JUVENILE CURFEWS AND THE MAJOR CONFUSION OVER MINOR RIGHTS

In 1976, the Supreme Court denied certiorari in *Bykofsky v. Borough of Middletown*,[1] the federal courts' first case involving juvenile curfews.[2] In the nearly three decades since, the federal circuits have fragmented over the constitutionality of such laws.[3] Justified on the basis that keeping children off the streets prevents them from engaging in crime or being victimized,[4] juvenile curfews forbid minors[5] to be in public at night except under special circumstances. Some argue that this restriction not only denies minors the basic freedom to be out at night with parental consent,[6] but also impinges on more fundamental aspects of liberty, such as political activism[7] and community involvement.[8] Given that juvenile curfews have become pervasive in recent years[9] and that they enjoy extraordinary popularity,[10] the stakeholders in the question of curfews' constitutionality are numerous indeed.

Faced with the overwhelming political popularity of juvenile curfews, advocates of minors' rights have attacked the ordinances in court, alleging that the freedoms they restrict are constitutionally protected rights.[11] The federal circuits are inconsistent on the proper

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[1] 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976).

[2] *See* 401 F. Supp. at 1245.

[3] *See* cases cited *infra* notes 12–13.

[4] *See, e.g.*, Qutb v. Strauss, 11 F.3d 488, 490–91 (5th Cir. 1993).

[5] This Note uses the terms "minor," "juvenile," and "child" interchangeably to designate a person under the age of eighteen, though some curfews have lower age cutoffs.

[6] *See, e.g.*, Schleifer v. City of Charlottesville, 159 F.3d 843, 846 (4th Cir. 1998) (noting plaintiffs' allegations that curfew forbade them to "attend[] late movies; get[] a 'bite to eat'; play[] in a band," and so forth, if those activities occurred after curfew and were performed unaccompanied by a parent or guardian).

[7] *See, e.g.*, Hodgkins v. Peterson, 355 F.3d 1048, 1055 (7th Cir. 2004) (expressing concern that curfews interfere with a minor's ability "to become a fully enfranchised member of democratic society"); *see also* Todd Kaminsky, *Rethinking Judicial Attitudes Toward Freedom of Association Challenges to Teen Curfews: The First Amendment Exception Explored*, 78 N.Y.U. L. REV. 2278, 2294–98 (2003) (arguing that juvenile curfews in the United States would inhibit youth movements such as the student uprising that culminated in the Tiananmen Square protests).

[8] *See, e.g.*, Nunez v. City of San Diego, 114 F.3d 935, 939 (9th Cir. 1997) ("Plaintiff minors allege, among other things, that the ordinance restricts them from . . . volunteering at a homeless shelter, attending concerts as a music critic, . . . [and] auditioning for theater parts . . . .").

[9] *See infra* p. 2403.

[10] One national poll showed 87% support for an 11 p.m. weekday juvenile curfew. ROPER CTR. FOR PUB. OPINION RESEARCH, CBS NEWS/N.Y. TIMES POLL (June 3, 1996) (Westlaw Poll Database, Question ID No. USCBSNYT.96JUN R077).

[11] *See, e.g.*, Calvin Massey, *Juvenile Curfews and Fundamental Rights Methodology*, 27 HASTINGS CONST. L.Q. 775, 796 (2000) (assailing the "implausible fiction that minors have less interest in their constitutional liberties" and insisting that minors have a full right of free movement). In addition to the Fifth and Fourteenth Amendment claims at the heart of this Note, some

treatment of these claims: not only do they disagree on exactly what freedoms are at issue and how fundamental they are,[12] but they also have applied varying levels of scrutiny — with different results — when determining whether those freedoms are unconstitutionally burdened.[13] Because even those circuits hostile to nonemergency juvenile curfews have not rejected them as inherently unconstitutional,[14] the question presented by this fractured doctrine is not *whether* juvenile curfews are constitutional, but rather, *what* juvenile curfews are constitutional.[15] The Fifth Circuit's 1993 ruling in *Qutb v. Strauss*,[16] which held that Dallas's juvenile curfew ordinance survived strict scrutiny, provided a model ordinance for other communities. Recently, however, that model has been threatened, particularly by the Second Circuit's decision in *Ramos v. Town of Vernon*,[17] which imposed high statistical requirements for justifying curfews.[18] Because the Supreme Court has never harmonized the circuits' discordant voices, it is difficult to hear any clear legal message.

This Note seeks to sort out the contradictory and confusing curfew doctrines enunciated by the federal circuits. It also demonstrates the weaknesses of the primary criticisms of juvenile curfews, particularly the claim that curfews should be subjected to rigorous statistical

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plaintiffs have asserted First Amendment claims that curfews interfere with minors' nocturnal political expression and association; challenges based on parents' rights to raise their children as they see fit; vagueness challenges; and Fourth Amendment challenges. *See, e.g.*, Ramos v. Town of Vernon, 353 F.3d 171, 173 (2d Cir. 2003).

[12] *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 539 (D.C. Cir. 1999) (en banc) (plurality opinion) (arguing that minors have no rights that are affected by curfews); Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) (holding that minors have qualified fundamental rights that are affected by curfews); *Nunez*, 114 F.3d at 945–46 (holding that minors have fundamental rights that are infringed by curfews).

[13] *See, e.g.*, *Hutchins*, 188 F.3d at 538 (plurality opinion) (rational basis scrutiny, curfew constitutional); *Schleifer*, 159 F.3d at 847 (intermediate scrutiny, curfew constitutional); *Ramos*, 353 F.3d at 186 (intermediate scrutiny, curfew unconstitutional); Qutb v. Strauss, 11 F.3d 488, 492, 495 (5th Cir. 1993) (presumed strict scrutiny, curfew constitutional); Nunez v. City of San Diego, 114 F.3d 935, 946, 952 (9th Cir. 1997) (strict scrutiny, curfew unconstitutional).

[14] *See, e.g.*, *Ramos*, 353 F.3d at 186 ("We do not intend by our holding to rule that the Equal Protection Clause prohibits the enactment of a juvenile curfew ordinance.").

[15] Some commentators, of course, persist in the argument that "[n]othing justifies the differential treatment of juveniles in the context of curfews, at least nothing that can withstand constitutional scrutiny." Tona Trollinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949, 996 (1996). No federal court of appeals has reasoned so broadly.

[16] 11 F.3d 488.

[17] 353 F.3d 171.

[18] *See id.* at 186 (potentially requiring municipalities to show not only that children are more likely than adults to commit crimes or be victimized, but also that the curfew hours are particularly dangerous). *See generally infra* Part IV. Additionally, the Seventh Circuit has placed new requirements on communities enacting curfews: it recently held that the traditional First Amendment curfew exception, *see infra* p. 2404, is insufficient. *See* Hodgkins v. Peterson, 355 F.3d 1048, 1062 (7th Cir. 2004) (holding that a curfew ordinance must require police to determine that no affirmative defense exists before making a stop).

analysis. Part I briefly describes both the history of juvenile curfews and the arguments traditionally raised in opposition to such ordinances. Part II looks at Supreme Court case law regarding the rights of minors, focusing on the seminal plurality opinion in *Bellotti v. Baird*[19] and the various ways that federal courts of appeals have understood that decision to affect equal protection analysis. Part III argues that despite the varying approaches of the circuits, the Dallas ordinance approved by the *Qutb* court remains a model curfew capable of surviving constitutional challenge in most circuits. Finally, Part IV considers the ways in which criticism of the statistical bases for juvenile curfews has played out in federal courts and argues that the Second Circuit's decision in *Ramos* is misguided.

