administration of juvenile courts and is often cited as the beginning of the modern era for juvenile rights. Since Gault, other rights have been recognized for juveniles. For example, In Re Gault overhauled the administration of juvenile courts.

40 See Rosado, supra note 4, at 21; see also, supra notes 19-21 and accompanying text.


42 387 U.S. 1 (1967). The court extended constitutional rights of criminal procedure to include juveniles. Among these rights were the right to counsel, the right to notice, and the right to fair treatment standards and due process.

been judicially added to expand the protection for adolescents. Thus, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

The Supreme Court, however, has not so extended the rights of juveniles as to be coextensive with those of adults. In *Prince v. Massachusetts*, the Court upheld the constitutionality of a statute prohibiting juveniles from selling magazines, newspapers or any other periodicals on the street. The Court stated that:

> the mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a 'sale' or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the state's command. The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment.

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45 *In Re Gault*, 387 U.S. 1, 13 (1967).

46 321 U.S. 158 (1944)

47 Id. at 168
Although this case does predate *Gault, Prince* has been cited in several recent cases as the authority on juvenile rights in comparison to those of adults. The most notable, for this discussion, is *Bykofsky v. Borough of Middleton*,\(^48\) which upheld a nocturnal juvenile curfew.

The *Bykofsky* court noted that minors are deprived of many rights afforded to adults (e.g., voting, drinking, enlisting, driving) and justly so.\(^49\) Although the rights of juveniles are protected, the state has traditionally been allowed more leeway when the subject of regulation is adolescents. Therefore, despite the general protection of juvenile constitutional rights, there remains a significant grey area that continues to raise controversy and debate. Until the Supreme Court definitively resolves the issue of juvenile rights, and addresses the curfew specifically, lower courts will be forced to continue analyzing the issue on a case by case basis, recognizing that children have rights that are not identical to those of adults.\(^50\)

Despite the silence of the Supreme Court on the curfew issue,\(^51\) it should be noted that there are some incontrovertible principles upon which lower courts have agreed. First, age is not a suspect classification and, therefore, a juvenile curfew does not violate the equal protection clause as long as it is rationally related to the desired outcome.\(^52\) Only one court has found that a juvenile


\(^{49}\) 401 F.Supp. at 1256-57.

\(^{50}\) The Supreme Court denied *certiorari* in *Bykofsky*. In his dissent of this decision, Justice Marshall stated that "the question squarely presented by this case, then, is whether the due process of the rights of juveniles are entitled to lesser protection than those of adults." 429 U.S. 964, 965 (1976)

\(^{51}\) *See Scope*, supra note 43, at 1168 n.27.

curfew was not in fact rationally related to its desired effects,\textsuperscript{53} but even in this case it must be remembered that the court did not treat age as a suspect classification warranting a higher standard of analysis.

A second similarity among curfew cases is that the courts almost universally recognize the limited power of the state to regulate juveniles. In \textit{Johnson v. City of Opelousas},\textsuperscript{54} the court struck down a curfew because the statute allowed too few exceptions. The court acknowledged that valid curfews could exist, however,\textsuperscript{55} and held that "[r]estrictions on minors that would be unconstitutionally invalid if applied to adults may be justified only if the restrictions serve a significant state interest . . . that is not present in the case of an adult."\textsuperscript{56}

In \textit{City of Seattle v. Pullman},\textsuperscript{57} the Washington Supreme Court found a curfew to be too vague and thus unconstitutional. Like the court in \textit{Johnson}, however, the Washington court stated, "[w]e do not prohibit the state from imposing reasonable controls on the conduct of minor children during evening hours."\textsuperscript{58} Many other courts that have found a juvenile curfew unconstitutional have done so for reasons of semantics, not for violations of constitutional judicial scrutiny. This test merely requires that a piece of legislation be rationally related to a legitimate outcome. This test is easily passed because virtually any outcome can be determined legitimate. The highest level of judicial scrutiny requires that the legislation address a compelling state interest in the least restrictive way. The third test is somewhere between these two extremes. It is a more recent creation, used in the area of gender, and is not important for this discussion.


\textsuperscript{54} 658 F.2d. 1065 (5th Cir. 1981).

\textsuperscript{55} \textit{Id.} at 1072-73.

\textsuperscript{56} \textit{Id.} (citing \textit{Carey v. Population Servs. Intern'l}, 431 U.S. 678 (1977)).

\textsuperscript{57} 514 P.2d 1059 (Wash. 1973).

\textsuperscript{58} \textit{Id.} at 1061.
principles. Thus, the objection of many courts is not with the curfew itself, but with the manner in which it is worded or enforced.

There is a third similarity among more recent curfew cases. In 1979, the Supreme Court decided *Bellotti v. Baird*. This case seemingly presented a new approach to the issue of juvenile rights generally, and to curfews specifically. This *Bellotti* approach has been at least a part of all decisions concerning juvenile curfews. This development requires a detailed discussion as I believe that *Bellotti* has been misapplied by the courts and that continued reliance on *Bellotti* is misplaced.

On August 2, 1974, the Legislature of the Commonwealth of Massachusetts passed an act requiring mothers under 18 years of age to obtain consent from both of their parents before undergoing an abortion. In its analysis, the court discussed matters which have been addressed above. The court first stated, "a child, merely on account of his maturity, is not beyond the protection of the court," but then went on to say, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of the State's duty towards children." In other words, the *Bellotti* court recognized that "although children generally are protected by the same constitutional guarantees against government deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability."

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61 Id. at 625.

62 Id. at 633.

63 Id. at 634 (quoting May v. Anderson, 345 U.S. 528, 536 (1953)).

64 Id. at 635.
The court then discussed the inability of children to make mature choices, as in the case of *Prince v. Massachusetts*.\(^{65}\) Finally, the *Bellotti* court discussed the unique and irreplaceable role of the parent in the upbringing of the child. Again quoting *Prince*, the court stated, "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that state can neither supply or hinder."\(^{66}\) This led the court to the decision that "[l]egal restrictions of minors, especially those supportive of the parental role, may be important to the child's chances for full growth and maturity that make eventual participation in a free society meaningful and rewarding."\(^{67}\)

This decision can be synthesized into three rationales allowing the state to treat children differently than adults: (1) a state may take appropriate action where a decision will have "potentially serious consequences" because children are often incapable of making mature decisions;\(^{68}\) (2) the state may "adjust its legal system" since children have a special vulnerability;\(^{69}\) and (3) the important role of parental responsibility within our society entitles parents to the "support of laws designed to aid discharge of that responsibility."\(^{70}\) These three considerations allowed the court to uphold the Massachusetts statute requiring parental consent. More importantly for this discussion, however, is courts that have addressed the constitutionality of juvenile curfews have used these three rationales to create a three

\(^{65}\) *Id.* at 636.

\(^{66}\) *Id.* at 638.

