YOUTH CURFEWS AND THE TRILOGY OF PARENT, CHILD, AND STATE RELATIONS

GREGORY Z. CHEN*

INTRODUCTION

In 1923, Justice McReynolds, writing for the Supreme Court in *Meyer v. Nebraska*,[1] noted that the state's involvement in the development and upbringing of minors extended deep into the history of Western civilization: "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians."[2] Employing this example of ancient history primarily as an heuristic device, Justice McReynolds declared that the society and government of Sparta were "wholly different from those upon which our institutions rest"[3]—the critical difference being the two societies' divergent conceptions of the relation between the individual and the state.[4] The United States Constitution, he concluded, barred restrictions as severe as those used in Sparta.[5]

Justice McReynolds's assessment, while made in reference to Nebraska's compulsory education laws, provides the ideal starting point for a discussion of youth curfew laws. The current controversy surrounding youth curfews in American cities also must be understood in terms of the relationship between the state and the individual. During the past forty years, local and state legislative bodies have passed curfews in more than seventy-five percent of U.S. cities with populations over 100,000.[6] As quickly as lawmakers have enacted youth curfews, children, their parents, and constitutional rights advocates have challenged the laws on the grounds that they represent an unjustifiable

* I would like to thank Christopher Eisgruber, Martin Guggenheim, Randy Hertz, Amy Schmidt Jones, Joanne Lin, William Nelson, Eric Stone, and John Sullivan for their thoughtful critiques and assistance in the development of this Note.

1 262 U.S. 390 (1923).

2 Id. at 402.

3 Id.

4 See id.

5 See id.

6 See William Ruefle, Catching Curfew Fever: Youth Curfews Without Social and Anti-Crime Programs Are Useless, Pitt. Post-Gazette, Oct. 25, 1995, at A17, available in LEXIS, News Library, PITTPG file. In just the last five years, over 95% of these major cities, including San Francisco, Austin, and Washington, D.C., either enacted a new curfew or revised an existing one. See id.

state infringement of individual rights.[7] The case law these challenges have generated, however, has failed to define a clear set of principles for evaluating youth curfews. Courts ruling on curfews have split on both the constitutionality of these laws and the applicable legal standards.[8]

The confusion in youth curfew jurisprudence arises from the absence of a unified legal framework that would enable courts to analyze the relevant relationships among state, parent,[9] and child. One problem with courts' past treatment of youth curfews is their lack of emphasis on the parent's role. Rather than incorporating the parent into their analysis, courts approach curfew cases primarily as conflicts between the state and the minor.[10] For example, a curfew preventing a sixteen-year-old from taking a late-night stroll restricts the minor's freedom of movement. Were the sixteen-year-old to challenge the law, the court would examine the fundamental rights of the minor in relation to the state's interests in curtailing the particular activity.

This straightforward balancing of state interests against individual rights is complicated by the state's unique custodial purposes for enacting youth curfews.[11] Unlike most criminal laws, curfews on minors serve two state interests: crime prevention (in this case juvenile crime) and protection of minors from crime. This second purpose originates from the state's custodial interest in ensuring the welfare

---

[7] Since 1990, at least 11 youth curfew laws have been challenged. See infra notes 119-20, 134, 149, 157 and accompanying text. Washington, D.C., in particular, has been a hotbed of controversy over youth curfews. In 1989, the federal court in Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989), struck down the city's 1989 curfew. See Temporary Curfew Emergency Act of 1989, D.C. Act 8-325, cited in and found unconstitutional by *Waters*, 711 F. Supp. at 1125 app. A. On June 20, 1995, the District of Columbia Council passed a modified version of the 1989 curfew. See Juvenile Curfew Act of 1995, D.C. Code Ann. § 6-2181 to -2183 (1995). In Hutchins v. District of Columbia, 942 F. Supp. 665 (D.D.C. 1996), the federal district court struck down the 1995 curfew. See id. at 668.

In 1993, San Diego began enforcing its longstanding curfew, which is now the subject of a challenge by the ACLU. See Linda Feldmann, Cities Adopt Curfews, but Impact on Crime Is Debated, Christian Sci. Monitor, Jan. 4, 1996, at 1.

[8] For commentary noting this inconsistent treatment, see, e.g., Susan M. Horowitz, A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances, 24 Colum. J.L. & Soc. Probs. 381 (1991) (critiquing constitutional standards for review of curfew ordinances); Note, Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution, 97 Harv. L. Rev. 1163 (1984) (discussing constitutionality of youth curfew laws and criticizing courts for failing to articulate specific rationales for upholding such laws).

[9] Throughout this Note, the term "parent" is frequently referred to in the singular to make clear that it represents the child's formal legal guardian as viewed in relation to the state. For these purposes, "parent" may encompass single parents, dual or multiple parents, male or female parents, grandparents, and other individuals who serve as a child's formal legal guardian.

