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NONEMERGENCY MUNICIPAL CURFEW ORDINANCES AND THE LIBERTY INTERESTS OF MINORS

I. Introduction

Most crimes committed in the United States occur in cities, and a large proportion of these crimes are committed by juveniles under the age of eighteen. Although the total number of reported Crime Index

1. Fed. Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States (1983) [hereinafter cited as U.C.R., for Uniform Crime Reports]. Of the 12.9 million Crime Index offenses occurring in 1982, id. at 39, 10,842,834 occurred in Standard Metropolitan Statistical Areas (S.M.S.A.s), compared with 646,598 in rural areas. Id. at 43. The Crime Index offenses represented by the U.C.R. statistics are: murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft and motor vehicle theft. Id. at 41. The U.C.R. figures are compiled by the Federal Bureau of Investigation from the voluntary reporting of city, county and state law enforcement agencies pursuant to 28 U.S.C. § 534 (1976). Id. at 1. This reporting system has been criticized. See C. Adrian & C. Press, Governing Urban America 362 (1977) (suggests inaccuracy arises from having local police chiefs report crime figures) [hereinafter cited as Governing Urban America]. The "S.M.S.A." designation for a metropolitan area was created by the Office of Management and Budget and describes an area containing a core city with at least 50,000 people, a resident labor force which is at least 75% nonagricultural, and surrounding counties for which the core city is the place of employment for at least 30% of the county population. J. Bolles & H. Schmandt, The Metropolis—Its People, Politics, and Economic Life 3 (3d ed. 1975). Recently, the S.M.S.A. designation has been changed in favor of three separate "M.S.A." categories: the Consolidated Standard Metropolitan Statistical Area (the largest), the Metropolitan Statistical Area, and the Primary Metropolitan Statistical Area (the smallest). Malcolm, A Tale of the Two Kansas Cities: They Fear a Federal Divorce, N.Y. Times, Feb. 10, 1984, at A12, col. 2.

See also J. Laub & M. Hindelang, Analysis of National Crime Victimization Survey Data of Serious Delinquent Behavior—Juvenile Criminal Behavior in Urban, Suburban, and Rural Areas (1981). This study concludes that urban crime not only occurs at a higher rate than does rural crime, but that it is also more likely to involve victims who are strangers to the delinquent and frequently involves group crime. Id. at 66, 67. The report also notes the lack of research concerning the special effect of the urban environment on juvenile crime, commenting that "[d]espite the fact that urbanization is one of the strongest and most enduring correlates of criminality, it has been virtually ignored by theorists and researchers alike." Id. at 66. This lack has been noted by other researchers as well. See, e.g., D. Stott, Delinquency: The Problem and Its Prevention 299 (1982) (author suggests need for researchers to explain why underprivileged areas of cities have such great delinquency problems while the problem is less severe in other regions of world having lower standard of living) [hereinafter cited as Stott].

2. U.C.R, supra note 1, at 165. Of all arrests reported by the nationwide survey for Crime Index offenses, 31% involved juveniles under the age of eighteen. Id. Of all arrests made in cities for all crimes, including those for crimes which are not
offenses decreased slightly in 1982, surveys of popular attitudes toward crime show an increased fear of crime, especially among persons living in urban areas.

Various theories exist concerning the causes of juvenile delinquency and measures for reducing or preventing delinquency have

Crime Index offenses, 19.4% involved juveniles under eighteen. Id. at 193. Of the 1,141,122 juvenile offenders taken into custody by police departments in 1982, 84% were city youths. Id. at 242 (final figure computed by author from statistics in source). Among the Crime Index offenses, juveniles eighteen and under had the greatest proportionate number of arrests for any age group for the crimes of motor vehicle theft, arson, robbery, burglary and larceny-theft. Id. at 346-48.

The connection between drug abuse and juvenile crime is often stressed. See P. KRATCOSKI & L. KRATCOSKI, JUVENILE DELINQUENCY 10 (1979) (noting that number of drug abuse arrests of juveniles reported nationwide increased to 95,299 in 1976 compared with 1,458 in 1960) [hereinafter cited as JUVENILE DELINQUENCY].

3. See supra note 1 for a list of Crime Index offenses.

4. U.C.R., supra note 1, at 43. The 12.9 million Crime Index offenses in 1982 represent a 3% decline from the 1981 figure of 13.3 million. Id. at 39. The only crime that showed an increase in 1982 was aggravated assault. Id. Compared with the Crime Index total for 1973, however, the 1982 figure represents a 47% increase. Id.

5. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1982 213 (1983) [hereinafter cited as SOURCEBOOK]. The Gallup Poll therein cited asked respondents the following question: “Is there any area right around here—that is, within a mile—where you would be afraid to walk alone at night?” In 1967, 31% responded yes. In 1982, 48% so responded, an increase of 3% from the 1981 poll. Id. But see SOURCEBOOK, supra, at 209 (another Gallup Poll indicated 7% reduction from 1981 to 1982 in number of respondents who felt there was more crime in survey area than during previous year).

6. SOURCEBOOK, supra note 5, at 213. There was a sharp difference between the percentage of positive responses among those living in urban areas having a population of greater than one million, where 57% so responded, and those living in rural areas with a population under 2,500, where only 31% expressed their fear of crime. Id.

7. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, REPORTS OF THE NAT’L JUVENILE JUSTICE ASSESSMENT CENTERS, THE PREVENTION OF SERIOUS DELINQUENCY: WHAT TO DO? 27-46 (1981) [hereinafter cited as SERIOUS DELINQUENCY]. This paper credits the “control theory” of delinquency causation as having the greatest scientific support. Id. at 28. Simply stated, this theory suggests that delinquency occurs when it is not properly prevented and where there is “inadequate attachment, particularly to parents and school; inadequate commitment, particularly to educational and occupational success; and inadequate belief, particularly in the legitimacy and moral validity of the law.” Id. at 29. The other major theory as to the cause of juvenile delinquency is the “cultural deviance” theory, which suggests that delinquents are actually seeking to conform with social values of a neighborhood, but that these values are in conflict with those of the conventional societal norms. Id. at 30, 43-45.

See also D. WEST, DELINQUENCY—ITS ROOTS, CAREERS AND PROSPECTS 129 (1982). Some of the factors which are suggested as contributing to juvenile delinquency include: (1) the individual’s hereditary predisposition (e.g., aggressive temperament); (2) a delinquent’s personality traits (e.g., drug and alcohol abuse); (3) an unsatisfactory home environment (e.g., criminal parents); (4) poor social circumstances (e.g., neighborhood and schools); (5) predisposition towards crime (e.g.,
been suggested. Federal and state legislation has specifically ad-

boredom, a need for money); (6) precipitating events (e.g., fight with family); and (7) opportunities for crime (e.g., unguarded property, weakness of victim). Id. Other factors that have been suggested as being prevalent among delinquents are infrequent father-son interactions, high levels of punishment, and lower educational aspirations of delinquent boys. L. Savitz, M. Lalli & L. Rosen, U.S. DEP’T OF JUSTICE, NAT’L INST. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CITY LIFE AND DELINQUENCY—SUMMARY REPORT 15 (1977).

Another author discusses five major theories of delinquency that have been developed since the 1700’s. JUVENILE DELINQUENCY, supra note 2, at 42. The classical approach viewed delinquency as a conscious choice of minors, which choice violated the “pleasure over pain” deterrence equation. Id. at 43-44. The biological approach promulgated in the 1800’s maintained that certain physical characteristics of children might indicate potential delinquency in the future. Current biological theory emphasizes the effects of defective genes increasing the probability of delinquency. Id. at 44-46. The psychological theory is based on Freud’s studies about inadequate parent training and its effects on children later in adolescence. Id. at 46-51. The sociological school emphasizes the role played by the juvenile’s environment in contributing to delinquency. Id. at 52. The socio-psychological approach stresses the dual effects of the individual child’s personality and psychology and the physical environment the child grows up in. Id. at 60-64. Where a particular theory of delinquency causation is emphasized, the choice of a prevention strategy will be accordingly affected. For example, the sociological theory of causation would emphasize prevention programs such as the Mobilization for Youth, which sought to improve a juvenile’s environment. Id. at 367-68. There are also delinquency prevention methods adopted from the psychology and clinical sociology schools, such as family intervention and “child behavior contracts.” R. Trojanowicz & M. Morash, JUVENILE DELINQUENCY: CONCEPTS AND CONTROL 243-45, 261-62 (1983).

8. See, e.g., SERIOUS DELINQUENCY, supra note 7, at 5-16. This paper defines two major approaches to delinquency prevention. The traditional “corrective approach” attempts to identify and correct the problems of identified delinquents, predelinquents and high risk youths. Id. at 5. The “preclusive approach” seeks to prevent the initial occurrence of delinquent acts. Id. at 6. A juvenile curfew is an example of the latter approach. The study concludes that primary emphasis should be placed on the preclusive prevention approach in practice. Id. at 61.

“Educative punishment” of juveniles has also been suggested. Stott, supra note 1, at 312. This would involve a system of victim-offender reconciliation wherein the juvenile would meet the victim and a program of restitution, utilizing the youth’s employment earnings or community work, would be arranged. The hope is that the offender will learn of the consequences of his or her delinquent acts by meeting with the victim. Id. See also NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976) [hereinafter cited as TASK FORCE ON JUVENILE JUSTICE]. This report identifies five major goals which the suggested standards seek to achieve: (1) the reduction of juvenile violence; (2) the reduction of delinquent recidivism; (3) assuring due process rights of juveniles subject to delinquency proceedings; (4) integrating the existing juvenile justice system with prevention programs; and (5) ensuring that deprived or abused children are protected. Id. at 14-15. Some of the standards urged by the Task Force include the development of comprehensive delinquency prevention programs (Standard 1.1), the establishment of protective services for children (Standard 3.5), greater dissemination of crime prevention information by local police departments (Standard 3.31), and the interaction of the juvenile justice system in educating school children (Standard 3.32). Id. at 35, 92, 148-50.
The need for greater involvement by municipal police departments has also been emphasized. *Juvenile Delinquency*, supra note 2, at 195-202. While the most obvious means of enhancing police intervention in high delinquency areas is to increase the number of police officers, special training is urged as the top priority. *Id.* at 200. Officers should become aware of the other governmental and private agencies that deal with the problems of delinquent youth. *Id.* Personal involvement of the officers in youth programs such as the New York Police Athletic League help to instill respect for the law and police officers in participants. *Id.* at 201. Accord A. Coffey, *The Prevention of Crime and Delinquency* 129 (1976) [hereinafter cited as *Prevention of Crime*].

Every person has a responsibility to take proper safety precautions to deter delinquency by "hardening the target." E. Banfield, *The Unheavenly City Revisited* 204 (1974). Anti-crime publicity, educational instruction and simple measures such as using better locks and alarms are effective because "most crimes are committed opportunistically by youths who want small amounts of money right away and will not go to much trouble, or take much risk to get it. A target need be hardened very little to protect it from them." *Id.* Accord W. Gorham & N. Glazer, *The Urban Predicament* 190-91 (1976) (discussing use of burglar alarms, street lighting and personal use of alarms, whistles and mace) [hereinafter cited as *Urban Predicament*]; *Prevention of Crime*, supra, at 54-56 (designating citizen apathy and misperception of their ability to reduce crime as problems hindering crime prevention efforts).

9. See *Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, Third Analysis and Evaluation: Federal Juvenile Delinquency Programs* (1979) [hereinafter cited as *Analysis and Evaluation*]. The report describes some of the federal programs which are designed to improve the socioeconomic positions of families in general as opposed to particular delinquency prevention programs. *Id.* at 73-95. For example, Title XX of the Social Security Act of 1975 provides for distribution of federal money to states for youth services such as emergency shelter facilities, unemployment referral networks and assistance for abused youths. *Id.* at 77-79 (Title XX is codified at 42 U.S.C. § 1397 (Supp. V 1981)). Title IV-B of the Act, referred to as the Child Welfare Services Act, provides formula grants to state governments for foster care, day care and child counseling services. *Id.* at 86-88. (Title IV is codified at 42 U.S.C. § 620-28 (Supp. V 1981)). Problems have arisen with such programs, including lack of uniformity of state standards, lack of citizen participation and the difference in juvenile eligibility status. *Id.* at 77-79. See also infra note 14 and accompanying text.

The role that social-welfare improvements play in reducing crime in the short run has been criticized. See *Urban Predicament*, supra note 8, at 195 ("[i]t would be a mistake, however, to suppose that reducing poverty, improving housing, or equalizing educational opportunities will, of themselves and in the short run, contribute substantially to a reduction in predatory crime"). Yet, another author in referring to the causal connection between high unemployment in American cities and a correspondingly high crime rate refers to street crime as "self-employment" which offers "flexible hours, minimal risks, tax-free income, and prestige among one's peers." Gross, *Some Anticrime Proposals for Progressives, Crime and Social Justice* 51, 53 (Summer 1982) [hereinafter cited as *Anticrime Proposals*].

dressed the serious problem of juvenile delinquency and has created administrative programs to study the causes of delinquency and to fund prevention programs. On the federal level, the Juvenile Justice and Delinquency Prevention Act expresses the concern of Congress for the seriousness of the delinquency problem, recognizes the failure


The Georgia Children and Youth Services Act is an example of a detailed statute specifically addressing juvenile delinquency problems. The State Department of Human Resources is empowered under the act to establish programs designed to provide delinquency prevention services, child welfare services, juvenile court assistance, regional group care, adoption and medical services and to build and maintain state juvenile institutions of varying degrees of security. GA. CODE ANN. § 49-5-8(a) (1982 & Supp. 1983).

Some of the purposes frequently seen in the more general youth development acts are included in the California Child Care and Development Services Act, which notes that the purposes of its state supported child care facilities include "provid[ing] the opportunity for positive parenting to take place through understanding of human growth and development . . . [and] reduc[ing] strain between parent and child in order to prevent abuse, neglect, or exploitation . . . ." CAL. EDUC. CODE § 8201(d); (e) (West 1982).

11. Task Force on Juvenile Justice, supra note 8, at 15-16. In calling for states to establish the financing of delinquency prevention programs as a high priority, the Task Force recommends the creation of a single state agency to coordinate the various local programs’ financing efforts. Id. at 59.


of current remedial measures and establishes an administrative arrangement for the allocation of funds for prevention programs to states which fulfill certain requirements. The vital role played by the local community in preventing delinquency is frequently emphasized.

14. See 42 U.S.C. § 5601(a)(2)-(4) (1976 & Supp. V 1981) (Congress specifically mentions failures of overburdened juvenile justice systems to provide effective individual justice, of social agencies to assist needs of dependent and abandoned children, and of the public and private sectors to create programs to address problems of drug and alcohol abuse among children). Congress succinctly admits this failure when stating that “existing Federal programs have not provided the direction, coordination, resources, and leadership required to meet the crises of delinquency.” Id. at § 5601(a)(7) (Supp. 1981). Accord SERIOUS DELINQUENCY, supra note 7, at 3. This study also notes the general failure of federal research efforts when stating that “recent Federal prevention efforts appear to lack the conceptual foundation, clear prevention focus, and commitment to rigorous research that are necessary to generate the knowledge required for effective delinquency prevention.” Id. at 3.

Other problems can plague delinquency prevention efforts, such as inadequate information, difficulties in reaching agreement among the local community, government agencies and the criminal justice system, and the lack of prevention expertise. PREVENTION OF CRIME, supra note 8, at 205-13. Although research may be lacking, delinquency efforts should not be delayed until further research is conducted, but should be adjusted accordingly as new findings arise. H. WITMAR & E. TUFTS, U.S. DEP’T OF HEALTH, EDUC. & WELFARE, CHILDREN’S BUREAU, THE EFFECTIVENESS OF DELINQUENCY PREVENTION PROGRAMS 50 (1957).