\(^{67}\) *Id.* (citing Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to their Rights*, B.Y.U. L. REV. 605 (1976)).

\(^{68}\) *Id.* at 635.

\(^{69}\) *Id.*

\(^{70}\) *Id.* at 639.
prong test. Regardless of whether the court has upheld the curfew or invalidated the curfew, the "Bellotti test" has been employed.

Both Waters v. Barry\(^7\) and McCollester v. City of Keene\(^7\) struck down juvenile curfews on specific constitutional grounds, as opposed to the semantic concerns discussed earlier.\(^7\) In Waters, the court stated, "[a]n application of [the Bellotti] criteria in this case makes clear that there is no basis for treating juveniles differently than adults; accordingly, the Act must fall."\(^7\) In McCollester, the court was equally plain: "the City fails to meet the three-prong test of Bellotti."\(^7\) Although there were other factors guiding the decisions of these courts, the application of Bellotti was clearly fundamental in dictating the outcome. As the Waters court was more explicit in its application of Bellotti than the McCollester court,\(^7\) it is that application I now examine.

The Waters court found violence to be ubiquitous, and that children were no more prone to it than adults.\(^7\) Moreover, the Waters court believed the decisions contemplated by the Bellotti court did not include the decision to venture outside of one's home at night.\(^7\) Finally, the court found that although keeping a child at home might foster parental guidance in those homes where guidance

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\(^7\) See also Scope, supra note 43, for a discussion of curfews generally failing the "Bellotti test."

\(^7\) 711 F.Supp. at 1136-37.

\(^7\) 586 F.Supp. at 1385.

\(^7\) The McCollester court did not fully explain why the curfew failed the "Bellotti test" other than to briefly discuss the vulnerability of children. Id. at 1385-86.

\(^7\) 711 F.Supp. at 1137.

\(^7\) Id.
had deteriorated, the curfew ignored those families that maintained strong support and discipline without state assistance. 79

This analysis is flawed in many ways. The mere fact that violence is ubiquitous should not invalidate a juvenile curfew, especially when it is reasonable to assume that children may very well be more susceptible to victimization. Moreover, this argument sounds suspiciously close to an equal protection analysis: an analysis which has already been refuted in the context of age. Furthermore, while the Waters court argued that children are no more endangered by violence than adults, it failed to offer any empirical evidence supporting this claim. 80 The vulnerability of a child is not simply physical; there are emotional and mental vulnerabilities as well. 81 This leads to the Bellotti rationale.

Children are in general poor decision makers, 82 as Bellotti acknowledges. In the context of juvenile curfews, decisions to cause

79 Id.

80 For a discussion of some empirical evidence see supra note 11 and accompanying text.

81 See infra note 69 and infra Part III.

82 Susan K. Knipps, What is a Fair Response to Juvenile Crime?, 20 FORDHAM Urb. L.J. 455, 464 (1993). See also LAMAR T. EMPEY & MARK C. STAFFORD, AMERICAN DELINQUENCY 43 (3d ed., 1991) (stating that "[t]he modern concept of childhood suggests that children must be stringently safeguarded, must receive a carefully structured education, and that only after many years of moral, physical, and intellectual quarantine can they be allowed to join adults."); JAY S. ALBANESE, DEALING WITH DELINQUENCY 41 (1985) (stating that adults are considered to be more responsible for their behavior then are children); Gisela Konopka, Conditions for Healthy Development of Adolescent Youth, in ISSUES IN ADOLESCENT PSYCHOLOGY 63 (Dorothy Rogers ed., 1977) (stating that "youth must develop the capacity to make decisions in many areas") (emphasis added); BARBARA M. NEWMAN & PHILIP R. NEWMAN, AN INTRODUCTION TO THE PSYCHOLOGY OF ADOLESCENCE 339-41 (1979) (arguing that the existence of the distinction between juveniles and adults is predicated upon the assumption that delinquents are not mature enough to be responsible for their actions); E. A. PEEL, THE NATURE OF ADOLESCENT JUDGMENT 152 (1971) (stating that age is positively correlated with the growth of mature judgment and behavior).
Juvenile Curfew

Juvenile trouble are subject to peer persuasion. Delinquency is often thought to be caused by peer pressure. The need of juveniles to conform to peer groups is greater than that of average adults, thus the vulnerability of juveniles' psyches is far more acute. This vulnerability, coupled with a poor decision making ability, leads one to believe that a curfew passes the first two criteria of *Bellotti*, for childhood is marked by a particular set of circumstances that makes adolescents both emotionally and physically vulnerable. The *Waters* court, however, determined that not only are children no less vulnerable than adults, an unsubstantiated claim, but that the decision making ability discussed in *Bellotti* was not meant for this particular issue. This assertion masks a greater truth.

*Bellotti* dealt with abortion rights, and thus the language of its decision was aimed at that specific issue. The *Waters* court may have been correct in concluding that *Bellotti* did not cover the decision to leave home at night, but *Bellotti* did not purport to cover anything except abortion; the Supreme Court did not consider juvenile curfews, as such was not the issue before it. Still, the *Waters* court uses *Bellotti* as a general guide, but when *Bellotti* does not specifically address the issue of curfews, the *Waters* court denies the possibility of extending the *Bellotti* decision beyond its literal meaning. The *Waters* court, however, went beyond any possible literal interpretation by holding that *Bellotti* was the last, definitive word on juvenile rights.

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84 Id.; see also Curfew Ordinances, supra note 83, at 131.

85 See Stanley H. King, Coping with Growth in Adolescence, 69 in ISSUES IN ADOLESCENT PSYCHOLOGY 68, 69 (Dorothy Rogers ed., 1977) (stating that the traditional views of adolescence show that it is a time marked by conflict, turmoil and rebellion); PAMELA RICHARDS ET AL., CRIME AS PLAY, 26-35 (1979) (arguing that delinquency is a result of experimentation with peers during leisure time); Konopka, supra note 82, at 63 (arguing that the search for identity during adolescence is more conscious than it is during adulthood and highly emotional).
The final rationale set forth in *Bellotti* is the role parents play in raising their children. The *Waters* court conceded that a curfew would help those families in which guidance had broken down, but also argued that a curfew might interfere with other parental wishes. A similar argument was recently refuted in *Qutb v. Strauss*. The *Qutb* court upheld a curfew, claiming that the only interference a curfew created was the limit placed on parents' abilities to allow children to leave the house at night, during curfew hours, unaccompanied by an adult. Is this such an intrusion? The *Qutb* court ruled that it was not.

Of course the *Waters* and *McCollester* courts' rationales are not entirely flawed. *Bellotti* may indeed lead one to believe that curfews are unconstitutional. The flaw in this reasoning, however, lies not in the examination of each of the three criteria, but in the application of *Bellotti* itself. The *Bellotti* court was deciding a highly controversial issue, an issue having nothing to do with juvenile curfews. There is no reason to believe the court had any other intention for its decision other than requiring parental consent. And since *Bellotti*, the Supreme Court has not applied the criterion in any other broader way. Thus there is no reason to believe the court

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86 11 F.3d. 488 (5th Cir. 1993).