I. THE JUVENILE CURFEW DEBATE

A. History

Juvenile curfews have deep historical roots.[20] By the end of the nineteenth century, curfews were fairly common in America — over three thousand communities had them[21] — and the arguments surrounding them had already fallen into the patterns that persist to this day. Those in favor of curfews argued that strict parenting and traditional families were in decay, particularly in cities: children were running amok, threatening social order, and failing to mature into proper citizens.[22] Those opposed to curfews replied that most juvenile crimes occurred in daylight hours, that most children were not criminals, and that many legitimate nocturnal activities were being suppressed.[23] Despite these concerns, curfews enjoyed substantial approval, particularly among progressives,[24] and were declared by President Benjamin Harrison to be "the most important municipal regulation for the protection of the children of American homes, from the vices of the street."[25] The popularity of juvenile curfews increased significantly during World

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[19] 443 U.S. 622 (1979) (plurality opinion).

[20] *See* Thistlewood v. Trial Magistrate, 204 A.2d 688, 690–91 (Md. 1964); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66, 66 n.5 (1958) [hereinafter *Curfew Ordinances*].

[21] Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 280 (1998/1999).

[22] *See Curfew Ordinances*, *supra* note 20, at 66 n.5.

[23] *See* Craig Hemmens & Katherine Bennett, *Juvenile Curfews and the Courts: Judicial Response to a Not-So-New Crime Control Strategy*, 45 CRIME & DELINQ. 99, 102 (1999); *see also Ex parte* McCarver, 46 S.W. 936, 937 (Tex. Crim. App. 1898).

[24] Hemmens & Bennett, *supra* note 21, at 280.

[25] *Id.* (internal quotation mark omitted).

War II, when the absence of parents due to military service or wartime late-shifts resulted in a perceived lack of control over children.[26]

In the 1990s, not long after federal courts began to develop case law on juvenile curfews,[27] juvenile victimization and crime rates seemed to explode across the country.[28] It is therefore not surprising that juvenile curfews were widely sought, with support crossing political[29] and racial[30] lines. Advocates viewed them as a necessary step toward saving America's imperiled youth and stopping epidemic juvenile crime,[31] though detractors charged that curfews were little more than "a cosmetic 'quick-fix' response to what is perceived to be a serious problem."[32] By 1995, 77% of cities with populations greater than 200,000 had some form of juvenile curfew, 60% of which were either enacted or enhanced after 1990.[33] The popularity of curfews was not limited to large cities: in 1995, 73% of cities of more than 100,000 had curfews, and by 1997, 80% of communities with populations greater than 30,000 had curfews.[34] Over the course of a century, America effectively closed the nighttime streets to minors.

B. The Typical Juvenile Curfew

Many current juvenile curfews are modeled after the Dallas curfew that survived strict scrutiny in *Qutb*.[35] Such curfews forbid unaccom-

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[26] *See Curfew Ordinances*, *supra* note 20, at 66 n.5.

[27] *See* Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1245, 1266 (M.D. Pa. 1975) (deciding "the first case to adjudicate the constitutionality of a nocturnal juvenile curfew ordinance" and upholding the ordinance).

[28] Juvenile arrests for violent crimes rose by 70% from 1989 to 1993, and "the number of juveniles falling prey to murder increased a dramatic 66% from 1985 to 1995." Brian Privor, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 420–21 (1999).

[29] *See* Hemmens & Bennett, *supra* note 21, at 272 (observing that both President Clinton and Senator Robert Dole supported curfews); Deirdre E. Norton, Note, *Why Criminalize Children? Looking Beyond the Express Policies Driving Juvenile Curfew Legislation*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 175, 175 n.1 (2000) (noting the same for then-Governor George W. Bush and Vice President Gore).

[30] In one poll, juvenile curfews enjoyed over 90% approval among Hispanics and African Americans. ROPER CTR. FOR PUB. OPINION RESEARCH, *supra* note 10. Indeed, the initial impetus for the statute at issue in *Qutb* came from a "coalition of African-American citizens [who] expressed fatigue with rampant juvenile crime . . . and demanded a curfew to ameliorate the blight." Trollinger, *supra* note 15, at 962.

[31] *See* Privor, *supra* note 28, at 420.

[32] Hemmens & Bennett, *supra* note 21, at 326.

[33] David McDowall, *Juvenile Curfew Laws and Their Influence on Crime*, FED. PROBATION, Dec. 2000, at 58, 58.

[34] *Id.*

[35] *See* Brian J. Lester, Comment, *Is It Too Late for Juvenile Curfews?* Qutb *Logic and the Constitution*, 25 HOFSTRA L. REV. 665, 697 (1996) ("After the *Qutb* decision, cities across the country enacted curfew ordinances mirroring the Dallas curfew ordinance."); *see also* Schleifer v. City of Charlottesville, 159 F.3d 843, 852 (4th Cir. 1998) ("The Charlottesville ordinance carefully

panied minors — those younger than seventeen or eighteen — from being in public spaces late at night, usually between 11 p.m. and 6 a.m. during the week, and midnight and 6 a.m. on weekends.[36] The curfews typically have exceptions for minors who are on the street due to emergency, work reasons, interstate travel, attendance of a sponsored event, participation in First Amendment activities, or an errand for a parent.[37] The stated rationales for juvenile curfews usually include reducing crime (particularly by disrupting the formation of gangs), protecting children, and increasing parental responsibility.[38]

C. Common Criticisms of Juvenile Curfews

Although juvenile curfews are extremely popular, they have also drawn significant criticism. Despite the fact that curfews enjoy strong support from minority communities, some fear that curfews are in fact either racist in intent or execution, or are at least unfairly burdensome to racial minorities.[39] Critics charge that juvenile curfews are modern analogues of slave curfews and World War II–era ethnic curfews.[40] Critics also argue that the poor suffer more under curfews than do the rich, given that confinement at home may be less burdensome when home is a large house with ample play-space and entertainment.[41] Some within poor minority communities, however, see the critics as outside meddlers who disparage curfews because they do not need the security that curfews provide.[42]

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mirrors the Dallas curfew ordinance that the Fifth Circuit found to satisfy strict scrutiny in *Qutb*." (citation omitted)).

[36] *See* Kaminsky, *supra* note 7, at 2285.

[37] *See, e.g.*, Qutb v. Strauss, 11 F.3d 488, 498 (5th Cir. 1993).

[38] *See, e.g.*, Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997).

[39] *See, e.g.*, Privor, *supra* note 28, at 462 (observing that "some courts may be only a small step away from accepting selective enforcement of effectively race-based curfews" and noting that during the first year of New Orleans's juvenile curfew, 93% of those arrested under the ordinance were African American); Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693, 1707 (1994) ("Once curfews are imposed, the burden falls disproportionately on minority individuals and communities.").

