

**It's Ten O'Clock: Do You Know Where Your Children Are? Qutb v. Strauss and the Constitutionality of Juvenile Curfews**

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# COMMENT

## IT'S TEN O'CLOCK: DO YOU KNOW WHERE YOUR CHILDREN ARE? *QUTB V. STRAUSS* AND THE CONSTITUTIONALITY OF JUVENILE CURFEWS

### INTRODUCTION

"America is facing a ticking youth crime bomb."<sup>1</sup> Juvenile crime and violence has increased sharply over the last decade,<sup>2</sup> despite some reports

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<sup>1</sup> Professor John Dilulio, Speech at Princeton University and at a Brookings Institute Forum—Why the GOP is Right to Oppose the Crime Bill and Where to Go From Here, in 140 CONG. REC. H7943-44 (daily ed. Aug. 11, 1994). In his speech, Professor Dilulio argued that Congress should reject the 1994 Crime Bill because, among other things, the bill failed to "address the problem of juvenile crime in a serious way." *Id.* at H7944. In addition, Professor Dilulio noted that "[t]he rate of growth in serious youth crime among white teenagers now exceeds the rate of growth in serious youth crimes among black and Hispanic teenagers." *Id.*

<sup>2</sup> Statistics reveal that juveniles are substantially contributing to the escalation of violent crime in the United States. See Howard N. Snyder, Fact Sheet No. 16, *Are Juveniles Driving the Violent Crime Trends?* (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice), May 1994 [hereinafter *Driving Trends*]. The Federal Bureau of Investigation's Uniform Crime Reporting Program ("U.C.R. Program") provides statistics regarding crime and arrests in the United States. *Id.* Four offenses—murder, rape, aggravated assault and robbery—are grouped together and identified as the Violent Crime Index. *Id.* This index has been called the "barometer of violent crime in the U.S." *Id.*; see also Barry Krisberg, *Youth Crime and Its Prevention: A Research Agenda*, in JUVENILE JUSTICE AND PUBLIC POLICY 1, 2-3 (Ira M. Schwartz ed., 1992) (detailing F.B.I. Uniform Crime Reports). The U.C.R. Program indicates a 19% increase in violent crimes perpetrated by juveniles in the United States between 1983 and 1992. *Driving Trends, supra*. In 1992, there were an estimated 198 Violent Crime Index arrests of juveniles for every 100,000 youths in the United States; the highest level of juvenile criminal activity in 20 years. Howard Snyder, Fact Sheet No. 14, *Juvenile Violent Crime Arrest Rates 1972-1992* (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice), May 1994 [hereinafter *Juvenile Crime Rates*] (citing 1992 FBI Uniform Crime Reports). From 1988 to 1992, the juvenile Violent Crime Index increased by 38%. *Id.* Juveniles were involved in 15%

and contentions to the contrary.<sup>3</sup> Moreover, not only are juveniles frequently the perpetrators of violent crimes, but they also account for an increasing number of the victims of such crimes.<sup>4</sup> In 1992, one out of

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of all murder arrests, Howard N. Snyder, Fact Sheet No. 13, *1992 Juvenile Arrests* (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice), May 1994, at 1 [hereinafter *1992 Juvenile Arrests*], and were solely responsible for 9% of murders. Howard Snyder, Fact Sheet No. 15, *Violent Crimes Cleared by Juvenile Arrest* (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice), May 1994, at 1 [hereinafter *Violent Crimes Cleared*]. Moreover, between 1988 and 1992, the number of juvenile murder arrests grew by 51%. *1992 Juvenile Arrests, supra*. By 1992, the proportion of murders committed by juveniles was the highest in a generation. See *Violent Crimes Cleared, supra*.

Despite these developments, there has been a decrease in the number of juveniles committing violent crimes. The number of juveniles arrested for murder, for example, decreased—from 5.4 arrests per 100,000 in 1991 to 5.0 arrests in 1992—for the first time in seven years. *Juvenile Crime Rates, supra*. It would be too speculative, however, to attempt to determine whether this is the beginning of a new trend. Moreover, the slight decrease in murder rates between 1991 and 1992 does not correspond with the rates of other violent crimes that make up the Violent Crime Index. For example, there has been a substantial increase in the number of juveniles arrested for aggravated assault. See *Juvenile Crime Rates, supra*, at 2. Between 1987 and 1992, the juvenile arrest rate for this crime increased by 54% and, in 1992, for every 100,000 juveniles, the police made 113 juvenile arrests for aggravated assault. *Id.* Robbery arrests also grew by a rate of 42% between 1989 and 1991. *Id.* While the 1992 figures reveal a drop of 3% in the arrest rates of juveniles for robbery, Dr. Snyder warns that it is too early to conclude that the drop is the start of a new trend. *Id.* Overall, 16% of all violent crimes solved by police in 1992 resulted in the arrest of a juvenile. *1992 Juvenile Arrests, supra*.

<sup>3</sup> See Laura Sessions Stepp, *The Crackdown on Juvenile Crime: Do Stricter Laws Deter Youths?*, WASH. POST, Oct. 15, 1994, at A1. Stepp cites an Office of Juvenile Justice and Delinquency Prevention report indicating that juvenile murder arrests decreased by 0.4% in 1992 as proof of a slow-down in juvenile violence. *Id.*; see *Juvenile Crime Rates, supra* note 2. Additionally, Stepp contends that adult arrests increased by 15% between 1982 and 1992, compared with a 5% increase in juvenile arrests for the same period. Stepp, *supra*, at A1. But see *1992 Juvenile Arrests, supra* note 2 (indicating that between 1989 and 1992, juvenile arrests for crimes of Violent Crime Index increased by 47% while adult violent crimes increased by 19%). Stepp's article does not address the argument that the increased percentage of adult crimes is merely the result of the aging of former juvenile offenders. See Dilulio, *supra* note 1, at H7944 ("Today's high-rate juvenile offenders are tomorrow's adult prisoners, but today's adult criminal records don't comprehend yesteryear's slew of juvenile crimes.").

<sup>4</sup> See *In U.S., Crime Strikes Youth at High Rate*, N.Y. TIMES, July 18, 1994, at A16; Joe Sexton, *Young Criminals' Prey: Usually Young*, N.Y. TIMES, Dec. 1, 1994, at A1. Fifty-five percent of all crimes against persons 12 to 19 years old were committed by members of the same age group. *Id.* (citing Justice Department's 1992 statistics). In 1992, 1240 African-American and 1103 white juveniles were murdered nationwide. *Id.* at B14. According to statistics provided by the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention, in 1992, one quarter of all victims of assaults, robberies and rapes were juveniles, even though juveniles account for only 10% of the United States population. Joseph Moone, Fact Sheet No. 17, *Juvenile Victimization: 1987-1992* (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice), June 1994, at 1 [hereinafter *Juvenile Victimization*]. In 1992, juveniles between the ages of 12 and 17 were victims of 1.55 million violent crimes; one out of every 13 juveniles was a victim of violent crime, a 23.4% increase from 1987. *Id.* Over the same period, the total juvenile population grew less than 1%, indicating a significant increase in the rate of juvenile

every seventy-two persons age thirty-five and over was a victim of a violent crime, but one out of thirteen juveniles was a victim of murder, rape, aggravated assault, or robbery.<sup>5</sup> The Justice Department's Office of Juvenile Justice and Delinquency Prevention recently issued a report<sup>6</sup> calling for "an unprecedented national commitment of public and private resources, energy and commitment to reducing juvenile violence and juvenile victimization in our nation."<sup>7</sup> Additionally, the 103rd Congress attempted to defuse this "ticking bomb" through the 1994 Violent Crime Control Act<sup>8</sup> and other legislation.<sup>9</sup> A number of social commentators

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victimization. Of the violent personal crimes committed against American juveniles, approximately 1.3 million were assaults and over 200,000 were robberies. *Id.*

<sup>5</sup> *Juvenile Victimization*, *supra* note 4, at 1.

<sup>6</sup> OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT AND CHRONIC JUVENILE OFFENDERS (1994) [hereinafter OJJDP REPORT].

<sup>7</sup> See John J. Wilson, *OJJDP Develops Strategy to Reduce Juvenile Violence*, CORRECTIONS TODAY, Aug. 1994, at 118. The OJJDP strategy consists of two elements: the preventive component and the intervention component. *Id.* The former adopts a community-based approach towards juvenile crime; communities are "to systematically assess their delinquency problem in relation to known risk factors and to set up programs to counteract them." *Id.* The latter component combines the accountability and punishments faced by the juvenile offender with a variety of intense treatment and rehabilitation programs. *Id.*

<sup>8</sup> Violent Crime Prevention and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 30701, 108 Stat. 1796, 1855 (codified at 42 U.S.C. §§ 13701-14223 (Supp. 1994)) [hereinafter Violent Crime Act]. The Act makes grants available to non-profit organizations seeking to develop and organize programs to benefit juvenile delinquents or youths deemed to be "at-risk" of becoming delinquents. *Id.* § 30701(a)(1)(C). The federal government has set aside \$36 million to be distributed over the next five years to such organizations. *Id.* § 30702.

The Violent Crime Act also provides substantial appropriations to other juvenile crime prevention programs. See *id.* §§ 31501-31504 (amending Urban Park and Recreation Recovery Act of 1978, §§ 1003, 1004, 1005, 1007(b), 1013 (codified at 16 U.S.C. §§ 2502, 2503, 2504, 2506(b), 2512)). For example, the Violent Crime Act provides \$3.5 million to individual states "to improve recreation facilities and expand recreation services in urban areas with a high incidence of crime and to help deter crime through the expansion of recreation opportunities for at-risk youths." Violent Crime Act § 31501. More significantly, the Violent Crime Act also provides funding to qualifying cities that establish "[m]idnight sports league programs" in conjunction with employment and educational training. *Id.* § 30201(a)(2)(E). These provisions of the Violent Crime Act, however, have been met with virulent opposition. See, e.g., Dilulio, *supra* note 1; Glen Kessler, *Something for All: In Trying For Mass Appeal, Bill is Open to Criticism*, NEWSDAY, Aug. 16, 1994, at A7; *It Oughta Be a Crime: Omnibus Crime Bill of 1994*, NAT. REV., Sept. 12, 1994, at 14 [hereinafter *It Oughta Be A Crime*]. Critics of the Violent Crime Act wanted to purge the legislation of these programs because they represented "wasteful social spending or congressional pork." Kessler, *supra* (reporting Florida Republican Congressman Bill McCollum's opposition to Violent Crime Act).

<sup>9</sup> Legislation introduced in the 103rd Congress that sought to curb the rising tide of juvenile violence was not limited to the Violent Crime Act. Juvenile Criminal Act of 1994, H.R. 4491, 103rd Cong., 2d Sess. (1994), pending at the close of the 103rd Congress, sought to address juvenile crime by providing incentives to individual states that will prosecute as adults juveniles

have also suggested a variety of strategies to diminish the levels of juvenile delinquency and youth crime.<sup>10</sup>

One strategy increasingly implemented on the local level is the juvenile curfew ordinance.<sup>11</sup> While the federal government attempts to reduce juvenile crime through programs such as midnight basketball leagues,<sup>12</sup> many cities are turning to juvenile curfews as an answer to the growing problem of juvenile crime and violence.<sup>13</sup> These ordinances are

who commit serious crimes. This bill would have amended the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601 (1988), to provide funding to states that would prosecute juveniles 14 years old and older as adults for committing violent crimes. H.R. 4491, §§ 3, 4 (listing "serious" felonies).

The proposed Juvenile Corrections Act of 1994, S. 2471, 103rd Cong., 2d Sess. (1994), sought to remedy the Violent Crime Act's failure to direct any of the \$8 billion appropriated for prison funding to juvenile detention facilities. *See* 140 CONG. REC. S13585 (daily ed. Sept. 28, 1994) (statement of Sen. Kohl). The bill proposed \$772 million in state and local grants over five years to construct and operate correction facilities for violent juvenile criminals. *See* 140 CONG. REC. S14117, 14118 (daily ed. Oct. 4, 1994) (statement of Sen. Cohen). The bill also laid out grants to provide juvenile criminals with remedial and vocational education opportunities, substance abuse programs, and release services and supervision. *Id.*

<sup>10</sup> It has been suggested, for example, that a full-employment economy that provides jobs for at-risk youths would contribute to a decrease in illegal activities, juvenile crime and gang activity within a community. *See* C. Ronald Huff, *The New Youth Gangs: Social Policy and Malignant Neglect*, in *JUVENILE JUSTICE AND PUBLIC POLICY* 20, 34-36 (Ira M. Schwartz ed., 1992). Target youth services and community-based programs would also reduce the number of youths involved in gangs. *Id.* at 36-37.

Pre-delinquency intervention programs have also been stressed as a way to prevent juvenile violence and crime before it actually occurs. *See* RICHARD J. LUNDMAN, *PREVENTION AND CONTROL OF JUVENILE DELINQUENCY* 17-18 (1993). These programs focus on identifying and treating "at risk" juveniles before they become involved in criminal behavior. Such intervention may be performed on an individualized basis and crafted to curb juvenile crime through individually-oriented solutions. *Id.* at 17.

Another method proposed to curb juvenile crime is the use of area projects. *Id.* Advocates of these community-based programs contend that youth crime "is a community problem requiring a community-oriented solution." *Id.* Area projects focus more on the neighborhood where the crime occurs and less on the individual juvenile. *Id.* at 18.

<sup>11</sup> A curfew is "[a] law (commonly an ordinance) which imposes on people (particularly children) the obligation to remove themselves from the streets on or before a certain time of night." *BLACK'S LAW DICTIONARY* 381 (6th ed. 1990).

<sup>12</sup> *See supra* note 8. The federal government will provide funding for local midnight sports leagues because these programs are presumed to prevent the increase of "juvenile violence, juvenile gangs, and the use and the sale of illegal drugs by juveniles." Violent Crime Act § - 30201(a)(2)(A). Many opponents of the Violent Crime Act contend that the programs will not achieve this goal. *See* Dilulio, *supra* note 1, at H7943 (describing midnight basketball program as "silly business"); *It Oughta Be A Crime*, *supra* note 8, at 14 (describing Violent Crime Act components as "goo-goo social welfare programs").