15. See 42 U.S.C. § 5611 (1976 & Supp. V 1981); ANALYSIS AND EVALUATION, supra note 9, at 1. The Act created the Office of Juvenile Justice and Delinquency Prevention, which consists of the Office of Operations, which coordinates all federal juvenile delinquency programs and awards formula grants to qualifying states, and the National Institute for Juvenile Justice and Delinquency Prevention, which directs research and education efforts. The Office of Juvenile Justice is a part of the Law Enforcement Administration, which is under the direction of the Attorney General and the Department of Justice. ANALYSIS AND EVALUATION, supra note 9, at 1.

16. See 42 U.S.C. § 5632 (Supp. V 1981) (minimum of $225,000 per qualifying state is provided, with remaining funds distributed based upon relative number of minors within the states).

17. See 42 U.S.C. § 5633 (1976 & Supp. V 1981). Congress mandates that a state must submit a three-year plan and submit annual performance reports. In addition, two-thirds of the money received by the state must be expended through local government or local private agency programs. Id. at § 5633(a)(5)(A), (B) (Supp. V 1981). Three-fourths of all funds provided by the federal government must, in addition, be expended on programs designed to prevent delinquency, to divert juveniles from the juvenile justice system, and to develop community alternatives to juvenile detention. Id. § 5633 (a)(10) (1976 & Supp. V 1981). To qualify for federal funds, a state must end the practice of detaining juveniles with adults. Id. at § 5633(a)(13) (Supp. V 1981).

18. See PREVENTION OF CRIME, supra note 8, at 53, 126 (community involvement is necessary to supplement police efforts to reduce crime); URBAN PREDICAMENT, supra note 8, at 215 ("primary responsibility for public safety will fall on the citizen"); Anticrime Proposals, supra note 9, at 52 (urging that communities begin
Many local governments have sought to reduce delinquency by enacting nocturnal juvenile curfew ordinances which prohibit the presence or loitering of minors of a certain age on public streets after an established curfew hour.\textsuperscript{19} While many states provide for the enactment of general curfews by state or local governments during emergency situations,\textsuperscript{20} only four states have a statewide nonemergency juvenile curfew.\textsuperscript{21} Eleven states specifically authorize municipalities to enact juvenile curfews in nonemergency situations.\textsuperscript{22} In Anticrime Proposals, supra note 9, at 52 (urging that communities begin “neighborhood walks . . . [a]rson watches and escort services” to reduce crime); Task Force on Juvenile Justice, supra note 8, at 25 (“individuals and groups can best determine the needs of their youth, [and] select the best available intervention method [at local level]”); Serious Delinquency, supra note 7, at 60-62 (places primary responsibility for delinquency prevention on community, noting that citizens and local organizations can and must provide resources, such as knowledge about alleged delinquents and relationships with their parents, which cannot be supplied by government agencies); Stott, supra note 1, at 313 (warns that community passivity and noninvolvement increase delinquency and suggests that decentralization of enforcement and administration of juvenile justice, such as with programs of reeducation and restitution, is necessary to create greater community involvement).


other states, these ordinances are passed pursuant to the city’s home rule powers. Preemption problems have arisen as a result of misappropriation of curfew authority by municipal officials.

During times of civil disorder, statutes provide for the exercise of emergency powers by the state, and in some instances, by local


24. See, e.g., Los Angeles, Cal., Municipal Code ch. IV, art. 5, § 45.03 (1981) [hereinafter cited as Los Angeles Curfew]. The curfew was enacted pursuant to the state constitution’s home rule provision. Cal. Const. art. 11, § 7 (West Supp. 1984) (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws”).

A municipal “home rule” provision refers to a “[c]onstitutional provision or type of legislative action which results in providing local cities and towns with a measure of self government if such local government accepts terms of the state legislation.” Black’s Law Dictionary 660 (5th ed. 1979). For a discussion of municipal home rule charters, see Vanlandingham, Municipal Home Rule in the United States, 10 WM. & MARY L. REV. 269, 273 (1968) (defining “legislative home rule” as the situation where the “state legislature, in the absence of constitutional provision, empowers municipalities to adopt and exercise home rule powers”); Governing Urban America, supra note 1, at 141 (mentions recent liberal judicial interpretation in some states of extent of a city’s home rule powers); W. Valente, Local Government Law 108 (2d ed. 1980) (discussing the vague grants of power from a state to a local government, creating an “imperium in imperio,” also referred to as an “absolute home rule,” situation which creates a crucial role for judicial interpretation).

25. See Municipal Court, Fort Lauderdale v. Patrick, 254 So. 2d 193, 194-95 (Fla. Dist. Ct. App. 1971) (curfew established by mayor held unenforceable where state law required municipality’s legislative body to enact such ordinances and establish penalties); State v. Gauthier, 263 La. 678, 682, 269 So. 2d 204, 206 (1972) (emergency curfew enacted by mayor contrary to state law which required city’s chief law enforcement officer to promulgate such curfews held void); Walsh v. River Rouge, 385 Mich. 623, 625, 640, 189 N.W.2d 318, 319, 326 (1971) (emergency curfew enacted by mayor during race riots at local high school was void, as power to declare local state of emergency belonged solely to governor under state law). Compare In re Michael G., 99 Misc. 2d 699, 700-01, 416 N.Y.S.2d 1016, 1017-18 (Rockland County Fam. Ct. 1979) (juvenile defendant’s charge of resisting arrest after being stopped for violating curfew dismissed because of state law that juveniles can be arrested only for committing act which would constitute crime or felony had it been committed by adult); with In re Carpenter, 31 Ohio App. 2d 184, 190, 195, 287 N.E.2d 399, 403, 406 (Ohio Ct. App. 1972) (Columbus truancy ordinance upheld; court noted that state compulsory school attendance law was not contrary).

governments. Statewide loitering or vagrancy laws are also prevalent and very similar in purpose and language to some juvenile curfew ordinances. 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


29. See, e.g., United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943 (1971) (defendant's conviction for violating city of Leeville's emergency curfew upheld). The emergency in Chalk involved high school race riots where windows were broken, police cars overturned, and persons injured. 441 F.2d at 1282. The court warned, however, that an emergency curfew is justified only "when local law enforcement is no longer able to maintain order and protect lives and property." Id. at 1280. See also American Civil Liberties Union v. Chandler, 458 F. Supp. 456, 458 (W.D. Tenn. 1978) (district court upheld curfew ordinance imposed by mayor after he had declared local state of emergency during policemen's strike). The Chandler court noted that "[t]here can be no question that, in ordinary circumstances, the imposition of a general curfew would unconstitutionally abridge rights guaranteed by the first amendment." 458 F. Supp. at 461. Accord Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977) (city of Eatonton's curfew ordinance held unconstitutional). In Ruff, the court found that such curfews are constitutional only where "there is some real and immediate threat to the public safety which cannot be adequately met through less drastic alternatives and where the curfew itself is tailored in duration and application so as to meet the specific crises without unnecessary infringement of individual liberties." 438 F. Supp. at 306. Accord Peters v. Breier, 322 F. Supp. 1171, 1172 (E.D. Wis. 1971) (court upheld Milwaukee curfew ordinance designated
have not existed the courts have struggled with the constitutional issues raised by the curfews and frequently held such ordinances to be unconstitutional.\textsuperscript{31}

Nonemergency juvenile curfew ordinances are often enacted, or an existing curfew amended, as part of an anti-crime initiative in response to public discontent expressed after local incidents of crime.\textsuperscript{32}

for particular municipal park and stressed fact that curfew was narrow in scope, as opposed to general municipal-wide ordinance).

30. See, e.g., People v. McKelvy, 23 Cal. App. 3d 1027, 1035, 100 Cal. Rptr. 661, 665 (Cal. Ct. App. 1972) (court upheld conviction of defendant under San Bernardino emergency curfew enacted during race riots of August, 1970; court commented that "[t]he freedom of movement is a fundamental right and its exercise may be restricted only where necessary to further the most compelling state interest"); State v. Boles, 5 Conn. Cir. Ct. 22, 27, 240 A.2d 920, 924 (1967) (defendant's conviction under emergency curfew upheld; court sarcastically commented that disjointed social times were such that large cities not having riots were deemed to be apathetic); Glover v. District of Columbia, 250 A.2d 556, 561 (D.C. 1969) (court upheld defendant's conviction under emergency curfew, situation being such that city had requested federal troop intervention); Thistlewood v. Trial Magistrate For Ocean City, 236 Md. 548, 551, 204 A.2d 688, 690 (1964) (court upheld defendant's conviction for violating Labor Day weekend juvenile curfew at beach resort city which suffered from nearly riotous conditions during that weekend); State v. Dobbins, 277 N.C. 484, 496, 178 S.E.2d 449, 456 (1971) (court upheld defendant's conviction under emergency curfew, emphasizing that curfew was temporary and that "clear and present" danger existed at time); Ervin v. State, 41 Wis. 2d 194, 201-02, 163 N.W.2d 207, 211 (1968) (court upheld defendant's conviction under emergency curfew ordinance and commented that "temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority"). Contra People v. Kearse, 58 Misc. 2d 277, 280, 295 N.Y.S.2d 192, 195 (Onondaga County Ct. 1968) (Syracuse curfew ordinance enacted pursuant to emergency powers provided by state law held "per se unenforceable" as it failed to provide for any exceptions, even for emergency vehicles).

For a description of the emergency situations that existed when some of these curfews were enacted, see State v. Chandler, 98 N.J. Super. 241, 243, 236 A.2d 632, 634 (Essex County Crim. Ct. 1967) (court took judicial notice of state of emergency which had been declared in Newark in July, 1967, such that "[g]un battles were waged on the streets and in houses . . . ;" and general curfew imposed on city by governor); A & B Auto Stores v. City of Newark, 106 N.J. Super. 491, 507-14, 256 A.2d 110, 119-22 (Super. Ct. Law Div. 1969) (racial problems leading to urban riots in late 1960's discussed). See also Comment, The Riot Curfew, 57 CALIF. L. REV. 450, 487 (1969) (referring to riot curfew as "drastic device" constitutionally justified only where state has "compelling reason") [hereinafter cited as Riot Curfew].

31. See W.J.W. v. Florida, 356 So. 2d 48, 50 (Fla. Dist. Ct. App. 1978) (court held Pensacola nonemergency curfew unconstitutional, stating that "[r]estraining children under the age of sixteen years from freely walking upon the streets or other public places when no emergency exists is incompatible with the freedoms of speech, association, peaceful assembly and religion secured to all citizens . . . "). See also infra notes 106-08 and accompanying text.

32. See Curfew Law Sparks Battle in Detroit, Nat'l L. J., Aug. 1, 1983, at 10, col. 1 (juvenile curfew enforced strictly after mayor speaks out against urban crime)
This Note will examine the nonemergency juvenile curfew amendments recently enacted in Trenton and Newark, New Jersey, and the Detroit, Michigan, ordinance which has recently been strictly enforced as part of a publicized anticrime campaign.\(^3\) This Note will then examine the conflicting federal and state court decisions which have considered the constitutionality of various curfew ordinances.\(^3\)

The courts have disagreed on the construction of these curfews, on their effectiveness in preventing juvenile delinquency and on the balance of minors' liberty interests against the police powers of local governments.\(^3\) The Trenton, Newark and Detroit ordinances will be analyzed in light of federal and state decisions which have examined the constitutional problems of overbreadth and vagueness that such nonemergency ordinances have raised.\(^3\)

This Note will suggest that even a carefully drafted nonemergency juvenile curfew, such as the Model Curfew Ordinance,\(^3\) unduly infringes upon a minor's liberty interests protected by the due process clause of the fourteenth amendment.\(^3\) This Note concludes that state or local governments should be given the power to enact curfews and other measures only in emergency situations. Should the delinquency problem in nonemergency situations prove overly difficult to control, local governments should also be empowered to enact a properly drafted loitering ordinance, such as one based on the Model Penal


\(^{34}\text{See infra notes 59-72 and accompanying text.}\)

\(^{35}\text{See infra notes 102-24, 186 and accompanying text.}\)

\(^{36}\text{See infra notes 122-23 and accompanying text for a discussion of differing judicial construction of these ordinances; infra note 186 and accompanying text for a discussion of the effectiveness of juvenile curfews; and infra notes 116, 181-85 and accompanying text for a discussion of the balancing of state interests against a minor's liberty interests.}\)

\(^{37}\text{See Nat'l. Inst. of Mun. Law Officers, Model Ordinance Service 7-400.1 to -400.4 (Rhyne ed. 1981) [hereinafter cited as Model Ordinance]; infra note 199 for a chart depicting relevant provisions of this proposed juvenile curfew ordinance.}\)

\(^{38}\text{See infra notes 159-93 and accompanying text.}\)
Code draft, which would enhance law enforcement agencies’ efforts in preventing delinquency without unduly infringing upon a minor’s liberty interests.\(^{39}\)

### II. Current Nonemergency Juvenile Curfew Ordinances

Nonemergency\(^{40}\) curfew ordinances applicable only to minors are in effect in such major cities as Los Angeles,\(^{41}\) Chicago,\(^{42}\) San Francisco,\(^{43}\) and St. Louis.\(^{44}\) Little variation exists among the ordinances concerning the age of minors covered by the curfew or the hour at which the curfew takes effect.\(^{45}\) There is, however, a more substantial

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39. See infra notes 194-211 and accompanying text.
40. See supra note 22 for statewide nonemergency curfew ordinances; supra note 23 for state statutes allowing municipalities to enact nonemergency curfews. The City of Philadelphia is unique in that in 1977 it enacted a juvenile curfew ordinance of unspecified duration pursuant to a council declaration of an “emergency” in the city. PHILADELPHIA, PA., CODE § 10-301(1)(a) (1977) (“[a]n emergency has been created by a substantial increase in the number and seriousness of crimes committed by minors . . . and this has created a menace to the preservation of public peace, safety, health, morals and welfare . . . ”) [hereinafter cited as PHILADELPHIA CURFEW].
41. See LOS ANGELES CURFEW, supra note 24, § 45.03.
42. CHICAGO, ILL., ORDINANCES § 190-2 (1980) [hereinafter cited as CHICAGO CURFEW].
43. SAN FRANCISCO, CAL., POLICE CODE art. 8, § 539 (1976) [hereinafter cited as SAN FRANCISCO CURFEW].
44. ST. LOUIS, MO., ORDINANCES § 15.110.010 (1982) [hereinafter cited as ST. LOUIS CURFEW].
45. See chart below. The numbers in the exceptions column represent the following situations where the minor is held to be exempt from the ordinance:

1. when accompanied by a parent or guardian
2. (1 +) or when accompanied by another adult approved by the parents;
3. when on an emergency errand;
4. (3 +) when directly going to or coming from a meeting, school or religious activity provided that prior notice is given to the municipality or prior approval is given to an organization holding such an activity;
5. (4) when going or coming directly from lawful employment;
6. when undertaking his or her parent’s lawful business;
7. (6) when authorized by a permit from the sheriff or mayor;
8. (7) when immediately in front of house or apartment;
9. (8 +) when traveling in a motor vehicle or when traveling interstate.
difference in the number and type of exceptions where the curfew will not apply. For example, the Los Angeles and Chicago curfews can be considered "strict" in the sense that there are only two possible situations listed in each ordinance where a minor might be on the streets without violating the law. 46 In both cities, a minor who is accompanied by a parent or legal guardian is exempted. 47 In Los Angeles, a minor on a public street after the curfew hour is exempted by the ordinance if accompanied by his or her spouse, if the spouse is over the

<table>
<thead>
<tr>
<th>City or State</th>
<th>Age: Less Than . . .</th>
<th>Day-Times</th>
<th>Wording of Prohibition</th>
<th>Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Los Angeles</td>
<td>18</td>
<td>All: 10 p.m.-sunrise</td>
<td>&quot;loiter&quot;</td>
<td>1, 8+</td>
</tr>
<tr>
<td>Chicago</td>
<td>17</td>
<td>Su-Th 11:30 p.m.-6:00 a.m.; Fri, Sa 10:30 p.m.-6:00 a.m.</td>
<td>&quot;present at or upon&quot;</td>
<td>1+, 4</td>
</tr>
<tr>
<td>San Fran.</td>
<td>18</td>
<td>All: 11:00 p.m.-6:00 a.m.</td>
<td>&quot;in or on&quot;</td>
<td>1+, 3, 4</td>
</tr>
<tr>
<td>St. Louis</td>
<td>17</td>
<td>Su-Th 11:00 p.m.-6:00 a.m.; Fri, Sa 12:00-6:00 a.m.</td>
<td>&quot;loiter, idle, wander, stroll&quot;</td>
<td>1+, 2, 3, 4, 5</td>
</tr>
<tr>
<td>Ind.</td>
<td>17</td>
<td>Sa, Su 1-5:00 a.m.; Su-Th 11:00 p.m.-5:00 a.m.</td>
<td>&quot;to be in&quot;</td>
<td>1+, 3, 4</td>
</tr>
<tr>
<td>Ill.</td>
<td>17</td>
<td>Sa, Su 12:01-6:00 a.m.; Su-Th 11:00 p.m.-6:00 a.m.</td>
<td>&quot;present at or upon&quot;</td>
<td>1+, 4</td>
</tr>
<tr>
<td>Mich.</td>
<td>16</td>
<td>All: 12:01-6:00 a.m.</td>
<td>&quot;loiter, idle or congregate&quot;</td>
<td>1+, 5</td>
</tr>
<tr>
<td>Ore.</td>
<td>18</td>
<td>All: 12:01-4:00 a.m.</td>
<td>&quot;in or upon&quot;</td>
<td>1+, 5, 9</td>
</tr>
</tbody>
</table>

Chart compiled by author from statutes and ordinances cited supra, notes 22, 24, 41-44. See also infra note 103 for a chart depiction of nonemergency curfew provisions considered by state and federal courts, and the Newark, Trenton and Detroit curfew ordinances.