[10] See infra Part III.C.

[11] See infra Parts I, III.A, IV.B (discussing legislative purposes for enacting curfews).

and proper development of children. Minors are presumed to need the care of some protective guardian, a role usually filled by the parent unless state intervention is required. The state's custodial function establishes an authority over minors that the state cannot exercise over adults. This important concept of state custody, however, raises difficult issues for courts examining minors' rights—issues not present in the context of adults' rights. For example, by acting as a surrogate guardian for minors, the state competes with the parent for control of her child, and as a result intrudes on the interests of both parent and child.[12] Therefore, an analysis of curfew laws should not only balance the interests of the state against the minor's rights, but also should account for the custodial role played by the parent.

Examination of the relationships among state, child, and parent is an appropriate starting point from which to develop a more structured view of the problems presented by youth curfews. This Note utilizes this tripartite structure to conceptualize minors' rights cases and identifies four principal analytic configurations that arise in such cases.[13] Configuration One involves state intervention to protect the minor from a parent who no longer acts in the child's best interests; in such cases, the state and child are more closely aligned than are the parent and the child. Configuration Two encompasses state regulations that assist a parent who is no longer able to control her child; here, the state's and parent's interests are more closely aligned. In Configuration Three, neither the state's nor the parent's interests are well aligned with the minor's own interests and therefore all three parties function in opposition. Finally, Configuration Four involves state intrusion into the family sphere in which the state alone opposes both the parent and the child.[14] This Note will demonstrate that Configuration Four describes the vast majority of state regulations on minors, including curfew laws. Most youth curfews function in opposition to parents' and minors' interests, and therefore require very close examination by legislators, courts, and the community prior to adoption.

---

[12] See infra Part II.A.

[13] Other commentators have called for coherent methods for analyzing youth curfews. See, e.g., Katherine Hunt Federle, Children, Curfews, and the Constitution, 73 Wash. U. L.Q. 1315, 1326-28, 1344-67 (1995) (setting forth "empowerment rights" perspective for children's rights and applying analysis to assess constitutionality of juvenile curfew ordinances); Horowitz, supra note 8, at 415-16 (calling for more fact-specific inquiries into each case to determine whether curfew is justified). This Note, unlike previous commentaries, provides an analytical structure for understanding both minors' rights and youth curfews that is based on the tripartite structure of parent, child, and state relations.

[14] The four Configurations can be illustrated schematically as follows: Configuration One: (state + child) v. parent; Configuration Two: (state + parent) v. child; Configuration Three: state v. child v. parent; and Configuration Four: state v. (child + parent).

The Note begins by providing a policy overview of these laws, whose popularity has swept across the country in response to public fear of crime and violence committed by and against youths. Part II examines seventy years of Supreme Court case law on minors' rights in light of the relations among child, parent, and state. Part III presents the confused body of law on youth curfews and concludes that the lack of a clearly defined structure for analyzing minors' rights has led to a fragmented approach to youth curfew analysis. This Part specifically demonstrates that courts have not adequately examined the parental role implicated by curfews. In Part IV, this Note argues that courts must be more careful to explore not only substantive comparisons of rights when they review youth curfews but also the nature of the alliances and conflicts among the parties involved in the dispute. This final Part presents a practical methodology for examining youth curfew cases. With the state's relationship to the family illustrated more fully, the Note concludes that courts will be more effective in achieving consistency and fairness in youth curfew jurisprudence.

I
THE POLICY CONTEXT OF YOUTH CURFEWS

Public demand for curfews has surged and subsided in waves, coinciding with the country's most dramatic periods of crime and social transformation.[15] During the late nineteenth century, racism and fear drove the public to adopt curfews on incoming immigrants and their children.[16] In the 1940s, the number of curfews in U.S. cities rose significantly in response to the wartime period's increasing problems of juvenile delinquency.[17] Another surge of interest in curfews came during the 1970s in the face of sharp increases in violent urban crime.[18] Until recently, such laws were so rarely enforced that they appeared to be forgotten sections of many local criminal laws. During the past decade, however, local concerns about juvenile violence and gang-related activity have rekindled interest in curfews directed primarily at youth activity.[19] Now more than three quarters of America's

[15] See Note, Curfew Ordinances and the Control of Nocturnal Juvenile Crime, 107 U. Pa. L. Rev. 66, 66-70 (1958) (describing how most large cities enacted juvenile curfew ordinances); Mark Potok, Teen Curfews 'The Norm' in More Cities, USA Today, June 26, 1995, at 1A, available in LEXIS, News Library, USATDY file ("[C]urfews are a political response to a dramatic rise in juvenile crime . . . .").

[16] See Potok, supra note 15, at 1A.

[17] See Note, supra note 15, at 66-70.

[18] See Potok, supra note 15, at 1A.