<sup>13</sup> In the past year, more than 50 municipalities have instituted juvenile curfews. Stepp, *supra* note 3, at A1; *see also* Marc H. Morial, "Our Juvenile Curfew Is Working." *New Orleans, Louisiana Implements a Juvenile Curfew Law that Involves the Parents of Curfew Violators, and Experiences a Significant Drop in Crime; Rethinking Public Safety*, NAT'L CITIES WKLY., Jan.

not a new phenomenon;<sup>14</sup> some cities have longstanding curfews, and the new movement may merely involve enforcing a law passed decades earlier.<sup>15</sup> The nation's largest metropolitan areas, such as New York City,

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30, 1995, at 2 (describing success of new curfew law); Adam Weintraub, *Crime Falls 13.2% with Curfew—Juveniles Are Off Street and Out of Jail*, CINCINNATI ENQ., July 2, 1995, at B1 (detailing recently enacted local curfew ordinances throughout Ohio). One city that has recently instituted a juvenile curfew is Tacoma, Washington. See Florangela Davila, *Tacoma Approves Youth Curfew*, SEATTLE TIMES, Nov. 16, 1994, at B1. A unanimous Tacoma city council approved a juvenile curfew that mirrors a Dallas city ordinance which was upheld by the Fifth Circuit Court of Appeals. *Id.*; see *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). The Tacoma curfew, which went into effect January 1, 1995, imposes fines on minors found on the street between midnight and 6 a.m. See Davila, *supra*, at B1. The minors, however, will not be subject to punishment if "accompanied by a parent, heading to, or returning from work, going home after a school, religious or an adult supervised activity, or traveling on an interstate highway." *Id.*

Florida recently enacted a statute providing its municipalities with guidelines for instituting juvenile curfews. See FLA. STAT. ANN. §§ 877.20-.25 (West 1994). Public support of the statewide curfew proposal grew in Florida as juvenile violent crimes increased dramatically over the last decade. Larry Rohter, *Florida Governments Move to Set Teenager Curfews*, N.Y. TIMES, Dec. 23, 1993, at A12. In 1993, 149 juveniles were charged with murder or manslaughter in Florida, compared with 69 a decade earlier. *Id.* In addition, juvenile armed robbery arrests rose from 645 to 1,972 during the same period, and juvenile arrests for aggravated assault or battery rose from 2,688 to 7,083. *Id.*

Rather than enacting a statewide curfew, the Florida law provides local counties and municipalities with the option of adopting local juvenile curfews. FLA. STAT. ANN. § 877.20 (West 1994); see Rohter, *supra* (discussing support for statewide curfew). When a municipality does impose a juvenile curfew, the statute mandates that the locality provide certain exceptions. See FLA. STAT. ANN. § 877.24 (West 1994). The local government may utilize a juvenile curfew only when it contains these minimum exceptions. *Id.* § 877.25. The validity of the Florida law, however, had been in danger after a Florida trial enjoined Dade County's juvenile curfew as violative of the Florida Constitution. See *Pred v. Dade County*, No. 94-03203-CA-21 (Fla. Cir. Ct., Sept. 21, 1994), *rev'd*, 1995 Fla. App. LEXIS 11440 (Fla. Dist. Ct. App. Nov. 1, 1995); see also *Florida Backs Local Curfew for the Young*, N.Y. TIMES, Oct. 2, 1994, at A26 (discussing Dade County's desire for acceptable curfew ordinance). An appellate court, however, reversed the trial court decision and permitted Dade County to implement the ordinance. *Metropolitan Dade County v. Pred*, 1995 Fla. App. LEXIS 11440 (Nov. 1, 1995).

<sup>14</sup> See *Thistlewood v. Trial Magistrate for Ocean City*, 204 A.2d 688, 690-91 (Md. 1964) (discussing history of juvenile curfews). Curfews have been used to restrict citizens' movement since William the Conqueror's invasion of England in the 11th century. *Id.* at 690. In the United States, antebellum southern communities used curfews to keep slaves off the streets at night. *Id.* In the decades following the Civil War, curfews to restrict juveniles' movements grew in popularity. *Id.* at 690-91. By 1900, almost 3,000 American localities employed juvenile curfews. *Id.* at 691; see also Peter L. Scherr, Note, *The Juvenile Curfew Ordinance: In Search of A New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 164-68 & nn.5-21 (1992) (providing additional history on curfews).

<sup>15</sup> See Neil Morgan, *Is Curfew Too Tough on San Diego Juveniles?*, SAN DIEGO UNION-TRIB., July 31, 1994, at A2 (discussing recent enforcement of San Diego curfew enacted in 1947).

have not generally sought to impose juvenile curfews.<sup>16</sup> It is in these areas, however, that juvenile crime and victimization are epidemic.<sup>17</sup>

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<sup>16</sup> In reaction to these problems, New York State has sought tougher laws for juvenile criminals. See Joseph B. Treaster, *Cuomo Seeks Sterner Laws for Juveniles*, N.Y. TIMES, June 21, 1994, at A1. In June 1994, a 15-member commission appointed by former Governor Mario Cuomo to review the problem of rising juvenile violence urged numerous changes to New York State's juvenile justice system, already considered among the toughest in the United States. *Id.* The panel advocated the fingerprinting of juveniles who had committed serious crimes and recommended that probation and court officials be given greater access to the presently-sealed records of juvenile criminals. *Id.* While many of the recommendations focused on post-arrest situations, former Governor Cuomo also stressed the need for strong prevention programs. *Id.* Above all, Cuomo stressed the need to control laws and agencies that often leave juvenile criminals with a sense that no one in authority cares about their criminal activity or its consequences. *Id.*; see also Anthony N. Destafano, *Cuomo's Plan Would Send More Violent Teens to Grown-Up Court*, NEWSDAY, Apr. 17, 1994, at A22 (discussing plan to add to list of crimes for which juveniles may be prosecuted as adults in New York). Opponents charge that the changes in the juvenile offender laws will not reduce juvenile crime or violence. Treaster, *supra*. According to Gail Nayowith, Executive Director of Citizens Committee for Children of New York, "[t]here is a very dearly held belief that we can use the criminal justice system to reduce juvenile crime. But, in fact, it hasn't worked. . . . [The Juvenile Offender Law] has not reduced juvenile crime. In fact, juvenile crime has increased." *Id.*

The New York Police Department and the City's Board of Education have created a truancy program to catch teenagers who skip school. See Ashley Dunn, *Crackdown on Truant By Police Find 216*, N.Y. TIMES, Apr. 7, 1994, at B4; Clifford Krauss, *Police Delay Rounding Up Truant Youths*, N.Y. TIMES, Mar. 23, 1994, at B1. Under the plan, certain police officers are assigned to curb crime and mischief committed by youths during the school hours. *Id.* The plan permits police officers who have engaged in special sensitivity training to patrol areas in search of truant. Dunn, *supra*. If a youth is found on the street during school hours, the police officer may ask the youth for identification. *Id.* If the officer determines that the youth is a truant, the officer may take the youth to a collection point in an area school, and parents and school officials are notified. *Id.* Thereafter, the student is released and sent back to his school. *Id.* On the day the program was put into effect, police detained 216 youths. *Id.*

In the past, New York City police officials have opposed a juvenile curfew, citing the force's inability to enforce the provisions. See Paul M. Cahill, *Nonemergency Municipal Curfew Ordinances and the Liberty Interest of Minors*, 12 FORDHAM URB. L.J. 513, 532 n.87 (1984). The Department has contended that a juvenile curfew would be too difficult to enforce. *Id.* (citing telephone interview with Lt. Butler, Youth Services Division, New York City Police Department). The large number of legitimate nighttime activities and police programs aimed at preventing juvenile crime illustrate the potential ineffectiveness of a juvenile curfew in New York City. *Id.*; cf. NEW YORK CITY ADMINISTRATIVE CODE AND CHARTER §3-105(1)(b), (3)(a) (1993) (stating curfew may be established in New York City restricting pedestrian and motor vehicle traffic to fire, police, emergency repair crews and medical personnel if mayor has declared state of emergency).

<sup>17</sup> From January through December, 1993, over 200 juveniles were arrested for murder in New York City, while 164 youths faced rape charges. NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, UNIFORM CRIME REPORTING PROGRAM (1994). Furthermore, juveniles accounted for over 9000 robbery arrests and over 1100 burglary arrests during that period. *Id.* Additionally, nearly 2000 New York City juveniles faced dangerous weapons charges in 1993. *Id.* In total, approximately 12,400 juveniles were arrested for these violent felonies in 1993, up from the 11,658 juveniles arrested for all felonies in 1990. *Id.*; see also Emily Sacher, *When*

Some critics view curfews as a public relations ploy that soothes the public's fear about crime without producing the desired results.<sup>18</sup> The impracticability of curfews has been a serious complaint among police forces in cities that employ a curfew.<sup>19</sup> Statistics indicate, however, that juvenile curfews, once implemented, can significantly reduce the levels of

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*Johnny Totes a Gun*, NEWSDAY, Oct. 28, 1990, at 6 (discussing increase in juvenile criminal activities in New York City).

New York ranks first among the 50 states in the violent crime arrest rate for youths aged 10 to 17, at 980 per 100,000 youths. G. Oliver Kopell, *Bar Must Fight Violent Crime Plaguing State*, N.Y. L.J., May 2, 1994, at 53. In 1992, 65 youths younger than 16 were arrested in New York for murder. *Not Just Kid Stuff*, NEWSDAY, July 24, 1994, at 33. The number of juveniles arrested for robbery and aggravated assault jumped from 3,471 to 5,232 and from 1,570 to 2,438, respectively, between 1983 and 1992. *Id.* Between January and December of 1993, juveniles 16 years old and younger accounted for 135 homicide-related arrests in New York State. NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, *supra*. More significantly, the number of robberies has skyrocketed, from approximately 5,200 to over 10,000 in 1993. *Id.* In 1993, police officers in New York State arrested nearly 22,000 juveniles on charges of murder, rape, robbery, aggravated assault, or burglary. *Id.*

This plague of juvenile violence and crime that confronts New York City has been evident in juvenile activity known as "wilding." Bill Reel, *It's Open Season for Wolf Packs*, NEWSDAY, Jan. 8, 1992, at 40; Felicia R. Lee, *Loose-Knit Type of Youth Gangs Troubling Police*, N.Y. TIMES, Dec. 11, 1990, at B3; Timothy Clifford, *4 Linked to Earlier "Wilding"*, NEWSDAY, June 10, 1989, at 7; Richard Esposito et al., *Police Charge 7 Teenagers in Brutal Attack on Jogger; Gang of 33 Roamed the Park*, NEWSDAY, Apr. 22, 1989, at 5. "Wilding" is a term used to describe the conduct of "loosely organized groups of young people who rob, rape or kill for money or fun." Lee, *supra*. The term came to be associated with the gang rape of a jogger by seven youths in Central Park on the evening of April 21, 1989. See Esposito, *supra*. Not surprisingly, four of the youths involved in this gang rape had been involved in another "wilding" attack one week earlier. Clifford, *supra*.

<sup>18</sup> See *Juvenile Curfews are No Fix at All*, CONN. L. TRIB., May 30, 1994, at 21 (criticizing juvenile curfew as quick fix). "Juvenile curfew laws may fulfill the feel-good notion that we are doing something about the juvenile crime problem, but do virtually nothing to address the underlying purpose for their passage." *Id.* The juvenile curfew has been described as merely part of the "frenzy" to do something about juvenile crime, a "popular local fad" that has no real import or effect on crime. *After Dark*, ECONOMIST, May 5, 1994, at 5. In fact, these laws are often enforced against juveniles who lie about their age or possess false identification. *Id.* More importantly, critics contend that curfews are ineffective because most juvenile crimes occur during daylight hours. *Id.* (arguing that four-fifths of violent crime occurs during daytime hours); *Juvenile Curfews are No Fix at All*, *supra* ("Statistics around the country reveal that there is no more crime committed by the juvenile during nighttime, nor are juveniles becoming victims more during nighttime as opposed to daytime hours.").

<sup>19</sup> See Eric Hanson & T.J. Milling, *Police Net First Curfew Law Arrests*, HOUS. CHRON., Feb. 15, 1992, at 1 (reporting that police officers complain Houston's juvenile curfew law is flawed); Jim Cudney, *Teen Curfew a Waste of Policemen's Time*, BUFF. NEWS, Oct. 29, 1993, at 3 ("I haven't met one patrol officer yet who believes a curfew law would have any significant impact."). Curfews are seen as time-consuming and unrealistic, and add to the many problems facing police officers engaged in juvenile justice procedures. *Id.*; see also *Pred v. Dade County*, No. 94-03203-CA-21, slip op. at 6 (Fla. Cir. Ct., Sept. 21, 1994) (reporting testimony of former Miami Chief of Police that juvenile curfew would be counter-productive use of police manpower).



juvenile crime.<sup>20</sup> Nevertheless, the American Civil Liberties Union and some legal commentators have labeled these measures unconstitutional;<sup>21</sup> throughout the 1980's and 1990's, a number of federal and state courts agreed.<sup>22</sup> Despite the debate, the United States Supreme Court has never

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<sup>20</sup> Rick Bragg, *Children Strike Fear into Grown-Up Hearts*, N.Y. TIMES, Dec. 2, 1994, at A1 (discussing juvenile crime in New Orleans). Between January and November of 1994, only 18 of 391 murders resulted in an arrest of a juvenile in New Orleans, compared to 31 of the 389 murders that resulted in a juvenile arrest in 1993. *Id.* Police attribute this decrease to the city's juvenile curfew. *Id.*; see also Christopher Cooper & Walt Philbin, *New Orleans Credits its Curfew for June's Drop in Crime*, TIMES-PICAYUNE, July 1, 1994, at A1. The Mayor's office claimed that in the first month after the curfew's implementation, murders committed during curfew hours dropped 13%, armed robbery decreased 26%, burglary dropped 11% and assaults were reduced by 9%. *Id.* But see Frank Donze, *Prove Curfew Cutting Crime Rate, ACLU Tells City*, TIMES-PICAYUNE, Sept. 15, 1994, at B3 (reporting that ACLU challenged credibility of evidence that juvenile curfew has reduced crime).

Other municipalities employing curfews have also witnessed a drop in juvenile crime. See Mary Jo Pitzel & Eric Miller, *Crime Studies Give Candidates Political Ammo*, ARIZ. REP., Sept. 8, 1994, at B1 (noting that Phoenix curfew resulted in 10.4% decrease in juvenile violent crime arrests); Ruth Rendon, *Stringent Juvenile Curfew Paying Off for Pasadena*, HOUS. CHRON., Nov. 28, 1993, at C3 (officials describe Pasadena curfew as effective); Laura Laughlin, *New Curfew Wins Praise in Phoenix*, L.A. TIMES, Sept. 9, 1993, at A5 (indicating that curfew reduced gang-related violence, juvenile crime and victimization); Diana Balazs, *Peoria Juvenile Curfew Called Success by Police*, ARIZ. REP., Aug. 27, 1993, at 1 (reporting that local curfew ordinance reduced juvenile crime and victimization, and was well received by local police).

<sup>21</sup> See Robyn E. Blummer, *More and More Cities Are Adopting Them, But Are They Constitutional? Yes: Safety is a Fundamental Right; No: Curfews Treat Law-Abiding Teens Like Criminals*, A.B.A. J., Apr. 1994, at 41. The ACLU contends that these ordinances violate minors' fundamental civil liberties regardless of any exceptions or defenses contemplated by the curfew law. *Id.* The result, they argue, is that juveniles are "placed under virtual house arrest every night with no charges levied, no right to counsel and no trial." *Id.*; see also James Gill, *ACLU's Drive to Scrap City's Curfew*, TIMES-PICAYUNE, Sept. 16, 1994, at B7 (discussing Louisiana ACLU chapter's fight against New Orleans' curfew).

Some legal commentators also contend that juvenile curfews are unconstitutional. See Cahill, *supra* note 16, at 558-59 (arguing that non-emergency juvenile curfews are unconstitutional unless limited to "loitering-prowling"); Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163 (1984) [hereinafter *Juvenile Curfews and the Constitution*] (arguing that juvenile curfews serve no state interest sufficient to justify curtailing minors' fundamental rights of movement and association); see also Jonathan Hangartner, Comment, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel*, 14 PACE L. REV. 203 (1994) (commenting that police sweeps act as de facto curfew, violating constitutional rights).