46. See infra note 103 for other examples of "strict" juvenile curfew ordinances. The connotation of "strict" exists for the purpose of the discussion herein.

47. See Los Angeles Curfew, supra note 24, § 45.03(a); Chicago Curfew, supra note 42, § 190-2. This juvenile curfew exception is common to virtually all nonemergency curfews. See supra note 45 and infra note 103 for depictions of this and other curfew exceptions.
age of twenty-one.\textsuperscript{48} In Chicago, a minor may legally appear in public after the curfew period begins if he is engaged in an occupation or business.\textsuperscript{49}

The curfew ordinances in San Francisco and St. Louis can be considered “less strict” because additional exceptions are provided.\textsuperscript{50} Both ordinances foresee the possibility of a minor’s appearing in public after the curfew period by permission of the minor’s parents.\textsuperscript{51} The St. Louis curfew also exempts minors on emergency errands,\textsuperscript{52} and the San Francisco ordinance allows exceptions for minors returning from nighttime social events with parental permission.\textsuperscript{53}

Federal and state courts which have reviewed juvenile curfew ordinances have found the number and type of exceptions provided by the measures to be crucial constitutional characteristics.\textsuperscript{54} Earlier state court decisions placed importance on the exact wording of the ordinances.\textsuperscript{55} Although recent court decisions\textsuperscript{56} have placed less weight on statutory language, the precise wording of the curfews nevertheless affects their constitutionality. The St. Louis curfew, for example, makes it unlawful for a minor to “loiter, idle, wander, or stroll” in public after the curfew hour.\textsuperscript{57} This language is similar to that contained in the city loitering ordinance held to be unconstitutional by the Supreme Court in \textit{Papachristou v. City of Jacksonville}.\textsuperscript{58}

\section*{A. Trenton, Newark and Detroit Curfew Ordinances}

Detroit, Newark and Trenton have recently revived or amended their nonemergency juvenile curfews.\textsuperscript{59} The most restrictive ordinance

\textsuperscript{48} \textit{Los Angeles Curfew}, supra note 24, § 45.03(a).
\textsuperscript{49} \textit{Chicago Curfew}, supra note 42, § 190-2.
\textsuperscript{50} See supra note 103 for other examples of “less strict” nonemergency curfews which have been considered by state and federal courts.
\textsuperscript{51} See \textit{St. Louis Curfew}, supra note 44, § 15.110.010; \textit{San Francisco Curfew}, supra note 38, § 539(a).
\textsuperscript{52} See \textit{St. Louis Curfew}, supra note 44, § 15.110.010.
\textsuperscript{53} See \textit{San Francisco Curfew}, supra note 43, § 539(a).
\textsuperscript{54} See supra notes 105-08, 123-34 and accompanying text.
\textsuperscript{55} See supra notes 102, 122-24 and accompanying text. For example, courts distinguished between the “mere presence” type of curfew, such as the Chicago and San Francisco prohibitions exemplify, supra notes 42 & 43, and the “remaining or loitering” type of curfew, which the Los Angeles and St. Louis curfews represent, supra notes 41 & 44.
\textsuperscript{57} \textit{St. Louis Curfew}, supra note 44, § 15.110.010.
\textsuperscript{58} 405 U.S. 156 (1972). See infra notes 138-41 and accompanying text.
\textsuperscript{59} See \textit{infra} notes 59-64, 125, 153-55 and accompanying text for a discussion of the Detroit ordinance; \textit{infra} notes 65-69, 129-30, 151-52 and accompanying text for a
is found in Detroit.\textsuperscript{60} This curfew was originally enacted as an emergency measure in 1976 and then adopted as an ongoing ordinance.\textsuperscript{61} After the city suffered a sharp increase in crime in early 1983, the Mayor announced that the curfew would be strictly enforced by the Detroit Police Department.\textsuperscript{62} This enhanced enforcement created discussion of the Newark ordinance; \textit{infra} notes 70-72, 131-34, 156-58 and accompanying text for a discussion of the Trenton ordinance.

\textsuperscript{60} \textit{DETROIT, Mich., City Code} § 36-3-1 (1976) [hereinafter cited as \textit{DETROIT CURFEW}]. \textit{See generally} Note, \textit{Juvenile Curfew Ordinances and the Constitution}, 76 Mich. L. Rev. 109 (1977) [hereinafter cited as \textit{Juvenile Curfew}]. The ordinance contains two exceptions:

The provisions of this Article do not apply to: (a) a minor accompanied by his or her parent, legal guardian or other adult person having the care or custody of the minor; or (b) a minor going to or returning from work provided that the minor’s hours of employment do not violate State Law; provided further that the minor possesses a signed statement issued by his or her employer within the previous 90 days setting forth the minor’s hours of employment; and provided further that such minor shall be exempt from the requirements of this Article for not more than one hour before the minor’s work day begins and for not more than one hour after the minor’s work day ends.

\textit{DETROIT CURFEW}, § 36-3-5. For a comparison of the three sample ordinances and their respective curfew exceptions, see \textit{infra} note 92, where the Detroit curfew is contrasted to other “strict” curfews which have been considered by state and federal decisions.

The city of Detroit has recently been beset with economic problems that include a 17\% unemployment rate and a population with nearly 30\% of its residents living below the poverty level. Holusha, \textit{After 10 Years in Office, Detroit Mayor Has Firm Hold on City}, N.Y. Times, Jan. 12, 1984, at A22, col. 1. The youth unemployment rate is over 50\%. Peterson, \textit{Youth Curfew in Detroit Stirs Emotional Debate}, N.Y. Times, July 13, 1983, at A7, col. 1 [hereinafter cited as \textit{Youth Curfew}]. In 1982, the city’s population was 1,181,868, with a U.C.R Crime Index total of 152,962, which includes 513 murders and non-negligent manslaughters. U.C.R., \textit{supra} note 1, at 355.

\textsuperscript{61} \textit{See Juvenile Curfew}, supra note 60, at 109 (city had serious gang problems during summer of 1976); \textit{Youth Curfew}, supra note 60 (emergency arose when youth gangs attacked group of concert-goers in downtown area in August, 1976).

\textsuperscript{62} \textit{Youth Curfew}, supra note 60, at A7. From January to May, 1983, the number of charges filed against juveniles increased 13\%, and the number of serious crimes reported from January to March increased 11.2\% from the previous year, to 60,080. T. Demchak & A. Smith, \textit{Detroit Curfew Limits Juveniles}, Youth Law News, July-Aug., 1983, at 1, col. 1.

Mayor Young’s anti-crime initiatives were prompted by an incident which left three bystanders dead. \textit{Detroit Mayor’s night curfew for teenagers draws praise}, San Francisco Examiner & Chronicle, July 24, 1983, at A8, col. 1 [hereinafter cited as \textit{Detroit Mayor’s night curfew}]. Upon announcing the nonemergency juvenile curfew, the Mayor issued a stern warning to the youth of Detroit: “I want to make one thing very clear to everyone—if you mess up, we will nail you.” \textit{Detroit Initiates Teen Curfew}, Juvenile Justice Digest, July 11, 1983, at 10.
public controversy and prompted a legal challenge of the curfew. Similar controversy surrounded the recent amendment of the Newark juvenile curfew ordinance. Three changes were made in the ordinance for the avowed purpose of making the curfew easier to enforce and more likely to withstand the anticipated constitutional challenges: (1) the age of the restricted minor was lowered from eighteen to thirteen; (2) the later summer-time curfew hour was eliminated; and (3) a new exception allowing a minor to lawfully remain within 100 yards of his or her residence during curfew hours.
was added. The ordinance was passed unanimously by the Newark
City Council with statements of praise and little reservation.

The recently amended nonemergency curfew in Trenton is the most
carefully drafted and extensively detailed of the three ordinances,
containing twelve exceptions wherein a minor may lawfully be
present in public after the curfew period begins. The Trenton City

(quoting Councilman Tucker, sponsor of Newark ordinance) [hereinafter cited as New Curfews].

68. NEWARK CURFEW, supra note 66.

69. Newark City Council Minutes, supra note 65, at 11-12. Various comments by
council members paraphrased by the stenographer include: "[t]his Council is not
trying to interfere with anyone's right" (Councilman Rice); "[t]he curfew...will
eliminate the criminals of tomorrow" (Councilwoman Villani); "[t]he essence of the
ordinance is not to punish children but to protect children" (Councilman Tucker).
Id. Contra, Telephone interview with Deborah Karpatkin, Esq., New Jersey Ameri-
can Civil Liberties Union (Jan. 27, 1984) (council failed to realize that, in many
urban areas, minors as young as thirteen years old may have significant responsibili-
ies, such as babysitting, shopping and cooking, in families where both parents work,
or in single parent families, and may have legitimate reasons for being in public after
10:00 p.m.). Ms. Karpatkin appeared before the Newark City Council meeting of
Jan. 4, 1984 to voice the American Civil Liberties Union's opposition to the curfew.
Newark City Council Minutes, supra at 9.

70. See TRENTO, N.J., ORDINANCES § 83-134 (1983) [hereinafter cited as TREN-
TON CURFEW]. The curfew was first read at the October 25, 1983 meeting and
adopted after the second reading at the December 15, 1983 meeting by a 6 to 1
margin. Trenton City Council Minutes, Regular Meeting, 2-3 (Dec. 15, 1983). In
part, the juvenile curfew ordinance states:

   It shall be unlawful for any person sixteen (16) years of age or younger
   (under seventeen (17)) to be or remain in or upon the streets within the
   City of Trenton at night during the period ending at 5:00 A.M. and
   beginning: (a) At 11:59 P.M. on Friday and Saturday nights, and (b) at
   10:00 P.M. on all other nights; provided that during the period commenc-
   ing June 15 and ending on the first Monday of September (Labor Day)
   inclusive, the beginning hours provided in subsection (a) shall be applica-
   ble to all nights of the week.

TRENTO CURFEW, supra § 3.

The exceptions to the curfew restriction include those situations where the minor
is: (a) accompanied by a parent or (b) authorized adult; (c) exercising first amend-
ment rights after first delivering a signed communication to the police; (d) present
after curfew hour in cases of "reasonable necessity" where the parents of the minor
have first contacted the police; (e) on the sidewalk near his residence; (f) returning
home from a school or religious activity of which the police have prior notice; (g)
individually authorized by a police permit; (h) authorized by the police as part of a
larger group; (i) going to or returning from work; or (j) traveling in a motor vehicle
in Trenton with his or her parent's consent. Id. § 4. The Trenton curfew closely
resembles the Middletown ordinance upheld by a district court in Bykofsky v. Bor-
and accompanying text. Exceptions (c), (d), and (f) present constitutional questions
not addressed by the Bykofsky court. See supra note 116.
Council explicitly stated that it acted in response to a "significant breakdown in the supervision normally provided by certain parents" and the resulting increase in juvenile delinquency. The Council also recognized the difficulties the Trenton Police Department faced in preventing juvenile crime and stated that an additional purpose of the curfew was to make the officers' law enforcement job easier.

B. Juvenile Curfew Enforcement

Nonemergency curfews frequently contain provisions specifying the manner in which a local police department is to enforce the ordinance. The officer may be required to take any minor found to be violating the curfew into custody, whereupon the parents will be notified by the police or a representative of a special youth detention center. Some ordinances allow an officer significant discretion in choosing how to respond to a violation. The Philadelphia curfew provides an officer with the option of directing the minor to proceed

71. Trenton Curfew, supra note 70, § 1. See also New Curfews, supra note 67 ("[w]e have to protect the kids from themselves and give them guidance"; "[w]e have to protect them from drugs and alcohol and prevent them from damaging people's property") (quoting Councilwoman Stubblefield, sponsor of curfew).

72. Trenton Curfew, supra note 70, at § 1.

73. See infra notes 74-82 and accompanying text. The delineation of enforcement standards has been cited as an important factor in determining whether a curfew or loitering ordinance is void for vagueness. See Papachristou v. City of Jacksonville, 405 U.S. at 156, 170 (1972) ("[w]here . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law").

The crucial role of the police officer intervening with a juvenile offender has been emphasized. Task Force on Juvenile Justice, supra note 8, at 182 ("[t]o a large extent, an officer's attitude and demeanor toward the juvenile will determine the latter's view of all ensuing procedures . . . "). The Task Force suggests that police patrols should be established in areas where there are the greatest delinquency problems in order to best fulfill their dual roles of enforcing the law and preventing delinquency. See Task Force on Juvenile Justice, supra, at 182, 197.

74. See, e.g., Trenton Curfew, supra note 70, § 6 (officer who determines that curfew violation has occurred "shall take the juvenile to the police station").

75. See San Francisco Curfew, supra note 43, § 599(c) (minor arrested for curfew violation "shall be taken forthwith to the Youth Guidance Center").

76. See, e.g., Chicago Curfew, supra note 42 (officer is only directed to warn child and serve written notice upon parents, as opposed to directive to issue citation to all violators); Newark Curfew, supra note 66, tit. 17, ch. 12, § 4(c) (minor who violates curfew is only "subject to arrest"). Of the 961,918 reported juvenile offenders who were taken into police custody in 1982, 33% were handled within the individual department and released, 58.1% were referred to juvenile court jurisdiction, and 5.6% were referred to criminal court. U.C.R., supra note 1, at 242.
home, taking the minor home himself, or taking the minor to the police station. The officer may choose the alternative which is “necessary to best protect the interest of the minor and the community.”