87 *Id.* at 495. New York State Dale Volker stated "The concept that youths have a right to be on the streets late at night is the perspective of a teen age mentality." Dale M. Volker, *Curfew is Necessary to Force Supervision*, *BUFF. NEWS*, April 3, 1993.

intended *Bellotti* to be the new doctrine of juvenile rights. If one insists on placing such significance on *Bellotti*, and superimposing its meaning on the issue of juvenile rights generally, then perhaps the only definitive rule to come away with is, "[I]egal restrictions of minors, especially those supportive of the parental role, may be important to the child's chances for full growth and maturity that make eventual participation in a free society meaningful and rewarding." The other possibility is that *Bellotti* merely stands for the tenet, "teenager[s] [are] less able to evaluate the consequences of [their] conduct." As rules, these remain vague, but at least it is a vagueness that the court itself expressed, not the injection of a totally new principle.

Those courts deciding the issue of curfews in light of the "Bellotti test" have been misguided. The rationales stated in *Bellotti* were not intended to, nor can they be made to, fit this issue. I shall now address the specific constitutional issues involved in a curfew, namely the right to move and freedom of speech.

**B. Issues of Constitutionality**

1. Right to Move

   In *United States v. Guest*, the Supreme Court held that the right to interstate travel is protected by the Constitution. Although there is no direct evidence that the right to move (the right to control one's own locomotion) is protected by the Constitution, there is little reason to believe otherwise. In *Bykofsky*, then, the court stated, "[n]o
right is more sacred, or is more carefully guarded, by the liberty assurance of the due process clause than the right of every citizen to the possession and control of his own person, free from restraint or interference by the state," and,

[t]he rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are basic values 'implicit in the concept of ordered liberty' protected by the due process clause of the fourteenth amendment.

In *Papachristou v. City of Jacksonville*, the court found general wandering and strolling to be amenities that have "dignified the right of dissent and have honored the right to be non-conformists and the right to deny submissiveness. They have encouraged lives of high spirit rather than hushed, suffocating silence." And perhaps the most notable declaration of the right to move came from Justice Douglas' concurrence in *Aptheker v. Secretary of State*, where he stated:

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

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93 Id. at 1254 (quoting U.S. v. Wheeler, 254 U.S. 281, 293 (1920)).

94 405 U.S. 156 (1972).

95 Id. at 164.

Once the right to travel is curtailed, all other rights suffer...

Thus, it would seem that despite a lack of an explicit declaration by the court the general right to move is in fact a fundamental right that can only be abridged if the statute in question is narrowly tailored to serve a compelling state interest.

2. First Amendment Rights

The rights provided by the First Amendment are usually not debated within the context of juvenile curfews. In the instances where such issues are raised, however, (e.g., the right to associate, the right to free speech, right to expression of religion) the curfew being challenged typically fails to contain the necessary exceptions for the legitimate exercise of First Amendment privileges. The most compelling argument discrediting First Amendment challenges to juvenile curfews was put forth by the Illinois Supreme Court in People v. Chambers. The lower court had ruled to invalidate a curfew, concluding that it infringed upon the rights of adolescents to move about in public and to socialize, both of which are rights


98 See Martin E. Mooney, Note, Assessing the Constitutional Validity of Juvenile Curfew Statutes, 52 NOTRE DAME L. REV. 858, 878-79 (1976-1977) [hereinafter Assessing Curfews] (arguing that it is difficult to argue that the right to move is not a fundamental right).


protected by the First Amendment. In response to this argument, the Illinois Supreme Court in *Chambers* overruled the lower court and stated, "[t]he statute is not aimed at any of the fundamental values of speech, association or expression protected by the first amendment, and indeed the suggestion that those values are impaired by the restriction here involved seems to trivialize them." The court went on to say that the right of children to choose with whom to associate, and when and where they associate, was not an unlimited, absolute right. Certainly one might argue that a juvenile curfew infringes upon First Amendment rights, and, indeed, that was done in *Waters v. Barry*. However, the court has also stated "[i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." A curfew infringes only on a small "kernel" of the liberties protected by the constitution.

A properly constructed curfew contains exceptions for registered First Amendment activities as well as instances where the adolescent is accompanied by an adult. In other words, a child is losing only ancillary rights at night when not accompanied by an adult.

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103 335 N.E.2d 55, 57 (1977).

104 Id.


3. Standard of Review

What then is the proper standard of review for determining the constitutionality of juvenile curfews? Despite the fact that courts have traditionally been more lenient in reviewing regulations of minors, I maintain that, because the fundamental right to move is infringed upon, strict scrutiny is appropriate. Strict scrutiny requires that a statute be narrowly drawn to satisfy a compelling state interest.

In *Qutb v. Strauss*, the court analyzed a juvenile curfew under the strict scrutiny test after assuming that a curfew did, in fact, violate fundamental rights. The court first determined that the interest of the state in protecting the welfare of children was compelling. The court then ruled that the curfew was narrowly drawn to meet the compelling interest. For a statute to be narrowly drawn, there must a nexus between the stated government interest and the

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107 In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976) the court stated that the appropriate standard of review when dealing with juvenile rights is a "significant state interest" test. This standard of review, however, has not been used to any great extent, being employed mainly in the context of the abortion issue. See Planned Parenthood v. Casey, 120 L.Ed. 2d 674, 754 n.8 (1992); Webster v. Reproductive Health Services, 492 U.S. 490, (1990) (Blackmun, J., dissenting); H.L. v. Matheson, 450 U.S. 398, 404 (1981); Carey v. Population Sers. Intl., 431 U.S. 678, 693 (1977). It was also stated in Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981). Because this new standard has only been used sporadically it is difficult to argue that it should be used for determining the constitutionality of a juvenile curfew.

108 *See also* Mooney, *Assessing Curfews*, *supra* note 98, 1976-77. Mooney argues that strict scrutiny is appropriate but does not then present an analysis of its application. *Id.* at 879.

109 *Supra* note 52 and accompanying text.

110 11 F.3d. 488 (5th Cir. 1993).