[40] *See, e.g.*, Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1318–19, 1340–44 (1995) (equating the status of antebellum African Americans to that of minors today in this regard); Norton, *supra* note 29, at 187–88 (making a similar argument regarding World War II ethnicity-based curfews). These critics reach this conclusion by "rejecting [moral or mental] capacity as an organizing principle" for the application of juvenile probation laws and instead focusing on "power." Federle, *supra*, at 1318. Of course, this justification depends on the rejection of the very capacity arguments the Supreme Court recently endorsed. *See* Roper v. Simmons, 124 S. Ct. 1183, 1195 (2005) (discussing juveniles' "underdeveloped sense of responsibility," vulnerability to peer pressure, and as-yet-unformed moral character (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

[41] *See, e.g.*, Norton, *supra* note 29, at 195.

[42] *See All Things Considered: Hartford Mandates Curfew* (NPR radio broadcast, Oct. 12, 1993) ("A lot of these folks that are [talking] about civil liberties, et cetera, don't live here . . . ." (statement of Michael Menatian, community organizer)).

Critics further have sought to attack juvenile curfews by demonstrating that the curfews are ineffective,[43] but these contentions are ultimately unconvincing. Although an article surveying the relevant studies reached the conclusion that "[juvenile] curfew laws have little potential to affect overall levels of crimes or victimizations involving young people,"[44] it acknowledged that at least one study had found a marked decrease in gang activity after a juvenile curfew was imposed[45] and that "many studies [found] that juvenile crimes often occur when groups of young people are away from home and adult supervision."[46] The article also presented a number of reasons to be skeptical of studies on the effectiveness of curfews, most notably the lack of a reliable control group against which to measure a curfew's success or failure.[47] Furthermore, as critics of curfews note whenever a drop in crime follows a curfew's enactment, there are always contributing factors that make proving a causal relationship difficult.[48] Short-term studies of juvenile curfews' effectiveness are misleading for a more fundamental reason as well: to the extent that the primary benefit of juvenile curfews is to prevent the formation of gangs, it may take years to see the full benefits. And although curfews may have little effect on those who already have become accustomed to late-night misdeeds, curfews can prevent younger children from developing those habits.[49]

Finally, critics argue that because many juvenile crimes occur during the day and most juvenile victimization occurs at home, nighttime curfews fail to target the worst problems.[50] Of course, these critics would never accept laws exiling children from home or forbidding them to be on the street during the day, because the critics' goal is not to maximize minors' security but rather to minimize juvenile curfews. Moreover, the attack ignores the fact that although more children may

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[43] *See* Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 525–26 (2000) (identifying ineffectiveness and inefficiency as classic grounds on which curfews are criticized).

[44] McDowall, *supra* note 33, at 61.

[45] *See id.*

[46] *Id.* at 59.

[47] *See id.* at 60.

[48] *See, e.g.*, Norton, *supra* note 29, at 194 (arguing that factors unrelated to the curfew were responsible for a drop in crime after a curfew's enactment).

[49] *See* Ramos v. Town of Vernon, 353 F.3d 171, 196 (2d Cir. 2003) (Winter, J., dissenting) ("It is often the late hours when young children are introduced to alcohol, cigarettes, or drugs, are first tempted to commit outrageous or unlawful acts, form embryonic and then growing gangs, develop violent animosities with peers, and generally get used to engaging in anti-social or even criminal behavior.").

[50] *See, e.g.*, Privor, *supra* note 28, at 470; Norton, *supra* note 29, at 194. This argument has swayed some judges. *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 566 (D.C. Cir. 1999) (Rogers, J., concurring in part and dissenting in part).

be harmed at home or during the day than are harmed on the streets at night, the social cost of denying home life or daytime freedom to minors is unacceptably high, while the cost of denying nighttime street life is comparably low. Cities have considered the victimization studies and have based their curfews on cost-benefit considerations.[51] For critics to attack this choice credibly, they would need to consider explicitly the significantly greater cost of curfews targeting home life and daytime freedoms.

It is hard to imagine unassailable proof of curfews' effectiveness or ineffectiveness. As a matter of policy, the evidence in favor of curfews may be too tenuous to justify enactment in light of their high enforcement costs.[52] But courts should not strike down curfews merely because they seem an inefficient use of social resources. Rather, the requisite proof of effectiveness is determined by the level of scrutiny courts apply when examining juvenile curfews, which in turn is determined by the strength of the rights asserted.

II. *BELLOTTI* AND THE RIGHTS OF CHILDREN

At the heart of juvenile curfew challenges is the assertion that minors have a constitutional right to be on the streets at night.[53] The Supreme Court has made clear that children have some sort of rights. In *In re Gault*,[54] the Court held that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[55] Likewise, in *Planned Parenthood of Central Missouri v. Danforth*,[56] the Court reasoned that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[57] On the other hand, the Court has indicated that the rights of minors are not equivalent to those of adults. In *Prince v. Massachusetts*,[58] for example, it held that "[t]he state's authority over children's activities is broader than over the like actions of

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[51] *Cf.* Schleifer v. City of Charlottesville, 159 F.3d 843, 850 (4th Cir. 1998) ("In exercising its legislative judgment, the City was forced to balance the law enforcement benefit[s] . . . against the greater law enforcement burden of doing so.").

[52] *See* McDowall, *supra* note 33, at 62.

[53] *See, e.g.*, sources cited *supra* notes 7–8. Although some plaintiffs have been quite successful in framing their curfew challenges as First Amendment claims, *see, e.g.*, Nunez v. City of San Diego, 114 F.3d 935, 951 (9th Cir. 1997), it is Fifth and Fourteenth Amendment claims that most directly implicate the rights of minors. Challenges also often include claims that curfews unconstitutionally restrict parents' discretion to raise their children as they see fit. *See, e.g.*, *Ramos*, 353 F.3d at 173. This Note focuses on the rights of children rather than the rights of their parents, and accordingly addresses parental claims only in passing.

[54] 387 U.S. 1 (1967).

[55] *Id.* at 13.

[56] 428 U.S. 52 (1976).

[57] *Id.* at 74.

[58] 321 U.S. 158 (1944).

adults,"[59] and in *Ginsberg v. New York*,[60] the Court upheld a state law that limited minors' access to pornography, even while acknowledging that such a law would have been unconstitutional if applied to adults.[61]

The Supreme Court consistently has denied certiorari in juvenile curfew cases,[62] leaving the federal circuits to fend for themselves in determining the appropriate level of scrutiny for adjudicating these claims. The circuits, predictably, have come to divergent conclusions. The Ninth Circuit found strict scrutiny appropriate.[63] The Fourth Circuit identified intermediate or heightened scrutiny as the appropriate level.[64] The Second Circuit adopted what seems to be a modified version of intermediate scrutiny.[65] Finally, a plurality of the D.C. Circuit reasoned that rational basis review was appropriate.[66]

The confusion in the circuits stems from their different approaches to minors' rights. Because age is not a suspect classification,[67] equal protection challenges to juvenile curfews must allege that the ordinances burden a fundamental right — the right of free movement.[68] To determine whether and to what extent minors have such a right, the circuits have looked to Supreme Court precedents, particularly to *Bellotti v. Baird*.

A. The Bellotti *Framework*

In 1979, the plurality opinion in *Bellotti* established a new guide for charting the uncertain territory of minors' rights. The *Bellotti* Court examined a statute that limited minors' access to abortions[69] and concluded that it was unconstitutional because it required parental consent and provided no judicial bypass for those cases in which a court determined the minor to be mature and fully competent.[70] More significant to this Note than Bellotti's holding was the plurality's dis-

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[59] *Id.* at 168.