It may be necessary for the local police department to enunciate enforcement procedures where a juvenile curfew fails to specify such rules. The Los Angeles Police Department has issued an order of operations concerning curfew arrest procedures which sets forth guidelines and allows for substantial police discretion. An officer is directed to give at least a fifteen minute warning to a juvenile prior to a curfew violation arrest under most circumstances. Special arrest reports are also required in which the officer must specify the actual warning period provided, the facts leading to the arrest and the local problems with juvenile crime in the area.

Municipal police departments frequently recognize the practical problems of insufficient manpower and community support in enforcing nonemergency juvenile curfews. Consequently, juvenile curfews

78. Id.
79. The Los Angeles Police Department consisted of 6,861 officers in 1982. U.C.R., supra note 1, at 256. This compares with the totals for the Trenton Police Department (354 officers), the Newark Police Department (1,166 officers) and the Detroit Police Department (4,092 officers). Id. at 276, 285, 289. In general, cities having a population of at least 250,000 had an average of 3.3 police department employees (including officers) for every 10,000 citizens, compared with a 2.3 average for cities with less than 10,000 persons. Id. at 245.
80. Office of Operations, Order No. 37, Los Angeles Police Dep’t (Aug. 27, 1976) [hereinafter cited as Los Angeles Police Order]. The order was issued in part because of the failure of some prior juvenile arrests to be successfully prosecuted by the District Attorney’s office due to incomplete arrest reports or other problems. See People v. Teresinski, ___ Cal. 3d ___, 144 Cal. Rptr. 257, 259 (Cal. Ct. App. 1978), vacated, 26 Cal. 3d 457, 162 Cal. Rptr. 44, 605 P.2d 874 (1980), vacated, 449 U.S. 914 (1980) (defendant’s conviction under city of Dixon’s juvenile curfew reversed due to officer’s incorrect application of “loitering” type of curfew to juvenile who was merely present in public when arrested).
81. Los Angeles Police Order, supra note 80, at 3. The only recognized exceptions to this prior warning requirement are where the endangerment of the minor or the danger to the community require an immediate arrest of the juvenile without giving him prior notice to return home. Telephone interview with Officer Slocombe, L.A. Police Dep’t, Juvenile Div. (Jan. 23, 1984). Officer Slocombe noted that groups of juveniles in Los Angeles had created problems with local community groups and merchants, pressuring the police to curb youth congregations and loitering. See Lindsey, Dancing in the Streets With a Dream, N.Y. Times, Jan. 27, 1984, at A10, col. 3 (police intervention during recent “break dancing” exhibition in Los Angeles neighborhood after numerous merchant complaints).
82. Los Angeles Police Order, supra note 80, at 3.
83. See New Curfews, supra note 67, at B5, col. 1 (“[i]t’s always been my perception that enforcement of curfew ordinances are [sic] extremely difficult, given the problems that exist in the environs of the city”; “[w]ithout a cooperative community, curfew enforcement is almost impossible”) (quoting Newark’s Police Director
are currently enforced with varying degrees of severity in different cities. In New York City, where there is no juvenile curfew ordinance, the police department states that such an ordinance would be unenforceable. Juvenile daytime truancy programs, however, are considered by some police departments to be both enforceable and effective.

Hubert Williams). The head of the Youth Division of the Trenton Police Department, Capt. Thomas S. Williams, also notes that enforcement of the juvenile curfew occupies officers who would otherwise be working on much more serious crime problems. Id. The overall effectiveness of crime prevention in some metropolitan police departments, due in part to union contracts, political demands and entrenched habit, has been noted. See Urban Predicament, supra note 8, at 215. Alternative enforcement methods, such as decoy patrols and selective investigation methods, have been suggested. Urban Predicament, supra, at 215.

84. The Chicago Police Department reported 63,506 curfew violation notices to parents in 1982, while the St. Louis Police Department reported only 1,001 such violations in 1983. Telephone interview with Officer Radney, Chicago Police Dept., Pub. Affairs Div. (Jan. 23, 1984); Letter from Lt. Donald N. Spicer, St. Louis Metropolitan Police Dept., Juvenile Div. Commander (Jan. 25, 1984).

85. Although there is no juvenile curfew ordinance in New York City, minors who commit criminal offenses may be subject to adult criminal penalties. New York State has recently extended the coverage of adult criminal statutes and penalties to children between the ages of 14 and 16 for violent crimes (i.e., robbery, burglary, first degree assault, rape, arson and kidnapping). Juvenile Offender Act, supra note 32, at 688. The age reductions mark an end to the 16-year-old age limitation which had existed for the previous 150 years. New York is now considered to be very strict towards serious juvenile offenders in that "no jurisdiction, other than New York, permits an adult criminal charge to be lodged against a person less than sixteen years of age without at least an initial determination by the juvenile court." Id.

86. The New York City Police Department is by far the largest in the nation, with 22,855 officers and 28,731 total department employees in 1982. U.C.R., supra note 1, at 289.

87. Telephone interview with Lt. Butler, Youth Servs. Div., New York City Police Dept (Jan. 30, 1984). The special characteristics of a large city, such as the large variety of legitimate nighttime activities, including night courses and school sporting events, and the overwhelming magnitude of other crime prevention efforts, have been cited as reasons for the unenforceability of a nonemergency curfew. Id. In lieu of enforcing a curfew ordinance, the city police enforce existing ordinances which prohibit harrassment, loitering or disorderly conduct. See Youths Harrass People Seeking Cabs at Depots, N.Y. Times, Jan. 27, 1984, at B1, col. 1, B4.

88. Telephone interview with Lt. Butler, Youth Services Div., New York City Police Dept (Jan. 30, 1984) (controlling daytime truancy violations in area such as Times Square said to be more practicable than enforcing nighttime juvenile curfew).
III. Constitutional Issues Raised by Nonemergency Juvenile Curfews

A. Due Process: Overbreadth Doctrine and First Amendment Rights

The legal challenges to nonemergency curfews have been based in part upon an alleged violation of the plaintiff's due process rights as guaranteed by the fourteenth amendment. Once the initial jurisdictional problems of standing and mootness have been overcome, courts have usually examined the specific provisions of the curfew being challenged with a predisposition toward finding the ordinance constitutional.

See N.Y Educ. Law § 3213(2)(a) (McKinney 1981) (“[a] supervisor of attendance . . . may arrest without warrant any minor who is unlawfully absent from attendance upon instruction . . .”).

89. See infra notes 104-08 and accompanying text. See U.S. Const. amend. XIV, § 1 (“[n]or shall any state deprive any person of life, liberty or property, without due process of law . . .”).

90. See, e.g., McCollister v. City of Keene, 668 F.2d 617, 620 (1st Cir. 1982) (court dismissed plaintiff's declaratory judgement action, holding that lower court lacked subject matter jurisdiction, plaintiff had not been accused of violating curfew, and that her complaint failed to allege "real risk that she personally will sustain a direct injury from enforcement of the statute"). But see Naprstek v. City of Norwich, 545 F.2d 815, 817 (2d Cir. 1976) (minors bringing 48 U.S.C. § 1983 action challenging juvenile curfew ordinance did have standing, though never actually accused of violating curfew, as "[t]he ordinance clearly prohibited the plaintiffs' intended conduct and . . . it had been applied to and enforced under circumstances in which the plaintiffs found themselves at the time of bringing the action").

91. See, e.g., Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981) (court of appeals dismissed, for lack of subject matter jurisdiction, appeal of plaintiff who, though fourteen when arrested for violating city curfew, had turned seventeen prior to court's decision and was, therefore, no longer covered by curfew). The court in Johnson decided the merits of the case, however, based on the standing of plaintiff's mother and the certified class consisting of "all persons who have been or in the future will be arrested or detained . . . ." Id. at 1070.

The question whether the municipality itself is a proper party-defendant in 48 U.S.C. § 1983 actions challenging a nonemergency curfew ordinance was settled by the Supreme Court in Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978). The Court rejected the contention that a municipality was not a "person" within the meaning of the statute. Id. at 690. Federal cases prior to Monell held that a city was not a proper defendant in such a section 1983 action. See, e.g., Naprstek v. City of Norwich, 545 F.2d 815, 817 (2d Cir. 1976); Bykofsky v. Borough of Middle-town, 40 F. Supp. 1242, 1246 (M.D. Pa. 1975), aff'd mem., 535 F.2d 1245 (3d Cir.), cert. denied, 429 U.S. 964 (1976).

92. P. KAUPER & F. BEYTAGH, CONSTITUTIONAL LAW 122, 123 (5th ed. 1980) (presumption of constitutionality is considered to be one of four most important judicial techniques in constitutional litigation) [hereinafter cited as KAUPER & BEYTAGH].
The doctrine of overbreadth\(^9\) was utilized by the Supreme Court to strike down a federal law which restricted the petitioner's right to travel in *Aptheker v. Secretary of State*.\(^4\) A Cincinnati ordinance

\(^9\) This Note will examine the overbreadth problems of nonemergency curfews separately from the void-for-vagueness problems, which are discussed *infra* notes 135-58 and accompanying text. One author notes that, although the two doctrines are similar in some respects, they are essentially different: "A law is 'void for vagueness' if it fails to give adequate notice of the conduct it encompasses. A law is overbroad if it sweeps so widely that it extends (or might be thought to extend) to otherwise protected expression or activity and where the behavior could be reached by a more narrowly drawn provision." KAUPER & BEYTAGH, *supra* note 92, at 1192. The overbreadth and void-for-vagueness doctrines are both closely related to the freedoms protected by the first amendment and "have particular significance where expression and associational rights are concerned." *Id.* at 1192.

Another analysis of the overbreadth doctrine compares the "statutory" line of conduct burdened by the challenged restriction against the "judicial" line, which specifies conduct protected by the first amendment. L. TRIBE, *American Constitutional Law* 710 (1978) [hereinafter cited as *TRIBE*]. The latter line prevails where judicially protected activities are burdened by the statute. *Id.* Another major difference between the two judicial doctrines is that an individual is normally permitted to litigate on behalf of the rights of third parties when claiming that a statute is unconstitutionally overbroad, but not when only claiming that it is void for vagueness. *Id.* at 719-20.

The close connection between the two doctrines was described by the Supreme Court in *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982):

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutional conduct. If it does not, then the overbreadth challenge must fail. The Court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is unconstitutionally vague in all of its applications.

*Id.* at 494.

\(^4\) 378 U.S. 500 (1964). In a 5-4 decision, the Court held that section 6 of the Subversive Activities Control Act, which made passport applications by declared Communists unlawful, was void under the fifth amendment due process clause. Though the stated purpose of the provision was to protect national security, the Court found that it was overbroad in that it "applies regardless of the purposes for which an individual wishes to travel." *Id.* at 511. *See also* Zemel v. Rusk, 381 U.S. 1, 16 (1964) (refusal of Secretary of State to validate petitioner's passport for trip to Cuba upheld on basis of national security; Court commented that, unlike situation in *Kent*, *infra*, "refusal to validate appellant's passport does not result from any expression or association on his part"). The Court in *Zemel* also noted that a person's freedom to travel is not absolute, as the freedom does not mean that "areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the Nation as a whole." *Id.* at 14.

For further discussion of the constitutional right to travel, see Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (state residency requirements for welfare recipients held unconstitutional under due process and equal protection clauses of fourteenth amendment; Court stated that "[t]he nature of our Federal Union and our constitu-
prohibiting public conduct found to be of a “manner annoying” to police officers was similarly held unconstitutional because of overbreadth in *Coates v. Cincinnati*. The doctrine was also cited as the rationale in federal and state cases which have held that vagrancy and loitering laws of states or municipalities were unconstitutional. There is significant similarity between the constitutional is-

85. 402 U.S. 611 (1971). The petitioners challenged their arrest under the ordinance. The Court held in their favor, stating that, while a municipality has the power to prevent obstruction of movement on public thoroughfares and, naturally, all conduct which is criminal, this ordinance was unconstitutionally overbroad because it “authorizes punishment of constitutionally protected conduct.” Id. at 614. The Court also reiterated the constitutional limitation on the use of public opinion to justify a challenged legislative action: “Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.” Id. at 615. See also Cox v. Louisiana, 379 U.S. 536 (1965) (convictions for disturbing the peace and obstructing public passages during extremely vocal but orderly civil rights demonstration reversed, as no conduct had occurred which state could constitutionally punish). While the Court in *Cox* held that the ordinance was unconstitutionally overbroad, it stated that a municipality does have power to “regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly.” Id. at 554.

86. As defined in *BLACK'S LAW DICTIONARY* 1388 (5th ed. 1979), “vagrancy” at common law constituted “[t]he act of going about from place to place by a person without visible means of support, who is idle, and who though able to work for his or her maintenance, refuses to do so, but lives without labor or on the charity of others.”

87. As defined in *BLACK'S LAW DICTIONARY* 849 (5th ed. 1979), “loitering” means “to be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind.”

88. See *supra* note 28 for examples of state loitering and vagrancy statutes.

89. See, e.g., Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980) (Dade County loitering law, which prohibited person’s knowingly being around others possessing or using narcotics, found unconstitutionally overbroad; court noted that “[a]n enactment which criminalizes ordinary associational conduct not constituting a
issues that have arisen in these cases and the issues raised by non-
emergency juvenile curfews.100

In nonemergency juvenile curfew decisions, whether a particular
ordinance is overbroad and thereby unconstitutionally infringes upon
associational rights protected by the first amendment101 depends upon
the number and type of exceptions provided for in the curfew. In
Johnson v. City of Opelousas,102 the curfew ordinance considered by
the Fifth Circuit only exempted from culpability minors who were
accompanied by a “parent, tutor or other reasonable adult” or who
were on an “emergency errand.”103 In reversing the district court’s

breach of the peace runs afoul of the First Amendment”); Territory of Hawaii v.
Anduha, 48 F.2d 171, 173 (9th Cir. 1931) (statute that made it unlawful to “loaf,
loiter or idle” held unconstitutional due to overbreadth; court noted that “[t]he act
trenches upon the inalienable rights of the citizen to do what he will and when he
will, so long as his course of conduct is not inimicable to himself or to the general
public of which he is a part”).

100. See infra note 28 and accompanying text. See also Guidoni v. Wheeler, 230
F. 93, 95 (9th Cir. 1916) (vagrancy ordinance which court upheld did not take effect
until after 11:00 p.m.). As defined in BLACK’S LAW DICTIONARY 344 (5th ed. 1979), 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.”

101. “Congress shall make no law respecting an establishment of religion, or
prohibiting the free exercise thereof; or abridging the freedom of speech, or of the
press; or the right of the people peaceably to assemble, and to petition the Govern-
ment for a redress of grievances.” U.S. CONST., amend. I.


103. Id. at 1067 n.1. See also chart below, which depicts various curfew ordi-
nances that have been examined by federal and state courts. The “Exceptions”
column numbers are coded in accordance with explanations in supra note 45. Cur-
fews considered in the cases marked with an asterisk were found unconstitutional.