[19] According to FBI crime statistics, 85,000 minors were arrested for curfew violations in 1993. See Ruefle, supra note 6, at A17. In 1993, San Diego's police department began

largest cities have youth curfew ordinances, and within the past five years fifty-three cities have adopted new curfews.[20]

In their simplest form, youth curfews make it unlawful for minors to stay out on the streets and in other public places during late-night hours. For example, the Dallas curfew forbids anyone under the age of seventeen from remaining in public places or on the premises of a private business establishment between 11 p.m. and 6 a.m. on weekdays and between 12 a.m. and 6 a.m. on weekends.[21] Violation of these laws can result in fines and a misdemeanor conviction,[22] although the minor usually is released to the parents without permanent charges. In practice, during curfew hours police officers may question any individual who appears to be under the age requirement and may arrest that person if the officer reasonably believes a violation has occurred.[23] Many curfew laws, including the one in Dallas, also prohibit parents from permitting their children to violate the curfew and prohibit the owners of private establishments from allowing minors to remain on their premises after curfew hours.[24]

Initially, curfews were straightforward bans on nearly all youth nighttime activity.[25] As more of these measures have come under attack and have been struck down by courts, however, city councils have drafted curfews that grant numerous exceptions for minors who are accompanied by parents, running errands for their parents, travelling

---

enforcing the city's long-dormant curfew law. See Feldmann, supra note 7, at 1. In 1995, Sacramento police officers began actively sweeping the city for curfew violators. See Beth Frerking, Curfews Today Try to Protect Innocent Kids, Sacramento Bee, Aug. 13, 1995, at F1, available in LEXIS, News Library, SACBEE File. See generally Note, Juvenile Curfews and Gang Violence: Exiled on Main Street, 107 Harv. L. Rev. 1693, 1695-97 (1994) (describing rise of youth curfew legislation to combat gang violence).

20 See Frerking, supra note 19, at F3.

21 See Dallas, Tex., Ordinance 21309 (June 10, 1992), quoted in Qutb v. Strauss, 11 F.3d 488 app. (5th Cir. 1993).

22 The Dallas curfew imposes a fine of up to $500 for each violation of the curfew. See id. § 31-33(e)(1), quoted in *Qutb*, 11 F.3d at 498.

23 See id. § 31-33(d), quoted in *Qutb*, 11 F.3d at 498.

24 See, e.g., id. § 31-33(b)(2)-(3), quoted in *Qutb*, 11 F.3d at 497. The Dallas law states that a parent commits an offense if "'he knowingly permits, or by insufficient control allows, the minor'" to violate the curfew. Id. § 31-33(b)(2), quoted in *Qutb*, 11 F.3d at 497. The "'owner, operator, or any employee of an establishment commits an offense if he knowingly allows'" a minor to remain on the premises. Id. § 31-33(b)(3), quoted in *Qutb*, 11 F.3d at 497; see also County of L.A., Cal., Ordinance 3611, § 2, amended by County of L.A., Cal., Ordinance 4256 (1945), construed in People v. Walton, 161 P.2d 498, 500 (Cal. 1945) (establishing punitive measures directed against parents similar to Dallas ordinance).

25 For example, Section 18-8.1 of the City of Opelousas, Louisiana, Code bans all nighttime activity for minors, granting exceptions only to emancipated minors, minors accompanied by parents, a tutor, or another "'responsible adult,'" and minors running an emergency errand. City of Opelousas, La., Code § 18-8.1 (1972), cited in Johnson v. City of Opelousas, 658 F.2d 1065, 1067 n.1 (5th Cir. Unit A Oct. 1981).

interstate, engaged in employment activities, involved in an emergency, or attending school or civic activities under adult supervision.[26] Both the Dallas curfew and the 1995 Washington, D.C., curfew even provide a special exception for minors who are "exercising First Amendment rights."[27] With these provisions, local councils hope that curfews will restrict few legitimate activities and prohibit only behavior that might result in crime or violence.

Researchers have conducted only limited studies examining the efficacy of youth curfews in preventing crime and protecting minors. Statistics suggest that, in some cities, these laws may have a positive impact. During the first year of Cincinnati's curfew, juvenile arrests dropped eighteen percent, and crimes involving youth victims decreased fifteen percent.[28] In San Antonio, in the three years after the city enacted a curfew victimization of minors between ten and sixteen years old fell eighty-four percent.[29] Commentators, however, have criticized local legislative bodies' reliance upon these figures.[30] Indeed, it is difficult to demonstrate that arrest rates are an accurate measure of criminal activity or that curfew ordinances are responsible for the changes in crime rates.[31] In fact, during the same time that San Antonio's youth victimization rate decreased, juvenile arrests rose by forty-one percent, suggesting that juvenile crime actually increased.[32] Thus, criminal and victimization rates offer contradictory indications of the efficacy of youth curfews.