<sup>22</sup> See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981); *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989); *McColleston v. City of Keene*, 586 F. Supp. 1381 (D.N.H. 1984); *McColleston v. City of Keene*, 514 F. Supp. 1046 (D.N.H. 1981), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982); *Frank O.*, 247 Cal. Rptr. 655 (Cal. Ct. App. 1988); *K.L.J. v. Florida*, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); *Pred v. Dade County*, No. 94-03203-CA-21 (Fla. Cir. Ct., Sept. 21, 1994), *rev'd*, 1995 Fla. App. LEXIS 11440 (Fla. Dist. Ct. App. Nov. 1, 1995); *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992); *Brown v. Ashton*, 611 A.2d 594 (Md. Ct. Spec. App. 1992); *Allen v. City of Bordentown*, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987). *Contra Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S.

affirmatively addressed the constitutionality of any juvenile curfew.<sup>23</sup>

A recent case, however, strongly suggests that a properly drafted juvenile curfew ordinance can survive constitutional scrutiny.<sup>24</sup> In *Qutb v. Strauss*,<sup>25</sup> the Fifth Circuit upheld a Dallas, Texas, juvenile curfew law under both the United States and Texas Constitutions.<sup>26</sup> The court held that the statute was narrowly tailored to implement the state's compelling interest in protecting the welfare of its young citizens and, thus, outweighed the rights of minors to remain in public places beyond designated hours.<sup>27</sup>

In *Qutb*, parents of teenage children residing in Dallas filed suit against the city seeking a temporary restraining order and a permanent injunction against the implementation of the juvenile curfew ordinance.<sup>28</sup> The plaintiffs asserted that Dallas' juvenile curfew violated their rights under the United States and Texas constitutions.<sup>29</sup> The city, apparently hoping to circumvent the lawsuit, amended the juvenile curfew (prior to the district court's decision) to incorporate additional defenses and omit certain troublesome provisions.<sup>30</sup> In addition, the Dallas City Council voluntarily

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Ct. 2134 (1994); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3rd Cir.), *cert. denied*, 429 U.S. 964 (1976); *In re Juvenile*, No. JT-9065297, 887 P.2d 599 (Ariz. Ct. App. 1994); *People ex rel J.M.*, 768 P.2d 219 (Colo. 1989); *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); *City of Milwaukee v. K.F.*, 426 N.W.2d 329 (Wis. 1988).

<sup>23</sup> *But see* *Bykofsky v. Borough of Middletown*, 429 U.S. 964 (1976) (Marshall, J., dissenting). Justice Marshall disagreed with the Court's denial of certiorari, insisting that the Court should address the issue of "whether the due process rights of juveniles are entitled to lesser protection than those of adults," because "this case poses a substantial constitutional question—one which is of importance to thousands of towns with similar ordinances." *Id.* at 965-66.

<sup>24</sup> *See infra* note 25 and accompanying text. *But cf. supra* note 22 and accompanying text.

<sup>25</sup> 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994).

<sup>26</sup> *Id.* at 490.

<sup>27</sup> *Id.* at 492.

<sup>28</sup> *Id.* at 496-99 (citing DALLAS, TEX., CITY CODE [hereinafter DALLAS CODE] ch. 31, § 31-33 (1992)).

<sup>29</sup> *Qutb*, 11 F.3d at 491 n.4. The plaintiffs maintained the following: (1) the juvenile curfew violated the minors' First Amendment right to free speech and association; (2) the ordinance also infringed the minors' constitutional right against unreasonable search and seizure; (3) the juvenile curfew ordinance took away the minors' right to a presumption of innocence, proof beyond a reasonable doubt and freedom against self-incrimination under the Fifth and Fourteenth Amendments; (4) the youth curfew violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment; and (5) the curfew was both overbroad and vague. *Id.*

<sup>30</sup> *Id.* at 491. The plaintiffs, however, merely amended their complaint and the district court granted another evidentiary hearing to determine if the amended ordinance violated the minors' and parents' various constitutional rights. *Id.*

delayed the implementation of the curfew until the federal court ruled.<sup>31</sup> The district court ruled, however, that the curfew violated the minors' Equal Protection and First Amendment rights and enjoined its implementation.<sup>32</sup> On appeal, the Fifth Circuit Court of Appeals reversed.<sup>33</sup>

Writing for the Fifth Circuit, Judge Jolly stated that the ordinance implicated the Equal Protection Clause<sup>34</sup> because it interfered with minors' fundamental right to move freely throughout the city and treated minors differently than adults.<sup>35</sup> Because a fundamental right was involved, the court evaluated the ordinance under a strict scrutiny analysis.<sup>36</sup> To survive such analysis, a statute must be narrowly tailored to meet a compelling state interest.<sup>37</sup> The parties and the district court agreed that the state had a compelling interest in authorizing the curfew.<sup>38</sup> Thus, the remaining issue addressed by the Fifth Circuit was whether the ordinance was narrowly tailored to achieve the compelling interest.<sup>39</sup> The court held that the amended ordinance was narrowly tailored to satisfy the compelling government interest of reducing juvenile crime and victimization,<sup>40</sup>

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<sup>31</sup> *Id.*; see Anne Belli Gesalman & Sylvia Martinez, *Curfew for Teens Upheld*, DALLAS MORNING NEWS, Nov. 23, 1993, at 1; Eric Hanson, *Curfew Goes into Force*, HOUS. POST, Nov. 9, 1991, at 1.

<sup>32</sup> *Qutb*, 11 F.3d at 491. Specifically, the district court concluded that the juvenile curfew ordinance "created a classification that could not withstand constitutional scrutiny." *Id.* The court, however, did not reach the plaintiffs' other claims because it ruled in favor of the minors' Equal Protection and First Amendment claims. *Id.* at 491 n.5.

<sup>33</sup> *Id.* at 490.

<sup>34</sup> See U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

<sup>35</sup> *Qutb*, 11 F.3d at 492. The court did not expressly determine whether the United States or Texas Constitutions provided the minors with a fundamental right to movement. See *id.* ("[W]e assume without deciding that the right to move freely is a fundamental right."). Legal commentators also have contended that minors possess this fundamental right. See, e.g., Hangartner, *supra* note 21 (asserting that First Amendment and Fourteenth Amendment Due Process Clauses support minors' right to intrastate travel). Courts have also interpreted the U.S. Constitution to provide this right to minors. See, e.g., *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 338 (Wis. 1988). But see *City of Panora v. Simmons*, 445 N.W.2d 363, 369 (Iowa 1989) (refusing to hold that right to intracity travel is fundamental for due process purposes); *People ex rel J.M.*, 768 P.2d 219, 223 (Colo. 1989) (holding minor's liberty interest in freedom of movement not fundamental).

<sup>36</sup> *Qutb*, 11 F.3d at 492.

<sup>37</sup> *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982)).

<sup>38</sup> *Id.* at 492. Dallas' interest in a juvenile curfew was to "reduce juvenile crime and victimization, while promoting juvenile safety and well-being." *Id.* The parents and the district court agreed with the city's assertion that its stated intention was compelling. *Id.*

<sup>39</sup> *Qutb*, 11 F.3d at 493.

<sup>40</sup> *Id.* at 493-96. The Fifth Circuit maintained that the data on Dallas juvenile crime established the requisite nexus between the compelling state interest and the classification of juveniles covered by the ordinance. *Id.* at 493-94. Additionally, the court concluded that the

characterizing the curfew as an incidental burden on the minors' constitutional right to travel during curfew hours.<sup>41</sup>

It is submitted that the Fifth Circuit correctly decided *Qutb* in accordance with current constitutional principles, even though many previous state and federal courts have overturned other such ordinances. This case should serve as a model for constitutionally sound juvenile curfew ordinances because the Dallas ordinance lacked the defects cited by other courts in prior curfew cases. This Comment will propose that the rationale articulated and implied by *Qutb* provides the specifications required for a juvenile curfew ordinance to survive federal constitutional scrutiny. Part I will examine the Dallas juvenile curfew ordinance and suggest that the constitutionality of such a curfew depends on the exemptions the law provides. Part II will explore the plaintiffs' equal protection claim and contend that the Fifth Circuit's holding was the correct response to the litigant's arguments. This section will also critically examine the strict scrutiny test employed by the *Qutb* court and propose that a thorough strict scrutiny analysis would produce the same result, even in light of prior federal court holdings that rejected other municipal curfew

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curfew was not so generally broad that it defeated the requirement for a narrowly tailored ordinance. *Id.* at 493-95. The curfew ordinance provided a number of exceptions and defenses which made the curfew narrowly drawn. "To be sure, the defenses are the most important consideration in determining whether the ordinance is narrowly tailored." *Id.* at 493-94. The court distinguished the Dallas juvenile curfew from the curfew ordinance held unconstitutional in *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981). *Qutb*, 11 F.3d at 494. The Dallas curfew provided a number of defenses, most notably an exception for First Amendment activities during curfew hours. *Id.* at 498 (citing DALLAS CODE, ch. 31, § 31-33 (c)(1)(H)). On the other hand, the *Johnson* curfew did not provide a defense for the exercise of these rights. *See Johnson*, 658 F.2d at 1072.

<sup>41</sup> *Qutb*, 11 F.3d at 495. The restriction on minors' ability to attend a midnight movie without adult supervision, or to gaze unchaperoned at the stars in a public park during curfew hours was substantially outweighed by the state's interest in protecting the child from juvenile crime and violence. *Id.*

The equal protection claim was not the sole issue addressed in *Qutb*. The parents also argued that the curfew violated their fundamental right to rear their children as they see fit. *Id.*; *cf. Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (involving parents' assertions that ban on selling obscene materials to minors violated their fundamental child-rearing right). The *Qutb* court concluded, however, that the numerous exceptions to the curfew enabled parents to make decisions regarding their children's movement in all situations except where the child is in a public place, alone, during curfew hours. *Qutb*, 11 F.3d at 495-96.

Additionally, the Fifth Circuit dismissed the minors' claim that the juvenile curfew violated their First Amendment right of association. *Id.* at 495 n.9. The court determined that minors' rights to associate with each other was not a protected right under the United States or Texas Constitution. *Id.*

Judge King concurred in the result without expressing his view on the method employed by the court to reach its conclusion. *Id.* at 495.

laws. Finally, Part III will discuss the impact that *Qutb* may have on future juvenile curfews.

### I. THE DALLAS CURFEW

In June of 1991, the Dallas City Council approved a city-wide juvenile curfew,<sup>42</sup> thereby joining other cities that have implemented juvenile curfews to reduce high rates of juvenile violence.<sup>43</sup> The Dallas City Council believed that the ordinance was warranted by increasing rates of juvenile crime and gang violence.<sup>44</sup> The city viewed the law as an instrument that would quell the juvenile crime problem without placing an undue burden on the constitutional rights of minors and their parents.<sup>45</sup>

The provisions of the Dallas juvenile curfew illustrate this balance.<sup>46</sup> The curfew bars persons under the age of seventeen from "public places" or "establishments" between the hours of 11:00 p.m. and 6:00 a.m. Sunday through Thursday, and between midnight and 6:00 a.m. on Friday and

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<sup>42</sup> See DALLAS CODE, ch. 31, § 31-33. Originally proposed by residents of South Dallas, the Dallas City Council approved the juvenile curfew ordinance by a 10-1 vote. See *Dallas Council Approves 11 P.M. Curfew for Teen-Agers*, HOUS. POST, June 13, 1991, at A31.

<sup>43</sup> See *Curfew for Juveniles*, A.B.A. J., Apr. 1994, at 41 (listing Phoenix, Milwaukee, Atlanta, Buffalo, Tampa, Newark, N.J. and Hartford, Conn. as employing juvenile curfew). Atlanta, Detroit and Los Angeles had already imposed a youth curfew at the time Dallas passed its curfew ordinance. See *Dallas Council Approves 11 P.M. Curfew for Teen-Agers*, *supra* note 42.

<sup>44</sup> See *Dallas Council Approves 11 P.M. Curfew for Teen-Agers*, *supra* note 42; Gesalman & Martinez, *supra* note 31. In 1990, the Dallas police reported 5425 juvenile arrests for various offenses, an increase of almost 300 arrests from the previous year. See *Qutb*, 11 F.3d at 493 (citing statistics presented by city at district court hearing). These arrests included 40 murders, 91 sexual assaults, 233 robberies and 230 aggravated assaults. *Id.* Moreover, the juvenile crime problem appeared to be worsening in 1991. From January to April, 1991, 21 juveniles had been arrested for murder, 36 for sexual offenses, 128 for robbery, and 107 for aggravated assault. *Id.* The city argued that the crimes of murder, rape and aggravated assault were more likely to occur during the hours covered by a potential curfew. *Id.*

<sup>45</sup> Dallas Mayor Steve Bartlett stressed that the purpose of the curfew law was to get the youths off the dangerous streets after midnight, not to arrest teenagers. Gesalman & Martinez, *supra* note 31. The goals of the curfew included: reducing the number of juvenile crime victims and injuries caused by accidents involving youths during the curfew hours; lessening the periods law enforcement officers must spend in the field addressing juvenile crime; decreasing the number of juveniles who stay out late because of peer pressure to do so; increasing options for dealing with gang problems; and helping parents control their children's nocturnal activities. *Qutb*, 11 F.3d at 494 n.8.

<sup>46</sup> See *Qutb*, 11 F.3d at 496-99 (citing DALLAS CODE, ch. 31, § 31-33). In fact, in the first six months after the curfew has been in force, Dallas Police reported that juvenile arrests and victimization decreased by 15%. Mark Potok, *Teen Curfews 'The Norm' in More Cities*, USA TODAY, June 26, 1995, at A1.

Saturday.<sup>47</sup> The ordinance contains a detailed definition section intended to reduce any confusion surrounding language such as "public place" and "establishment."<sup>48</sup> More specifically, the Dallas law provides nine exemptions to prosecution under the ordinance.<sup>49</sup> These defenses,

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<sup>47</sup> *Qutb*, 11 F.3d at 497 (citing DALLAS CODE, ch. 31, §§ 31-33(a)(1)(A), (B)). The curfew not only punishes the minor for a curfew violation, *id.* (citing DALLAS CODE, ch. 31, § 31-33(b)(1)) but also restricts a parent from knowingly allowing the minor to remain in a public place or establishment during curfew hours. *Id.* (citing DALLAS CODE, ch. 31, § 31-33(b)(2)). The curfew also prohibits owners, operators, or employees of establishments from allowing the minor to remain on those premises during the curfew. *Id.* (citing DALLAS CODE, ch. 31, § 31-33(b)(3)).

<sup>48</sup> *Qutb*, 11 F.3d at 497 (citing DALLAS CODE, ch. 31, § 31-33(b)). The juvenile curfew ordinance must contain a detailed definition section to prevent a reviewing court from voiding the curfew on vagueness grounds. Courts have held juvenile curfew ordinances to be unconstitutionally vague when the ordinance contained broad and ambiguous terms that substantially affected the juvenile's conduct. *See Allen v. Bordentown*, 524 A.2d 478, 481-82 (N.J. Super. Ct. Law Div. 1987) (holding "reasonable judgment," "emergency errand" and "legitimate business" unconstitutionally vague due to subjective basis which results in discriminatory enforcement); *In re Frank O.*, 247 Cal. Rptr 655, 660 (Cal. Ct. App. 1987) (rejecting Long Beach, Ca. curfew because vague terms allowed for arbitrary and erratic implementation); *Brown v. Ashton*, 611 A.2d 599, 609 (Md. App. 1992) (holding that term "bona fide organization" lacks detailed definition and is unconstitutionally vague). To survive a vagueness claim, a juvenile curfew ordinance should contain a precisely worded, detailed definition section. *See Natalie M. Williams, Comment: Updated Guidelines for Juvenile Curfews: City of Maquoketa v. Russell*, 79 IOWA L. REV. 465, 475-76 (1994).

<sup>49</sup> *Qutb*, 11 F.3d at 498 (citing DALLAS CODE, ch. 31, § 31-33(c)). Section 31-33(c) provides in part:

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

- (A) accompanied by the minor's parent or guardian;
- (B) on an errand at the direction of the minor's parent or guardian, without any detour or stop;
- (C) in a motor vehicle involved in interstate travel;
- (D) engaged in an employment activity, or going to or returning home from an employment activity, without detour or stop;
- (E) involved in an emergency;
- (F) on the sidewalk abutting the minor's residence or abutting the residence of a next-door neighbor if the neighbor did not complain to the police department about the minor's presence;
- (G) attending an official school, religious, or other recreational activity supervised by adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the minor, or going to or returning home from, without any detour or stop, an official school, religious, or other recreational activity supervised by adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the minor;
- (H) exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly; or
- (I) married or had been married or had disabilities of minority removed in accordance with Chapter 31 of the Texas Family Code.