“STRICT” JUVENILE CURFEWS

<table>
<thead>
<tr>
<th>Case, City</th>
<th>Age: Less Than . .</th>
<th>Days-Times</th>
<th>Wording of Prohibition</th>
<th>Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newark, N.J.</td>
<td>13</td>
<td>All: 10:00 p.m.-6:00 a.m.</td>
<td>“to loiter”</td>
<td>1, 2, 5, 7</td>
</tr>
<tr>
<td>1984</td>
<td></td>
<td>F, Sa 11:00 p.m.-6:00 a.m.; Su-Th 10:00 p.m.-6:00 a.m.</td>
<td>“to be upon”</td>
<td>1, 4</td>
</tr>
<tr>
<td>Detroit</td>
<td>18</td>
<td>Su-Th 11:00 p.m.-4:00 a.m.</td>
<td>“travel, loiter, wander, stroll, or play in or upon”</td>
<td>1, 4, 5</td>
</tr>
<tr>
<td>1976</td>
<td></td>
<td>F, Sa 1-4:00 a.m.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Johnson*</td>
<td>17</td>
<td>Su-Th 10:30 p.m.-6:00 a.m.</td>
<td>“to be upon”</td>
<td>1, 4, 5</td>
</tr>
<tr>
<td>Opelousas,</td>
<td></td>
<td>F, Sa 12-6:00 a.m.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mosier*</td>
<td>18</td>
<td>Su-Th 10:30 p.m.-6:00 a.m.</td>
<td>“to be upon”</td>
<td>1, 4, 5</td>
</tr>
<tr>
<td>Van Wert,</td>
<td></td>
<td>F, Sa 12-6:00 a.m.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
finding that the curfew was constitutional, the Fifth Circuit found that the paucity of exceptions made the ordinance overbroad because minors were prohibited from “attending associational activities such as religious or school meetings, organized dances, and theater and

<table>
<thead>
<tr>
<th>Case, City and Year</th>
<th>Age, Less Than</th>
<th>Days-Times</th>
<th>Wording of Prohibition</th>
<th>Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>W.J.W.* Pensacola, 1978</td>
<td>16</td>
<td>All: 11:00 p.m.-5:00 a.m.</td>
<td>“in or upon”</td>
<td>1, 4</td>
</tr>
<tr>
<td>Chambers Ill., 1976</td>
<td>18</td>
<td>Sa, Su 12:00 a.m.; Mon-Th 11:00 p.m.-6:00 a.m.</td>
<td>“present at or upon”</td>
<td>1, 4</td>
</tr>
<tr>
<td>Doe* Honolulu, 1973</td>
<td>18</td>
<td>All: 10:00 p.m.-sunrise</td>
<td>“loiter”</td>
<td>1, 8</td>
</tr>
<tr>
<td>Ruggiero Eastlake, 1966</td>
<td>16</td>
<td>All: 12:00 a.m.</td>
<td>“to be upon”</td>
<td>1, minor’s “legitimate excuse”</td>
</tr>
<tr>
<td>Alves* Chico, 1957</td>
<td>17</td>
<td>All: 10:00 p.m.-5:00 a.m.</td>
<td>“in or on”</td>
<td>1, 4</td>
</tr>
<tr>
<td>Walton L.A. County, 1945</td>
<td>18</td>
<td>All: 9:00 p.m.-4:00 a.m.</td>
<td>“remains or loiters”</td>
<td>1, 6</td>
</tr>
<tr>
<td>McCarver* Grahm, 1898</td>
<td>21</td>
<td>All: 9:00 p.m.- (unspecified)</td>
<td>“remaining or being found upon”</td>
<td>1, 2</td>
</tr>
</tbody>
</table>

“LESS STRICT” JUVENILE CURFEWS:

<table>
<thead>
<tr>
<th>City and Year</th>
<th>Age</th>
<th>Days-Times</th>
<th>Wording of Prohibition</th>
<th>Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trenton, 1983</td>
<td>17</td>
<td>F, Sa 11:59 p.m.-5:00 a.m. Su-Th 10:00 p.m.-5:00 a.m.</td>
<td>“to be or remain upon”</td>
<td>1+, 3+, 4, 6, 7, 10</td>
</tr>
<tr>
<td>Teresinski Dixon, 1978</td>
<td>18</td>
<td>All: 10:00 p.m.-5:00 a.m.</td>
<td>“loiter, idle, wander, stroll or play”</td>
<td>1+, 3, 4, 6, 7</td>
</tr>
<tr>
<td>Bykofsky Middletown, 1975</td>
<td>18</td>
<td>All: 11:00 p.m.-6:00 a.m.</td>
<td>“to be in or remain upon”</td>
<td>1+, 3+, 4, 6, 7, 10</td>
</tr>
<tr>
<td>Pullman* Seattle, 1973</td>
<td>18</td>
<td>All: 10:00 p.m.-6:00 a.m.</td>
<td>“loiter, idle, wander”</td>
<td>1, 3, 4, 5</td>
</tr>
<tr>
<td>In re C Sacramento, 1972</td>
<td>18</td>
<td>All: 10:00 p.m.-daylight</td>
<td>“loiter, idle, wander, stroll or play”</td>
<td>1+, 2, 3</td>
</tr>
</tbody>
</table>

Chart compiled by author from ordinances considered in decisions discussed infra notes 122-24, 185-93, and ordinances discussed supra notes 59-72.

sporting events, when reasonable and direct travel to or from these activities has to be made during the curfew period.” 105 The court also found that the city curfew violated rights of minors protected by the state constitution, including freedoms of speech and association, 106 freedom of religion 107 and freedom to travel. 108 It can be inferred from

105. Johnson, 658 F.2d at 1072. It is important to note that when, as here, a court finds that the ordinance as drafted is unconstitutionally overbroad, the constitutional infirmity may be overcome through redrafting. KAUPER AND BEYTACH, supra note 82, at 1192. See also Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977) (curfew and loitering ordinances both found “facially unconstitutional” due to vagueness and overbreadth). The Ruff court noted what it considered to be the appropriate judicial approach: “ ‘Rather than await a case-by-case excision of a statute's overbreadth or vagueness through review of its application to particular conduct, which would be needlessly time-consuming and ineffectual, courts under the rubric of the overbreadth doctrine, invalidate the statute facially so as to end its deterrence of constitutionally protected activity.’ ” Id. at 305 (quoting from Hobbs v. Thompson, 448 F.2d 456, 459-60 (5th Cir. 1971)).

Two prerequisites for a successful overbreadth challenge exist: (1) the protected activity must be a significant aspect of the restriction; and (2) there must be no “satisfactory way of severing the law's constitutional from its unconstitutional applications” so as to render the law valid. TRUE, supra note 93, at 711. Where the protected activity does not involve first amendment freedoms, the plaintiff may be required to show that the challenged ordinance creates a “substantial” overbreadth problem. Id. at 712-13.

106. See Johnson, 658 F.2d at 1072; accord Ginsberg v. New York, 390 U.S. 629, 639 (1968) (statute prohibiting sale of pornographic materials to person known to be minor under seventeen upheld, as state properly concluded that exposure to such materials “might be harmful” to children); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (minors’ first amendment rights of freedom of expression were violated by school board where students were suspended for wearing black armbands to protest Vietnam War).

Concerning the associational rights of minors protected by the first amendment, the Johnson court made an analogy between the nonemergency curfew ordinance and ordinances which regulate minors’ use of pinball and video games, noting that the latter do not restrict liberties as seriously as do the curfew ordinances. Johnson, 655 F.2d at 1071 n.8; accord Aladdin’s Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980) (city ordinance which prohibited minors from using video games at any time held to be unconstitutionally overbroad). The Supreme Court remanded Aladdin’s to the court of appeals to determine whether the Fifth Circuit’s decision had been based on the Texas or the United States Constitution. 455 U.S. 283 (1982). If the state constitution was the basis of the decision, the Court could not review the circuit court’s interpretation of state law pursuant to 28 U.S.C. § 1254(2). 455 U.S. at 292. The circuit court had noted that there was no compelling state interest that warranted the restraint placed on the protected associational rights of minors. Id. at 1042. See also Ranii, Pac-Man Meets Lawman, Nat’l L. J., May 23, 1983, at 1, col. 1 (discussion of conflict in state court decisions concerning constitutionality of these ordinances and issue whether use of the games constitutes activity protected by freedom of speech).

107. See Johnson, 655 F.2d at 1072; accord West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (school board regulation imposing penalties on students and parents where Jehovah Witness child refused to salute flag was unconstitutional infringement of minor’s and parents’ freedom of religion).

108. See supra note 94.
dictum that a more narrowly drawn juvenile curfew with a greater number of exceptions might also be found unconstitutional. 109 The Johnson court also refused to accept or reject the type of juvenile curfew which had been considered and upheld six years earlier by a Pennsylvania district court in Bykofsky v. Borough of Middletown. 110 In addition to providing exceptions to the curfew's application when a juvenile is accompanied by a parent, guardian or authorized adult, the Middletown ordinance considered in Bykofsky provided nine other exceptions from the curfew: (1) when a minor is exercising first amendment rights and had submitted a signed writing to the sheriff's office specifying when, where and how he or she will be out in public after the curfew hour; (2) when a "reasonable necessity" exists and the parents have first notified the police; (3) when the minor is on a sidewalk in front of his home; (4) when the minor is directly returning home from a school or religious activity and prior notice was given the police; (5) when authorized by a special individual permit from the mayor; (6) when authorized by a group permit; (7) when the minor has a current employment card signed by the Chief of Police; (8) when the minor is traveling in a motor vehicle with his parent's consent; and (9) when so ordered formally by the mayor for groups of minors or all minors seventeen years of age or over. 111 The ordinance also described police enforcement procedures, 112 the liability of parents who knowingly allow their children to

109. See Johnson, 658 F.2d at 1072, 1074 ("less drastic means [than the nonemergency curfew] are available . . ." to combat juvenile delinquency). The court made direct mention of the decision in Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd mem., 535 F.2d 1235 (3d Cir. 1975), cert. denied, 429 U.S. 964 (1976), when stating: "We express no opinion on [the] validity of curfew ordinances narrowly drawn to accomplish proper social objectives." Id. at 1072. The court reserved judgment on this issue because appellants failed to challenge the city's authority to enact any juvenile curfew and limited their litigation to the existing ordinance. Id. at 1074.


111. Id. at 1269-70, §§ 5(c)-(k) (quoting Borough of Middletown, Pa., Ord. 662 (1975)).

112. Id. at 1271. Section 7 of the ordinance states that the officer shall take the juvenile violator to the police station and call his or her parents. The police will interrogate the parents, so as to ascertain if they knowingly or negligently allowed their child to be present in public after the curfew hour. The officer does have discretion, however, to deliver the juvenile directly to the parents under "appropriate circumstances." Id. All officers must complete a written report within 24 hours after the violation. If a parent fails to come for his or her child, the child shall be transferred to the juvenile authorities. Id.
be upon the streets after the designated curfew hour, and the monetary penalties involved.

In upholding the constitutionality of the Middletown juvenile curfew, the district court rejected appellants' contention that the curfew was overbroad and violated their first amendment rights. The court held it was not an unconstitutional prior restraint to require the minor to notify borough officials of his intention to exercise his first amendment rights after the curfew hour, and “restrict[ed] only slightly first amendment rights of assembly, association, and free expression.” In addition, the minor's right to travel arguably is not

113. Id. at 1271. Section 6 of the ordinance makes it unlawful for parents to knowingly or negligently allow their child to be upon the streets in violation of the curfew. The purpose of this added liability is to “keep neglectful or careless parents up to a reasonable community standard of parental responsibility.” Id.

114. Id. at 1271-72. Section 8 of the nonemergency curfew provides for fines of $25, $50 and $75, respectively, for each parental violation of Section 6. In addition, where the minor violates the curfew four times, he or she will be turned over to the juvenile justice authorities. Id.

115. See supra notes 93-101 and accompanying text.

116. Bykofsky, 401 F. Supp. at 1258. Contra Johnson, 658 F.2d at 1072 (“[i]t is clear that these rights of minors in Opelousas currently are being burdened by that city's juvenile curfew ordinance”). The Bykofsky court's lack of emphasis on the restrictive effects of the Middletown curfew seems to run counter to the Supreme Court's emphasis on the importance of free movement in Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972), discussed infra notes 138-41 and accompanying text.

The curfew exceptions which require a minor to obtain prior approval before exercising first amendment rights by submitting a written and signed communication to the sheriff raise the issue of the constitutionality of a prior restraint of protected activity. See Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 611, 616 (1976) (municipal ordinance requiring advance notice to be given to local police department for identification purposes prior to door-to-door solicitation on behalf of charity or political campaign was void under first and fourteenth amendments; regulations in this area “ must be done, and the restriction applied, in such manner as not to intrude upon the rights of free speech and free assembly” ) (quoting Thomas v. Collins, 323 U.S. 516, 540-41 (1945)); Hudgens v. N.L.R.B., 424 U.S. 507, 520 (1976) (striking union members did not have right to picket their employer's retail store located within privately owned shopping center; Court, in dicta, noted that “while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes . . . what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression . . .”) (emphasis in original); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552 (1975) (municipal theater's rejection of petitioner's application to show "Hair" in anticipation of its alleged obscenity held to be unconstitutional prior restraint "under a system lacking in constitutionally required minimal procedural safeguards"); In re Mosier, 59 Ohio Misc. 83, 98, 394 N.E.2d 368, 377 (C.P. Van Wert County 1978) (juvenile curfew's requirement that all groups sponsoring nighttime functions with minors in attendance first gain Police Chief's permission was void; overly broad and unconstitutionally vague ordinance "provides no standards at
unduly infringed due to the exception granted in the ordinance for interstate travel.\textsuperscript{117}

The Bykofsky court refused to rely on or even examine in detail any of the prior state decisions that had considered nonemergency juvenile curfews because the court found that "the particular ordinances which were approved or rejected do not contain many features which might serve as significant points for distinguishing the valid from the invalid regulatory scheme."\textsuperscript{118} The court rejected the prior judicial reasoning utilized in many state decisions\textsuperscript{119} which had distinguished whether a curfew prohibited a minor's "remaining or loitering"\textsuperscript{120} on the streets as opposed to his "mere presence"\textsuperscript{121} during the curfew period. The court concluded instead that the two types of curfew prohibitions were indistinguishable for all practical purposes.\textsuperscript{122} While some state courts emphasized the distinction between a "mere presence" and "remaining" type restriction in their analyses of...
whether a prohibition was overbroad in application,\textsuperscript{123} both types of restrictions have been held unconstitutional, thus giving credence to the court's rejection of the prior narrow statutory construction analysis.\textsuperscript{124}

The current Trenton, Newark and Detroit nonemergency curfew ordinances present constitutional problems of overbreadth. The most restrictive ordinance is found in Detroit,\textsuperscript{123} which prohibits activities such as returning from a school or a church activity after the curfew

\textsuperscript{123.} See, e.g., People v. Teresinski, \textit{Cal. 3d 144 Cal. Rptr. 257 (1978)}, vacated, \textit{26 Cal. 3d 457, 162 Cal. Rptr. 44, 605 P.2d 874 (1980)}, vacated, \textit{449 U.S. 914 (1980)} (arrest under loitering type juvenile curfew dismissed where defendant was merely present); \textit{In re Nancy C.}, \textit{28 Cal. 3d 747, 105 Cal. Rptr. 113 (Cal. Ct. App. 1972)} (arrest of minor under juvenile curfew upheld); People v. Walton, \textit{70 Cal. App. 2d 862, 866, 161 P.2d 498, 501 (Cal. App. Dep't Super. Ct. 1945)} (dismissal of defendant's arrest under loitering type juvenile curfew reversed; court noted that such ordinance was simply "preventing such minors from tarrying and staying unnecessarily upon the streets and public places, and does not restrict those minors who are using or are on such streets or places while actually in the process of going to or from places of business or amusement or otherwise"). \textit{See also Bykofsky}, \textit{401 F. Supp. at 1268 (section 3(d) of Middletown ordinance explicitly states that "this is not a mere prohibitory or presence type curfew ordinance").} \textsuperscript{124.} See \textit{Alves v. Justice Court of Chico Judicial Dist.}, \textit{148 Cal. App. 419, 424-25, 306 P.2d 601, 605 (Cal. Dist. Ct. App. 1957)} (nonemergency juvenile curfew held void due to limited number of exceptions; court noted that ordinance "would preclude aimless loitering by minors in public places during the hours set forth, but it would also make unlawful many other activities by minors which otherwise would be entirely lawful"); \textit{W. J. W. v. State}, \textit{356 So. 2d 48, 50 (Fla. Dist. Ct. App. 1978)} (Pensacola juvenile curfew held void because of overbreadth; enforcement "would make many activities unlawful which otherwise would be lawful"); \textit{In re Doe}, \textit{54 Hawaii 647, 513 P.2d 1385 (1973)} (Honolulu curfew held void on overbreadth and vagueness grounds); \textit{In re Mosier}, \textit{59 Ohio Misc. 83, 90, 394 N.E.2d 368, 372 (C.P. Van Wert County 1978)} (City of Van Wert's juvenile curfew held void due to overbreadth in that it prevented minors from attending nighttime functions, such as religious services and city council meetings, which extend past curfew hour); \textit{Ex Parte McCarver}, \textit{39 Tex. Crim. 448, 452, 46 S.W. 936, 937 (1898)} (Graham city juvenile curfew held void; court noted that many innocent and beneficial activities, including socials, dances or attending "sermon or exhortation" would be punishable after "curfew bell tolls"); City of Seattle v. Pullman, \textit{82 Wash. 2d 794, 800, 514 P.2d 1059, 1063 (1973)} (municipal juvenile curfew held unconstitutional due to its failure to distinguish between "conduct calculated to harm and that which is essentially innocent"). The \textit{Pullman} case is especially relevant in that it invalidates a juvenile curfew that contains the greatest number of exceptions of any curfew ordinance which has been held to be unconstitutional. See \textit{supra} note 103 for a chart depicting a number of juvenile curfew ordinances that have been reviewed by state and federal courts. \textit{But see People v. Chambers}, \textit{66 Ill. 2d 36, 41, 360 N.E.2d 55, 57 (1976), rev'g 32 Ill. App. 3d 444, 335 N.E.2d 612 (1975)} (state nonemergency curfew upheld by state supreme court; court decided that first amendment rights were not unconstitutionally infringed by law); City of Eastlake v. Ruggiero, \textit{7 Ohio App. 2d 212, 216, 220 N.E.2d 126, 128 (Ohio Ct. App. 1966)} (juvenile curfew upheld; court concluded "there is no curtailment of normal or necessary juvenile nighttime activities").
hour. In Johnson, these activities were found to be constitutionally protected and the overly restrictive juvenile curfew held void based on the overbreadth rationale. The same overbreadth problem exists in the Newark ordinance, even though the amended version provides an additional exception which allows a minor to remain within 100 yards of his or her residence after the curfew hour.