[60] 390 U.S. 629 (1968).

[61] *See id.* at 633.

[62] *See, e.g.*, Schleifer v. City of Charlottesville, 526 U.S. 1018 (1999) (mem.) (denying certiorari); Qutb v. Bartlett, 511 U.S. 1127 (1994) (mem.) (same).

[63] *See* Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997).

[64] *See* Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998).

[65] *See* Ramos v. Town of Vernon, 353 F.3d 171, 178–81 (2d Cir. 2003); *see also infra* p. 2412 (summarizing the Second Circuit's analysis).

[66] *See* Hutchins v. District of Columbia, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (plurality opinion).

[67] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

[68] *See, e.g.*, *Ramos*, 353 F.3d at 176 ("[P]laintiffs argue that the curfew ordinance impinges on the exercise of the right to free movement . . . within the state and within one's own community." (internal quotation mark omitted)).

[69] Bellotti v. Baird, 443 U.S. 622, 624–26 (1979).

[70] *See id.* at 651.

cussion of children's constitutional rights. The plurality offered "three reasons justifying [its] conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[71] With regard to the second factor, the plurality emphasized that "minors often lack the experience, perspective, and judgment to . . . avoid choices that could be detrimental to them."[72]

Because the *Bellotti* plurality drew its three factors out of diverse cases involving the rights of minors and not merely out of cases pertaining to abortion rights,[73] the opinion potentially provides a framework for assessing all minors' rights claims. Thus, although some commentators and courts have argued that *Bellotti*'s logic is "troublesome outside of the particular setting of abortion rights,"[74] most federal courts have found the framework useful when considering the constitutionality of juvenile curfews.[75] The actual application of the *Bellotti* factors in challenges to juvenile curfews, however, has proven both contentious and inconsistent.

B. Applying Bellotti *to Juvenile Curfews*

Adult curfews have been held unconstitutional except in cases of emergency,[76] and therefore nonemergency juvenile curfews are permissible only if children have lesser rights than adults. Thus, applying *Bellotti* to juvenile curfews first requires an examination of the minors' asserted right of free movement. Although there is undeniably a right to interstate travel,[77] it is less clear whether there is a right to free movement within a state. The Supreme Court noted in dictum that "[f]reedom of movement [including that within state frontiers] is basic in our scheme of values,"[78] but it never has held that the right exists with respect to adults, let alone with respect to children.

Unsurprisingly, federal courts of appeals have struggled to articulate the right involved in juvenile curfew cases. At one extreme, the Ninth Circuit found that the right at issue is every citizen's fundamental right to free movement.[79] At the other extreme, a plurality of the

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[71] *Id.* at 634.

[72] *Id.* at 635.

[73] *See generally id.* at 634–39 (citing cases addressing criminal due process, the First Amendment, and parental rights).

[74] *E.g.*, Village of Deerfield v. Greenberg, 550 N.E.2d 12, 16 (Ill. App. Ct. 1990).

[75] *See* Federle, *supra* note 40, at 1337 ("Of the sixteen cases decided after 1979 that address the constitutional validity of juvenile curfew ordinances, twelve have cited to [*Bellotti*].").

[76] *See* Hemmens & Bennett, *supra* note 21, at 272–73.

[77] *See* United States v. Guest, 383 U.S. 745, 759 (1966).

[78] Kent v. Dulles, 357 U.S. 116, 126 (1958).

[79] *See* Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir. 1997).

D.C. Circuit in *Hutchins v. District of Columbia*[80] narrowly defined the asserted right as a minor's freedom "to be on the streets at night without adult supervision."[81] The Second Circuit criticized the *Hutchins* plurality for its excessively narrow definition, pointing out that the definition "incorporates two controversial elements: the class characteristic of plaintiffs — their age — and the specific manner in which they might exercise their freedom of movement — at night without supervision."[82] The court warned that a right too narrowly defined would by its nature never be found fundamental.[83] Instead, it found the right at issue to be "a minor's right to move about freely with parental consent."[84]

Because fundamental rights must be deeply rooted in the nation's history and tradition,[85] and because juvenile curfews have been widespread for the past century,[86] it is somewhat bizarre to claim that minors enjoy a strong right to move about freely. Courts clearly want to find some sort of right to be at issue — no circuit has rejected the existence of a right[87] — because rational basis review seems too cursory for something as significant as juvenile curfews.[88] Although starting from the desired level of scrutiny and then determining the weight of the right at issue inverts the normal analytical process, intermediate scrutiny does seem appropriate: it is well-suited for achieving the *Bellotti* Court's goal of taking a serious look at laws that single out juveniles. And surely the historical roots of a minor's right to move about at night are just as deep as those of a minor's right to have an abortion.[89]

Once a right has been identified, *Bellotti* provides a framework for determining whether its protection should be diminished for minors. For a juvenile curfew to withstand constitutional scrutiny under the *Bellotti* analysis, it must be possible to justify reducing the rights at

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[80] 188 F.3d 531 (D.C. Cir. 1999) (en banc) (plurality opinion).

[81] *Id.* at 538.

[82] Ramos v. Town of Vernon, 353 F.3d 171, 177 (2d Cir. 2003).

[83] *See id.* at 176; *cf.* Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003) (criticizing prior precedent's "failure to appreciate the extent of the liberty at stake" when it construed the challenge to a sodomy law as implicating only a "right to engage in consensual sodomy"). Nevertheless, the *Ramos* court itself integrated age and parental consent into its own definition of the right. *See* 353 F.3d at 176 n.3.

[84] *Ramos*, 353 F.3d at 176 n.3.

[85] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[86] *See supra* section I.A, pp. 2402–03.

[87] *See infra* section III.A, pp. 2413–16.

[88] *See, e.g.*, *Ramos*, 353 F.3d at 178; Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998); *see also* Chudy, *supra* note 43, at 574 (reasoning that because age is a semi-suspect class and the right of intrastate travel is quasi-fundamental, the two should combine to require intermediate scrutiny).

[89] *See* Bellotti v. Baird, 443 U.S. 622, 624–25 (1979).

issue for minors because of their "peculiar vulnerability[;] . . . their inability to make critical decisions in an informed, mature manner; [or] the importance of the parental role in child rearing."[90]

1. Bellotti *Factors.* — There are three prominent approaches to analyzing the first *Bellotti* factor, "the peculiar vulnerability of children." First, courts can look to *Prince v. Massachusetts*, in which the Supreme Court noted that "streets afford dangers for [children] not affecting adults,"[91] and accordingly take judicial notice of these special dangers.[92] Second, courts can demand that cities provide evidence showing that children face real danger on the nighttime streets.[93] Finally, courts can demand that cities demonstrate not only that children are at risk, but also that they are at greater risk than are adults.[94] Because the age-old, widespread intuition that children are at greater risk is almost impossible to prove,[95] the third approach's high demands would yield an unreasonable result. The first approach's conclusion, however, is overinclusive, as surely *some* streets are safe for children, even at night. Accordingly, the second approach seems most desirable.