DALLAS CODE, ch. 31, § 31-33(c).

however, do not cover every activity in which a child may be innocently involved during the curfew hours.<sup>50</sup> Nevertheless, the Fifth Circuit determined that minors' rights regarding involvement in these non-exempt activities did not outweigh the compelling need for a juvenile curfew.<sup>51</sup>

In the past, courts have overturned juvenile curfew ordinances if they lacked sufficient protection for activities in which minors might constitutionally be involved during curfew hours.<sup>52</sup> In *Waters v. Barry*,<sup>53</sup> for example, the federal district court overturned a Washington, D.C. curfew law<sup>54</sup> that provided five such exemptions,<sup>55</sup> including situations in which the minor was with a parent,<sup>56</sup> returning home within sixty minutes after the end of a pre-registered educational, religious, or non-profit sponsored

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<sup>50</sup> Specifically, the district court asserted that the defenses do not protect juveniles who attend concerts, films, plays, non-supervised, non-sponsored midnight sports league games or innocent strolls in the public park to gaze at the stars. *Quib*, 11 F.3d at 494-95.

<sup>51</sup> *Id.* at 495. The Fifth Circuit faulted the district court for the manner in which the court examined the defenses. *Id.* A juvenile could attend a late-night activity if he or she was accompanied by a parent or guardian. *Id.* Additionally, the examples of a midnight basketball game or youth group event usually involve adult supervision and are exceptions under the ordinance. See DALLAS CODE, ch. 31, § 31-33 (c)(1)(G). The minor may even attend a party beyond curfew hours as long as a parent supervised the event. *See id.*

Moreover, the juvenile was not actually deprived of attending those cultural or entertainment events listed by the district court. Instead, the curfew law merely required the juvenile who wished to attend the event unchaperoned to attend the matinee show. *Quib*, 11 F.3d at 495. Thus, the ordinance was not depriving minors of an activity because they could take part in the activity at an earlier time. Stargazing, an activity that could only be done at night, could not only be performed in a public park until 11:00 p.m., but the minor could watch the stars all night if he or she remained on the sidewalk in front of his or her home. *Id.*

<sup>52</sup> *See, e.g.*, *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981) (invalidating law because ordinance failed to exclude minors involved in First Amendment activities); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1385 (D.N.H. 1984) (finding ordinance unconstitutional for failing to include defense encompassing minors' fundamental right to movement), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1985); *K.L.J. v. Florida*, 581 So. 2d 920, 922 (Fla. Dist. Ct. App. 1991) (striking down Jacksonville curfew law as unable to "apprise parties as to what conduct is permissible"); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992) (holding juvenile curfew unconstitutionally overbroad because not drawn narrowly to provide exception for emancipated minors and First Amendment fundamental rights).

<sup>53</sup> 711 F. Supp. 1125 (D.D.C. 1989).

<sup>54</sup> *Id.* at 1128 (citing WASHINGTON, D.C. TEMPORARY CURFEW EMERGENCY ACT of 1989, D.C. LAW 8-20 [hereinafter WASHINGTON ACT]). The plaintiffs' class included juveniles, young adults and individuals associated with religious organizations. *Waters*, 711 F. Supp. at 1128. The plaintiffs asserted that the curfew contained a number of constitutional infirmities. *Id.* at 1132-40. Specifically, the court held that the juvenile curfew violated the minors' right to movement under the First Amendment right to assembly and association as well as their substantive due process rights under the Fifth Amendment. *Id.* at 1134-35. Additionally, the curfew violated the minors' Fifth Amendment Equal Protection rights. *Id.* at 1138-40.

<sup>55</sup> *See id.* at 1141 (citing WASHINGTON ACT § 4(d)).

<sup>56</sup> *Waters*, 711 F. Supp. at 1141 (citing WASHINGTON ACT § 4(d)(1)).

event,<sup>57</sup> or traveling by motor vehicle.<sup>58</sup> While the court commended the city for including these exceptions,<sup>59</sup> it was more disturbed by the actual imposition of a juvenile curfew than by the defenses provided.<sup>60</sup>

It is clear, however, based on the existing cases, that the constitutionality of a juvenile curfew depends on the number and types of defenses it contains. Under equal protection analysis, the validity of the law depends on the presence of certain defenses which ensure that it is "narrowly tailored" to satisfy the compelling state interests involved.<sup>61</sup> Similarly, the inclusion of defenses for activities protected by the First Amendment would be necessary to defeat overbreadth challenges to the law.<sup>62</sup> When exam-

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<sup>57</sup> See *id.* (citing WASHINGTON ACT § 4(d)(2)).

<sup>58</sup> See *id.* (citing WASHINGTON ACT § 4(d)(3)). The Washington, D.C. juvenile curfew also provided a defense for a minor if he is returning home from a job as long as the minor possesses a copy of his or her working papers. See *id.* at 1141 (citing WASHINGTON ACT § 4(d)(4)). Finally, the ordinance contained a two-part emergency clause. It exempts the minor, who is a custodial parent, on an emergency errand directly related to his or her child's health and also a minor who is on an emergency errand for a parent and possesses a note from the parent. See *id.* (citing WASHINGTON ACT §§ 4(d)(5)(A) and (B)).

<sup>59</sup> "These exemptions represent a laudable effort on the District's part to conform the Act to the requirements of the Constitution." *Waters*, 711 F. Supp. at 1135.

<sup>60</sup> For the district court, the number of defenses under the curfew was irrelevant. "[I]t is what these curfews restrict, and not what they exempt, that matters the most." *Id.* at 1136. By its very nature, the Washington, D.C. juvenile curfew prohibited more juveniles from innocently moving about than prevented those juveniles who used the curfew hours to commit illegal activities. *Id.* at 1136. Even with its defenses, the Washington curfew was held to "'broadly stifle' the fundamental liberty interests of thousands of perfectly innocent, law-abiding juveniles who live in or who may visit the District of Columbia." *Id.*

<sup>61</sup> *Qutb v. Strauss*, 11 F.3d 488, 493-94 (5th Cir. 1993) ("To be sure, the defenses are the most important consideration in determining whether the ordinance is narrowly tailored."), *cert. denied*, 114 S. Ct. 2134 (1994); see *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 339 (Wis. 1988) (concluding juvenile curfew ordinance drawn "as narrowly as practicable").

*Waters* did not evaluate the defenses to determine whether the curfew act was narrowly tailored. That court believed logic was "perhaps most fatal to the Act's constitutionality." *Waters*, 711 F. Supp. at 1139. The curfew was not narrowly tailored because it lacked the logical fit between the compelling state interest and the classification created by the ordinance. *Id.* Therefore, this conclusion prevented the court from determining whether the defenses acted to narrowly tailor the juvenile curfew law.

<sup>62</sup> The failure to draft the curfew with an exception for First Amendment activities should result in an unconstitutional curfew. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1074 (5th Cir. 1981) (holding that curfew unconstitutionally swept within ambit innocent activities protected by First Amendment); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992) (determining juvenile curfew unconstitutional since ordinance lacked exception for minors' freedom of movement when acting in conjunction with First Amendment rights); *Allen v. City of Bordentown*, 524 A.2d 478, 483 (N.J. Super. Ct. Law Div. 1987) (ruling juvenile curfew unconstitutionally overbroad because law contained sweeping restrictions on minors' fundamental right to free speech, religion and assembly). But see *City of Milwaukee*, 426 N.W.2d at 339 (concluding that curfew lacking specific First Amendment defense was not substantially overbroad); *In re Juvenile*, No. JT 9065297, 887 P.2d 599, 609 (Ariz. App. Ct. 1994) (holding



ined in this light, the *Qutb* holding is consistent with *Waters*,<sup>63</sup> as the Dallas curfew contained nearly twice the number of defenses of the Washington, D.C. curfew, and the Dallas exceptions were more expansive.<sup>64</sup> It was the breadth of these defenses that prevented the Dallas

curfew was not overbroad when liberally construed to contain First Amendment defense).

The overbreadth doctrine invalidates a law when it "does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that . . . constitute an exercise" of First Amendment rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (holding criminal statute that prohibited picketing in front of business establishments unconstitutional because it barred First Amendment right to peaceful picketing). The overbreadth doctrine is confined to litigation relating to the First Amendment. *Moose Lodge No. 107 v. Irwins*, 407 U.S. 163, 168 (1972). A state statute can potentially violate a person's First Amendment rights because the liberty component of the Fourteenth Amendment encompasses the rights guaranteed by the First Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Fifth Circuit did not address the plaintiff's challenge that the Dallas juvenile curfew was unconstitutionally overbroad. *See Qutb*, 11 F.3d. at 491 n.5. It is submitted the Dallas law cannot be deemed overbroad since the curfew law provided a defense for First Amendment activity.

<sup>63</sup> Reviewing the Dallas juvenile curfew ordinance, District Court Judge Buchmeyer apparently adopted the *Waters* rationale, concluding that "[i]t is what the Ordinance restricts . . . and not what it exempts that matters the most." *Id.* at 493 (alteration in original). The Fifth Circuit, however, rebuked this rationale because the ordinance's defenses were vital to the curfew's constitutionality. "[I]t is clear to us that neither the restrictions of the curfew ordinance nor its defenses can be viewed in isolation from each other; the ordinance can be examined fairly only when the defenses are considered as part of the whole." *Id.* at 493. The presence of the nine enumerated defenses must be considered in conjunction with the prohibitions the curfew sustains. It appears, therefore, that the *Waters* court improperly examined the Washington, D.C. juvenile curfew because the court placed only a limited emphasis on the curfew's exemptions.

<sup>64</sup> The defenses provided by the WASHINGTON ACT were inferior to the exemptions the DALLAS CODE provides to minors. The Dallas ordinance allows a guardian to accompany a juvenile to a public place during curfew hours. The corresponding D.C. provision only allowed the minor's parent to be with the minor. *Compare* DALLAS CODE, ch. 31, § 31-33(c)(1)(A) with WASHINGTON ACT § 4(d)(1). During curfew, a Dallas minor can be in a public place if his presence involves an emergency. DALLAS CODE, ch. 31, § 31-33(C)(1)(E). The Washington, D.C. curfew, however, would require a similarly situated minor to possess a note from his parents, if it was practicable. WASHINGTON ACT § 4(d)(5)(B). A minor who was a custodial parent could break the curfew if involved in an emergency relating to his or her child's health as long as the juvenile parent could explain the emergency if stopped by police. WASHINGTON ACT § 4(d)(5)(B).

The Washington youths were required to return home within one hour following the departure of an educational, religious, or non-profit sponsored activity. WASHINGTON ACT § 4(d)(2)(C). While he or she must return home directly after leaving an activity sponsored by the city, civic association, or similar entity, a Dallas youth does not face a time limit. *See* DALLAS CODE, ch. 31, § 31-33(c)(1)(G).

More important, however, was the failure of the D.C. curfew to provide minors with certain exemptions that are included in the Dallas ordinance. Absent from the D.C. Act is an exemption for minors who violate curfew hours in an exercise of their "First Amendment rights protected by the United States Constitution, such as free exercise of religion, freedom of speech, and the right to assembly." *See* DALLAS CODE, ch. 31, § 31-33(c)(1)(H). Under the Dallas ordinance, the minor can perform any errand at the direction of his or her parent or guardian. *Id.* § 31-

curfew from impermissibly stifling constitutional rights.

## II. EQUAL PROTECTION ANALYSIS

The central issue in *Qutb* was whether the Dallas juvenile curfew violated the Equal Protection Clause of the Fourteenth Amendment.<sup>65</sup> The Supreme Court has interpreted this clause as a "direction that all persons similarly situated should be treated alike."<sup>66</sup> The Dallas ordinance treats certain "persons similarly situated" differently because the law's prohibitions relate only to persons under seventeen and not to adults.<sup>67</sup> This discrimination required the Fifth Circuit to analyze the statute under the Equal Protection Clause.<sup>68</sup>

Courts employ one of two tests to determine whether a government-created classification violates the Equal Protection Clause, depending upon the right or classification at issue.<sup>69</sup> If the state action burdens a "fundamental right"<sup>70</sup> or the classification disadvantages a "suspect class,"<sup>71</sup>

33(c)(1)(E). Additionally, the Dallas law exempts all married, divorced, and emancipated minors. *Id.* § 31-33(c)(1)(I). Finally, a minor can remain on his or her sidewalk or neighbor's sidewalk, unless the neighbor complains to the police, during curfew hours. *Id.* § 31-33(c)(1)(F).

<sup>65</sup> *Qutb*, 11 F.3d at 491 n.5; see U.S. CONST. amend. XIV, §1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). *Qutb* addressed the Free Association issue in a footnote. See *Qutb*, 11 F.3d at 495 n.9. Freedom of association has been deemed worthy of constitutional protection. See *Roberts v. Jaycees*, 468 U.S. 609, 617-18 (1984) (discussing "freedom of intimate association" and "freedom of expressive association"). Certain types of association, however, are not a part of the minor's penumbra of fundamental rights. See, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (refusing to recognize "generalized right of 'social association' [including] chance encounters in dance halls" as constitutionally protected). The Fifth Circuit found that this was "precisely the type of association we are primarily concerned with in this case." *Qutb*, 11 F.3d at 495 n.9. Therefore, the juvenile curfew did not infringe upon the minors' constitutional right to association. *Id.*

But see *Waters*, 711 F. Supp at 1134 n.16 ("Unlike the ordinance at issue in *Stanglin*, the [juvenile curfew] Act operates in much more of a blunderbuss fashion . . . effectively prohibit[ing] on its face forms of nocturnal expression and association that would clearly fall within the ambit of the First Amendment."); Susan M. Horowitz, Note, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J.L. & SOC. PROBS. 381, 396 (distinguishing *Stanglin* holding from juvenile curfew ordinance because "the ordinance in *Stanglin* concerned a specific arena, while curfew encompasses a large, general vicinity and results in more indiscriminate restriction of freedoms").

<sup>66</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

<sup>67</sup> *Qutb*, 11 F.3d at 492 ("[I]t is clear that the curfew ordinance distinguishes between classes of individuals on the basis on [sic] age, treating those persons under the age of seventeen differently from those persons age seventeen and older.").

<sup>68</sup> *Id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly,

such action or classification will be constitutional only if it survives "strict scrutiny."<sup>72</sup> If such rights or classifications are not implicated, the court applies a rational basis test.<sup>73</sup> In *Qutb*, the court held that the classification established by the juvenile curfew did not disadvantage a suspect class.<sup>74</sup> Therefore, the Fifth Circuit inquired whether the Dallas law impinged upon a fundamental constitutional right.<sup>75</sup>

#### A. Minors' Fundamental Rights

Minors possess certain fundamental rights under the U.S. Constitution<sup>76</sup> and are accorded a "significant measure of First Amendment

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therein."); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (holding that rights are fundamental when "deeply rooted in this Nation's history and tradition"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (determining that right is fundamental when "explicitly or implicitly protected by the Constitution"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (recognizing that certain fundamental rights are "found to be implicit in the concept of ordered liberty").

A number of rights are implicit within the Fourteenth and Fifth Amendment concept of "liberty." See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (right to marry); *Moore*, 431 U.S. at 499 (personal choice in matters of family life); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (procreation); *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (interstate travel); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (vote); see also *Plyler*, 457 U.S. at 211 (holding minor's right to education non-fundamental but highly protected).

<sup>71</sup> See *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28 (describing composition of suspect classification). The traditional indicia of a "suspect" classification entails a finding that (1) the class has been saddled with certain disabilities as a result of the discrimination, (2) the class has been subjected "to such a history of purposeful unequal treatment," or (3) the class has been relegated "to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* The Fourteenth Amendment abolishes legislation that imposes disadvantages on groups "disfavored by virtue of circumstances beyond their control." *Plyler*, 457 U.S. at 216-17 n.14.