The Trenton curfew ordinance is the most carefully drafted of the three curfews and is apparently modeled after the Middletown curfew upheld in Bykofsky. It contains all but one of the listed exceptions of the Middletown curfew, with minor variations in other provisions. Because of this similarity, the Trenton curfew would most likely withstand a constitutional challenge based on alleged overbreadth problems. However, such a curfew would likely be found unconstitutional if measured against the Fifth Circuit's rationale in Johnson.

B. Void for Vagueness

The doctrine of void-for-vagueness is closely related to the overbreadth problem because a statute containing words that are vague may be a basis for arresting and convicting a person for acting in a manner he reasonably thought was legal. The government has a strict burden of clarity in legislative drafting, as "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of

125. DETROIT CURFEW, supra note 60.
127. Id. at 1073.
128. Id. at 1074. See also supra note 93 and accompanying text.
129. See supra note 66 for the text of the statute.
130. See NEWARK CURFEW, supra note 66 and accompanying text.
132. See TRENTON CURFEW, supra note 70, § 4. Provision (k) of the Middletown curfew empowered the mayor to issue a formal rule designating certain minors or groups of minors who were at least seventeen years old as being excluded from the curfew restrictions. Bykofsky, 401 F. Supp. at 1270.
133. See TRENTON CURFEW, supra note 70, § 4. For example, the Trenton curfew extends the time allowed for a juvenile to return home from a school or religious activity after the curfew hour from thirty minutes to one hour. Id., § 4(f).
134. See Johnson, 658 F.2d at 1072. See supra note 109 and accompanying text.
135. See supra notes 93-134 and accompanying text.
136. See supra note 93 for a definition of the void-for-vagueness doctrine. See also Note, Constitutional Law—"Locomotion" Ordinances as Abridgement of Personal Liberty, 32 TULANE L. REV. 117 (1957).
penal statutes."137 In Papachristou v. City of Jacksonville,138 the Supreme Court held that the city vagrancy ordinance, which prohibited in part "persons wandering or strolling around from place to place without any lawful purpose or object . . .,"139 was void because it was unconstitutionally vague. The Court found two fatal flaws in the ordinance: it allowed a person to be arrested for engaging in activities which are normally innocent,140 and it gave nearly unfettered discretion to police officers in arresting persons they found merely to be undesirable.141

137. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (statute making "gang" membership crime violated defendant's fourteenth amendment due process rights). The Court stated that the word "gang" as used in the statute created a vagueness problem because:

[T]he state court did not find, and we cannot, that "gang" has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or of anything that is unlawful.

Id. at 457. See also Smith v. Goguen, 415 U.S. 566, 568 (1974) (statute which prohibited any public act which "treats [American flag] contemptuously" held to be impermissibly vague); Smith v. Florida, 405 U.S. 172 (1972) (case challenging state vagrancy law on grounds of vagueness remanded in light of Papachristou decision, infra note 120).

138. 405 U.S. 156 (1972). The case consolidates five separate arrests under the vagrancy ordinance for such charges as "prowling by auto" and "disorderly loitering." Id. at 158.

139. Id. at 157 n.1. Other descriptions of vagrants included "common night walkers . . . [and] persons able to work but habitually living upon the earnings of their wives or minor children . . .." Id. at 156-57 n.1.

140. Id. at 163 ("[t]he Jacksonville ordinance makes criminal activities which by modern standards are normally innocent"). Justice Douglas refers to Walt Whitman and Henry David Thoreau in praising the freedom of nightwalking as an "amenity" he recognized is not explicitly mentioned in the Constitution. Id. at 164.

Municipal ordinances that restrict the sale of paraphernalia designed for drug use have recently been challenged on void-for-vagueness grounds. See, e.g., Hoffman Estates v. Flipside.. Hoffman Estates, 455 U.S. 489, 498 (1982) (municipal ordinance requiring license to sell such merchandise upheld as not void for vagueness; since ordinance challenged restricts business enterprise, as opposed to law that interferes with free speech or association, it is subject to less severe vagueness test because a business "can be expected to consult relevant legislation in advance of action"); Florida Businessman v. City of Hollywood, 673 F.2d 1213, 1218-19 (11th Cir. 1982) (state "head shop" law upheld; phrases "designed for use" and "reasonably should know" were not unconstitutionally vague).

141. 405 U.S. at 165 ("[h]ere the net cast is large . . . to increase the arsenal of the police"); see also People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973) (state loitering law held unconstitutionally vague). The facts in the Berck case show the fine line the void-for-vagueness doctrine can follow in judicial application. The police had observed the defendant after midnight standing behind a tree near a residence known by the police to be temporarily unoccupied. Upon confrontation,
Similar problems have been found to exist with nonemergency curfew ordinances applying to all age groups, and those particularly applicable to juveniles. Some of the juvenile curfews have been found void for vagueness due to the improper use of a particular word or phrase or the failure to specify a time when the curfew period

the defendant refused to identify himself or explain his presence. Id. at 576, 300 N.E.2d at 416, 347 N.Y.S.2d at 41-42. The statute that was held void had required three elements for a loitering offense: (1) loitering in a place without apparent reason, (2) under circumstances which justify suspicion of an impending crime, and (3) after refusal of the suspect to identify himself or give an account of his conduct. Id. at 569 n.1, 300 N.E.2d at 412 n.1, 347 N.Y.S.2d at 35 n.1. As in Papachristou, the New York Court of Appeals felt that such a statute gave too much discretion to the police and expressed fear that it would be enforced arbitrarily. Berck at 571, 300 N.E.2d at 414-15, 347 N.Y.S.2d at 37.

142. See Ruff v. Marshall, 438 F. Supp. 303, 305 (M.D. Ga. 1977) (phrase “activity of necessity,” which constituted exception to 11:00 p.m. to 6:00 a.m. curfew declared by mayor, was “obviously so unclear as to support a finding that the ordinance’s application is unconstitutionally vague”); Hayes v. Municipal Court of Oklahoma City, 487 P.2d 974, 975 n.2 (Okla. Crim. App. 1971) (loitering ordinance providing that “any person who strolls or loiters idly about the streets” committed criminal act held void for vagueness); Borough of Dumont v. Caruth, 123 N.J. Super. 331, 340, 302 A.2d 566, 570 (1973) (park loitering ordinance containing word “loiter” held to be void for vagueness); City of Portland v. James, 251 Or. 8, 9, 13, 444 P.2d 554, 554, 557 (1968) (municipal police code ordinance which made it unlawful to “roam or be upon any street... without disclosing a lawful purpose” held void for vagueness; “[t]he principal evil of such vague legislation is that it invites arbitrary and discriminatory enforcement”); City of Seattle v. Drew, 70 Wash. 2d 405, 406, 409, 423 P.2d 522, 523, 524 (1967) (ordinance which prohibited “wandering or loitering abroad, or abroad under other suspicious circumstances” after dark was unconstitutionally void for vagueness; “lay meaning of loitering cannot reasonably connote unlawful activity”). See also Recent Decisions, Constitutional Validity of Curfew Ordinances, 55 MICH. L. REV. 1026, 1028 (1957) (distinguishing loitering ordinance prohibition directed at “mere idleness” from one prohibiting loitering for “illegal or unlawful purposes,” latter type being more likely to withstand constitutional challenge).

143. The court in Johnson, 658 F.2d 1065 (5th Cir. 1981) did not examine the wording of the statute, although the language used, which made it unlawful to “travel, loiter, wander, stroll or play,” see id. at 1067 n.1, is virtually the same as that found in other void-for-vagueness cases, notably Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). See supra notes 138-41 and accompanying text. The lower court in Johnson, however, did examine the plaintiff’s claim of void-for-vagueness, and found that the phrases “emergency errand” and “responsible adult” contained in the curfew ordinance were not impermissibly vague. Johnson, 488 F. Supp. at 441.

144. See, e.g., In re Doe, 54 HAWAI’I 647, 651, 513 P.2d 1385, 1388 (1973) (Honolulu juvenile curfew ordinance unconstitutionally vague because word “loitering” did not provide notice as to what conduct constitutes wrongful activity in violation of statute); City of Seattle v. Pullman, 82 Wash. 2d 794, 795 n.1, 799, 514 P.2d 1059, 1060 n.1, 1063 (1973) (city curfew ordinance which made it unlawful to “loiter, idle, wander or play” held void for vagueness as these words do not have lay meaning which connotes wrongful misconduct of type constitutionally punishable).
would end. In *Bykofsky*, a severability clause in the ordinance was utilized by the district court to eliminate words and phrases that were found to be unconstitutionally vague. Some of the words and phrases challenged by the petitioners were found not to be void for vagueness, notably the word “remain” in the curfew prohibition clause. After the words found to be unconstitutionally vague were deleted, the entire corrected ordinance was found sufficiently clear to satisfy due process requirements.

Examination of the Trenton, Newark and Detroit curfews reveals that the most serious vagueness problem exists with the Newark ordinance. The prohibitions contained therein make it unlawful for a...
minor to "loiter, idle, wander, stroll or play" in public areas after the curfew hour.\textsuperscript{151} Virtually the same language was contained in the city vagrancy ordinance found unconstitutionally void in Papachristou.\textsuperscript{152}

Since the Detroit curfew is a "mere presence" type of juvenile curfew,\textsuperscript{153} a vagueness problem does not arise. The prohibitory language of the curfew makes it unlawful for a minor "to be on" public streets after the curfew hour.\textsuperscript{154} Instead, such language will pose constitutional problems relating to the overbreadth doctrine.\textsuperscript{155}

The Trenton curfew is carefully drafted and avoids a void-for-vagueness problem. The drafters apparently followed the vagueness analysis applied by the Bykofsky\textsuperscript{156} court and eliminated all of the phrases found by the court to be unconstitutional.\textsuperscript{157} The Trenton ordinance also includes a severability clause to enable the statute to survive constitutional challenge if a particular word or phrase is found to be void for vagueness.\textsuperscript{158}

C. Substantive Due Process

Nonemergency juvenile curfew ordinances have also been challenged on substantive due process grounds.\textsuperscript{159} The initial step in a substantive due process analysis is to ascertain whether the challenged

\textsuperscript{151} New York City Curfew, supra note 66.

\textsuperscript{152} Papachristou v. City of Jacksonville, 405 U.S. 156, 157 n.1 (1972) ("persons wandering or strolling around"). The Court also discusses the vagueness problem that arises from the words used in the ordinance. Id. at 162-64.

\textsuperscript{153} See Detroit Curfew, supra note 60, § 36-3-1 ("it shall be unlawful for a minor to be on the public streets . . . ").

\textsuperscript{154} Id.

\textsuperscript{155} See supra notes 93-134 and accompanying text.


\textsuperscript{157} See 401 F. Supp. at 1248-53; Trenton Curfew, supra note 70, § 4(g) (excluding "normal" and "minor well along the road to maturity") and § 4(h) (excluding "normal" and "consistent with the public interest"). See supra note 148 and accompanying text.

\textsuperscript{158} See Trenton Curfew, supra note 70, § 4(k) (nearly identical to Middletown curfew severability provision considered by Bykofsky court, 401 F. Supp. at 1270-71 and supra notes 47 & 48 and accompanying text).

\textsuperscript{159} See infra notes 167-93 and accompanying text. The expansion of the scope of protection provided against state restrictions which violate a person's liberty began in the late 1800's and has involved Supreme Court decisions in the areas of education, freedom of contract and discrimination, among others. See Moore v. City of East Cleveland, 431 U.S. 494, 496 n.2 (1977) (city zoning ordinance which restricted occupancy of dwellings to only limited types of blood relatives violated petitioner's liberty as protected by due process clause); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (state law requiring parents to send their children to public schools violated parents' liberty; Court nonetheless recognized state's police power to regu-
state restriction infringes upon a plaintiff’s fundamental right. This in turn will determine whether a reviewing court should apply a strict standard of scrutiny to the state restriction and judge whether the statute or ordinance is necessary to further a compelling state interest. If a fundamental right is not at issue, a less severe standard is

late quality of nonpublic schools and to require attendance of minors below certain age at approved nonpublic or public schools); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (statute prohibiting teaching of foreign language in public grammar schools held to violate liberty protected by due process clause, such “liberty” including “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men . . . ”); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (state law prohibiting its citizens from contracting for insurance outside of state violated due process protection of petitioner’s “liberty,” which Court stated included “not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but . . . [also] the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways . . . ”). See generally KAUPER & BEYTAGH, supra note 92, at 585, 601, 698-701, 710, 750-51, for a discussion of Supreme Court approaches to substantive due process issues and the extent to which the fourteenth amendment incorporates the protections of the Bill of Rights against state law infringement.

160. The Supreme Court prefers to protect individual fundamental rights by reference to specific provisions in the Bill of Rights as opposed to basing a decision solely on substantive due process grounds. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965). The Griswold Court held that the state law prohibiting any use of contraceptives was unconstitutional. Justice Douglas made reference to the first, third, fourth, fifth and ninth amendments to reach the conclusion that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . [v]arious guarantees create zones of privacy.” Id. at 484. As an example, the opinion states that the enumerated freedoms of speech and press include the unenumerated peripheral freedoms to print, distribute and receive information, to inquire and to teach. Id. at 482.

The Court has held, however, that a state restriction was unconstitutional solely on due process grounds without reference to the Bill of Rights provisions. See Roe v. Wade, 410 U.S. 113 (1973). In holding that the state law which restricted legal abortions was unconstitutional, the Court incorporated the fundamental right to privacy, which includes the right of a mother to decide to terminate her pregnancy, “in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . .” Id. at 153.