Whether or not these laws have proven effective, the increasing public concern with crime and gang violence is driving cities to implement curfews and other experimental measures.[33] Public surveys of

---

[26] See, e.g., Dallas, Tex., Ordinance 21309, § 31-33(c)(1) (June 10, 1992), quoted in *Qutb*, 11 F.3d at 498; Juvenile Curfew Act of 1995, D.C. Code Ann. § 6-2181 to -2183 (1995).

[27] Dallas, Tex., Ordinance 21309, § 31-33(c)(1)(H) (June 10, 1992), quoted in *Qutb*, 11 F.3d at 498; see also D.C. Code Ann. § 6-2183(b)(1)(H) (Supp. 1996) (including free exercise of religion, freedom of speech, and right of assembly as exceptions to curfew).

[28] See Frerking, supra note 19, at F1; see also Steven A. Chin, S.F. Eyes San Jose Curfew Results, S.F. Examiner, Aug. 9, 1995, at A1 (citing 13% drop in violent incidents and 12% drop in crimes against minors since San Jose's curfew law went into effect).

[29] See Frerking, supra note 19, at F1.

[30] See Feldmann, supra note 7, at 1 (quoting statement by lieutenant in Washington, D.C., police department that crime statistics cannot be linked definitely to curfew ordinance and statement by ACLU national capitol area chapter legal director that many possible factors could affect arrest rates, including police staffing power).

[31] See id.

[32] See Frerking, supra note 19, at F1.

[33] One indication of the rising incidence of crime against youth is that the homicide rate among 14- to 17-year-olds more than doubled between 1985 and 1995. See Ruefle, supra note 6, at A17; see also Note, supra note 19, at 1694-95 (stating that communities have begun searching for ways to fight back against gang violence and have imposed youth cur-

attitudes toward youth curfews have been conducted primarily at the local level, and some of these studies suggest growing interest in these relatively inexpensive programs.[34] In New Orleans and Cincinnati, polls found that ninety percent of adults supported the idea of a curfew. In Mobile, seventy-five percent of adults polled favored a curfew.[35] For legislators trying to assuage the rising fear of urban violence, youth curfews are an attractive solution that seems to have substantial public support. Many cities appear determined to enact these laws, despite their constitutional implications. In 1995, Washington, D.C., enacted a second curfew ordinance after a federal district court struck down a similar law in 1989, which it had called an irrational policy.[36] Other major cities, including Austin, San Francisco, and San Jose, have recently passed such laws or given them serious consideration amid fierce controversy.[37]

Within this realm of public debate, courts have limited power to intervene unless youth curfews trample upon constitutionally protected rights. Individuals have challenged youth curfews as unlawful restrictions on many fundamental liberties, including freedom of movement,[38] freedom of expression,[39] freedom from unreasonable

---

fews as one method); Christopher S. Yoo, Comment, The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances, 89 Nw. U. L. Rev. 212, 215-25 (1994) (describing increasing difficulty local communities are experiencing with youth gang activity and implementation of "antigang injunctions" as preventive measures).

34 The committee charged with investigating a youth curfew proposal for Washington, D.C., found that the processing time for a curfew violator could range from less than one hour to three hours and fifteen minutes. These "administrative costs" would be the primary fiscal burden on the police department. See Memorandum from William P. Lightfoot, Chairman, Committee on the Judiciary, to Councilmembers of the District of Columbia 14 (Apr. 19, 1995) [hereinafter D.C. Report] (presenting Committee Report on Bill 11-25, the Juvenile Curfew Act of 1995).

35 See Frerking, supra note 19, at F1.

36 See Waters v. Barry, 711 F. Supp. 1125, 1139 (D.D.C. 1989). The city's Committee on the Judiciary found limited statistics to support the proposed 1995 youth curfew ordinance. See D.C. Report, supra note 34, at 14. In its report, the Committee stated that juvenile arrest statistics for the period January 1, 1993, through February 23, 1994, indicated that 3722 minors were arrested during curfew hours out of a total of 7305 youth arrests. See id. at 12. In other words, 51% of all juvenile arrests were made during curfew hours. See id.

37 See Frerking, supra note 19, at F1; Ruefle, supra note 6, at A17.

38 See, e.g., Qutb v. Strauss, 11 F.3d 488, 492, 496 (5th Cir. 1993) (assuming freedom of movement to be fundamental right and holding that ordinance satisfied strict scrutiny); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1248 (M.D. Pa. 1975) (considering plaintiffs' claim that restriction of freedom of movement constitutes violation of substantive due process rights), aff'd, 535 F.2d 1245 (3d Cir. 1976).

39 See, e.g., *Qutb*, 11 F.3d at 491 n.4 (noting alternative claim that ordinance impermissibly infringed First Amendment freedom of expression).

search and seizure,[40] due process,[41] and equal protection.[42] At the core of these challenges lie several basic questions: Do minors have the right to be out in public at night for no reason whatsoever, without interference from the state? Do parents have the power to allow their children to do so? Notwithstanding the important exceptions incorporated into modern curfews, all of them deny minors the right to engage in this simple activity and remove parental discretion over a child's nighttime behavior. Can the state demonstrate sufficient public need, such as rising crime and failing families, to justify this kind of intrusion into the family sphere?