<sup>72</sup> To validate state action under strict scrutiny, the state must demonstrate that the law is narrowly tailored to serve a compelling state interest. *Id.* at 216-17; *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). Laurence Tribe notes that "there are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights." LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1452 (2d ed. 1988).

<sup>73</sup> See *San Antonio Indep. Sch. Dist.*, 411 U.S. at 40. Under a rational basis test, the state action will be upheld if the state can show a rational relation to a legitimate state purpose. *Id.*

<sup>74</sup> *Qutb*, 11 F.3d at 492 ("[N]o one has argued, and correctly so, that a classification based on age is a suspect classification."). Age is not a suspect classification. See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). Prior to *Gregory*, other courts had refused to hold that a juvenile curfew created a suspect class based on age. See, e.g., *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975), *aff'd per curiam*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

<sup>75</sup> *Qutb*, 11 F.3d at 492.

<sup>76</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (holding abortion statute requiring parental consent violated minors' right to privacy). The United States Constitution vests children with many of the same rights possessed by adults. See, e.g., *Carey v. Population Serv.*

protection.”<sup>77</sup> The First Amendment has been interpreted to establish fundamental rights to movement and travel.<sup>78</sup> Legal commentators argue that these fundamental rights should apply to minors as well.<sup>79</sup>

Courts reviewing juvenile curfews, however, have split on this critical question.<sup>80</sup> This issue is significant because a conclusion that a minor does

Int'l, 431 U.S. 678 (1977) (right to possess and purchase contraception); *Breed v. Jones*, 421 U.S. 519, 531-32 (1975) (holding that Fifth Amendment's Double Jeopardy clause applies to minors); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (prohibiting minors from wearing black armbands violates their First Amendment rights).

<sup>77</sup> *Eronzck v. Jacksonville*, 422 U.S. 205, 212-13 (1975) (holding that minor has First Amendment right of access to non-obscene material); see *Tinker*, 393 U.S. at 513-14 (upholding minors' First Amendment rights of speech and expression).

<sup>78</sup> An adult's right to travel is worthy of constitutional protection, regardless of the adult's destination. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (“[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (indicating that right to wander, stroll, or loaf is protected by Constitution because “[t]hese unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity”); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (asserting fundamental right to interstate travel because “the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout . . . our land”); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1968) (“The right to travel is part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment . . . [f]reedom of movement is basic in our scheme of values.”); *Apthker v. Secretary of State*, 378 U.S. 500, 508 (1964) (striking down law that prohibited application for passport because regulation broadly restricted fundamental right to travel abroad).

<sup>79</sup> See *Hangartner*, *supra* note 21, at 227 (arguing minors' right to intrastate travel should be explicitly recognized as fundamental right under Due Process clauses of Fifth and Fourteenth Amendments); *Juvenile Curfews and the Constitution*, *supra* note 21, at 1174 (contending that minors' fundamental rights include movement and association).

While the Supreme Court has insisted that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,” *In Re Gault*, 387 U.S. 1, 13 (1969) (citations omitted), the Court has not considered “the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the State.” *Id.* At one point, however, some members of the Court indicated a desire to decide the constitutionality of curfews. See *Bykofsky v. Borough of Middletown*, 429 U.S. 964 (1976) (Marshall, J., dissenting). Justice Marshall insisted that the issue presented by *Bykofsky*, “whether the due process rights of juveniles are entitled to lesser protection than those of adults,” required the Court to grant certiorari since the case posed “a substantial constitutional question—one which is of importance to thousands of towns with similar ordinances . . .” *Id.* at 965-66.

<sup>80</sup> Compare *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa 1975), *aff'd per curiam*, 535 F.2d 1245 (3rd Cir.), *cert. denied*, 429 U.S. 964 (1976) (holding minors have less constitutional protection than adults); *People ex rel J.M.*, 768 P.2d 219, 223 (Colo. 1989) (denying fundamental status to minor's right of intracity travel under due process); *City of Panora v. Simmons*, 445 N.W.2d 363, 386 (Iowa 1989) (same); *Metropolitan Dade County v. Pred*, 1995 Fla. App. LEXIS 11440 (Fla. Dist. Ct. App. Nov. 1, 1995) (indicating that juveniles do not possess same “quantum or quality of rights as adults” under both state and federal Constitutions) *with* *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (assuming without

not have a fundamental right to movement results in an Equal Protection analysis using the less stringent rational basis test.<sup>81</sup> In *Qutb*, the Fifth Circuit did not conduct an extensive inquiry into this issue but merely adopted the position that the minors' right to movement is fundamental.<sup>82</sup>

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deciding that minors' right to movement is fundamental); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981) (holding that right to movement extended to minors for purposes of overbreadth analysis); *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (indicating that right to walk streets is included in First Amendment rights and "liberty" under Fifth Amendment's due process clause); *McCollester v. City of Keene*, 586 F. Supp. 1381, 1384-85 (D.N.H. 1984) (indicating that amended curfew violated minor plaintiffs' personal liberty in freedom of movement); *McCollester v. City of Keene*, 514 F. Supp. 1046, 1050 (D.N.H. 1981) (holding right to movement invaluable and central to juveniles), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982); *Village of Deerfield v. Greenberg*, 550 N.E.2d 12, 15 (Ill. App. Ct. 1990) (assuming without deciding that minors possessed constitutional right to movement); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992) ("Whenever the First Amendment rights . . . require one to move about, such movement must necessarily be protected under the First Amendment."); *Brown v. Ashton*, 611 A.2d 599, 606 (Md. Ct. Spec. App. 1992) (stating that minors' right to movement "is now widely regarded as fundamental"); *Allen v. City of Bordentown*, 524 A.2d 478, 483 (N.J. Super. Ct. Law. Div. 1987) (holding that overbroad curfew restricted First Amendment right of movement); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 336 (Wis. 1989) (holding juvenile curfew could infringe upon minor's fundamental right to movement).

<sup>81</sup> See *Bykofsky*, 401 F. Supp. at 1265. The Middletown curfew ordinance neither created a suspect classification nor infringed upon a minor's fundamental right. *Id.* As a result, the traditional rational basis test was "the proper yardstick to utilize in determining the constitutionality of the ordinance." *Id.*; see *supra* note 73 and accompanying text (describing rational basis test).

The Middleton juvenile curfew satisfied the test's requirement that the curfew have a rational relationship to a legitimate government interest. The government interests that the court found included (1) preventing minors from committing acts of violence against other minors as well as adults; (2) enforcing parental control by having parents take legal responsibility for their children; (3) protecting the public at large from the juvenile's nocturnal mischief; and (4) reducing juvenile crime activity in Middletown. *Bykofsky*, 401 F. Supp. at 1255. The district court reasoned that the maintenance of the town's interests in social and economic welfare outweighed the minor's interest in nocturnal movement. *Id.* at 1258.

Additionally, the curfew was not arbitrary in terms of age classification. *Id.* at 1265. The district court maintained that the age classification in the juvenile curfew rested upon real and substantial differences among the adult and juvenile maturity levels. *Id.* Thus, the dissimilar maturity levels permitted different treatment and led to the conclusion that the curfew did not violate equal protection principles. *Id.* at 1265-66.

A court's determination that the right to movement is not a fundamental right also has an adverse impact on the minors' substantive due process claim; the court will apply a rational basis standard which is easily met. See *People ex rel J.M.*, 768 P.2d at 223; *Simmons*, 445 N.W.2d at 369.

Other courts have criticized *Bykofsky* for its application of the rational basis test. See, e.g., *Waters*, 711 F. Supp at 1136 (disagreeing with *Bykofsky* Court's holding that minors' constitutional rights deserve less protection than those of adults).

<sup>82</sup> "For purposes of our analysis, we assume without deciding that the right to move about freely is a fundamental right." *Qutb*, 11 F.3d at 492.

As a result, the court subjected the curfew ordinance to the strict scrutiny test.<sup>83</sup>

In a non-emergency situation, states cannot show a compelling state interest to justify a curfew against adults.<sup>84</sup> When confronted with a constitutional challenge to a curfew law by a minor, courts look to *Belotti v. Baird*.<sup>85</sup> In *Belotti*, a plurality of four Supreme Court Justices offered the following reasons to justify treating minors and adults differently: (1) the peculiar vulnerability of children; (2) their inability to make critical decisions in an informed manner; and (3) the importance of the parental role in child rearing.<sup>86</sup> The substantive "test" created from these criteria has been criticized by legal commentators<sup>87</sup> and inconsistently applied by

<sup>83</sup> *Id.*

<sup>84</sup> "While both general curfews and juvenile curfews enacted during emergency situations by municipalities have been upheld in federal and state decisions, in those situations where emergencies have not existed the courts have struggled with the constitutional issues raised by the curfews and frequently held such ordinances to be unconstitutional." Cahill, *supra* note 16, at 521-22.

<sup>85</sup> 443 U.S. 622 (1979). *Belotti* addressed the constitutionality of a Massachusetts statute that restricted a minor's right to have an abortion without parental consent. *Id.* at 625-26 (citing MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979)). The statute provided:

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a Judge of the superior court for good cause shown.

*Id.* This statute, which required a minor to obtain either both parents' permission or judicial permission to have an abortion, was unconstitutional because it unduly infringed upon the minor's right to seek the procedure. *Id.* at 647-48.

One commentator claims that since *Belotti* "all lower courts deciding the constitutionality of juvenile curfews have adopted and applied" its principles. Horowitz, *supra* note 65, at 383.

<sup>86</sup> *Belotti*, 443 U.S. at 634. Justice Powell justified these three reasons on the grounds of the unique status of children under the law. *Id.* at 633. "Children have a very special place in life which law should reflect." *Id.* (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

<sup>87</sup> See, e.g., Horowitz, *supra* note 65, at 383 (insisting that lower courts should not blindly follow *Bellotti*). Horowitz insists that "*Bellotti* . . . should not be regarded as a judicial talisman." See *id.* at 406. She further insists that it is inappropriate to apply the rationale of an abortion case to evaluate a state's interest in a juvenile curfew. *Id.* at 408. "Abortion has a unique and special standing within the context of fundamental rights that 'require a State to act with particular sensitivity.'" *Id.* at 409 (quoting *Bellotti*, 443 U.S. at 642). The three factors presented by the *Bellotti* plurality represented a desire to address the sensitive nature of a minor's abortion rights, but the Court failed to note whether these factors could be formulated into a test in non-abortion cases. See *id.* at 407-08.

Another commentator advocates the use of a "compelling for children standard." See *Juvenile Curfews and the Constitution*, *supra* note 21, at 1172-73. Since courts have acknowledged that there are special interests surrounding children, a state's infringement upon the juvenile's fundamental rights should be subject to its own special strict scrutiny analysis. *Id.* at 1172. Under this method of strict scrutiny analysis, a state may infringe on the minor's fundamental rights when it demonstrates a compelling state interest "based on the unique development traits of children." *Id.* A court utilizing this standard would require juvenile curfew

courts.<sup>88</sup> Nevertheless, the principles established in *Belotti* seem to

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proponents to demonstrate that the juvenile curfew actually diminished the significant and real danger of physical and emotional harm to minors and others. *Id.* The state proves this "compelling for children" interest by demonstrating that the curfew exhibits one of the three *Bellotti* factors. *Id.* at 1173. The "compelling for children" test was adopted by the dissent in *City of Panora v. Simmons*, 445 N.W.2d 363, 371 (Iowa 1989) (Lavorato, J., dissenting). Justice Lavorato opined that the state would fail to pass a "compelling for children" test because none of the *Bellotti* factors were present. *Id.* at 371-73. In support of this assertion, the dissent applied the facts to the arguments and rationale offered in the Harvard Law Review article. *Id.* (citing *Juvenile Curfews and the Constitution*, *supra* note 21).

This standard, however, has not been accepted by the Iowa courts since *Simmons*. Writing for the majority in *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992), Justice Lavorato rejected a juvenile curfew and neither applied nor urged the use of the "compelling for children" interest he had previously advocated in *Simmons*. In *Russell*, the Iowa Supreme Court held that the city of Maquoketa's juvenile curfew ordinance was unconstitutionally overbroad. *Id.* at 186. In dicta, however, the unanimous court cited the majority's admission in *Simmons* that when a juvenile curfew violated a fundamental right, the level of judicial scrutiny was raised from rational relationship to strict scrutiny. *Id.* at 184 (citing *Simmons*, 445 N.W.2d at 367).

Susan Horowitz's proposed test differs from the "compelling for children" interest test. See Horowitz, *supra* note 65, at 415-16. She insists that courts should not emphasize the *Bellotti* factors when reviewing a juvenile curfew. *Id.* Instead, courts should determine the validity of the government's interest in the juvenile curfew on a case-by-case, fact-specific basis. *Id.* Under Horowitz's strict scrutiny analysis, the particular facts relating to the curfew, not the presence or absence of a *Bellotti* factor, should be the determinative factors. *Id.*

In his note on curfews, Peter L. Scherr focuses on the substantive due process issue and proposes an intermediate scrutiny test for courts. See Scherr, *supra* note 14, at 191. The curfew must substantially relate to an important government interest unique to minors. *Id.* The state would be required to prove that it has an important and unique interest in keeping the children off streets and out of public places at night. *Id.* Similar to Horowitz's proposal, Scherr's test takes into consideration the specific facts pertaining to each city's curfew. *Id.*

<sup>88</sup> The application of the *Bellotti* test has resulted in a number of inconsistencies. First, the courts have wavered on the appropriate time to consider the three *Bellotti* factors. Some courts have used *Bellotti* to determine the existence of the minors' fundamental right. See *People ex rel J.M.*, 768 P.2d 219, 233 (Colo. 1989) (holding presence of *Bellotti* factors justifies conclusion that child's liberty interest in movement not coextensive with that of adults); accord *City of Panora v. Simmons*, 445 N.W.2d 363, 369 (Iowa 1989). This approach, however, has been sharply criticized. See *id.*, 445 N.W.2d at 374 (Lavorato, J., dissenting). Justice Lavorato indicated that "*Bellotti* presupposes that a *fundamental right exists* and simply uses the three reasons to determine whether a governmental restriction can be placed on a fundamental right." *Id.* (emphasis added); see also *Allen v. City of Bordentown*, 524 A.2d 478, 484 (N.J. Super. Ct. Law Div. 1987) (employing *Bellotti* analysis against Equal Protection claim after determining existence of minors' fundamental right); *Juvenile Curfews and the Constitution*, *supra* note 21, at 1172 (applying *Bellotti* analysis to create "compelling for children" interest because minors possess fundamental right to movement).

Recent cases have employed a *Bellotti* analysis only after the court has determined that the curfew violated the fundamental right. See *In re Juvenile Action No. JT9065297*, 887 P.2d 599, 606 (Ariz. Ct. App. 1994) (examining *Bellotti* factors to determine presence of substantial state interest to justify infringement on minors' fundamental right to movement); *Pred v. Dade County*, No. 94-03203-CA-21, slip op. at 13-14 (Fla. Cir. Ct. Sept. 21, 1994) (indicating three factor test has "generally been considered by federal courts in determining when a state may give less deference to the constitutional rights of minors"), *rev'd*, 1995 Fla. App. LEXIS 11440 (Fla. Dist. Ct.

furnish the necessary justification to infringe upon the rights of minors where similar infringement upon adults would be unconstitutional.<sup>89</sup>

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App. Nov. 1, 1995). Additionally, courts have differed on the number of *Bellotti* factors that must exist to justify unequal treatment. One court required satisfaction of all three *Bellotti* factors. See *McColester v. City of Keene*, 514 F. Supp. 1046 (D.N.H. 1981), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982) [hereinafter *McColester I*]. In *McColester I*, the court determined that the "peculiar vulnerability of children" and the minors' "inability to make critical decisions in an informed, mature manner" were relevant to the implementation of the Keene juvenile curfew ordinance. *Id.* at 1050-51. The court, however, struck down the curfew because the law impermissibly usurped the parental role in child rearing. *Id.* at 1052. "[T]here are many situations which are within the purview of the ordinance even though the parent did exercise reasonable parental control or guidance." *Id.* (internal quotations omitted). Other courts, however, suggest that different treatment can be justified if only one of the three factors is proven by the state. See *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981) (rejecting law on overbreadth grounds but suggesting that one *Bellotti* factor would be sufficient to justify unequal treatment) (citing *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029 (5th Cir. 1980), *rev'd on other grounds*, 455 U.S. 283 (1982)); *In re Juvenile*, 887 P.2d at 606 ("If the state does not have a significant interest that is unique to children in terms of one of these factors, then the state must treat adults and children the same."); *Juvenile Curfews and the Constitution*, *supra* note 21, at 1172-73.