111 *Id.* at 492 (citing Plyler v. Doe, 457 U.S. 202, 215-16 (1982)).
classification of those affected by the statue.\textsuperscript{112} A "tight fitting" of the statute ensures that the statute was not constructed for illegitimate ends.\textsuperscript{113} The court concluded that since the state presented a multitude of empirical evidence describing the problems of crime, including the fact that most violent crimes occur at night,\textsuperscript{114} the curfew was the least restrictive means available for furthering the state interest. The court also placed great significance on the fact that there were a variety of exceptions that protected legitimate activities of juveniles.\textsuperscript{115} Such exceptions even further tightened the statute. Finally, the court stated that the intrusion on parental rights was minimal.\textsuperscript{116} The \textit{Qutb} court ruled that a properly drawn curfew could pass the highest of constitutional standards.\textsuperscript{117}

There is yet another possible standard of review that might be employed. In \textit{Thistlewood v. Trial Magistrate},\textsuperscript{118} the Maryland Court of Appeals ruled that a compelling state interest was addressed when

\begin{footnotesize}
\begin{enumerate}
\item Id. at 493 (citing City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989)).
\item Id.
\item Id.
\item Id.
\item Id. at 495.
\item But cf. Waters v. Barry, 711 F.Supp. 1125 (D.D.C. 1989). The Waters court employed the strict scrutiny test as well but ruled that a juvenile curfew is not constitutional. The court found that the statute was "a bull in a china shop of constitutional values," \textit{Id.} at 1134. The court also stated that it must act "gingerly" when stifling personal liberties. The court went on to conclude that a curfew would not work. They ruled that it will not deter criminals and that daytime can be just as dangerous as night. \textit{Id.} at 1135. It is interesting to note that the court did not rely on any evidence for these claims other than one statistic that showed the murder rate was higher during the day. This hardly stands as a thorough investigation of all the pertinent issues. The court also employed the \textit{Bellotti} test. \textit{Id.; see supra} part II, section B.
\item 204 A.2d. 688 (Md. 1964).
\end{enumerate}
\end{footnotesize}
a summer resort town instituted a juvenile curfew during Labor Day weekend. The curfew had been enacted in response to the large influx of adolescents during this weekend. In its decision, the Thistlewood court asked three questions: (1) is there an evil to be addressed; (2) do the means employed to combat the evil have a real and substantial relation to the evil sought to be corrected; and (3) do the means employed "unduly infringe or oppress fundamental rights" of those persons affected? Although the court did not explicitly use the strict scrutiny test, (Thistlewood predates Shapiro), the three questions asked are simply a rephrasing of the strict scrutiny test employed in later fundamental rights cases. This "reasonableness test" could also be used to determine the constitutionality of a juvenile curfew.

My discourse has already answered the first question presented in Thistlewood; there is a growing evil in American society. The third question has also been answered; the rights of juveniles are not completely coextensive with those of adults, but the liberty they lose as a result of a curfew is very small. The second question, however, remains to be answered. Restated, the question is whether a juvenile curfew will work? Can a curfew curb crime by and against adolescents?

In Waters v. Barry, the court concluded that because most murders occur during the daytime, and because criminals will not be deterred by such a simple regulation, the curfew would not work. This simple-minded analysis ignores the fact that murders are not the only evil to be prevented. This analysis also ignores the sociological

119 Id. at 693. This test came to be known as a "reasonableness test" and was used in several subsequent cases. See e.g., In re Nancy C., 105 Cal. Rptr. 113 (1972) (ruling that curfews are in general reasonable); City of Eastlake v. Ruggiero, 220 N.E.2d. 126 (Ohio App. 1966) (a curfew is a justifiable police action but cannot exceed the bounds of reasonableness); Alves v. Justice Court of Chico Judicial Dist., 605 P.2d 601, 605 (Cal. App. 1957) (where a curfew that had no written exceptions was found to be unreasonable and, therefore, unconstitutional).

121 See supra Introduction.

work done on delinquent behavior. It is this second point to which I
now turn.

Even in cases where the court has concluded that curfews will
work, there has been little or no reliance on relevant authority; there
have been only guesses. Analysis by courts and legal authors have
relied solely upon legal arguments to either support or denounce
curfews.\textsuperscript{122} An examination of some of the major theories relating to

\textsuperscript{122} One of the better examples of this myopic analysis can be found in \textit{Scope, supra}
note 43, at 180, where the author states that the "unique developmental
characteristics of childhood fail to justify the limits that curfews place on the
exercise of the fundamental rights of movement and association" without offering
more than scant evidence to support such a claim. This author also claimed that
"[b]ecause their capacities of reason and emotion are not yet fully formed, children
are more likely, in certain situations, to make decisions or take actions that may
cause serious damage to the children themselves or to others or may even alter the
course of their entire lives." \textit{Id.} at 1168. The presence of such unsubstantiated
claims within this piece of scholarship is especially noteworthy because this article
is often cited to by the courts as an authority. Another example is \textit{People in the}
Interest of J.M.}, 768 P.2d 219 (Colo. 1989), in which the court states:

\begin{quote}
We believe 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. The three factors enumerated in \textit{Bellotti} are all present in
this case. Youths abroad at night are more vulnerable to crime
and peer pressure than their adult counterparts. Similarly, a
child's immaturity may lead to a decision to commit delinquent
acts, such as vandalism, drug or alcohol use, or crimes of
violence. Although adults may also make these decisions, they
are more likely to do so in an informed and mature manner with
full consideration of the consequences of their acts. Courts have
recognized that, during the formative years of childhood and
adolescence, minors often lack the experience, perspective, and
judgment to recognize and avoid choices that could be
detrimental to them. \textit{Id} at 223.
\end{quote}

This assertion may in fact be accurate, but the court offers no evidence for such a
claim. Even in \textit{Qurb v. Strauss}, 11 F.3d. 488 (5th Cir. 1993), the court discusses the
incapacity of children to make sound judgments without supporting this claim. \textit{See
also Assessing Curfews, supra} note 98, at 879 (where the author argues that a
curfew would probably not reduce crime and yet presents with very little research).
Juvenile curfew will indicate that a curfew may go a long way in curbing juvenile delinquency. In fact, if a juvenile curfew will not work to at least some degree, then there is little reason to consider the constitutionality of a curfew.

Part III of this discussion includes an examination of the major theories of juvenile delinquency. Such an examination will support the claim that a juvenile curfew can, at least theoretically, work. Discussing the efficacy of a juvenile curfew without any examination of sociological work reduces the analysis to unsubstantiated conclusions. This is something I seek to avoid.

PART III

A. Multiple Marginality

There are a variety of sociological theories on juvenile delinquency. These theories do not necessarily conflict, they simply focus on different aspects of the problem. Although it is quite natural within the realm of social sciences to find oneself espousing one particular theory over another, James Diego Vigil presents what he and others call the "multiple marginality theory." To his credit, this theory addresses the problem of juvenile delinquency in the same way Geertz approached social phenomena: through a "thick description." Simply defined this is a recognition of the complexities of inner city life. It is a "multi-dimensional analysis" which weaves together all related theories into a broad examination of the gang sub-culture. Thus, "the multiple marginality construct offers an integrative interpretation, a way to build theory rather than a theory itself." There is no one single theory which deals effectively with all causes of gang development; it is merely a question of emphasis.