State restrictions on the liberties of minors present a complicated problem because of the view that minors are vulnerable and immature[43] and therefore have a special need for custodial protection.[44] The American legal and political system is based on the traditional Western view that the parent, not the state, will fill this role of guardian until the child reaches an age of majority.[45] Minors' particular need for custodianship has made the task of defining minors' rights difficult for courts[46] and commentators.[47] While the Supreme Court has stopped short of declaring that minors have fewer rights than

---

[40] See, e.g., Ashton v. Brown, 660 A.2d 447, 454, 461 (Md. 1995) (noting Fourth Amendment claim but deciding case on other grounds).

[41] See, e.g., Waters v. Barry, 711 F. Supp. 1125, 1132 (D.D.C. 1989) (holding that ordinance deprived minors of due process rights).

[42] See, e.g., *Qutb*, 11 F.3d at 492 (hearing equal protection challenge under Fourteenth Amendment); *Waters*, 711 F. Supp. at 1138 (holding that ordinance violated equal protection component of Fifth Amendment Due Process Clause).

[43] See Bellotti v. Baird, 443 U.S. 622, 634-37 (1979) (plurality opinion) (considering vulnerability and immaturity of minors in assessing state regulation of their behavior).

[44] See Schall v. Martin, 467 U.S. 253, 265 (1984) (asserting that minors are "always in some form of custody"); In re Gault, 387 U.S. 1, 17 (1967) (describing traditional view that minors have right to custody, not liberty).

[45] The Western conception of family relations has a long tradition of granting such broad authority to parents. For example, Aristotle and Locke placed the power of child custody and development in the control of the parents. See Aristotle, The Politics 32-33, 316 (Ernest Barker trans., 1962) (comparing parental authority to monarchical authority and emphasizing its important role in free society); John Locke, Two Treatises of Government 308-09 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing that parental guidance does not infringe upon child's freedom and is necessary until child can exercise rationality and freedom); see also Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (rejecting Plato's conception of overriding governmental authority over child development as "violen[t] to both letter and spirit of the Constitution").

[46] See, e.g., Ginsberg v. New York, 390 U.S. 629, 636 (1968) (declining to set forth comprehensive theory of minors' rights); *Gault*, 387 U.S. at 13 (same).

[47] See, e.g., Laurence H. Tribe, American Constitutional Law § 16-31, at 1588-93 (2d ed. 1988) (describing childhood as "semi-suspect classification"); Sharon Elizabeth Rush, The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology, 36 Hastings L.J. 461, 461 (1985) (noting difficulty in defining "child" and in striking balance between "the democratic ideals of individual freedom and the sanctity of the family unit").

adults, in many circumstances it has upheld state restrictions on minors that would be impermissible for adults. Whether for the purpose of providing an adequate education,[48] limiting exposure to pornography,[49] or requiring parental consent before an immature or less than fully competent minor may obtain an abortion,[50] the state frequently has imposed greater restrictions on the behavior of minors. Thus, before local communities can decide whether or not to implement a youth curfew, courts must clarify to what extent minors' rights are protected under the Constitution. Only then will lawmakers understand the extent to which they can regulate minors' behavior.

II
THE SUPREME COURT'S FRAGMENTED APPROACH TO MINORS' RIGHTS

In 1953, Justice Felix Frankfurter wrote: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children."[51] In these statements Justice Frankfurter identified the fundamental problem with the Supreme Court's treatment of minors' rights: the Court has applied general legal principles and theories to cases involving state regulation of minors without establishing a structured framework for minors' rights.

This Part explores how the Supreme Court has conceptualized the rights of minors. Despite its reluctance to articulate a coherent rationale for the treatment of minors' rights, two themes are apparent in the Court's decisions. First, the past seventy years of Supreme Court precedent reveal a trend toward increasing recognition of the rights of children. Second, the development of minors' rights can be understood as a history of the conflicts among the state, parent, and child. Unlike constitutional litigation over adults' rights, which balances the interests of the state and the individual, in cases concerning

---

[48] See Wisconsin v. Yoder, 406 U.S. 205, 213-15 (1972) (acknowledging state's strong interest in regulating education); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (noting that no party contested "the power of the State . . . to require that all children of proper age attend some school").

[49] See *Ginsberg*, 390 U.S. at 638 (upholding New York statute that limited access by minors to obscene pornographic material and defined obscenity based on appeal to minors).

[50] See Bellotti v. Baird, 443 U.S. 622, 651 (1979) (plurality opinion) (striking down statute requiring parental consent in all cases and not allowing judicial determination of minors' competence).

[51] May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

minors, the critical role played by the parent creates a tripartite structure of relationships.