The second *Bellotti* factor, children's "inability to make critical decisions in an informed, mature manner," has likewise prompted divergent interpretations. Some courts, focusing on the word "critical," have argued that a minor's decision to go out at night does not rise to the level of importance necessary to merit special consideration under *Bellotti*.[96] This viewpoint has received significant support from commentators critical of juvenile curfews.[97] Other courts have argued that, to the contrary, "[a]lone on the streets at night children face a series of dangerous and potentially life-shaping decisions," such as whether to buy drugs or join a gang.[98] Those who favor curfews often argue more generally that the focus on the word "critical" is misguided[99] because *Bellotti* itself elsewhere characterized these decisions as

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[90] *Id.* at 634.

[91] 321 U.S. 158, 169 (1944).

[92] *See, e.g.*, City of Seattle v. Pullman, 514 P.2d 1059, 1067 (Wash. 1973) (Hunter, J., dissenting) (proposing that the court "take judicial notice that children without purpose wandering about the streets at all hours of the night often leads to mischief to their detriment").

[93] *See, e.g.*, *Schleifer*, 159 F.3d at 849 (requiring that the City show evidence of "a real, not fanciful problem").

[94] *See, e.g.*, Ramos v. Town of Vernon, 353 F.3d 171, 186 (2d Cir. 2003) ("Significantly, the [evidence does] . . . *not* indicate that the school children . . . [are] any more likely than adults to be victims.").

[95] *See infra* pp. 2419–20.

[96] *See, e.g.*, Johnson v. City of Opelousas, 658 F.2d 1065, 1073 (5th Cir. Unit A Oct. 1981).

[97] *See, e.g.*, Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1177 (1984).

[98] *Schleifer*, 159 F.3d at 849.

[99] *See, e.g.*, Benjamin C. Sassé, Note, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 724–25 (2000) (arguing that *Bellotti* extends to more choices than just those considered "critical").

merely "choices that could be detrimental to [minors]."[100] A federal district court, taking this position, noted that "on an isolated night, a decision to go out after curfew hours may not be a critical decision, but rather one of minimal importance; but that decision, made night after night, might have an adverse effect on a child's life."[101] This argument, however, proves too much. Any decision — for example, to watch television rather than exercise, to ignore one's friends, not to do homework — ultimately may "have an adverse effect" when "made night after night." There at least ought to be some showing that the decision to go out at night is particularly detrimental.

Because this Note focuses on how juvenile curfew laws interrelate with the rights of children, it does not discuss the role of the third *Bellotti* factor, "the importance of the parental role in child rearing."[102] Nevertheless, this factor, too, can cut both ways.[103]

2. Judicial Application of Bellotti. — There are traditionally two divergent approaches to the appropriate use of the *Bellotti* factors in analyzing juvenile curfews. The first approach reasons that *Bellotti* determines the situations in which juveniles have lesser rights, so that when *Bellotti* factors are applicable, a lower standard of scrutiny is appropriate.[104] The second approach determines the applicable level of scrutiny independently of *Bellotti*, and then uses *Bellotti*'s factors as a framework for determining the strength of the state's interest. If the state can prove that its interest in the curfew relates to a relevant *Bellotti* factor, the interest will receive extra weight.[105] Generally, the former method indicates friendliness toward curfews, and the latter, hostility.

The second approach effectively renders the *Bellotti* analysis irrelevant in the context of juvenile curfews. The interests that the city would assert — protecting children from harm and protecting society from juvenile offenders — have been recognized as compelling by the Supreme Court.[106] Thus, the city's interests will suffice even under

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100 Bellotti v. Baird, 443 U.S. 622, 635 (1979).

101 Schleifer v. City of Charlottesville, 963 F. Supp. 534, 542 (W.D. Va. 1997).

102 Although this factor, per *Bellotti*, ostensibly relates to the rights of children, the posture of juvenile curfew cases has moved the factor into the *parental* rights analysis. Juvenile curfew challenges tend to be brought by parents who charge that the curfew undermines, rather than reinforces, their parental role.

103 *Compare* Nunez v. City of San Diego, 114 F.3d 935, 951–52 (9th Cir. 1997) (holding that a juvenile curfew interfered with parents' ability to raise their children as they see fit), *with* Hutchins v. District of Columbia, 188 F.3d 531, 545 (D.C. Cir. 1999) (en banc) (holding that a juvenile curfew "enhance[d] parental authority").

104 *See, e.g.*, *Hutchins*, 188 F.3d at 541.

105 *See, e.g.*, *Nunez*, 114 F.3d at 944–45.

106 *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982) (holding that "preserving and promoting the welfare of [children]" is a compelling interest); Schall v. Martin, 467 U.S. 253, 264 (1984) (hold-

strict scrutiny.[107] The levels of scrutiny are therefore relevant only in that the higher levels require a tighter fit between the asserted interest and the juvenile curfew ordinance: rational basis scrutiny merely requires a rational connection, intermediate scrutiny requires a substantial relationship, and strict scrutiny requires narrow tailoring. In the curfew context, the second approach therefore eliminates any special treatment of minors' rights.

In *Ramos v. Town of Vernon*, the Second Circuit established what seems to be a third approach. The court first used *Bellotti* to justify the use of intermediate rather than strict scrutiny, and then used it to heighten the requirements placed on the state.[108] Under this novel approach, the state's asserted interest must "address the vulnerabilities particular to minors," and the state's intended beneficiary must be children, not society in general.[109] Although the Second Circuit described this approach as "intermediate scrutiny,"[110] intermediate scrutiny normally does not demand that those burdened by a restriction also be its beneficiaries.[111]

Moreover, although the *Ramos* court purported to derive this new requirement from *Bellotti*, at least two *Bellotti* factors — the importance of parental control and the tendency of children to make bad decisions — do not necessarily require benefit to children. Parents who forbid their children to go out at night may do so for selfish reasons (for example, to have peace of mind), and the bad decisions that juvenile delinquents make (for example, to commit a violent crime) principally harm society, not the delinquents themselves.[112] In fact, it is far from clear that the statute at issue in *Bellotti*, which required a minor to obtain parental consent before having an abortion,[113] was enacted for the benefit of the young women considering the procedure. Although the law arguably was intended to protect pregnant minors, the lobbyists responsible for its passage may well have cared more about

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ing that the state's compelling interest in protecting society applies with respect to juvenile offenders as well as adult offenders).

[107] *See, e.g.*, *Nunez*, 114 F.3d at 947.

[108] *See* Ramos v. Town of Vernon, 353 F.3d 171, 179–80 (2d Cir. 2003).

[109] *See id.* at 180.

[110] *Id.*

[111] *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 770–71 (1977) (finding that under intermediate scrutiny, illegitimate children of men could be treated worse than both legitimate children and illegitimate children of women for purposes of intestate succession in order to protect the state's interest in "the orderly settlement of estates").

[112] One can argue, of course, that by preventing minors from hurting others, the government is in fact looking out for the minors' best interests. But this argument just shows the meaninglessness of the "true beneficiary" question: *any* restriction on minors can be described either as benevolent paternalism or as selfish oppression, and there likely will be evidence that both motives influenced the passage of the law.

[113] *See* Bellotti v. Baird, 443 U.S. 622, 625 (1979).

preserving unborn life and helping parents to monitor their children's sexual behavior. Because it is difficult to determine the intended beneficiaries from the law itself, the two-step process created by the *Ramos* court introduces arbitrary judicial discretion and a narrower focus to the *Bellotti* analysis.