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123 James Diego Vigil, Barrio Gangs: Street Life and Identity in Southern California, 9-12 (1988). I should mention here that some analyses may focus simply on gang formation rather than juvenile delinquency as a whole.

124 Id. at 173.
Each theory is not exclusive of any other, and each theory contributes to a fuller understanding of the problem.

Passing these [gang] theories through the prism of multiple marginality best reflects the complexity of modern urban society. Multiple marginality implies more than just many gang facets. It also entails the many situations and conditions that contribute to gangs . . . . Similarly, while other gang theories may utilize particular variables to underscore their point, it is the collective synthesis of these variables that determines early involvement and subsequent regular gang membership.\(^{125}\)

With this theoretical frame of mind it becomes impossible not to examine all of the major theories of juvenile delinquency. To truly advocate a juvenile curfew, all of the existing major theories addressing juvenile delinquency must be presented. Legal success depends specifically upon whether a curfew will work. Arguing for a curfew based upon expected positive results requires one to be cognizant of the work done in the area, and knowledgeable as to what the experts have learned. To disregard one particular theory would be to risk leaving out an important piece. Therefore, the next section is a general outline of the theories concerned with juvenile delinquency. It should be noted that I am not presenting these theories in any particular order.

**B. The Sociological Perspective and Some Practical Applications**

Shoemaker claims that there are three basic sociological conceptions of juvenile delinquency, each based upon a focus of the

\(^{125}\) _Id._ at 172-73.
lower class.\textsuperscript{126} The first of these is a strain theory initially espoused by Cohen, which places the causation of delinquency upon basic differences between the cultural values of the middle class and the lower class.\textsuperscript{127}

In Cohen's theory, the middle class values of success, responsibility, self-control, long range planning, respectfulness, and politeness, are the values which dominate the school system.\textsuperscript{128} The lower class values of aggression, realism, skepticism and immediacy are therefore in direct contention with the school structure. A child from the lower class will do poorly in school because he is at odds with the value system.\textsuperscript{129} This conflict will create a feeling of low self esteem and of rejection.\textsuperscript{130} To improve self esteem the child associates with others in the same situation, and together their hostility and aggression towards the middle class value system ferments.\textsuperscript{131} Finally, the juvenile is prodded into delinquent acts to gain esteem within the peer group.\textsuperscript{132} Thus, the rejection of school values leads to an association with a deviant crowd in order to improve self esteem.

Cohen's theory is labeled a strain theory in light of the strain between expected middle class values and enforced lower class

\begin{enumerate}
\item[\textsuperscript{126}] DONALD J. SHOEMAKER, THEORIES OF DELINQUENCY: AN EXAMINATION OF EXPLANATIONS OF DELINQUENT BEHAVIOR 116 (2d ed. 1990). I have relied primarily upon Shoemaker's book for my research. This means that I have adopted Shoemaker's taxonomy. For other reviews of this literature see MICHAEL RUTTER & HENRI GILLER, JUVENILE DELINQUENCY: TRENDS AND PERSPECTIVES, (1983) [hereinafter RUTTER]; EMPEY, supra note 82.
\item[\textsuperscript{127}] SHOEMAKER, supra note 126, at 117.
\item[\textsuperscript{128}] Id. at 118.
\item[\textsuperscript{129}] Id.
\item[\textsuperscript{130}] Id. at 119.
\item[\textsuperscript{131}] Id. at 118-19.
\item[\textsuperscript{132}] Id.
\end{enumerate}
values. Empirical research has corroborated some strain theories, as a definite link exists between delinquency and poor school performance. It may also be assumed that ours is a stratified society, and that value systems will conflict. It cannot be shown, however, that these conflicts cause delinquency, nor can it be proven that the lower class drop-outs harbor aggression towards the middle class value system. Cohen's theory does have its merits in that it points to the critical link in juvenile delinquency, namely the failure within the school system to deal effectively with students of the lower class, but he fails to explain why most delinquent acts occur outside of school.

Another strain theory comes from the work of Cloward and Ohlin, who reason that expectations of success stem from a concept defined by the middle class which is then superimposed upon the lower class. While children in a lower class environment have the same economic aspirations as those within a middle class environment, their paths to this success are blocked. They compete with the middle class and invariably lose. This results in frustration and low self-esteem which, in turn, leads to delinquency. This hypothesis is a departure from Cohen in that Cloward and Ohlin emphasize goals and aspirations, while Cohen specifically states that it is the lower class value system which is at odds with the middle class. Cloward and Ohlin claim that everyone aspires to achieve the American dream, but unfortunately, the opportunities to fulfill that

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133 Id. at 116-24.

134 Id. at 120.

135 Id. at 120-24.

136 Id. at 124.

137 See RUTTER, supra note 126, at 246.

138 SHOEMAKER, supra note 126, at 125-26.

139 Id. at 126.
dream are not evenly distributed.\textsuperscript{140} It is these blocked opportunities that produce strain.

Cloward and Ohlin's theory also focuses on the specific manifestations of frustration in relation to the attitudes of the neighborhood. Factors such as the presence of adult criminal activity, the perceived importance of the neighborhood school, and the stability of the community all serve to define the characteristics of the delinquent.\textsuperscript{141} In this aspect, the theory is useful for defining specific delinquent behavior. Cloward and Ohlin also detail three possible outcomes for the delinquent in terms of subculture: criminal sub-culture, conflict sub-culture, and retreatist sub-culture.\textsuperscript{142} Those adolescents living in the criminal sub-culture achieve success through crime, while those in the conflict sub-culture can find no way to succeed, often resorting to seemingly mindless violence. The retreatist sub-culture is left for those who turn towards drugs to alleviate their spirit.\textsuperscript{143} This particular strain theory has not survived empirical tests.\textsuperscript{144} In general the theory seems to gloss over complicated psychological processes and, therefore, has difficulty accounting for differences among juvenile delinquents.\textsuperscript{145} There is support, however, that neighborhood characteristics and organizations define juvenile delinquents.\textsuperscript{146}

Walter Miller is the author of a highly politicized theory of lower class delinquency. He postulates that a definite lower class male value system exists similar to that described by Cohen (i.e.

\begin{footnotesize}
\textsuperscript{140} See EMPEY, supra note 82, at 232.
\textsuperscript{141} Id. at 231-34.
\textsuperscript{142} Id. at 233.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 240-245.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\end{footnotesize}
toughness, street-smartness, excitement, autonomy, fatalism).\textsuperscript{147} He goes on to state that, because female oriented households dominate the underclass, the young males of such households turn to gangs in order to enforce and further develop these values.\textsuperscript{148} Delinquency represents the only source for male role models, and so it becomes the focus of attention for the adolescent.\textsuperscript{149} Thus, this theory suggests that delinquency is an intrinsic aspect of the lower class. It also implies that a "culture of poverty" does exist.\textsuperscript{150} The primary weakness of this theory, however, lies in the fact that no real research was conducted. The theory is "substantiated more by common sense and haphazard observations than by systemic research."\textsuperscript{151} Miller espouses the "culture of poverty" theory without truly testing it empirically.\textsuperscript{152}

Clifford Shaw and Henry McKay first proposed their theory in 1942. Resting upon the concept of social disorganization, Shaw and McKay's theory assumes that a breakdown of community institutions, resulting from rapid industrialization and urbanization, or increased immigration to a specific area, will lead to delinquency.\textsuperscript{153} This process starts with an increase in population coupled with the overall decline of living conditions caused by industrialization.\textsuperscript{154} These events encourage urban flight, leaving the

\textsuperscript{147} Id. at 190.