A. *The Early 1900s—Minors' Rights as Conflicts Between Parent and State*

During the first half of the twentieth century the Supreme Court approached minors' rights cases as clashes between the state's interest in regulating minors' behavior and the authority of parents to determine how to raise their children. Two 1920s cases defined the Court's thinking. In 1923, in *Meyer v. Nebraska*,[52] the Court struck down a Nebraska law that forbade teaching of any subject in a language other than English.[53] Two years later, in *Pierce v. Society of Sisters*,[54] the Court held unconstitutional Oregon's compulsory education law that required parents to send children under seventeen years old to public, rather than private, schools.[55]

The Court viewed these cases as contests between parent and state for the power of custody over children, even though the decisions affected the children's education, not that of their parents.[56] In these early rulings the Court essentially subsumed any conception of minors' liberties within the parents' authority over the child.[57] The *Meyer* Court stated that the parents maintained a "right of control" over their children, enabling them to hire whomever they chose as instructors.[58] In *Pierce*, the Court found that the Oregon law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[59] Absent from these powerful statements was any specific mention of the rights of the children to choose their own education. *Pierce* and *Meyer* set forth what became the dominant view in minors' rights

---

52 262 U.S. 390 (1923).

53 See id. at 397, 403.

54 268 U.S. 510 (1925).

55 See id. at 534-35. In both cases, the challenging parties were not parents, but private entities offering alternative instruction to public schooling. In *Pierce*, appellee Society of Sisters operated an independent private school system. See id. at 531-32. The plaintiff instructor in *Meyer* taught reading in German to a 10-year-old boy. See *Meyer*, 262 U.S. at 396. Nevertheless, the Court emphasized that the laws stripped parents of their right to choose their children's education.

56 The *Pierce* Court acknowledged but did not give weight to the plaintiff's argument that the Oregon law infringed upon the children's right to influence their parents' educational decisions. See *Pierce*, 268 U.S. at 532 (noting that plaintiff argued that statute conflicted with "the right of the child to influence the parents' choice of a school").

57 See id. at 534-35; *Meyer*, 262 U.S. at 400 (pointing to "natural duty of the parent to give his children education").

58 *Meyer*, 262 U.S. at 400 (indicating "right of parents to engage" instructors for their children).

59 *Pierce*, 268 U.S. at 534-35.

cases: the liberties of minors were dependent upon the protective authority of the parent over the child, and any state restriction on the behavior of minors would have to be reconciled with the parent's interests, rather than with those of the minor.[60] In essence, any enhanced power the state exercised over minors derived from parental custody and authority.[61]

The lasting impact of *Meyer* and *Pierce* is apparent in the Court's subsequent decisions. For example, in *Wisconsin v. Yoder*,[62] members of the Old Order Amish religion challenged a state compulsory education law by refusing to send their children to school beyond the eighth grade.[63] Writing for the Court, Chief Justice Burger affirmed the conception that a minor's rights are merely a subset of her parent's rights.[64] As with *Meyer* and *Pierce*, what is remarkable about *Yoder* is the Court's careful and explicit avoidance of any recognition of a minor's own rights: it was the parents' "right of free exercise, not that of their children," that was critical to the case.[65] While the prominence of this view has since subsided, its underlying premise—that a parent and child have closely aligned, if not identical, interests—continues to define the current understanding of minors' rights.[66]

---

60 Within the structural framework set forth in this Note, the *Pierce* and *Meyer* Courts' interpretation of the relationships among parent, child, and state could be illustrated either as a conflict solely between the parent and state (parent v. state) or perhaps as a conflict between the parent and state in which the child's interests are parenthetically represented by the parents (parents (+ child) v. state).

61 See *Pierce*, 268 U.S. at 534 (noting liberty interest of parents and guardians to direct upbringing and education of children in their custody). The state could exercise heightened regulatory control over minors under the doctrine of parens patriae, which refers to the role of the state as sovereign and guardian of all persons under legal disability, including juveniles and the insane. See *Meyer*, 262 U.S. at 401.

62 406 U.S. 205 (1972).

63 See id. at 207. The Amish parents viewed the education requirement as a threat to the Amish religion and their way of life and refused to comply with the law. See id. at 209-13 (recounting testimony of expert witnesses who noted conflict between secular education and Amish religious beliefs).

64 See id. at 214 (balancing "[s]tate's interest in universal education" against "traditional interest of parents with respect to the religious upbringing of their children").

65 Id. at 231. Justice Douglas, in dissent, assailed the Chief Justice's reasoning for discounting the rights of the children so clearly implicated in the case. See id. at 241-43 (Douglas, J., dissenting). He wrote:

> Our opinions are full of talk about the power of the parents over the child's education. And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.

Id. at 243 (Douglas, J., dissenting) (citations omitted).