Moreover, there has arisen a disagreement regarding the level of state interest that must be satisfied using the *Bellotti* factors. A recent Arizona Court of Appeals decision contended that the juvenile curfew can be upheld if the state demonstrates a "significant state interest." See *In re Juvenile*, 887 P.2d at 606. Most courts, however, indicate that a state must use the *Bellotti* test to demonstrate that a juvenile curfew furthers a compelling state interest. See *Waters v. Barry*, 711 F. Supp. 1125, 1136-37 (D.D.C. 1989); *Pred*, No. 94-03203-CA-21, slip op. at 13-14; *Allen*, 524 A.2d at 478; *City of Milwaukee v. K.F.*, 426 N.W.2d 329 (Wis. 1988). It is submitted that the compelling state interest standard is the proper level of scrutiny to evaluate the juvenile curfew. See, e.g., *Horowitz*, *supra* note 65, at 383-84 (insisting that lower courts should not blindly follow *Bellotti*).

<sup>89</sup> See *Simmons*, 445 N.W.2d at 363. While the Iowa Supreme Court applied the "rational basis" test to Panora's juvenile curfew, it insisted that the federal district court wrongly decided *Waters*. *Id.* "We believe that the Federal District Court in *Waters* erred in its application of the *Bellotti* rationale." *Id.* at 369. The court stated that the epidemic dimension of drug usage among minors reveals the "particular vulnerability" of children. *Id.* Since only one *Bellotti* factor must be exhibited, it appears that the district court actually established compelling state interest for its juvenile curfew. *Id.*; see also *City of Milwaukee*, 426 N.W.2d at 339 (concluding that states' power to limit "parental freedom and authority in things affecting the child's welfare" justified less deference to minors rights under *Bellotti* test).

But see *Pred*, No. 94-03203-CA-21, slip op. at 14-15. The Dade County Circuit Court enjoined the juvenile curfew because it violated minors' rights under the Florida State Constitution. *Id.* at 12, 14. The Dade County Commission drafted its ordinance with the explicit requirement that the compelling state interest be satisfied by the *Bellotti* factors. See *id.* at 14. The trial court, however, held that the state failed to prove the compelling state interest. *Id.* A juvenile curfew would not curb increasing juvenile crime and victimization because most of the crime occurred during daytime and was committed by a small group of repeat offenders. *Id.* at 15. This supports the contention that the trial court in *Pred* rejected the argument that the curfew was constitutional as a result of the *Bellotti* factors.

But see *Waters*, 711 F. Supp. at 1136-37. The *Waters* court reviewed the *Bellotti* factors and held that none of them were present to allow less deference to the constitutional rights of the



The Fifth Circuit in *Qutb* did not perform the *Bellotti* test, but rather presumed that the rights involved were fundamental.<sup>90</sup> It is submitted, however, that the court would have reached the same decision had *Bellotti* been employed. The court addressed two of the *Belotti* factors—minors' vulnerability and their inability to make informed decisions<sup>91</sup>—in finding that the state had a legitimate interest in protecting juveniles' welfare

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minors. *Id.* The court rejected *Bykofsky*, which concluded that the constitutional interests of minors were less compelling than adult and community interests. *Id.* at 1136 (citing *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1256 (M.D. Pa. 1975)). "Applying the *Bellotti* factors, the Court thus holds that the context in which the District seeks to enforce the Act does not justify differentiating between the constitutional rights of minors and adults." *Waters*, 711 F. Supp. at 1137. First, the district court maintained that the scourge of drugs and violence posed no peculiar danger to juveniles. *Id.* Second, "the inability to make critical decisions" did not apply to a decision to remain in the house or roam the streets during curfew hours. *Id.* Finally, the curfew "gracelessly arrogates unto itself and to the police the precious rights of parenthood" and, thus, frustrated the thousands of parents who had control over their children. *Id.*

<sup>90</sup> *Qutb*, 11 F.3d at 492 n.6.

<sup>91</sup> In *Qutb*, the court could have merely referred to the parties' stipulation of the compelling interest and moved on to determine whether the law was "narrowly tailored." *See id.* at 492-93. The Fifth Circuit, however, articulated that the curfew represented an elevated interest in protecting a juvenile because the state "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Id.* at 492 (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990)). It appears the court had "no difficulty agreeing" with the stipulation to the presence of a compelling interest because the *Hodgson* reasoning satisfied the first two components of the *Bellotti* analysis. *Qutb*, 11 F.3d at 482.

The trial court, holding that the curfew violated the minors' right to movement, argued that the Dallas curfew would impair the child's ability to "take an innocent stroll or gaze at the stars from a public park." *Id.* at 495 (internal quotations omitted). The Fifth Circuit correctly dismissed this argument. *Id.* ("[A] juvenile may stare at the stars all night long from the front sidewalk of his or her home . . ."). Besides the obvious safety concerns of being in a dark, public area in the early morning hours, there may be other significant consequences that will affect the child the following day. For instance, a juvenile who goes for a late night "gaze at the stars" on a weekday night might also fail to get enough sleep to be productive in school the following morning. Further, there is no reason why a child should be "gazing at the stars" in a public park or loitering on a street corner in the early morning hours when they have obligations the next day. It is therefore suggested that a child involved in such activity demonstrates the "lack of judgment" noted in *Hodgson* which should satisfy the "particular vulnerability" or the "critical decision-making" components of the *Bellotti* test.

If the Dallas juvenile curfew ordinance did not provide the minor with the nine defenses, the first two *Bellotti* criteria should not be satisfied. *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981). In dicta, the *Johnson* court stated that overly broad curfew restrictions did not present an issue of "peculiar vulnerability of children." *Id.* The court noted that a minor was neither peculiarly vulnerable when he traveled or attended a religious or scholastic activity during curfew hours nor when he was on the sidewalk abutting his house. *Id.* Additionally, these activities would not satisfy the *Bellotti* concern of "critical decisions" on the part of minors. *Id.* Therefore, a curfew lacking these exemptions should not satisfy the *Bellotti* test. Labeling these activities as defenses, however, should eliminate the potential argument that curfew restrictions do not satisfy the *Bellotti* test.

because minors may lack the ability to exercise their rights properly.<sup>92</sup>

The third *Bellotti* factor examines the parents' role in their children's upbringing.<sup>93</sup> Although the only two issues addressed by the trial court were the Fourteenth Amendment Equal Protection issue and the First Amendment free association challenge,<sup>94</sup> the Fifth Circuit considered the previously unaddressed issue of whether the curfew violated the plaintiff parents' fundamental right to rear their children as they see fit.<sup>95</sup> The *Qutb* court ruled that the juvenile curfew ordinance threatened only a permissibly slight invasion of this right.<sup>96</sup> "Because of the broad exemptions included in the curfew ordinance, the parent retains the right to make decisions regarding his or her child in all other areas."<sup>97</sup> It is suggested that this conclusion, in effect, satisfies the third element of the *Bellotti* test. The court properly concluded, therefore, (regardless of the plaintiffs'

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<sup>92</sup> See *Qutb*, 11 F.3d at 492 (reaffirming Supreme Court's recognition of states' particular interest in youth).

<sup>93</sup> See *supra* note 86 and accompanying text.

<sup>94</sup> *Qutb*, 11 F.3d at 490 n.2.

<sup>95</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1922) (determining that parents' rights to rear their children fell within the ambit of the Fourteenth Amendment as a "liberty"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) ("This primary role in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1942) ("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 by obligations the state can neither supply nor hinder."); see also *Yoder v. Wisconsin*, 406 U.S. 205, 232-33 (1971) (holding Wisconsin law requiring all children to attend school until age 16 violated Amish parents' fundamental right to rear children in accordance with Amish values and religion).

<sup>96</sup> *Qutb*, 11 F.3d at 495-96. The U.S. Court of Appeals indicated that the juvenile curfew only infringed upon parents' rights when the youth remained in a public place after the curfew took effect. *Id.* This restriction represented only a minimal intrusion on the parents' rights. The court argued that the parent could still dictate whether the juvenile remained in a public place or establishment as long as the parent or guardian supervised the minor. *Id.* The parent still controlled the minor's ability to attend all activities sponsored by the city, civic organization, or any group that took responsibility for the minor. *Id.* Finally, the parent retained the right to control the minors' ability to get a job, run an errand, seek out emergency aid, or exercise their First Amendment rights. *Id.*

<sup>97</sup> *Qutb*, 11 F.3d at 495. It is submitted that the provision of these defenses to minors and their parents in the Dallas juvenile curfew was not based upon an assumption that the traditional family unit has broken down. Courts have rejected the contention that the state's desire to repair the family unit is a compelling interest in the juvenile curfew. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981) (holding that overbroad juvenile curfew inhibits rather than promotes parents' rearing right); *Waters v. Barry*, 711 F. Supp 1125, 1137 (D.D.C. 1989) (same); *McCollester v. City of Keene*, 514 F. Supp. 1046 (D.N.H. 1981) (same), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982). *But cf. In re Juvenile Action No. JT906527*, 887 P.2d 599, 607 (Ariz. Ct. App. 1994) (agreeing with assertion that Phoenix curfew "rests on the implicit assumption that in many cases, the traditional family unit in which two parents exercise control over their children's activities has dissolved").

stipulation) that the Dallas juvenile curfew's infringement on minors' rights was justified since it satisfied the *Belotti* test. In any event, because this type of analysis is more stringent, and an ordinance that survives strict scrutiny will necessarily pass a rational basis test, this Comment will focus on the approach taken by the *Qutb* court as a model for approaching curfew laws.

### B. *Compelling State Interest*

To survive a strict scrutiny examination, the juvenile curfew ordinance must first promote a compelling state interest.<sup>98</sup> In *Qutb*, the city asserted that the juvenile curfew furthered compelling state interests in that it would simultaneously reduce youth crime and victimization, while promoting juvenile safety and well-being.<sup>99</sup> The plaintiffs and the district court agreed that this satisfied the first prong of strict scrutiny analysis.<sup>100</sup> As a result, the Fifth Circuit concluded that the Dallas City Council had a compelling interest in its juvenile curfew and, therefore, was not required to demonstrate that interest.<sup>101</sup> In any event, statistics revealed the scope of the juvenile crime problem in Dallas and demonstrated the nexus

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<sup>98</sup> See *supra* note 72.

<sup>99</sup> *Qutb*, 11 F.3d at 492.

<sup>100</sup> *Id.* In fact, the parents conceded that the city had a compelling state interest to invoke a juvenile curfew. *Id.*

<sup>101</sup> *Id.* The fact that the parties and the district court conceded that the Dallas juvenile curfew served a compelling interest becomes a distinguishing factor for future courts reviewing a city's juvenile curfew ordinance. See *Pred v. Dade County*, No. 94-03203-CA-21, slip op. at 14-15 (Fl. Cir. Ct. Sept. 21, 1994). In *Pred*, the Dade County Circuit Court concluded that the Dade County juvenile curfew failed strict scrutiny because the county failed to show a compelling state interest. *Id.* at 14. The *Pred* court expressly distinguished its case from *Qutb* by pointing to the parents' stipulation in *Qutb*. "[T]he [p]laintiffs in *Qutb* stipulated that the Texas curfew served a compelling state interest. There has been no such stipulation in this case. To the contrary, the Defendant [sic] has been unable to prove that Dade's curfew serves a compelling state interest." *Id.* Dade County failed to prove a compelling state interest under the Florida Constitution. *Id.* at 15. A Florida appellate court vacated the trial court's injunction on the ground that the curfew did not interfere with a minor's rights under the Florida or United States Constitutions. *Metropolitan Dade County v. Pred*, 1995 Fla. App. LEXIS 11440, at \*4 (Fla. Dist. Ct. App. Nov. 1, 1995). Drawing such a legal conclusion deems it unnecessary to judge the curfew under any form of equal protection analysis.

The conclusions drawn by the trial court in *Pred*, however, should not suggest that a compelling state interest cannot be present if parties challenge a juvenile curfew solely under the federal constitution. *Qutb* paid scant attention to the compelling state interest issue because of the stipulation. *Qutb*, 11 F.3d at 492. It is submitted, however, that without the stipulation, the Fifth Circuit would have held that the state's interest in reducing juvenile crime and victimization was compelling.

between the ordinance and the compelling state interest.<sup>102</sup>

### C. *Narrowly Tailoring the Curfew*

Strict scrutiny also requires that the challenged statute be narrowly tailored to serve the compelling state interest involved.<sup>103</sup> In *Qutb*, the court rejected the district court's conclusion that the Dallas curfew "totally failed to establish that the Ordinance's classification between minors and non-minors is narrowly tailored to achieve the stated goals of the curfew."<sup>104</sup> Rather, the curfew's nine defenses were deemed to comprise the least restrictive methods for accomplishing the "compelling" municipal goal of reducing juvenile crime and victimization.<sup>105</sup> Therefore, the curfew was drawn narrowly enough to pass strict scrutiny.<sup>106</sup>

In *Qutb*, the defense provision of the juvenile curfew was "the most important consideration in determining whether this ordinance [was] narrowly tailored."<sup>107</sup> An earlier Fifth Circuit decision, *Johnson v. City of Opelousas*,<sup>108</sup> established the proposition that a broad defense section would serve as the method to narrowly tailor the ordinance.<sup>109</sup> In *Johnson*, the Fifth Circuit reversed a Louisiana federal district court's holding that the Opelousas juvenile curfew ordinance was constitutional.<sup>110</sup> The

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<sup>102</sup> *Qutb*, 11 F.3d at 493. The court did not require the city to provide the exact data on the number of juveniles who commit crimes during the curfew hours or figures pertaining to their juvenile victims to show the nexus. *Id.* at 493 n.7. *But see* Williams, *supra* note 48, at 482 (contending that city should provide exact statistical evidence of high rates of juvenile crime and delinquency to prove constitutionality of juvenile curfew).

<sup>103</sup> *See Qutb*, 11 F.3d at 493. The juvenile curfew will satisfy this portion of strict scrutiny if there is a "nexus between the stated government interest and the classification created by the ordinance." *Id.* (citing *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989)). Moreover, the city must demonstrate that the curfew ordinance utilized the least restrictive means to accomplish a reduction in juvenile crime and victimization. *Qutb*, 11 F.3d at 493.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; *see supra* note 49 (listing Dallas curfew's defenses).

<sup>106</sup> *Qutb*, 11 F.3d at 495. This decision was the first instance of a federal court concluding that a juvenile curfew ordinance passed a strict scrutiny test. *Cf. Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975) (holding curfew satisfied rational basis test), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976). *But see* *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1981) (holding curfew failed to pass strict scrutiny).

<sup>107</sup> *Qutb*, 11 F.3d at 493-94.

<sup>108</sup> 658 F.2d 1065 (5th Cir. 1981).

<sup>109</sup> *Id.* at 1074 ("Since the absence of exceptions in the curfew ordinance precludes a narrowing construction, we are compelled to rule that the ordinance is constitutionally overbroad.").