Ultimately, however, the level of scrutiny applied has proven largely irrelevant. After the Fifth Circuit upheld Dallas's juvenile curfew under strict scrutiny, that curfew became a model for other municipalities.[114] Because the only other circuit to apply strict scrutiny also suggested that the Dallas model would pass muster,[115] the nominal level of scrutiny is therefore less important than the actual analysis of the courts. Accordingly, Part III provides a description of how various circuits have assessed juvenile curfews.

III. THE FEDERAL CIRCUITS' VARYING APPROACHES

A. Cases

The early history of juvenile curfews in the federal courts is reflected in three cases. In *Bykofsky v. Borough of Middletown*, the Middle District of Pennsylvania held that because minors had a diminished interest in being out at night, "legislation peculiarly applicable to minors is warranted for the protection of the public — e.g., to protect the community from youths aimlessly roaming the streets during the nighttime hours."[116] In *Johnson v. Opelousas*,[117] however, the Fifth Circuit struck down as overbroad a curfew similar to the one upheld in *Bykofsky* because the curfew provided no exception for minors attending religious or school meetings, sitting on their own sidewalks, going to or from their jobs, or engaging in interstate travel.[118] Twelve years later, in *Qutb v. Strauss*, the Fifth Circuit upheld a Dallas curfew designed precisely to address the concerns raised in *Johnson*.[119] The *Qutb* court ruled that the curfew ordinance would survive even under strict scrutiny, and accordingly declined to decide the appropriate level of review.[120] Because of *Qutb*'s strong holding, Dallas's curfew became the model used by most cities and the paradigm against which alternative ordinances were judged. The cases since *Qutb* have plotted an uncertain course.

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114 *See supra* section I.B, pp. 2403–04.
115 *See* Nunez v. City of San Diego, 114 F.3d 935, 948–49 (9th Cir. 1997).
116 401 F. Supp. 1242, 1256–57 (M.D. Pa. 1975).
117 658 F.2d 1065 (5th Cir. Unit A Oct. 1981).
118 *Id.* at 1071–72.
119 *See* Qutb v. Strauss, 11 F.3d 488, 494 (5th Cir. 1993).
120 *Id.* at 492.

1. Nunez v. City of San Diego.[121] — In *Nunez*, the Ninth Circuit struck down San Diego's juvenile curfew on both equal protection and First Amendment grounds.[122] The court applied strict scrutiny, reasoning that the curfew implicated fundamental rights and that *Bellotti* should be used to strengthen the state's interest, not to decrease the level of scrutiny.[123] Although San Diego had "established some nexus between the curfew and its compelling interest of reducing juvenile crime and victimization,"[124] the City's failure to adopt the *Qutb* exceptions, particularly the First Amendment exception, showed that the curfew was not as narrowly tailored as it could have been.[125] Accordingly, the curfew failed constitutional analysis.[126]

2. Schleifer v. City of Charlottesville.[127] — In *Schleifer*, the Fourth Circuit held that Charlottesville's juvenile curfew survived intermediate scrutiny.[128] The court reasoned that this standard was appropriate because although minors have certain liberty interests, these rights are less fundamental than those of adults.[129] Remarking that the "dispute about the desirability or ultimate efficacy of a curfew is a political debate, not a judicial one," the court noted that cities have the right to "not have their efforts at reducing juvenile violence shut down by a court before they even have a chance to make a difference."[130] Ultimately, the court upheld the ordinance, which was modeled after Dallas's curfew, demanding only that the "curfew . . . be shown to be a meaningful step towards solving a real, not fanciful problem."[131]

3. Hutchins v. District of Columbia. — In *Hutchins*, the D.C. Circuit, sitting en banc, upheld the District's juvenile curfew,[132] which was almost identical to Dallas's curfew.[133] A plurality of the circuit found rational basis review appropriate because "juveniles do not have a fundamental right to be on the streets at night without adult supervision."[134] Applying the first approach to *Bellotti*,[135] a majority of the court agreed that no more than intermediate scrutiny was required: "[*Bellotti*] means, at a minimum, that a lesser degree of scrutiny is ap-

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121 114 F.3d 935 (9th Cir. 1997).
122 *See id.* at 948–49, 951.
123 *See id.* at 945.
124 *Id.* at 948.
125 *See id.* at 948–51.
126 *Id.* at 952.
127 159 F.3d 843 (4th Cir. 1998).
128 *Id.* at 847.
129 *See id.*
130 *Id.* at 850.
131 *Id.* at 849.
132 Hutchins v. District of Columbia, 188 F.3d 531, 547 (D.C. Cir. 1999) (en banc).
133 *Id.* at 544.
134 *Id.* at 538 (plurality opinion).
135 *See supra* p. 2411.

propriate when evaluating restrictions on minors' activities where their unique vulnerability, immaturity, and need for parental guidance warrant increased state oversight."[136] The court held that the District had demonstrated that its "important government interest" in "protecting the welfare of minors" was sufficient to withstand such scrutiny in light of the "reams of evidence depicting the devastating impact of juvenile crime and victimization in the District."[137]

4. Ramos v. Town of Vernon. — In *Ramos*, the Second Circuit likewise applied intermediate scrutiny, rejecting rational basis review because intermediate scrutiny "allows for a more discerning inquiry to accommodate competing interests,"[138] and rejecting strict scrutiny because "[y]outh-blindness is not a constitutional goal."[139] Under the *Ramos* court's conception of intermediate scrutiny, a curfew is more likely to pass constitutional muster "[i]f the direct and primary beneficiaries are children," which Vernon failed to prove.[140] The court emphasized that communities must rely on reasoned analysis and "careful study of the problem"[141] rather than on "stereotypes and assumptions about young people."[142] Vernon had not done so, and its curfew therefore failed intermediate scrutiny.[143]

5. Hodgkins v. Peterson.[144] — In *Hodgkins*, the Seventh Circuit held that Indianapolis's juvenile curfew violated minors' First Amendment rights.[145] Although the curfew pursued significant governmental purposes[146] and had a First Amendment exception, the court held that the ordinance was not narrowly tailored and failed to allow alternative channels for expression.[147] The court feared that minors would be stopped and possibly arrested before they were able to prove that their activities fell within the First Amendment exception,[148] and that this risk would chill nighttime expressive activity.[149] A curfew that "specifie[d] that a law enforcement official must look

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136 *Hutchins*, 188 F.3d at 541.
137 *Id.* at 542.
138 Ramos v. Town of Vernon, 353 F.3d 171, 178 (2d Cir. 2003).
139 *Id.* at 180.
140 *See id.*
141 *Id.* at 185–86.
142 *Id.* at 181.
143 *See id.*
144 355 F.3d 1048 (7th Cir. 2004).
145 *Id.* at 1064.
146 *Id.* at 1059.
147 *See id.* at 1064. A First Amendment exception in a juvenile curfew law usually suffices to cure First Amendment infirmity. *See, e.g.*, Qutb v. Strauss, 11 F.3d 488, 494 (5th Cir. 1993).
148 *See Hodgkins*, 355 F.3d at 1053.
149 *Id.* at 1063.

into whether an affirmative defense applies before making an arrest" could pass muster, but Indianapolis's did not.[150]