66 See infra Part IV.A-B.

B. *The 1960s—Minors' Rights as Conflicts Between State and Minor*

Three 1960s decisions, *In re Gault*,[67] *Ginsberg v. New York*,[68] and *Tinker v. Des Moines Independent Community School District*,[69] signalled a move by the Court toward a new conception of minors' rights, emphasizing the minor's, rather than the parent's, relationship with the state. In *Gault*, the Court heard a habeas corpus petition by the parents of fifteen-year-old Gerald Gault, a youth who had been committed to a state industrial school for making an obscene phone call while on probation.[70] Following his arrest, Gault was denied many of the procedural due process protections afforded to adults, including the right to notice, the right to a fair hearing with counsel, and the privilege against self-incrimination.[71]

As in *Meyer* and *Pierce*, the parents in *Gault* played a central role in the case.[72] Yet the Court chose a different course than the one taken in *Meyer* and *Pierce* by concentrating on the denial of due process rights to the minor. In reversing the lower court's dismissal of the Gaults' petition, Justice Fortas found a profound unfairness in sentencing a fifteen-year-old to six months of incarceration when an adult convicted of the same offense faced no more than two months in jail or a fine of up to fifty dollars.[73] Due process rights, the Court declared, are fundamental and an "indispensable foundation of individual freedom" that cannot be denied to an adult or a child.[74]

A second important element of the *Gault* decision was the examination of the criminal justice system's unique custodial relationship with the child.[75] In its role as parens patriae, Justice Fortas explained, the state has tried to shield minor offenders from the formality and

---

[67] 387 U.S. 1 (1967).

[68] 390 U.S. 629 (1968).

[69] 393 U.S. 503 (1969).

[70] See *Gault*, 387 U.S. at 4.

[71] See id. at 5-7 (noting that at hearing in absence of counsel, Gault admitted to making lewd statements).

[72] Several factors indicate the important role played by the parents in the Court's decision. First, Mr. and Mrs. Gault brought the habeas corpus petition before the Court. See id. at 4. Second, the *Gault* Court noted that the Gaults had not been notified upon their son's arrest. See id. at 5 (indicating that "[no] notice that Gault was being taken into custody was left at the home"). Third, the Court pointed out the lower court's failure to inquire into the conditions of support in Gault's home and to consider discipline at home rather than through the justice system. See id. at 28 & n.41.

[73] See id. at 29.

[74] Id. at 20.

[75] See id. at 25-27 (describing relationship between rehabilitative purposes of juvenile justice system and curtailment of formal procedural protections).

severity of the adult criminal justice system.[76] Historically, the judiciary has upheld the notion that the child, "unlike an adult, has a right not to liberty but to custody."[77] Even when a minor committed an offense, the legal system viewed itself as an intervening caretaker on the minor's behalf in addition to its role as an arbiter of justice.[78] Poised as an ally of the minor, rather than solely as a punisher, the juvenile system was "'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a [criminally charged] person of his liberty."[79]

The dual purposes of the juvenile justice system illustrate one of the primary tensions within the Court's overall approach to minors' rights, one that extends well beyond the realm of criminal justice: by invoking its custodial power, the state is empowered to intrude into a minor's sphere of liberty in a manner that exceeds justifiable intrusion into an adult's sphere of liberty. The state stands simultaneously in opposition to and in allegiance with the minor's interests. As a result, the classical liberal framework for understanding individual rights, which places the state in opposition to the individual, is compromised because the state also advocates for the minor.

Gault marked a change in the Court's thinking that continued through *Ginsberg v. New York*,[80] a decision in which the Court once again separated minors' rights from those of parents.[81] Writing for the Court, Justice Brennan first affirmed the child-versus-state framework of analysis established in *Gault* by asking whether New York could constitutionally "accord minors under 17 a more restricted right [to purchase pornography] than that assured to adults."[82] Second, Justice Brennan noted that even though the New York pornography law restricted the behavior of minors, the law "[did] not bar parents who so desire from purchasing the magazines for their children."[83] Rather than opposing both the parent and child, the state law was narrowly drafted to limit only the minor's interests. Whereas in *Pierce* the Oregon law completely removed a parent's control over choosing

---

76 See id. at 15-16.

77 Id. at 17.

78 See id. at 15-16.

79 Id. at 17; see also id. at 17 n.22 (citing Pee v. United States, 274 F.2d 556 app. (1959) (listing authority in 51 jurisdictions to this effect)).

80 390 U.S. 629 (1968).

81 In *Ginsberg*, the Court heard the appeal of a stationery store and luncheonette owner convicted under New York law for selling "girlie" magazines to a sixteen-year-old boy. See id. at 631, 634. Although the statute was challenged by a private business, the Court recognized that the minors' rights were at stake. See id. at 636-37.