<sup>110</sup> *See Johnson v. City of Opelousas*, 488 F. Supp. 433 (W.D. La. 1980), *rev'd*, 658 F.2d 1065 (5th Cir. 1981).

court of appeals concluded that the law was constitutionally overbroad,<sup>111</sup> but limited its decision to this sole issue.<sup>112</sup> The court maintained that the curfew must provide an exemption for minors exercising their First Amendment rights during curfew hours.<sup>113</sup> The Dallas curfew satisfied this requirement and also provided other defenses described in *Johnson*.<sup>114</sup> Additionally, the *Qutb* holding addressed other issues left unanswered in the earlier case.<sup>115</sup> Therefore, *Qutb*'s holding that the Dallas

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<sup>111</sup> *Johnson*, 658 F.2d at 1074. The Fifth Circuit held that the city's curfew ordinance prohibited many activities that are protected by the United States Constitution. *Id.* The curfew provided that the minor could be on a public street or public place during curfew hours only if he or she was accompanied by a parent, tutor, or reasonable adult or if the minor was on an emergency errand. *See id.* at 1071 (citing OPELOUSAS, LA., CITY CODE § 18-8.1(a) (1980)).

<sup>112</sup> "We express no opinion on validity of curfew ordinances narrowly drawn to accomplish proper social objectives." *Id.* at 1072. The court refused to apply the *Bellotti* test to determine the presence of a compelling state interest to the curfew. "We need not conduct such an inquiry . . . since none of the three factors, while possibly relevant to a general curfew mandate, apply to the overly broad restrictions with which we are concerned." *Id.* at 1073 (footnote omitted).

<sup>113</sup> The court's criticism against the curfew's "implicit prohibitions" established certain prerequisites for future juvenile curfew ordinances. To satisfy this standard, the Fifth Circuit implied that a juvenile curfew ordinance must provide for certain instances which the Opelousas curfew failed to consider.

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

*Id.* at 1072.

<sup>114</sup> *See Qutb*, 11 F.3d at 494-95. The Dallas curfew satisfied strict scrutiny because "the city has enacted a narrowly drawn ordinance that allows the city to meet its stated goals while respecting the rights of the affected minors." *Id.* at 494 (footnote omitted). The curfew incorporated as defenses those curfew-prohibited activities that *Johnson* indicated were substantial infringements upon the juveniles' constitutional rights. *See Johnson*, 658 F.2d at 1072. It should be assumed that the drafters of the Dallas juvenile curfew relied upon *Johnson v. City of Opelousas* as a guide because most of the defenses provided in the Dallas curfew are cited by *Johnson* as necessary to a narrow construction. *Compare Johnson*, 658 F.2d at 1072 with *supra* note 49 (listing nine defenses in Dallas curfew).

<sup>115</sup> In *Johnson*, the Fifth Circuit indicated that a narrowly drawn juvenile curfew would be constitutional if the state demonstrated that the curfew's restrictions served a "significant state interest . . . that is not present in the case of an adult." *Johnson*, 658 F. 2d at 1073 (citations omitted). The city failed to establish this particular type of interest when it imposed its curfew. *Id.* *Qutb*, however, indicated that a *compelling* state interest is required. Moreover, the *Bellotti* test should be used as "[t]his analysis affects the balancing between the state's interest against the interests of the minor when determining whether the state's interest is *compelling*." *Qutb*, 11 F.3d at 492 n.6 (emphasis added).

juvenile curfew did not violate the Equal Protection Clause represents the Fifth Circuit's affirmative opinion on the validity of narrowly drawn curfew ordinances, and is not inconsistent with earlier decisions.

It is suggested that federal courts may not simply rely on the number of defenses to determine whether a curfew is narrowly tailored. In *Waters*, the district court concluded that Washington's curfew was not narrowly tailored because of a lack of a logical nexus between the state interest and the classification created by the ordinance;<sup>116</sup> the court seemed to ground its logic in certain incomplete and inaccurate crime statistics.<sup>117</sup> In *Qutb*,

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<sup>116</sup> According to the court, "[l]ogic and the unrebutted evidence in the record . . . indicate that in this instance no such [narrowly tailored] relationship exists." *Waters*, 711 F. Supp. at 1139. With respect to this issue the court bluntly stated, "in practical effect, the challenged classification simply does not operate so as rationally to further the Act's express objectives." *Id.* (quoting *United States v. Moreno*, 413 U.S. 528, 537 (1973)).

<sup>117</sup> Even though the statistics painted the picture of a besieged and troubled city, *Waters* contended that the particular crime data did not establish a relationship between the challenged classification and the need to stop the problem of juvenile crime. *Id.* Statistics offered in the record revealed that none of the 26 juvenile homicide victims in 1989 were murdered during the hours covered under the proposed D.C. curfew. *Id.* Only half of these homicides occurred outside the victim's home. *Id.* Moreover, between 1985 and 1988, approximately half of the homicides in the District occurred during non-curfew hours. *Waters*, 711 F. Supp. at 1139. Reliance on these figures weighed heavily in the district court's decision to reject the contention that the curfew was narrowly drawn. *Id.*

Further, *Waters* described the city council as "naive" for assuming that a curfew discouraged juveniles from leaving their homes at night to engage in criminal behavior. *See id.* ("The naivete of such an assumption is striking.") It appears that the "logic and unrebutted evidence in the record" offered by the *Waters* Court reveals its own naivety. The court's insinuation that the "far more painful" punishment given to juveniles who break the law served as a better method of preventing crime indicates that the court failed to understand why the city implemented the curfew in the first place. A juvenile curfew probably can not deter the juvenile from leaving his house during curfew hours but it enables a police officer who sees a potential violator to stop, question and possibly detain that juvenile before the minor can cause harm or have any harm befall upon him or her. While a curfew may have the unfortunate effect of keeping an innocent child inside the house during curfew hours, it also has important, beneficial consequences. The curfew can potentially prevent the commission of a violent crime by the juvenile during those hours. More importantly, the curfew serves to protect innocent minors from falling prey to all criminals during those hours. *See In re Juvenile Action No. JT9065297*, 887 P.2d 599, 610 (Ariz. App. Ct. 1994) (insisting Phoenix curfew protects law-abiding minors by removing "them from the physical proximity and spheres of influence of those juveniles who may have already chosen a life of crime and will ignore any curfew"). More significantly, the district court based its logic on data that was incomplete for purposes of this analysis. The court cited only three statistics, all relating to murder. *See Waters*, 711 F. Supp. at 1139. While this crime certainly poses a serious problem, it is the rarest of violent crimes committed by the juvenile. *See supra* note 2. When citing these murder statistics, the court discussed the number of juveniles killed in the district and ignored the number of juveniles who actually committed murder. *See Waters*, 711 F. Supp. at 1139. Moreover, the *Waters* Court agreed that Washington, D.C. was in the midst of a crisis that resulted from an "unprecedented explosion of violence" relating to the surge in illegal narcotic activity. *Id.* at 1127.

however, the Dallas City Council provided the court with the appropriate data to enable the city to establish the logical connection between the ordinance and the applicable state interest.<sup>118</sup>

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It appears, however, that the court did not base its logic on the numbers of juveniles arrested in Washington, D.C. for rape, robbery, aggravated assault, or any drug related violent crimes. The court failed to consider the number of juveniles that commit these serious, violent crimes. The FBI and Department of Justice's Office of Juvenile Justice and Delinquency Prevention consider the juvenile's participation in these crimes to be just as serious as their involvement in murders because these crimes comprise the Violent Crime Index and are monitored closely by the two government agencies. *See supra* note 2. Any court could conclude that a juvenile curfew fails to bear an intimate relation to the problem of juvenile crime when the only statistics depended upon by the court relate to a small fraction of the problem. It seems, therefore, that the district court performed an incomplete analysis on the nexus between the curfew ordinance and the state's potential compelling interest.

<sup>118</sup> The city provided certain statistics to demonstrate that there was a nexus between its compelling state interest and the juvenile curfew ordinance. *See Qutb*, 11 F.3d at 493. These statistics illustrated

1. Juvenile crime increases proportionally with age between ten years old and sixteen years old.
2. In 1989, Dallas recorded 5160 juvenile arrests, while in 1990 there were 5425 juvenile arrests. In 1990 there were forty murders, ninety-one sex offenses, 233 robberies, and 230 aggravated assaults committed by juveniles. From January through April 1991, juveniles were arrested for twenty-one murders, thirty sex offenses, 128 robberies, 107 aggravated assaults, and 1042 crimes against property.
3. Murders are most likely to occur between 10:00 p.m. and 1:00 a.m. and [are] most likely to occur in apartments and apartment parking lots and streets and highways.
4. Aggravated assaults are most likely to occur between 11:00 p.m. and 1:00 a.m.
5. Rapes are most likely to occur between 1:00 a.m. and 3:00 a.m., and sixteen percent of rapes occur on public streets and highways.
6. Thirty-one percent of robberies occur on streets and highways.

*Id.* Based on this data, it was evident that the problems of juvenile crime and victimization were worsening. Furthermore, the data indicates that a high degree of juvenile crime occurred during the hours affected by the curfew. Thus, there was an intimate relationship between the classification created by the juvenile curfew and the problem facing the city.

It is important to note, however, that the Fifth Circuit drew its conclusion without requiring the city to provide "detailed studies of the precise severity, nature and characteristics of the juvenile crime problem." *Id.* at 493 n.7. It has been argued that a city should document specific statistics of juvenile crime and delinquency in the ordinance's statement of purpose. *See Williams, supra* note 48, at 482 (providing cities with "practical suggestions" on drafting valid juvenile curfew ordinances). *Qutb* indicates that the failure to include this data will not invalidate the curfew.

The *Qutb* Court also dismissed the necessity of offering proof regarding the effectiveness of a juvenile curfew in solving the juvenile crime problem. *Qutb*, 11 F.3d at 493 n.7 (indicating that "we do not demand of legislatures scientifically certain criteria of legislation") (citations omitted). It would have been nearly impossible for the city to satisfy this requirement because the city suspended implementation of the curfew until the court challenges had been exhausted. *See supra* note 31 and accompanying text.

### III. STATE REACTION TO THE *QUTB* DECISION

Supporters of juvenile curfews hope the Fifth Circuit's holding and the United States Supreme Court's denial of certiorari will end the controversy surrounding juvenile curfews.<sup>119</sup> Since *Qutb*, a number of cities have enacted curfew ordinances with the confidence that their laws will survive court challenges.<sup>120</sup> One state has enacted legislation specifically authorizing local governments to impose juvenile curfews within their city limits.<sup>121</sup> This legislation itself, however, is likely to face legal challenges.<sup>122</sup> Since *Qutb*, the courts of two states have attempted to resolve the issue of whether to strike down a juvenile curfew on federal and/or state

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<sup>119</sup> See, e.g., *Silence is Golden; Enough Said On Curfew Gripes*, ARIZ. REPUBLIC, June 4, 1994, at B8 (insisting that Supreme Court ruling should help uphold Phoenix curfew undergoing judicial challenge); *A Case for Curfews*, CHRISTIAN SCIENCE MONITOR, June 4, 1994, at 18 (stating curfews will protect children and other members of society). But see Indira A. R. Lakshmanan, *High Court Declines to Consider Curfew; Decision on Dallas Case may Affect Mass.*, BOSTON GLOBE, June 1, 1994, at 21 (reporting that Laurence Tribe believes Supreme Court inaction has no impact on issue as it "means absolutely nothing about whether the court would uphold a curfew of this kind").

<sup>120</sup> See *supra* note 13; Rohter, *supra* note 13 (reporting Dade County City Council approval of juvenile curfew inspired by *Qutb* decision). James Burke, the sponsor of the Dade County curfew, insisted that he had been motivated to seek the curfew by the Dallas juvenile curfew ordinance and not by a personal violent crime committed against him by a young adult. *Id.*; see also Michael Browning, *Curfew is Success in Big Easy*, MIAMI HERALD, Sept. 25, 1994, at A14 (reporting New Orleans enacted juvenile curfew on June 1, 1994); Dale Anderson & Harold McNeil, *Griffin Signs Law on Curfew; Curb on Young to Begin Jan. 1*, BUFF. NEWS, Dec. 6, 1993, at 1 (reporting that Buffalo, N.Y., mayor signed juvenile curfew law). See generally Lakshmanan, *supra* note 119, at 21 (quoting Laurence Tribe as saying *Qutb* result was likely to "give the excuse to go ahead" and institute juvenile curfews); Todd Murphy, *Bather Again to Try for Youth Curfew with New Provisions*, COURIER-J., June 2, 1994, at 1B (reporting attempt by Mayor of Louisville, Kentucky to institute curfew following *Qutb* decision).

<sup>121</sup> See FLA. STAT. ANN. §§ 877.20-.25 (West 1994). Specifically, the legislation provides "counties and municipalities the option of adopting" a local juvenile curfew ordinance. *Id.* § 877.20; see also *supra* note 13. Contained among its provisions is a defenses section that is very similar to the Dallas juvenile curfew ordinance. See FLA. STAT. ANN. § 877.24.

Surprisingly, the Texas State Senate rejected a similar bill that would provide its counties with the power to impose juvenile curfews. Mark Langford, *Texas Senate Rejects Juvenile Curfew*, U.P.I., Feb. 27, 1995, available in LEXIS, Nexis library, UPI file.

<sup>122</sup> See *supra* note 113. Despite the presence of exceptions similar to those found in the Dallas curfew, the legislation is nonetheless vulnerable to attack. In fact, a Dade County, Florida curfew was struck down as unconstitutional shortly after the Florida legislature enacted § 877.20. See *Pred v. Dade County No. 94-03203-CA-21* (Fla. Cir. Ct. Sept. 21, 1994), *rev'd*, 1995 Fla. App. LEXIS 11440 (Fla. Ct. App. Nov. 1, 1995); see also Luisa Yanez, *Judge: Dade Curfew Violates Teen's Rights*, SUN-SENT., Sept. 22, 1994, at 1B. This ruling, however, was not based on the Federal law. *Florida Backs Local Curfew for the Young*, *supra* note 13, at 26. As a result, Dade County is strongly considering adoption of a new juvenile curfew, pursuant to the Florida statute, but with concerns about a possible challenge. *Id.*



constitutional grounds.<sup>123</sup> It is submitted, however, that the importance of *Qutb* has not been diminished by the legal conclusions made by these courts.

#### A. *In Re Juvenile*

In *In Re Juvenile*, the Arizona Court of Appeals held that Phoenix's juvenile curfew did not violate the constitutional rights of minors<sup>124</sup> and was not impermissibly overbroad.<sup>125</sup> The court cited *Qutb* to support its decision,<sup>126</sup> but this reliance is arguably inappropriate.

It is submitted that the Arizona court erred because the juvenile curfew ordinance was substantially overbroad and, thus, did not satisfy the "narrowly tailored" component of strict scrutiny analysis.<sup>127</sup> The Phoenix curfew contained fewer exceptions than some curfews overturned by other courts.<sup>128</sup> Most notably, the curfew lacked an exception for minors

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<sup>123</sup> See, e.g., *In Re Juvenile* Action No. JT906527, 887 P.2d 599, 611-12 (Ariz. Ct. App. 1994) (finding Phoenix curfew constitutional); *Pred*, No. 94-03203-CA-21, slip op. at 18 (holding Dade County juvenile curfew unconstitutional), *rev'd*, 1995 Fla. App. LEXIS 11440 (Fla. Ct. App. Nov. 1, 1995); see also *Sansbury v. City of Orlando*, 654 So. 2d 965 (Fla. Dist. Ct. App. 1995) (denying preliminary injunction against implementation of Orlando's juvenile curfew).