B. The Enduring Dallas Model

The outcomes of these cases indicate that, despite significant disagreement among the circuits regarding the appropriate level of scrutiny, the Dallas model remains effective, having survived challenges in *Schleifer* and *Hutchins*. Likewise, the curfew in *Nunez* failed at least in part because "San Diego rejected a proposal to tailor the ordinance more narrowly by adopting the broader exceptions used in the ordinance upheld in *Qutb*."[151] Although a model ordinance failed scrutiny in *Hodgkins*, this case represents an outlier in its First Amendment concerns. Thus, of greatest significance is *Ramos*, in which a curfew modeled after *Qutb* failed. The *Ramos* court purported to base its equal protection decision on the weakness of the Town's evidence in support of its curfew, particularly on the Town's failure to present statistical evidence about local youth victimization and juvenile delinquency.[152] For *Ramos* to make sense within the larger framework of precedent regarding juvenile curfews, then, the evidence offered by the Vernon must have differed in a meaningful way from that offered by Dallas, Charlottesville, and San Diego. As Part IV discusses, however, the evidence offered by those cities was not meaningfully different from that offered by Vernon and hence logically would not have satisfied the *Ramos* court.

IV. PROVING MINORS' VULNERABILITY AND POOR JUDGMENT

Under the *Bellotti* framework, when concerns about the parental role are absent, children's rights cannot be diminished without a showing of "peculiar vulnerability" or of an "inability to make critical decisions in an informed, mature manner."[153] Unless a court is willing entirely to take judicial notice of the dangers and temptations that nighttime streets pose to minors, cities must provide evidence of juvenile crime and victimization to support their juvenile curfews.[154] Traditionally, courts have accepted simply a showing that many children are victimized and commit crimes — even, in some cases, when applying strict scrutiny.[155] The Second Circuit, in *Ramos*, rejected Vernon's

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150 *Id.* at 1061.

151 Nunez v. City of San Diego, 114 F.3d 935, 948–49 (9th Cir. 1997).

152 *See* Ramos v. Town of Vernon, 353 F.3d 171, 184–87 (2d Cir. 2003).

153 *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).

154 *See supra* p. 2410.

155 *See, e.g.*, Schleifer v. City of Charlottesville, 159 F.3d 843, 848–49 (4th Cir. 1998) (intermediate scrutiny); *Nunez*, 114 F.3d at 947–48 (strict scrutiny); Qutb v. Strauss, 11 F.3d 488, 493 & n.7 (5th Cir. 1993) (presumed strict scrutiny).

fairly weak evidentiary showing[156] and at least turned the kind of showings made in the other cases into minimum requirements. *Ramos* also may be read as demanding proof that children are *particularly* likely to commit crimes or be victimized and that curfew hours are *particularly* dangerous.[157] This more expansive construction, which is consistent with the academic criticism that curfews are ineffective,[158] is both novel and troubling.

A. Ramos*'s Novel Approach*

Traditionally, circuit courts have found that evidence that minors commit crimes and are victimized demonstrates a sufficient means-ends fit between juvenile curfews and the state's interest in preventing crime and protecting children. In *Qutb*, the Fifth Circuit, although it assumed the applicability of strict scrutiny, did not demand "precise data concerning the number of juveniles who commit crimes during the curfew hours, or the number of juvenile victims of crimes committed during the curfew."[159] Instead, it accepted statistics showing that "[j]uvenile crime increases proportionally with age between ten years old and sixteen years old," that there had been several thousand juveniles arrested in Dallas in the preceding years, and that some types of crimes occurred most often at night and that others occurred mostly on the streets.[160] In *Schleifer*, the Fourth Circuit accepted as sufficient nationwide data on increased juvenile crime and recidivism, supported by expert testimony that the same trends "were reflected in Charlottesville," and coupled with the testimony of two police officers "that the children they observe on the street are at special risk of harm."[161] In *Nunez*, the City offered nationwide crime data, supplemented by somewhat contradictory local statistics that provided "some, but not overwhelming, support" for the curfew, but ultimately failed to show "that the nocturnal, juvenile curfew is a particularly effective means of achieving [a] reduction [in juvenile crime and victimization]."[162] Nevertheless, even under strict scrutiny, the Ninth Circuit found the evidence sufficient.[163]

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156 The city council considered only personal accounts of youth "gathering on the streets" and local concerns about increased gang violence. *See Ramos*, 353 F.3d at 184–87.

157 *See id.* at 186 ("[N]o effort seems to have been made by the town to ensure that the population targeted by the ordinance represented that part of the population causing trouble or . . . being victimized . . . .").

158 *See supra* section I.C, pp. 2404–06.

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

160 *See id.*

161 Schleifer v. City of Charlottesville, 159 F.3d 843, 848 (4th Cir. 1998).

162 *See* Nunez v. City of San Diego, 114 F.3d 935, 947–48 (9th Cir. 1997).

163 *See id.* at 948. The Ninth Circuit went on, however, to strike down the curfew for failing to have sufficient exceptions. *See id.* at 948–49.

In *Ramos*, the Town of Vernon relied upon police and citizen observations of increased numbers of youths idling in public and increased youth gang activity, data gathered by other municipalities, and a survey in which local children had expressed concern about juvenile violence.[164] According to the Second Circuit, however, this did not satisfy intermediate scrutiny.[165] Ultimately, the crux of the Second Circuit's critique was that Vernon had failed to show both that most juvenile crimes were being committed at night and on the streets,[166] and that "schoolchildren themselves [were] the source of the problem or any *more likely than adults* to be victims."[167]

Ramos is susceptible to a modest reading and a radical reading. The modest reading treats the opinion's rhetoric as inflated and assumes that Vernon's failings were that it apparently offered no concrete evidence of local juvenile crime and that it proved only one case of juvenile victimization, which occurred at home.[168] This modest reading, which is consistent with the other circuits' case law, requires only that communities show evidence that minors are vulnerable and make bad decisions. After that, judicial notice is taken that children are more vulnerable, more likely to make bad decisions, and more likely to fall prey to the nighttime dangers. Even applying strict scrutiny, the Ninth Circuit did exactly this, stating its independent "conclusion that minors have a special vulnerability to the dangers of the streets at night."[169]

The radical reading takes seriously *Ramos*'s rhetoric that courts cannot rely on "stereotypes and assumptions" about the vulnerability of minors.[170] Under the radical reading, Vernon's curfew would not have survived even if the Town had shown that children were occasional vandals, thieves, assailants, and victims. Rather, the Town would have needed to show that minors were more likely than adults to be victims or perpetrators of crime and that the streets were more dangerous by night than by day.[171] Such a requirement would be a

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164 *See* Ramos v. Town of Vernon, 353 F.3d 171, 184–85 (2d Cir. 2003).

165 *See id.* at 186.

166 *See id.*

167 *Id.* (emphasis added).

168 *See id.* On the other hand, the Second Circuit acknowledged that cities did not "need to bide their time waiting for unspeakable tragedies to befall them before responding with legislation." *Id.*

169 Nunez v. City of San Diego, 114 F.3d 935, 948 (9th Cir. 1997). Other circuits have done likewise. *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 543 (D.C. Cir. 1999) (en banc) ("[C]ommon sense tells us that younger children will surely be more vulnerable."). In fact, the Ninth Circuit did so despite statistical evidence showing that juvenile crime had *increased* relative to the general crime rate after San Diego enacted its curfew. *See Nunez*, 114 F.3d at 947.