\textsuperscript{148} Id. at 189-90.

\textsuperscript{149} Id.

\textsuperscript{150} Id at 138.

\textsuperscript{151} DONALD J. SHOEMAKER, THEORIES OF DELINQUENCY 125 (1984).

\textsuperscript{152} See SHOEMAKER, supra note 126, at 135-41.

\textsuperscript{153} Id. at 84-89.

\textsuperscript{154} See EMPEY, supra note 82, 180.
ineducated and less economically secure behind. Community institutions break down as a result. "Under such conditions, parents are relatively helpless to control or help their children ... demoralized slum parents are unable either to provide direction for their children or control their delinquent tendencies." An individual within a disorganized community responds to this situation in a natural and instinctive way, by locating the only organization within the community - the gang.

Relating delinquency to geographical areas is justified because of increased delinquency within the most densely populated sections of cities and those sections experiencing the greatest amounts of industrialization. Some statistical evidence may support these claims. Weaknesses do exist, however, for the theory does not account for cultural values, nor does it consider why there are individuals within these areas who are not delinquents and why delinquents exist outside of these areas.

Related to this theory is the anomie theory which instead of placing the burden upon community institutions, leaves it with the community as a whole. The disorganized community, so goes the argument, will result in delinquency. Thus the anomie theory relies upon the same geographical considerations as Shaw's and McKay's theory of social disorganization, and, as such, fails in the same

155 Id. at 183.

156 Id.

157 For example, 8 in 10 delinquents acts are committed in groups. Empey, supra note 82, at 183; see also Rutter, supra note 126, at 249.

158 See Shoemaker, supra note 126, at 90-7.

159 Rutter, supra note 126, at 245. This is taken from Durkheim's similar notion of anomie.

160 Shoemaker, supra note 126, at 98.
Both of these theories also lack a micro-sociological standpoint, and fail to show exactly how disorganization affects the individual.\textsuperscript{162} Another school of thought has been labeled the control theory. A basic assumption of this theory is that delinquency is a universal tendency which is only kept in check by internal and external forces.\textsuperscript{163} Reckless' containment theory, a personal control theory of delinquency, points to the individual's personalized feelings and self-concept.\textsuperscript{164} All individuals have pushes and pulls which are internalized and handled, depending upon the individual. For example, a person lacking a role model and having a low self esteem, perhaps derived from a sense of alienation from school or from their community, may be easily swayed by a peer group.\textsuperscript{165} Here, in Reckless' terms, the strength of the external push would be stronger than that of the internal pull.\textsuperscript{166}

Hirchi's control theory is somewhat different than Reckless' as it focuses less on an individual's self concept and more on the individual's relationship with religion, family, and school (the community as a whole).\textsuperscript{167} Four basic concepts accompany this theory: commitment, attachment, involvement and beliefs.\textsuperscript{168} Commitment refers to the adolescent's internalization of values and beliefs. It is considered a type of informal cost-benefit analysis where

\textsuperscript{161} Id. at 108.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 173.
\textsuperscript{164} Id. at 175.
\textsuperscript{165} Id. at 177-78.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 182-84.
\textsuperscript{168} Id.
the child assesses the benefits of conformity to accepted societal values in comparison to the costs of nonconformity and delinquency. Attachment considers the psychological and emotional connection to other groups, and the importance of these other groups' opinions. Involvement refers to the level of participation in conventional activities. "[A]dolescents who are busy doing conventional things - duties around the home, studying, or engaging in sports - may not have time to be delinquent." Beliefs involves the acceptance of traditional values as legitimate. As the belief of legitimacy wanes, the likelihood of delinquency increases. The most important finding of this research is that, "school experiences are not only directly associated with delinquency, but that they are also relatively more associated with delinquency than other institutional variables, namely family relationships."

Sutherland's theory of "differential association," first proposed in 1938, has recently been reexamined. This theory stresses learning, and suggests that criminal behavior is learned. This learning is facilitated through association with criminals. The differential association refers to the frequency and strength of association with these criminal elements. The greater the association, the greater the chance of delinquent behavior. Sutherland argues that the underlying cause of criminal activity is cultural conflict, but

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169 EMPEY, supra note 82, at 261.

170 SHOEMAKER, supra note 126, at 183.

171 Id.


173 See RUTTER, supra note 126, at 265.

174 SHOEMAKER, supra note 126, at 151-52.

175 Id. at 152.

176 Id. at 153.
this idea is not pursued to a great extent. The reason for the reemergence of differential association is the corroboration by modern empirical analysis of some of its tenets, notably, that most delinquent acts occur in the presence of other delinquents, and the probability of juveniles committing specific criminal acts has been found to be statistically dependent on the commission of similar acts done by their peer group.\footnote{177 Id. at 149-50.}

Where then does a curfew fit? Arguably, nowhere. Indeed, the sociologists discussed above have never addressed the issue. They speak of societal reform, education reform, juvenile justice system reform, but never anything so mundane as a juvenile curfew. This may lead one to argue that even the sociologists of the study would not favor a curfew. This argument, however, is not a logical inference. Sociologists do not advocate a curfew because they are concerned with the prevention of delinquency on a societal level. A curfew is not designed or intended to rid America of juvenile delinquency, it is merely intended to curb its manifestation. Those who favor curfews in no way believe that the very serious problems of American adolescence will be solved by curfew alone,\footnote{178 See Rosado, supra note 4, at 21. Buffalo Common Councilman Archie Amos stated "This bill will not correct the structural problems in a family. It will not create an environment in the home that will promote communication and it will not make a parent or guardian become involved with his or her child. It will, however, remove these youth from some of the negative influences on the streets." Councilman Amos Defends Curfew Ordinance, THE CHALLENGER, Nov. 11, 1991.} for a juvenile curfew is no panacea for delinquency or crime.\footnote{179 Id.} It is one tool among many that is available. Indeed, it is not even the most powerful tool. A review of the sociological perspective shows that education reform would go much further in reducing juvenile delinquency, but that does not render curfews ineffective.