161. See, e.g., Roe v. Wade, 410 U.S. at 163, 173-74; Griswold v. Connecticut, 381 U.S. at 497 (Goldberg, J., concurring); Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942) (state law punishing “habitual criminals” by sterilization held void under equal protection clause; Court held for first time that strict scrutiny approach must be used because “fundamental” rights of marriage and procreation are infringed by statute).

applied, and the statute need only be reasonably related to a legitimate state interest to be upheld as constitutional.\footnote{162}

The Supreme Court has recognized that minors share coextensive due process rights with adults in certain areas, such as criminal procedures,\footnote{163} but that the state has a greater interest in restricting activities

\footnote{162. Plyler v. Doe, 457 U.S. 202 (1982) (state law withholding funding from school districts for children of illegal aliens found unconstitutional under fourteenth amendment); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-39, 55 (1973) (state property tax system of public school financing upheld; Court applied minimum scrutiny test after finding that no "fundamental right" to education exists and that "state action rationally furthers a legitimate state purpose or interest . . ."); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (state law requiring parents to send their children to public school held void; "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State"); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (state law prohibiting language instruction at public grammar schools held void as "arbitrary and without reasonable relation to any end within the competency of the State"); Lochner v. New York, 198 U.S. 45, 56 (1905) (state law limiting number of hours bakers could work in a week held unconstitutional; restriction was not a "fair, reasonable and appropriate exercise of the police power of the State, [but was] . . . an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . .").}

\footnote{163. See, e.g., Breed v. Jones, 421 U.S. 519 (1975) (prosecution of juvenile in adult court after adjudicatory proceeding involving same crime violated due process clauses of fifth and fourteenth amendments and minor's protection against double jeopardy); In re Winship, 397 U.S. 358, 359 (1970) (conviction of minor in family court based upon "preponderance of the evidence" burden of proof reversed; minors are entitled to same "beyond reasonable doubt" standard adults enjoyed as required by "the essentials of due process and fair treatment"); In re Gault, 387 U.S. 1, 13 (1967) (conviction of minor for adult crime reversed due to failure of juvenile court to provide notice to minor and his parents of charges brought against him and of his right to counsel; "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"); Kent v. United States, 383 U.S. 541 (1966) (indictment for robbery dismissed where juvenile court had waived jurisdiction in favor of adult court without granting minor hearing and representation by counsel). But see McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (Court refused to require states to provide juries in juvenile proceedings because this was one of few remaining distinguishing characteristics of juvenile, as opposed to adult, proceedings; Court refused to end "idealistic prospect of an intimate, informal protective proceeding"). See generally Note, Fourth Amendment Protection For the Juvenile Offender: State, Parent and The Best Interests of the Minor, 49 FORDHAM L. REV. 1140 (1981).}
that are especially harmful to minors, such as the sale of pornographic literature.\textsuperscript{164} When the challenged ordinance or statute is a non-emergency curfew, the question arises whether the nonemergency restriction, which would be unconstitutional if applied to adults, violates a minor's due process rights.\textsuperscript{165}

Two federal decisions have recognized that restrictive non-emergency curfew ordinances do infringe upon important constitutional rights of minors.\textsuperscript{166} In Bykofsky,\textsuperscript{167} a district court recognized

The Court has registered its dissatisfaction with the operations of the juvenile justice systems in the various states, noting that "studies . . . raise serious questions as to whether actual performance of the juvenile justice systems] measures well enough against theoretical purpose[s] [sic] to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults."  \textit{Kent}, 383 U.S. at 555. Justice Blackmun in a later opinion stated that the major causes of the systems' overall failures were communities' unwillingness to devote the time, concern and facilities necessary, and the lack of professional people and alternative delinquency prevention ideas. \textit{See McKeiver}, 403 U.S. at 544. \textit{See supra} note 14 for a discussion of Congress's opinion of the juvenile justice system's failure.

\textsuperscript{164} Ginsberg v. New York, 390 U.S. 629, 633 (1968) (state law making sale of pornographic materials to minors under seventeen with knowledge of minor's age illegal upheld as constitutional); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (defendant's conviction for violating state child labor law by allowing her nine year old niece to work with her selling religious literature in public streets upheld; however, in areas where societal evil such as child labor is not concerned, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

Where minors are not subject to harmful activities, it has been held that they have constitutional rights substantially coextensive with those of adults. \textit{See, e.g.}, Coss v. Lopez, 419 U.S. 565, 576 (1975) (state law allowing for public school's suspension of minor petitioners for ten days without hearing held to violate minors' due process rights, including their "liberty interest in reputation"); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (upheld minor's right to first amendment expression in wearing protest armband where no disruption to school activities resulted).

\textsuperscript{165} \textit{See Tribe, supra} note 93, at 1077-82. Constitutional problems are posed by the prevalence of "conclusive presumptions" that more restrictive legislation is justified when applied to youths merely because they are children. Professor Tribe suggests a middle ground between granting completely coextensive constitutional rights for children as adults and greatly limiting the rights of minors: "[C]onclusive presumptions need not be abandoned wholesale in order to concede that readily disprovable generalizations about children—like all other measures for which 'less restrictive alternatives' exist—cannot suffice to justify what would, absent the fact of childhood, constitute an action beyond the power of the state." \textit{Id.} at 1078.

\textsuperscript{166} \textit{See Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1253-55 (M.D. Pa. 1975), aff'd mem., 535 F.2d 1245 (3d Cir.), cert. denied, 429 U.S. 964 (1976); Johnson v. City of Opelousas, 658 F.2d 1065, 1072 (5th Cir. 1981). The Bykofsky court, however, decided that the constitutional rights infringed upon were not "fundamental". 401 F. Supp. at 1265. The Johnson court did not decide the issue of whether the rights infringed were "fundamental". 658 F.2d at 1072. At least one Supreme Court justice has suggested that some of the constitutional rights affected by a nonemergency juvenile curfew may be fundamental. See Doe v.
that the substantive right of freedom of movement is protected by the due process clause,\textsuperscript{168} and that a minor's presence on the street might constitute innocent activity.\textsuperscript{169} The court decided, however, that the state's asserted interests in "the protection of the younger children . . . the enforcement of parental control . . . the protection of the public . . . [and the] reduction in the incidence of juvenile criminal activity"\textsuperscript{170} outweigh the minor's liberty interests.\textsuperscript{171} Although the court admitted that it is "impossible to ascertain with scientific certainty"\textsuperscript{172} whether the curfew achieves its main goal of reducing juvenile delinquency, it concludes that since it does prevent "some"\textsuperscript{173} juvenile

\textsuperscript{168}Bolton, 410 U.S. 179, 209-12, 213 (1973) (Douglas, J., concurring) ("the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf . . ." is fundamental, and thus protected by due process clause from restrictions which are not necessary to support compelling state interest); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (acts of walking, wandering and strolling are referred to as "historically part of the amenities of life as we have known them"). See also In re Mosier, 59 Ohio Misc. 83, 99, 394 N.E.2d 368, 377 (C.P. Van Wert County 1978) (wandering, walking, loitering and strolling are "fundamental" rights unconstitutionally infringed upon by juvenile curfew) (citing Papachristou, supra notes 120-23 and accompanying text).

\textsuperscript{169}Id. at 1255 ("[n]o right is more sacred, or is more carefully guarded, by the liberty assurance of the due process clause than the right of every citizen to the possession and control of his own person, free from restraint or interference by the state").

\textsuperscript{170}Id. at 1254 (examples of innocent activities protected by the due process clause include "exercise, recreation, walking, standing, talking, socializing . . .").

\textsuperscript{171}Id. at 1255.

\textsuperscript{172}Id. at 1256.

\textsuperscript{173}See also Task Force On Juvenile Justice, supra note 8, at 24 (difficulty of measuring effectiveness of particular delinquency prevention program arises from task of proving that preventive actions "led to anticipated events not happening"); \textbf{Stott}, supra note 1, at 4-5 (mentions difficulty of measuring such important variables as parental affection and discipline, both of which can be vital factors in preventing delinquency). Another practical difficulty in determining whether a juvenile curfew reduces delinquency is caused by the fact that only a small portion of all reported crimes result in arrests. This makes it impossible to determine how many of the crimes not leading to an arrest were committed by juveniles. Telephone interview with Officer Hugh Donnelly, St. Louis Metropolitan Police Dep't, Director of Pub. Information (Jan. 24, 1984). See also Juvenile Curfews, supra note 60, at 112 n.14; \textbf{D. Gibbons}, Delinquent Behavior 52 (1981) (hidden or undetected delinquent acts occur on all social class levels, and it is important to realize that an "important number of serious delinquencies [are] enacted by juveniles who manage to stay out of the hands of the police or courts").

\textsuperscript{174}\textbf{Bykofsky}, 401 F. Supp. at 1256. In apparent contradistinction to its apologetic view towards the lack of verifiable proof of the curfew's effectiveness, the court had previously stated that the ordinance "makes a substantial contribution to the alleviation of nocturnal juvenile criminal activity." Id.
crime, there is a “rational relation between the end sought and the means chosen.”174

The Johnson175 decision examined the substantive due process issue raised by the nonemergency curfew in light of the subsequent Supreme Court decisions in Planned Parenthood of Missouri v. Danforth,176 Bellotti v. Baird,177 and Carey v. Population Services Interna-

The court’s opinion of the effectiveness of juvenile curfews in preventing delinquency has been challenged. See People v. Chambers, 66 Ill. 2d 36, 46, 360 N.E.2d 55, 59 (1976), rev’d, 32 Ill. App. 3d 444, 335 N.E.2d 612 (1975) (Goldenhersh, J., dissenting) (majority’s statistics showing general increase in juvenile crime are “interesting but are utterly without value insofar as the crucial question presented is concerned, i.e., how many of these offenses are committed [during the curfew period?]”); New Curfews, supra note 67, at B5, col. 3 (head of Trenton Police Department, Youth Division, challenging effectiveness of revised Trenton curfew, stated that more than 86% of crimes committed by juveniles in Trenton in first nine months of 1983 occurred before 10:00 p.m. curfew hour). See also Papachristou v. City of Jacksonville, 405 U.S. at 171 (crime prevention argument in favor of vagrancy ordinance is discredited; “[t]he implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment”). But see Nocturnal Juvenile Crime, supra note 19, at 95-97 (although stating belief that effective curfew could make “substantial contribution” to reducing delinquency, author also admits that “an accurate determination of the effectiveness of the curfew in achieving its objective is, as a practical matter, impossible to ascertain”).

174. Bykofsky, 401 F. Supp. at 1256. The Supreme Court denied petitioners’ application for a writ of certiorari after the court of appeals affirmed the curfew’s constitutionality. 429 U.S. 964 (1976). Three justices voted to hear the case, however. In a vigorous dissent, Justices Marshall and Brennan stated that because fundamental rights of minors were involved, the state had the burden of showing that the curfew was necessary for a compelling state interest. Id. at 965. The confusion in the lower courts as to whether juveniles share coextensive due process rights with adults in this area was considered a “substantial constitutional question” by the dissent. Id. at 965-66. See Ex Parte McCarver, 39 Tex. Crim. 448, 452, 46 S.W. 936, 937 (1898) (minors and adults have coequal rights of “ingress and egress,” rendering juvenile curfew unconstitutional; ordinance was “as rigid as military law”).


176. 428 U.S. 52 (1976) (provisions of state abortion regulation held unconstitutional, including requirement that minor seeking abortion must first obtain parental consent). See also M. Shapiro & R. Tresolini, AMERICAN CONSTITUTIONAL LAW 732-33 (5th ed. 1979) (authors predict that Danforth decision that minors have constitutional rights “as against their parents” will involve Supreme Court in future decisions concerning family discipline problems) (emphasis in original).

177. 443 U.S. 622 (1979) (state law requiring minor to obtain consent of both parents, or order of judge for “good cause shown” after consulting with parents, before having an abortion violates minor’s due process rights). The judgment of the Court suggested the requirements of a constitutional state abortion regulation applicable only to minors:

Every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to
The Johnson court applied an innovative intermediate scrutiny test which the Supreme Court had utilized for the first time act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion would nevertheless be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.

 ld. at 647-48.


178. 431 U.S. 678 (1977) (state law prohibiting sale of contraceptives except by licensed pharmacists to purchasers over sixteen years of age, found unconstitutional
in *Danforth*, stating that a nonemergency curfew would be valid against minors only if it serves a "significant state interest . . . that is not present in the case of an adult." The *Johnson* court utilized the analysis which had been used by a plurality of the Court in *Bellotti* to ascertain whether there is a different significant state interest supporting a nonemergency curfew ordinance specifically for minors. The court concluded that: (1) there is no "peculiar" vulnerability of children concerning the activities prohibited by the ordinance, such as returning from nighttime school activities; (2) the minor's decision to travel or engage in associational activities after the curfew hour is not a "critical" decision; and (3) the restriction on a minor's travel-

under due process clause. The plurality opinion of Justices Brennan, Marshall, Stewart and Blackmun applied the intermediate level of scrutiny that had been used by the Court in *Danforth*, that "[s]tate restrictions inhibiting privacy rights of minors are valid only if they 'serve any significant state interest . . . that is not present in the case of an adult.'" 431 U.S. at 693 (quoting *Danforth*, 428 U.S. 75). It is relevant that Justice Blackmun's plurality opinion placed the burden of presenting evidence of the alleged state interest, here the discouragement of premarital sexual activity, upon the state. In *Carey*, the state failed to show that such a restriction constituted "a rational means for the accomplishment of some significant state policy." 431 U.S. at 696 n.22. The *Carey* Court used an intermediate level of scrutiny when it considered the constitutionality of the state restriction, even though a minor's fundamental right of privacy was involved. This was justified by the Court based on its recognition of the greater state interest in regulating a minor's conduct. *Id.* at 693 n.15.

180. *Johnson*, 658 F.2d at 1073. The court explicitly recognized, however, the power of the state to place regulations on minors in some situations where it would be unconstitutional to place the same restrictions on adults. *Id.* at 1072. *See supra* note 164 for discussion of restriction of sale of pornographic materials to minors upheld in *Ginsberg*, 390 U.S. 629 (1968).
181. 443 U.S. at 634 (1979). The plurality opinion described three areas where a minor's constitutional rights may not be coextensive with rights enjoyed by adults: (1) where minors are particularly vulnerable; (2) where they are unable to make decisions in a mature manner; and (3) where the parental role in raising children is especially important. *Id.*
182. *See Johnson*, 658 F.2d at 1073-74. The *Johnson* court also noted the fact that the Supreme Court has not yet specified the standards which should be used when inquiring into the question whether minors share coextensive due process rights with adults in other areas. *Id.* at 1074.
183. *See Johnson*, 658 F.2d at 1073. The court contrasted the nonemergency curfew situation, where a juvenile is not particularly vulnerable, with the area of criminal procedure, where a minor is particularly vulnerable and entitled to a separate procedural system. *Id.* *See also* Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1043 (5th Cir. 1980), *remanded*, 455 U.S. 283 (1982) (circuit court found that minors were not subject to "special vulnerability" concerning alleged dangers involved in playing video games).
184. *Johnson*, 658 F.2d at 1073. The court compared the decisions required by a nocturnal curfew, such as whether to walk from nighttime school events, with those decisions of minors in the areas of abortions and peaceful expression of their political opinions, pursuant to their first amendment rights, and found that it would be
ing to and from these activities actually impedes parents in raising their children with minimal state interference. 185

The state courts that have considered the substantive due process questions raised by juvenile curfews often have based their constitutional conclusions on whether the particular ordinance had any substantial effect in achieving the purpose asserted. 186 These cases were unable to point to any statistical data to support their conclusions on the effectiveness of the curfews. 187

Illogical to protect the latter from undue restrictions, but not the former. Id. See also Aladdin’s, 630 F.2d at 1043 (similar comparison is made with regulations of minor’s rights to play video games).