<sup>124</sup> See *In re Juvenile*, 887 P.2d at 612 (holding that curfew does not violate state and federal constitutional guarantees). In this case, a minor violated the Phoenix juvenile curfew ordinance by remaining in a public park after curfew hours. *Id.* at 602. The juvenile court found the minor guilty of violating the curfew and punished her with a small fine. *Id.* The minor appealed, contending the curfew violated her state and federal constitutional rights. *Id.*

The Arizona court observed that the juvenile curfew burdened the minor's fundamental right to movement and her First Amendment rights. *Id.* at 607. The court, however, contended that this burden was justified if the state demonstrated a "significant state interest . . . not present in the case of an adult." *In re Juvenile*, 887 P.2d at 606 (citations omitted). The court reviewed the *Bellotti* factors and determined that each factor could prove the presence of the significant state interest. *Id.* at 606-07. The court, however, asserted that the state had also demonstrated a *compelling* interest to impose a juvenile curfew. *Id.* at 608. Since the interest was compelling, the Arizona court concluded that the curfew survived a strict scrutiny analysis. *Id.* at 609.

<sup>125</sup> *Id.* at 608-10. The Phoenix curfew expressly provided the minor with only three defenses: when the minor is on an emergency errand, when the minor is with a parent, guardian, or an adult responsible for the child, or when the minor is on a reasonable, legitimate and specific business errand or activity for a responsible adult. *Id.* at 609 (citing PHOENIX, AZ., CITY CODE § 22-1 (Supp. June 30, 1993)). The court, however, insisted that these three exemptions were more liberal and generous to a minor's constitutional rights and did not make the curfew unconstitutionally overbroad. *In re Juvenile*, 887 P.2d at 609.

<sup>126</sup> "The fact that the Phoenix language is not identical to the Dallas ordinance does not mean that the reasoning in *Qutb* cannot be applied to analyze the Phoenix ordinance." *Id.* at 609.

<sup>127</sup> According to the Arizona Court of Appeals, a courts' analysis of the overbreadth issue mirrors the narrowly tailored question because, "[l]ike the strict scrutiny test, the overbreadth doctrine also requires that the ordinance be narrowly tailored." *Id.* at 608 (citing *State v. Johnson*, 542 P.2d 808 (Ariz. 1975)).

<sup>128</sup> See *supra* note 126.

exercising their First Amendment rights during curfew hours, which, in itself, should render this curfew unconstitutionally overbroad.<sup>129</sup> The Arizona court, however, overlooked this fatal flaw by liberally construing the three enumerated defenses to imply a defense for minors exercising their First Amendment rights.<sup>130</sup> This conclusion, however, was not supported by any case law.<sup>131</sup> *Qutb* and other federal court decisions on juvenile curfews seem to be clear on this issue — the curfew ordinance must explicitly contain a First Amendment exemption to ensure the curfew will be constitutional.<sup>132</sup> Therefore, the Phoenix juvenile curfew should

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<sup>129</sup> See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1071 (1980) (holding that ordinance is unconstitutional because it infringed upon rights such as freedom to travel to associational activities); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183-84 (Iowa 1992) (holding that ordinance was overbroad because it stifled First Amendments Protections); *Allen v. City of Bordentown*, 524 A.2d 478, 483-84 (N.J. Super. Ct. Law Div. 1987) (holding that curfew affected personal liberties). But see *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 339-40 (Wis. 1988) (determining that juvenile curfew will not be unconstitutionally overbroad for failure to provide minor with First Amendment defense). The 5-4 decision to uphold this curfew, however, has been viewed as unpersuasive and criticized as “gloss[ing] over the need to draw curfew ordinances narrowly to avoid infringement of fundamental rights under the First Amendment.” *Russell*, 484 N.W.2d at 186.

<sup>130</sup> *In re Juvenile*, 887 P.2d at 609. The court viewed the Phoenix curfew defenses as “more liberal or generous” than the ten defenses to the Dallas curfew. *Id.* The court, however, recognized that previous courts had invalidated juvenile curfews because they failed to protect the minor’s fundamental rights. *Id.* (citations omitted); see also *supra* note 129. These rulings should have convinced the Arizona court to overturn the curfew because the ordinance failed to provide explicitly the defense for First Amendment activities. Rather than invalidate the present curfew and require the city to rewrite the law, the Arizona Court of Appeals liberally construed the curfew’s defenses to contain this exception. See *In re Juvenile*, 887 P.2d at 609.

<sup>131</sup> *Id.* To support this contention, the Arizona court relied on the *Qutb* reasoning that “the ordinance can be examined fairly only when the defenses are considered as part of the whole.” See *id.* (citing *Qutb*, 11 F.3d at 493). It appears, however, that the *Qutb* court articulated this point of view to save a juvenile curfew that contained the broad defense section. The Fifth Circuit compared the defenses in the Dallas curfew against the prohibitions of the Opelousas curfew to demonstrate that the Dallas curfew was narrowly drawn and, therefore, constitutionally sound. See *Qutb*, 11 F.3d at 494-95. When one considers the minors’ defenses to the Phoenix curfew, one cannot agree with the Arizona court’s contention that the Phoenix curfew exemptions are more generous than those found in the Dallas ordinance. See *City of Milwaukee*, 426 N.W.2d at 340 (recognizing the *Bykofsky* curfew as more liberal than Milwaukee ordinance because former provided more listed defenses to minors). Assuming that a First Amendment defense is implied in the Phoenix curfew, this ordinance does not exempt a minor on an errand at the direction of his or her parent, allow the minor to attend a city or civic sponsored activity, permit a minor to be in a motor vehicle travelling interstate, or enable the minor to remain on his own sidewalk to gaze at the stars during curfew hours. See *Qutb*, 11 F.3d at 498 (citing DALLAS CODE ch. 31, § 31-33(c)(1)). A juvenile curfew ordinance lacking these exemptions, therefore, should not be construed as more liberal than an ordinance that provides the minor with these defenses.

<sup>132</sup> See *id.* at 494 (holding that juvenile curfew survived strict scrutiny by respecting youths’ freedoms, “[m]ost notably, if the juvenile is exercising his or her First Amendment rights, the curfew ordinance does not apply”); *Johnson*, 658 F.2d at 1072 (prohibiting minors from

be seen as unconstitutionally overbroad because it lacks these fundamentally required defenses. It is not narrowly drawn to serve a compelling state interest and the Arizona Supreme Court should reverse the decision and invalidate the ordinance.

### B. *Pred v. Dade County*

In *Pred*, a Florida intermediate appellate court reversed a Florida trial court's decision to enjoin the Dade County juvenile curfew ordinance.<sup>133</sup> Unlike the *Qutb* and *Juvenile* holdings, the Florida trial court determined the validity of the curfew solely on state constitutional grounds.<sup>134</sup> The court held the juvenile curfew unconstitutional because it violated the minor's fundamental right to privacy<sup>135</sup> by infringing upon the minor's

exercising First Amendment activities during curfew hours "overtly and manifestly infringe[s] upon [their] constitutional rights"); *Russell*, 484 N.W.2d at 185-86 (holding ordinance failed to provide exception for First Amendment rights); *Allen*, 524 A.2d at 483 (holding that ordinance unconstitutionally overbroad because it contained sweeping restrictions on minors' First Amendment freedoms).

<sup>133</sup> No. 94-03203-CA-21 (Fla. Cir. Ct. Sept. 21, 1994), *rev'd*, 1995 Fla. App. LEXIS 11440 (Fla. Dist. Ct. App. Nov. 1, 1995). On January 18, 1994, the Dade County Commission passed the juvenile curfew ordinance by a vote of 10 to 3. Nancy San Martin, *Dade Teen Curfew Takes Effect Feb. 17 Unless It's Challenged*, ORLANDO SENT., Jan. 19, 1994, at A1. Eighty percent of Dade county residents and 90 percent of the county's police officers favored the juvenile curfew. *Id.* (citing Florida International University study). *But see Pred*, 94-03203-CA-21, slip op. at 6-7 (citing disapproval of juvenile curfews of two Dade County police chiefs).

<sup>134</sup> *Pred*, No. 94-03203-CA-21, slip op. at 17-18. The plaintiff specifically alleged that the Dade County juvenile curfew violated a number of sections of the Florida State Constitution. *Id.* at 1; *see* FLA. CONST. art. 1, §§ 2, 3, 4, 5, 9, 23 (West 1994).

Florida's Constitution provides its citizens with greater rights and protection than the United States Constitution. *See Pred*, 94-03203-CA-21, slip op. at 10 (citing *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992)). Furthermore, Florida's *Declaration of Rights* contains "a broad spectrum of enumerated . . . implied rights and liberties that . . . protect each individual within our borders from the unjust encroachment of state authority . . . from whatever official source into his or her life." *Id.* at 10 (quoting *Traylor*, 596 So. 2d at 963). The *Pred* Court agreed with the plaintiffs that the juvenile curfew violated the minor's rights provided under the *Declaration of Rights*, such as the freedom of speech, association, assembly and the freedom to "simply stroll[] aimlessly." *Id.* at 11.

In contrast, the United States Court of Appeals dismissed the plaintiffs' argument that the juvenile curfew violated the minor's Equal Protection rights under the Texas Constitution. *Qutb*, 11 F.3d at 495 n.9 ("We find nothing . . . that warrants a different treatment of this issue under the state constitution."). Likewise, the Arizona Court of Appeals rejected the contention that the Phoenix juvenile curfew violated the Arizona Constitution. *In re Juvenile*, 887 P.2d at 611 (determining that provisions of Arizona Constitution did not warrant different conclusion).

<sup>135</sup> *Pred*, No. 94-03203-CA-21, slip op. at 7. Florida is only one of four states to provide its citizens with an explicit constitutional provision guaranteeing a person's right to privacy. *Id.* at 11. The Florida Constitution provides: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings

ability to be "let alone."<sup>136</sup> Applying a strict scrutiny test, the court held that the state neither demonstrated a compelling interest<sup>137</sup> nor proved that the curfew law was narrowly tailored.<sup>138</sup> The trial court found the ordinance unconstitutional and enjoined Dade County from enforcing the juvenile curfew.<sup>139</sup> The appellate court, however, concluded that the curfew ordinance did not violate a juvenile's rights under the Florida and United States Constitutions.<sup>140</sup>

The legal rationale articulated in the *Pred* decisions should not have a significant effect on the *Qutb* decision or its rationale, since they were primarily based on the state constitution.<sup>141</sup> *Qutb* applied federal constitutional standards to its review of the Dallas juvenile curfew,<sup>142</sup> a fact explicitly pointed out by the *Pred* trial court.<sup>143</sup> *Pred* serves, however, as

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as provided by law." FLA. CONST. art. I, § 23 (West 1994). The Florida Supreme Court broadly interpreted this section to embrace more privacy interests than the United States Constitution, including the right to be free from physical and psychological intrusion or coercion by the state or society. See *Pred*, No. 94-03203-CA-21, slip op. at 11-12. (citing *In re Browning*, 568 So. 2d 4, 9-10 (Fla. 1990)).

<sup>136</sup> See *id.* at 12 ("Plaintiffs 'personal autonomy' is sufficiently affected by the provisions of the curfew.") (citation omitted).

<sup>137</sup> *Id.* at 14-15.

<sup>138</sup> *Id.* at 15-16.

<sup>139</sup> *Id.* at 17-18. The recently enacted state law enabling cities to enact curfews may be in jeopardy due to this decision. See *Florida Backs Local Curfews for the Young*, *supra* note 13, at 26. Additionally, other Florida cities employing a juvenile curfew ordinance are justifiably worried that their curfews may be unconstitutional as a result of *Pred*. See Richard Danielson, *Curfew Ruling in Dade May Hurt Tampa*, ST. PETERSBURG TIMES, Sept. 22, 1994, at 1B; Dan Tracy, *Judge Throws Out Dade's Curfew On Teens*, ORLANDO SENT., Sept. 22, 1994, at C1. Presently, Orlando's curfew faces a court challenge by the ACLU, which had previously lost a motion to stay the law. Tracy, *supra*. Orlando city officials, however, believe their ordinance is distinguishable from Dade County's curfew because the Orlando law is "narrowly tailored" to a 12-block area of downtown Orlando. *Id.*

<sup>140</sup> *Pred*, 1995 Fla. App. 11440, at \*3-4. The Florida Court of Appeals, Third District maintained that "under both the Florida and United States Constitutions, children, due to their special nature and vulnerabilities, do not enjoy the same quantum or quality of rights as adults." *Id.* (citing *Jones v. State*, 640 So. 2d 1084 (Fla. 1994) and *Bellotti v. Baird*, 443 U.S. 622 (1979)). Based on this legal theory, the Dade County juvenile curfew would not violate any alleged rights of minors. *Id.*; see *Sansbury v. City of Orlando*, 654 So. 2d 965 (Fla. Dist. Ct. App. 1995) (denying permanent injunction against implementation of Orlando's curfew).

<sup>141</sup> *Pred*, No. 94-03203-CA-21, slip op. at 2 (holding that juvenile curfew violates Article I of Florida Constitution); see *supra* note 135; see also *Pred*, 1995 Fla. App. LEXIS 11440, at \*2-3 (agreeing with County that curfew ordinance does not violate minors' rights under Florida Constitution, but also indicating curfew does not "impermissibly impinge on any such rights" of minors under United States Constitution).

<sup>142</sup> See *Qutb*, 11 F.3d at 495.

<sup>143</sup> See *Pred*, No. 94-03203-CA-21, slip op. at 14. Judge Gerstein listed two significant reasons why his decision to invalidate the juvenile curfew differed from the Fifth Circuit's decision to uphold the Dallas ordinance in *Qutb*:

a reminder to legislators to be aware of state constitutional law while drafting a juvenile curfew law. The *Qutb* decision remains the most recent standard for federal constitutional guidelines of a juvenile curfew law.

### CONCLUSION

This Comment has demonstrated the constitutional propriety of the Fifth Circuit's decision to uphold Dallas' juvenile curfew ordinance. *Qutb v. Strauss* highlights a number of considerations a municipality should consider when drafting a juvenile curfew. First, attention should focus on the defenses to be provided; *Qutb* demonstrates the importance of a broad defense section. The quantity and quality of the defenses will often dictate the constitutionality of the ordinance. Second, *Qutb* reveals that juvenile curfews can survive strict scrutiny. Even though the Fifth Circuit did not expressly address the compelling state interest issue, the opinion implicitly indicates that fundamental rights are at stake when minors' rights to movement are restricted, requiring the state to demonstrate a compelling interest in the curfew. Moreover, the Dallas curfew was narrowly drawn to preserve the minors' fundamental rights.

Future state court decisions that may invalidate curfews should not diminish the importance of *Qutb*, where these curfews were either drafted more broadly than the Dallas ordinance or were evaluated under more protective state laws. The juvenile curfew may be one of the more controversial methods employed to face the growing juvenile crime and

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First, *Qutb* was decided under the federal constitution. Our state's constitution has extended even greater protection than is afforded under the federal constitution and 'when our state constitution creates fundamental rights, those rights must be respected even if no similar right is recognized by the federal court.' Secondly, the Plaintiffs [sic] in *Qutb* stipulated that the Texas curfew served a compelling state interest. There has been no such stipulation in this case. To the contrary, the Defendant [sic] has been unable to prove that Dade's curfew serves a compelling state interest.

*Id.* (citations omitted). The appellate court's decision to reverse the trial court and uphold the curfew ordinance also differs from the *Qutb* decision. In *Qutb*, the Fifth Circuit deemed the minors' rights to be fundamental, thereby requiring the curfew to satisfy a strict scrutiny equal protection analysis. See *Qutb v. Strauss*, 11 F.3d 488, 492-95 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994). The *Pred* appellate court appeared to ignore the issue of whether a minor's rights are fundamental or not, which triggers either a strict scrutiny or rational basis test. See *supra* notes 80-83 and accompanying text. Rather, the appellate court concluded that the minors' constitutional rights are not violated by a juvenile curfew ordinance at all, thereby deeming it unnecessary to apply any type of equal protection analysis.

victimization problem facing our nation; however, when drafted in light of the *Quib* rationale, such curfews should not be deemed violative of minors' rights under the federal constitution.

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