Curfew can be effective, and that is illustrated by the theories presented above. Each theory contains at least one common thread...
that should not be underestimate; the ability to perform delinquent acts relies on the availability of both time and group strength. This may seem to be so trivial as to be unacademic, but it is important. In a strain theory context, for example, the child needs the support of other adolescents to encourage delinquency in an effort to improve self esteem. In Hirchi's social control theory, those children committed to legitimate activities simply do not have time for delinquency. In terms of the external pushes and pulls presented by Reckless, a child needs to be externally pulled by delinquency. This obviously occurs through an association with those who can provide the pull. If criminal behavior is learned, as Sutherland postulates, then it must be taught. Even if a community has deteriorated to such a degree that there exists no organization, an adolescent still needs to find that organization among his peers through association.

These major theories provide evidence that adolescents unable to associate with deviant peers for extended periods of time will not exhibit delinquent behavior. Is this not just what a curfew accomplishes? By making it difficult for the group of delinquent juveniles to convene at night, and to wander the streets, a curfew necessarily reduces the external pull of delinquents. "Whether or not a youth who is motivated to perform delinquent acts in fact performs such acts depends on the youth's experience of counteracting motives and opportunities to perform the acts." This same author goes on to say:

Even in the absence of counteracting motives, the youth cannot perform the delinquent act he is motivated to perform without opportunities to do so. . . . The opportunities for delinquent behavior are increased by circumstances influencing the existence of stable delinquent subcultures in the environment and favorable interaction with those who share the subculture. Such opportunities are decreased by effective negative sanctions for delinquent behavior.

\[^{180}\text{KAPLAN, supra note 83, at 147 (emphasis added).}\]
that diminish the availability of delinquent role models as well as the means and occasions for delinquent activities.\textsuperscript{181}

Thus, the strongest argument for a curfew lies neither in the legal nor in the academic world, but in a simple matter of opportunity. As I have stated, a curfew may not decrease the motivation to perform the delinquent act, but it will undoubtedly curtail the availability of the deviant social group that influences and coerces the activity of each member.

This very practical argument is further buttressed by work done with gang members. Many gang members claim their gangs began as an informal group of friends that later named themselves collectively.

You know we were just standing on the corner, then we just got to just getting together every day, and then we came up with something called the 34th Street Players. And as we kept going north, the gangs got to coming around and they got to have gang fights and they got to robbing and just carrying on.\textsuperscript{182}

Me and my friends were just sitting around and my friend said let's get some names to put on our shirt that no one has. Then, so I said, "I know, the "Sheiks." I'm fixing to look it up in the dictionary and see what it means, and it said, "a strong person." So I said, "That fits me." So we got the "Sheiks" put on the back of our shirts, and then they said, "Who is the Sheiks?" And I said, "It's going to be a dancing group."\textsuperscript{183}

\textsuperscript{181} Id. at 149.

\textsuperscript{182} JOHN HAGEDORN & PERRY MACON, PEOPLE AND FOLKS, 61 (1988).

\textsuperscript{183} Id. at 59.
It is clear that simple association leads to organized delinquent behavior. The fact that adolescents have the time to associate in such groups facilitates the process of delinquency. A curfew will necessarily constrain these factors. Unsupervised association will no longer occur during the night, thus, reducing the opportunity to commit illegal acts.

One further argument in favor of curfews is the showing through gang member testimonial that time spent at home decreased as delinquent activity increased. The importance of the single parent household (invariably the mother), should not be underestimated within the context of the inner city. Gang members often mark a father's departure from the family, either through divorce, imprisonment, or disappearance, as a pivotal point in their lives.

Then things got different when my Dad passed away. I went to a party and got all wasted on pills, sniffing, smoking weed, and drinking. I almost passed out of an overdose. . . . My mother could not take care of the house, her children [five of them], and her work at the same time. I began to feel lonely and started a complex that my mother didn't love me because she didn't take care of me the way she used to. I felt like a stranger in my own house as I got older because I was not able to communicate with anyone . . . .

This statement from a gang member illustrates that a juvenile in a single parent home is at an extreme disadvantage. The pressure of a street socialization and the lure of the adolescent peer group often overwhelm the parental influence, especially when there are many children in one household. The peer group becomes a stronger reference group than the family.

A curfew will not magically reinvigorate the American family, but it will help to reinforce bonds to the family. Children will be

\[^{184}\text{VIGIL, supra note 123, at 44-45.}\]
forced to stay at home. I do not mean to trivialize the problems of the American city by suggesting that a curfew will solve the crisis, because as I have stated, no single policy can accomplish this task. A curfew is just one helpful tool available to policy makers. Some may call curfews Band-aidS which obscure the real problems. Indeed, curfews are Band-aidS, but Band-aidS can be effective if utilized appropriately and temporarily until more effective and substantive policies can be implemented.\textsuperscript{185}

CONCLUSION

This discussion presented legal arguments, sociological arguments and practical arguments for the institution of juvenile curfews in American cities. There is one approach that remains untouched, the philosophical argument, Does a juvenile curfew mesh with the overarching American ideals about government?

Americans have traditionally disliked and distrusted big government and government intervention.\textsuperscript{186} Can a curfew be reconciled with these feelings? Unfortunately, no amount of philosophical posturing can persuade instinctive, gut level, responses. To the social libertarian in all Americans,\textsuperscript{187} the notion of a juvenile


\textsuperscript{186} \textit{PAUL M. SINDERMAN, A QUESTION OF LOYALTY} (1981).

\textsuperscript{187} By social libertarian I in no way mean to infer that Americans generally support the Libertarian political party. I simply mean to suggest that Americans generally fear "Big Brother" activity on the part of the government. \textit{But see THEODORE J. LOWI, THE END OF LIBERALISM} (2d ed. 1979) (arguing that since the 1960's and the advent of "interest group liberalism" the existence of big government has been viewed by American society as not only legitimate but as a necessity).
curfew speaks of draconian measures in a totalitarian regime.\textsuperscript{188} I ask the reader to suspend these instinctive responses and to realize that juvenile crime is reaching epidemic proportions. Despite the lack of solid statistical evidence it is clear that youth crime is now a commonality. One author, who argued against curfews, said, "absent evidence that juvenile crime has reached an emergency level, children, like adults, are entitled to the presumption that they will behave in accordance with the law."\textsuperscript{189} I submit to the reader that the level of juvenile crime has already reached an emergency status. So while one grapples with notions of the "good society" and the proper role of government, the crisis grows.