170 *Ramos*, 353 F.3d at 181.

171 *See id.* at 186.

significant and troubling departure from the course taken by the other circuits.

B. Relative Danger Is Impossible To Prove

The most significant problem with the *Ramos* court's approach to evidence is that municipalities likely will not be able to prove either that minors are more vulnerable or that they are more likely to make bad choices than are adults. This is not because children are in fact less vulnerable or less reckless, but rather because evidence to prove the proposition is almost impossible to gather. For example, how can a city prove that children are more vulnerable to harm on nighttime streets? First, it could try to prove that children are victimized more often by comparing victimization rates of minors and adults. But what would these rates be? If they were simply minor victims divided by minors and adult victims divided by adults, then surely adults would have a higher victimization rate — more adults will be victimized because many more adults are on the streets at night. After all, many parents restrict their children's freedom even if the state does not, and many children will not go out regardless.[172] So the denominator would need to be the number of minors or adults on the street. But such figures are obviously very difficult to come by.[173]

Even if the rate could be calculated, it would still reveal little about whether children are *harmed* more than adults are when they are victimized — an assumption that surely underlies juvenile curfews. So it would be necessary to introduce an expert to testify that those covered by the curfew were likely to suffer more harm than those not covered.[174] Assume, as seems fair, that such testimony could be elicited.[175] What is the court to do next? If numerical values could be assigned to "harm," it would be possible to multiply victimization rate by harm

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[172] *Cf.* Schleifer v. City of Charlottesville, 159 F.3d 843, 850 (4th Cir. 1998) (noting the City's argument that juvenile crime statistics were skewed by existing curfews among the data set).

[173] There may also be significant difficulty in determining the numerator — the number of minors and adults victimized. Vernon, for example, did not keep records of victims' ages. *Ramos*, 353 F.3d at 185. Even with such records, there may be reason to fear underreporting by minors.

[174] It is unclear, however, who "those not covered" would be. Would the proper comparison class be all adults? If a curfew covered juveniles up to sixteen years old, would the appropriate comparison be between sixteen-year-olds and seventeen-year-olds? *Cf. Schleifer*, 159 F.3d at 849–50 (rejecting the plaintiffs' contention that "the exclusion of seventeen-year-olds from the curfew is a fatal flaw in the ordinance . . . [because] this group is responsible for one-third of all crimes committed by juveniles . . . [and therefore their] exclusion renders the ordinance impermissibly underinclusive").

[175] Whether such testimony would need to be based on studies of the town's own minors, rather than minors generally, is unclear. *Cf. Ramos*, 353 F.3d at 185 ("[I]t is not enough . . . to recite interests that have been used to support curfew ordinances in other municipalities."). Likewise, it might be necessary to update such studies continuously in order to reflect the current juveniles affected.

and compare the products to determine which group was more "vulnerable." But no such numbers exist. And so the court would be left making a policy decision of the sort best left to the political branches.[176]

Even if a state or large city could afford the costs of such studies, the Town of Vernon probably could not. Moreover, under *Ramos*, Vernon would not be able to rely on studies commissioned by other cities: "[I]t is not enough for defendants to recite interests that have been used to support curfew ordinances in other municipalities."[177] Accordingly, the radical reading of *Ramos* effectively would bar many communities from enacting juvenile curfews.

The radical reading of *Ramos* also produces troubling consequences in other areas of age-based laws. Consider, for example, laws forbidding young children to marry. Under the *Ramos* rule, it would be necessary to show that children were particularly vulnerable to abuse and coercion, or particularly likely to divorce, or particularly likely to be traumatized by intercourse or some other incident of marriage. It would be very difficult for any state, especially one that has long outlawed such marriages, to prove such contentions. The only "marriages" involving children would be outlaw unions, and so at most the state could show that children illegally married were more likely to suffer than adults legally married. This, of course, would be a fallacious comparison. And even if data existed, what would the appropriate comparison classes be? If the law forbade children under the age of sixteen to marry, would it be necessary for the state to prove that fifteen-year-olds were at greater risk than sixteen-year-olds?[178]

Not only would such high demands be unfair to municipalities, they also would defy precedent. As a doctrinal matter, the Constitution does not demand scientific or statistical certainty of legislatures. In *Ginsberg v. New York*, one of the precedents relied upon by *Bellotti*,[179] the Supreme Court upheld a statute limiting minors' access to pornography, even while admitting that "[i]t is very doubtful that this finding [of danger to minors] is an accepted scientific fact."[180] Equally

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[176] *See Schleifer*, 159 F.3d at 850.

[177] *Ramos*, 353 F.3d at 185. Here, again, the Second Circuit seems to have ignored the Supreme Court's limited guidance. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 51–52 (1986) (holding that under intermediate scrutiny in the First Amendment context, a city may rely on outside statistics "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

[178] *Cf. supra* note 174.

[179] *See* Bellotti v. Baird, 443 U.S. 622, 636 (1979) (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)).

[180] *Ginsberg*, 390 U.S. at 641. *Contra* Craig v. Boren, 429 U.S. 190, 200–03 (1976) (stating in dictum that extensive but inconclusive statistics "hardly can be viewed as impressive in justifying . . . [an] age classification").

telling is the fact that the Second Circuit, purporting to apply intermediate scrutiny, seemed to demand a much tighter means-ends fit than the Fifth and Ninth Circuits did when applying strict scrutiny in *Qutb* and *Nunez*.

Given the dramatic consequences of the radical reading of *Ramos*, it may be best to assume that the Second Circuit did not intend to go so far. The best reading may be that the *Ramos* court was shocked by the lack of concrete evidence proffered by the Town and simply spoke too strongly. Seeking to prevent rash decisionmaking, the court attempted to ensure that cities engage in some type of formal study of the problem of youth crime and victimization.[181] Accordingly, the *Ramos* court's real concern was not whether the evidence supplied demonstrates that children are more vulnerable or that nighttime is more dangerous, but rather whether careful study, not panic, drove the city council's decision. Read this way, *Ramos* is novel, but unremarkable — future towns and cities defending their curfews simply must produce a report that looks official and deliberative. Although this may impose significant expenses on smaller municipalities, the cost likely will not be unbearable.

V. CONCLUSION

Juvenile curfews are widespread and widely supported, and it is unlikely that the academic criticisms discussed in Part I will sway public opinion sufficiently for the political process to eliminate them. Thus, courts likely will remain the primary vehicle for challenging these ordinances. Although it is possible to create some coherence in the doctrine by focusing on the Dallas ordinance at issue in *Qutb*, the circuits remain undeniably split on the constitutionality of juvenile curfews. The split involves wildly varying standards of review, significant disagreement over the rights at issue, and dramatic differences in the way in which cities must prove the need for a curfew. Such a serious circuit split on such widespread legislation deserves attention by the Supreme Court. The Court should take up the challenge raised by Justice Marshall in response to *Bykofsky v. Borough of Middletown* and determine the answer to this "substantial constitutional question . . . of importance to thousands of towns."[182]

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[181] *See Ramos*, 353 F.3d at 186–87.

[182] Bykofsky v. Borough of Middletown, 429 U.S. 964, 965 (1976) (Marshall, J., dissenting from denial of certiorari).