185. Johnson, 658 F.2d at 1074. See also Aladdin’s Castle, 630 F.2d at 1043 (role of parents to decide whether their child can enter video game center was wrongfully assumed by city). The Aladdin court also makes the significant point that the ordinance’s requirement that a parent accompany the minor would, in practice, have placed an unreasonable burden on the parents. Id. at 1043. The same point was raised concerning the Newark and Trenton juvenile curfews by Deborah Karpatin, Esq., of the New Jersey American Civil Liberties Union. Telephone interview with Deborah Karpatin, Esq., New Jersey American Civil Liberties Union (Jan. 27, 1984). She pointed out that in many urban families where there are two working parents, or only one parent, the family often relies on the assistance of the older children in caring for the younger siblings. Thus, minors thirteen years of age and older may have significant adult responsibilities which necessitate going to the store or doing errands after the curfew hour. Parental accompaniment in such situations might also be unreasonably burdensome. Karpatin interview, supra.

186. A split exists among state jurisdictions. For cases finding that the juvenile curfew in question did not have a substantial effect on its stated purpose and was unconstitutional, see Alves v. Justice Court of Chico Judicial Dist., 148 Cal. App. 2d 419, 425, 306 P.2d 601, 605 (Cal. Dist. Ct. App. 1957) (“prohibition against the mere presence of a minor on a street or in a public place between the designated hours for a purpose other than required by his business, or unless accompanied by a parent or legal guardian, has [no] real or substantial relationship to the primary purpose of the statute”; “it therefore constitutes an unlawful invasion of personal rights . . . “); W. J. W. v. State, 356 So. 2d 48, 50 (Fla. Dist. Ct. App. 1978) (“prohibition against mere presence of a child . . . has [no] real relationship to the primary purpose of the statute . . . “); In re Mosier, 59 Ohio Misc. 83, 92-93, 394 N.E.2d 368, 374 (C.P. Van Wert County 1978) (quoting Alves, supra); City of Seattle v. Pullman, 82 Wash. 2d 794, 800, 514 P.2d 1059, 1063 (1973) (nonemergency curfew “bears no real or substantial relationship to the proclaimed governmental interest—the protection of minors”). But see In re Nancy C., 28 Cal. App. 3d 747, 758, 105 Cal. Rptr. 113, 121 (Cal. Ct. App. 1972) (juvenile curfew upheld; “[t]o forbid juveniles from loitering in the streets during nighttime hours has a real and substantial relationship to the dual goal of protection of children and the community . . . “); People v. Chambers, 66 Ill. 2d 36, 42, 360 N.E.2d 55, 57 (1976) (“[w]hen a child is at home during the late night and early morning hours, it is protected from physical as well as moral dangers”); City of Eastlake v. Ruggiero, 70 Ohio App. 2d 212, 215, 220 N.E.2d 126, 128 (Ohio Ct. App. 1966) (“curfew ordinances for minors are justified as necessary police regulations to control the presence of juveniles in public places at nighttime with the attendant risk of mischief”; “such ordinances promote the safety and good order of the community by reducing the incidence of juvenile criminal activity”).

187. See cases cited supra note 186.
Only two state cases have approached their review of the challenged juvenile curfew primarily as a substantive due process question and examined the issue of what level of judicial scrutiny to apply to the ordinance. In *Thistlewood v. Trial Magistrate*, the court considered three questions when evaluating the municipal curfew challenged by the arrested minors: (1) whether there is an evil creating a need for the juvenile curfew; (2) whether the means chosen has a "real and substantial relation" to the end sought; and (3) whether the juvenile curfew "unduly infringe[s] or oppress[es] fundamental rights." It appears that this due process analysis will produce the same result as the approach used by the *Johnson* court. Subsequently, in *In re Mosier*, a county court interpreted the *Thistlewood* analysis as being the equivalent of a "compelling interest" scrutiny, which, it concluded, must be applied by a court when reviewing a nonemergency juvenile curfew ordinance.

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188. 236 Md. 548, 204 A.2d 688 (1964).
189. Id. at 556, 204 A.2d at 693 (nonemergency juvenile curfew is "like any other which restricts the activity or conduct of individuals, adult or minors, [in that it] must not exceed the bounds of reasonableness").
190. See *Johnson*, 658 F.2d 1065 (5th Cir. 1981). Applying the *Thistlewood* test to the Opelousas curfew, the third question concerning the undue infringement would be answered in the affirmative, as the lack of exceptions for legitimate nighttime activity would render the curfew oppressive. Applying the *Johnson* due process analysis to the Ocean City curfew considered in *Thistlewood*, the fact that the curfew was limited to one particular weekend where nearly riotous misbehavior had occurred would likely constitute "a significant state interest" (quoting *Danforth*, 428 U.S. at 75, *supra* note 177), and render the curfew constitutional.
191. 59 Ohio Misc. 83, 394 N.E.2d 368 (C.P. Van Wert County 1978). The court posited three questions as part of its due process analysis of the challenged curfew: (1) what are a minor's constitutional rights; (2) what standard is to be used to test the ordinance's constitutionality; and (3) is the juvenile curfew valid under this test? Id. at 88, 394 N.E.2d at 371-72.
192. Id. at 93, 394 N.E.2d at 374. The court concluded that the Van Wert ordinance would also be unconstitutional under the substantive due process approach used by the *Thistlewood* court. Id.
193. Id. at 94-98, 394 N.E.2d at 374-76. The court viewed the Supreme Court decision of *In re Gault*, 387 U.S. 1 (1967), *supra* note 165, as the turning point in the expansion of the substantive due process rights of minors. Id. at 94, 394 N.E.2d at 374-75. The court rejected the reasoning of prior cases that failed to apply the "compelling interest" test. It also stated that the *Bykofsky* court, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976), would have found the Van Wert ordinance unconstitutional as well. Id. at 97, 394 N.E.2d at 376.
IV. An Alternative Proposal

The constitutional problems created by nonemergency juvenile curfew ordinances in the areas of overbreadth, void for vagueness, and infringement of substantive due process rights suggest two possible approaches on the political and judicial levels. First, after examining the past decisions dealing with juvenile curfews, one might conclude that a carefully drafted ordinance, such as the Middletown curfew considered in Bykofsky, which provides for a sufficient number of excepted activities, would withstand a constitutional challenge on the federal level. Thus, Johnson would be seen merely as a narrow statutory decision regarding a single, poorly drafted and overly restrictive juvenile curfew. In consideration of this view, model curfew ordinances have been proposed which closely resemble the Middletown and Trenton juvenile curfew ordinances.

194. See supra notes 93-134 and accompanying text for a discussion of the overbreadth doctrine.
195. See supra notes 135-58 and accompanying text for a discussion of the void-for-vagueness doctrine.
196. See supra notes 158-93 and accompanying text for a discussion of substantive due process and the liberty interests of minors.
199. See, e.g., Juvenile Curfew, supra note 60, at 152; Model Ordinance, supra note 37, at 7-400.1 to 400.4; 2A T. Matthews & B. Matthews, Municipal Ordinances 226, § 40.39 (2d ed. 1973). These proposals appear below in chart form, with the numbers listed in the "Exceptions" column representing the same situations as described in supra note 45.

<table>
<thead>
<tr>
<th>Proposal</th>
<th>Age: Less than . . .</th>
<th>Days-Times</th>
<th>Wording of Prohibition</th>
<th>Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juvenile Curfew</td>
<td>17</td>
<td>All: 11:00 p.m.-6:00 a.m.</td>
<td>&quot;to be in or upon&quot;</td>
<td>1+, 3+, 4, 5, 7</td>
</tr>
<tr>
<td>Model Ordinance</td>
<td>(none specified)</td>
<td>(none specified)</td>
<td>&quot;remain, idle wander, stroll or play&quot;</td>
<td>1+, 2, 3+, 4, 5</td>
</tr>
<tr>
<td>Matthews</td>
<td>12</td>
<td>All: 9:30 p.m.- (end not stated)</td>
<td>&quot;to be in or remain upon&quot;</td>
<td>1+, 4, 5</td>
</tr>
</tbody>
</table>

Chart compiled by author from sources cited supra.

200. See Bykofsky, 401 F. Supp. at 1266-73; supra note 111 and accompanying text.
201. Trenton Curfew, supra note 70 and accompanying text.
A second alternative approach proposed here suggests that consideration of recent Supreme Court decisions in other areas concerning the due process rights of minors\textsuperscript{202} and the invalidation of the juvenile curfew in \textit{Johnson}\textsuperscript{203} lead to the conclusion that even a carefully drafted nonemergency curfew ordinance, such as the Middletown or Trenton curfew, would fail to surmount the "significant state interest" scrutiny enunciated by the Court.\textsuperscript{204} The crucial balancing of the valid state interest in reducing delinquency against the recognized liberty interests of minors suggests that a minor who may have a significant level of maturity to decide whether to leave school, to marry or to have an abortion should also be allowed the constitutional freedom to decide when to begin or terminate his or her lawful public presence.

The problems of youth violence and gang activities, however, are harsh realities that cause great suffering and property loss in communities and create difficult law enforcement problems for local police forces.\textsuperscript{205} Where such activities proliferate in an urban area to a degree which endangers the health, safety and welfare of the city residents and creates an emergency situation, a local government which finds its police force inadequate to control the situation should be empowered to declare a state of emergency, prohibit certain activities and enact a temporary curfew.\textsuperscript{206} Such curfews should be the rare exception, however, and not standard municipal legislative practice.

This Note suggests that, in nonemergency situations, municipalities which find that a severe delinquency problem evades effective enforcement under existing ordinances should enact a "loitering-prowl-

\textsuperscript{202} See \textit{supra} notes 176-85 and accompanying text for a discussion of cases relating to the minors' substantive due process rights.

\textsuperscript{203} 658 F.2d 1065 (5th Cir. 1981).

\textsuperscript{204} See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 75 (1976); \textit{supra} note 176 and accompanying text.

\textsuperscript{205} Nighttime gatherings of youths have the potential to lead to the commission of delinquent acts. Telephone interview with Officer Slocombe, Los Angeles Police Dep't, Juvenile Div. (Jan. 23, 1984). See also \textit{supra} note 2 (discussion of juvenile crime statistics).

\textsuperscript{206} See, e.g., \textsc{A.L.R. Legal Forms, Municipal Corporations} 570-71, § 180:121 (Proclamation by mayor—State of emergency due to civil disturbance) (1973). The sample emergency curfew would also empower the mayor to temporarily prohibit the public from possessing licensed firearms or explosive materials or liquids in public and prohibit the sale or purchase of alcoholic beverages. \textit{Id.} See \textit{generally} \textit{Riot Curfew, supra}, note 30, at 453-66 (describing government procedures involved in exercise of emergency powers).
ing” type of ordinance applicable to minors and adults similar to a proposed Model Penal Code draft.\textsuperscript{207} Innocent activity and mere presence in public would not be punishable,\textsuperscript{208} but police officers, when observing individuals who seek to conceal themselves or some object, or who take flight, upon seeing the officer, in a manner that “warrants alarm,” would be permitted to approach such persons as potential violators of such an ordinance.\textsuperscript{209} The officer would then be required to allow the suspect to explain the observed conduct and

\begin{itemize}
  
  \item \textsuperscript{208} See supra notes 138-41 and accompanying text for a discussion of the ordinance considered in Papachristou, 402 U.S. 156 (1972). Unlike the vagrancy ordinance held to be unconstitutional due to vagueness in Papachristou, the Model Penal Code ordinance would allow a police officer to act on pre-arrest suspicion of a loitering violation only in three situations: (1) upon flight of a suspect; (2) upon attempted concealment after seeing the officer; or (3) after suspect’s refusal to identify himself. M.P.C., supra note 198, at 382. This Note proposes to eliminate this third cause of valid pre-arrest suspicion. See infra note 209. It is arguable that a reasonable person should be aware that his flight or attempted concealment upon seeing a police officer would raise the officer’s suspicion and justify his stopping that person. As the Model Penal Code Commentary suggests, “[i]f even the Model Code provision is unconstitutionally vague . . . then it seems likely that no general provision against loitering can be drafted to survive constitutional review.” M.P.C., supra note 207, at 396.
  
  The problem of arbitrary police enforcement mentioned in Papachristou would arguably be averted by the requirement that an officer must allow a pre-arrest suspect to dispel the alarm raised by his flight or concealment. If the officer refuses to believe the suspect’s explanation or identification, the subsequent proof at trial of the truth of the explanation will exonerate the accused loiterer. See infra note 209 and accompanying text.
  
  \item \textsuperscript{209} See M.P.C., supra note 207, at 382. The Model Penal Code draft includes a third situation which warrants the creation of alarm on the part of a police officer such as to arouse pre-arrest suspicion: where a person refuses to identify himself when approached by an officer, the officer may, after allowing the person the requisite opportunity to dispel the alarm, arrest the person for violating the curfew ordinance. Id. This Note proposes the exclusion of this provision. The failure of a person to identify himself when approached by an officer should not by itself create an “alarm ing” situation so as to justify an arrest, but instead should only allow the officer to “make such observations as would facilitate later identification of the suspect if a crime did take place,” id. at 389, or to continue surveillance to prevent a possible crime.
\end{itemize}
If the explanation given is not believed by the officer and an arrest is made, the person arrested can show his innocence by substantiating the truth of his explanation at trial. This would enhance law enforcement efforts to prevent crime, including juvenile delinquency, in a manner which upholds first amendment rights protected by the due process clause, without punishing individuals for innocent activity.

IV. Conclusion

Nonemergency juvenile curfew ordinances infringe upon the constitutionally protected liberty interests of minors even where they are carefully drafted to include exceptions for certain activities after the curfew period. Where such ordinances do not include these exceptions, they frequently have been found unconstitutional because protected first amendment activities are infringed upon by the overly broad curfew restriction, or because the curfew violates a minor's substantive due process rights. Municipal curfews should be enacted only in emergency situations and should not be used as a means of creating convenient law enforcement methods beyond existing penal sanctions against unlawful conduct. The serious problem of juvenile delinquency requires greater federal and state participation and financial support for improved programs specifically designed to pre-

The finding of criminal liability based on a person's refusal to identify himself to a law enforcement officer creates potential constitutional infringements of the fifth amendment's protection against self-incrimination. See Garner v. United States, 424 U.S. 648, 665 (1976) (petitioner's conviction under federal gambling statutes based in part upon his tax return occupation designation as "professional gambler" upheld notwithstanding claim that use of his statements violated fifth amendment protection against self-incrimination; Court found that because petitioner "made disclosures instead of claiming the privilege [of not designating his occupation] on his tax return, his disclosures were not compelled incriminations"); California v. Byers, 402 U.S. 424, 425, 434 (1971) (state "hit and run" statute, which required driver involved in accident to stop and identify himself, is constitutional despite respondent's claim that such requirement compels person to make self-incriminating statements contrary to fifth amendment). In Byers, the Court stressed that the person's identification does not in itself subject him to criminal liability, and that, although "identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence." 402 U.S. at 433-34. This situation can be distinguished from the third requirement of the Model Penal Code draft where a person would be subject to arrest merely from his refusal to identify himself to a police officer. M.P.C., supra, at 397-98.


211. Id.

212. See supra notes 93-134, 159-93 and accompanying text for a discussion of the overbreadth doctrine and substantive due process.
vent delinquency, and for general social programs aiming to improve the economic and emotional stability of families.\(^{213}\) Private agencies and religious organizations must make greater efforts to increase local participation in such programs. Juvenile curfew legislation should not utilize police action as a substitute for improved social welfare and crime prevention programs as means for reducing juvenile delinquency.

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\(^{213}\) See supra notes 9-18 and accompanying text for a discussion of delinquency prevention programs and state and federal legislation aiming to reduce juvenile delinquency.