Cities will continue to consider curfews a viable measure because they have been shown to have positive effects. In San Antonio, juvenile victimization decreased from 3,600 cases to just over 800.\textsuperscript{190} In Little Rock there has been a 14\% decline in overall crime.\textsuperscript{191} Furthermore, comprehensive studies of curfews enacted in

\textsuperscript{188} This perception of a curfew as a product of totalitarianism is completely exaggerated. Curfews have not been used to arrest children by the thousands. For example, Lieutenant David Zimprich of the Milwaukee Police stated "If kids are at a church dance that breaks up at 11, we're not going to stand outside and write tickets." Gene Warner, Curfew Called Useful as Tool, Not Panacea, BUFF. NEWS, Feb. 17, 1991, at B1. In Atlanta, the police have formally stated "Our first initiative in protecting our children was the education of children and parents to the risks or [sic] wandering the streets late at night. Our approach was to educate our children and their parents, rather than to emphasize arrests." Eldrin Bell Chief of Police for Atlanta Update on the Atlanta Police Curfew Policy, July 17, 1991. At the time this report was made 82\% of the juveniles encountered after hours were released to the custody of the parent with no other enforcement action. Id. Similarly in Buffalo in the first six months of enforcement none of the juveniles encountered were forced to pay the fines ranging from $25.00 to $200.00. Kwiatkowski, supra note 32.

\textsuperscript{189} See Scope, supra note 43, at 1177.


\textsuperscript{191} Id. One police officer in Little Rock stated "We're not going to say that the curfew is a cure all. It's just one of the many programs that may have helped." Id.
both Phoenix and Atlanta show success.\textsuperscript{192} Those courts and persons worried about the rights to a "late-night game of basketball, to sit in the open air on a muggy summer night, or to walk home at one's leisure from an unregistered church\textsuperscript{193} or "stargazing, sitting on the sidewalk near his house, or taking a late night evening walk,"\textsuperscript{194} clearly have no notion of city life in America, and presumably have little concern for those living there for "[t]here is nothing positive happening on the streets that time of night."\textsuperscript{195}

\begin{itemize}
\item \textsuperscript{192} See Eldrin Bell - Chief of Police, \textit{THE CITY OF ATLANTA JUVENILE CURFEW EXPERIENCE}, July 17, 1991; Dennis A. Garret - Chief of Police, \textit{JUVENILE CURFEW PILOT PROGRAM} (and related materials) Feb. 5, 1993.
\item \textsuperscript{193} Waters v. Barry 711 F.Supp. 1125, 1135 (D.D.C. 1989). It was these listed activities that the court felt obliged to protect and thus it invalidated a curfew.
\item \textsuperscript{194} McCollester v. Keene, 586 F.Supp. 1381, 1385 (D.N.H. 1984).
\end{itemize}
APPENDIX A

Re: Ordinance Amendment
New Chapter 343 - Promoting the General Welfare of Minors in Public Places

The Common Council of the City of Buffalo does hereby ordain as follows:

Section 1: That a new Chapter 343 entitled "Promoting the General Welfare of Minors in Public Places," with Sections and Section Headings to read as follows:

Chapter 343
Promoting the General Welfare of Minors in Public Places

Sec. 343.1 Prohibited Acts
Sec. 343.2 Parental Responsibility
Sec. 343.3 Definitions
Sec. 343.4 Ordinance Exceptions
Sec. 343.5 Enforcement
Sec. 343.6 Penalties

343.1 Prohibited Act

Subject to the exceptions set forth in Section 343.4 of this chapter, it shall be unlawful for any minor sixteen (16) years of age or younger to congregate, loiter, wander or play in or upon any public place, between the hours of 11:00 P.M. and 5:00 A.M. of the following day, official city time, except on weekends, when such
restricted hours shall be from 12:00 Midnight on Friday and Saturday to 5:00 A.M. of the following day.

343.2 Parental Responsibility

Subject to the exceptions set forth in Section 343.4 of this chapter, it shall be unlawful for the parent or guardian of any minor sixteen (16) years of age or younger to knowingly or negligently by insufficient control allow such minor to congregate, loiter, wander or play in or upon any public place, between the hours of 11:00 P.M. and 5:00 A.M. of the following day, official city time, except on weekends, when such restricted hours shall be from 12:00 Midnight on Friday and Saturday to 5:00 A.M. of the following day.

343.3 Definitions

a) Direct Route - The shortest path of travel through a public place to reach a final destination, without any detour or stop.

b) Adult Supervised - Adult persons are present at the activity and the adult persons take full responsibility for the minor.

c) Adult Sponsored - Adult persons underwrite or promote an activity and the adult persons take responsibility for the minor.

d) Accompanied - To go along with or be associated with under individualized supervision.

e) Parent - A natural parent, adoptive parent, stepparent or another person, or other adult person having the lawful care and custody of the minor.

f) Emergency Errand - An unforeseen combination of circumstances or the resulting state that requires immediate action by the minor to prevent serious bodily injury or loss of life.
g) Public Place - Any place to which the public or a substantial group of the public has access and includes, but is not limited to, highways, streets, alleys, parks, playgrounds, shops, shopping plazas, transportation facilities, vacant lots, hospitals and public buildings.

h) Guardian - A person who, under court order, is the guardian of the person of a minor; or a public or private agency with whom has been placed by a Court.

i) Adult - Any person eighteen (18) years of age or older.

j) Sixteen Years of Age or Younger - Any person younger than seventeen (17) years of age.

343.4 Exceptions

a) When the minor is on the sidewalk abutting the minor's residency, and either next neighbor has not communicated an objection to the police officer.

b) When the minor is travelling in a direct route to his or her residency from employment and carries a signed statement from the employer briefly identifying the minor, the address of the minor's residency, the address of the minor's place of employment, the name and title of the minor's employer who signed the statement, and minor's hours of employment.

c) When the minor is travelling in a direct route to his or her residency from an adult supervised or adult sponsored religious school, civic, not-for-profit, recreational or entertainment activity or adult supervised or sponsored organized dance.

d) When the minor is accompanied by his or her parent or guardian.
e) When the minor is accompanied by an adult authorized by the parent or guardian of the minor.

f) When the minor is in a motor vehicle with parental or guardian consent for normal travel, and interstate travel beginning or ending in the City of Buffalo is expected.

g) When the minor is upon an emergency errand.

h) When the minor is attending or travelling in a direct route to or from an activity involving the exercise of First Amendment Rights protected by the United States Constitution.

343.5 Enforcement

Following strictly the applicable provisions of the Family Court Act, Police officers and Buffalo Municipal Housing Authority Officers are hereby authorized to take into custody any minor who shall violate the provisions of this chapter.

343.6 Penalties

A parent or guardian who violates this Chapter shall: upon the first violation, be issued a warning citation, upon the second violation, be subject to a fine of not more than Twenty Five Dollars ($25.00); upon the third violation, be subject to a fine of not more than One Hundred Dollars ($100.00); upon the fourth violation and every offense thereafter be subject to a fine of not more than Two Hundred Dollars ($200.00).

Section 2. Sunset Provision

This curfew ordinance shall expire twelve months after its effective date unless enacted again by the Common Council.
Section 3. Effective Date

This curfew ordinance shall take effect January 1, 1994.

It is hereby certified, pursuant to Section 34 of the Charter, that immediate passage of the foregoing Ordinance is necessary.