82 Id. at 637.

83 Id. at 639.

the kind of education and upbringing for a child, the New York law in *Ginsberg* left considerable discretion with the parent. The Court's awareness of this aspect of the New York law indicated its developing sensitivity to the independent interests of the parent and minor.[84]

In 1969, the Court's decision in *Tinker v. Des Moines Independent Community School District*[85] further expanded protection for minors' rights. Fifteen-year-old John Tinker was suspended when he violated a school policy by wearing a black armband to school to protest the war in Vietnam.[86] Tinker's subsequent challenge to the school policy brought into conflict a minor's right to political expression and the state's power to control the educational environment. The Court declared eloquently: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[87] By interpreting *Tinker* as a straightforward First Amendment case, the Court treated John Tinker first as an individual endowed with fundamental rights and only incidentally as a minor. A student, like a teacher or any adult, was entitled to the protections of the Constitution. "Students in school as well as out of school are 'persons' under our Constitution," the Court declared.[88] "They are possessed of fundamental rights which the State must respect."[89]

Although the *Tinker* majority announced a powerful conception of minors' rights, the members of the Court continued to disagree about the circumstances under which minors' rights could be treated differently from those of adults.[90] Furthermore, the Court declined to

---

84 The Court distinguished between the state's dual interests in supporting parents and protecting minors. First, it reiterated the importance of laws that support the parents' "claim to authority in their own household." Id. Second, the Court stated that the "[s]tate also has an independent interest in the well-being of its youth" and in safeguarding youth from harm. Id. at 640. In earlier decisions, notably *Meyer*, *Pierce*, and even *Gault*, the Court affirmed the state's custodial powers but did not clearly distinguish between the state's concern for both the child's well-being and the parents' authority over the child.

85 393 U.S. 503 (1969).

86 See id. at 504. Tinker was joined by other students and had the full support of his parents. See id.; see also id. at 516 (Black, J., dissenting).

87 Id. at 506.

88 Id. at 511.

89 Id. The *Tinker* Court was further persuaded by the lack of any evidence that the armbands disrupted the educational environment. The "silent, passive" protest caused no disorder or disturbance to the school's functions. Id. at 508.

90 Chief Justice Warren and Justices Douglas, Brennan, and Marshall joined Justice Fortas's opinion concluding that minors' rights were equal to those of adults in the instant case. Justice White wrote a concurring opinion and did not address this point. See id. at 515 (White, J., concurring). Justices Black and Harlan, in separate dissents, did not address the comparative value of minors' rights as opposed to adults' rights. See id. at 515 (Black, J., dissenting); id. at 526 (Harlan, J., dissenting). Justice Stewart directly challenged the majority's bold pronouncement of minors' rights. See id. at 515 (Stewart, J., concurring).

resolve the problem of defining minors' rights in relation to adults' rights, leaving its opinions subject to misinterpretation and confusion.[91] The *Gault* Court had announced that it too had not "consider[ed] the impact of these constitutional provisions upon the *totality* of the relationship of the juvenile and the state."[92] Similarly, the *Ginsberg* Court paraphrased *Gault* in the First Amendment context, stating that it could not "consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State."[93]

Following *Gault*, *Ginsberg*, and *Tinker*, lower courts hearing minors' rights cases had limited guidance for rendering a decision and, furthermore, were confronted with competing methods of analysis. Compulsory education requirements in public schools provide an example. Following *Pierce*, a lower court might be inclined to interpret a regulation as a state restriction upon parents' right to choose the kind of education and upbringing they want for their children. On the other hand, under *Tinker*, the court might be compelled to recognize that minors have their own interests and beliefs that require protection. The Court's unwillingness to define a clear structure for analyzing minors' rights cases left this area of law uncertain and unpredictable.[94]

---

[91] For example, in *Tinker* Justice Stewart criticized the Court's conclusion that the "rights of children are co-extensive with those of adults" as a direct contradiction of *Ginsberg*. Id. at 514-15 (Stewart, J., concurring). He argued that, in some instances, the state can restrict minors' rights more severely than adults' rights. See id. One way to resolve this tension between *Ginsberg* and *Tinker* is to recognize that *Ginsberg* granted the state enhanced authority only to safeguard minors from harm, such as that associated with pornography. See Ginsberg v. New York, 390 U.S. 629, 640 (1968). In contrast, the state could not legitimately assert a heightened custodial power in *Tinker* because John Tinker was exercising his First Amendment right and was not in danger of harm. See *Tinker*, 393 U.S. at 508.

[92] In re Gault, 387 U.S. 1, 13 (1967) (emphasis added).

[93] *Ginsberg*, 390 U.S. at 636.

[94] Indeed, just three years after *Tinker* and after Chief Justice Warren had retired from the bench, the Court retreated from its late-1960s approach to minors' rights with its holding in Wisconsin v. Yoder, 406 U.S. 205 (1972). See supra notes 62-65 and accompanying text. Nevertheless, even in *Yoder* the Court at least acknowledged the possible tensions between parent and child by noting that no "conflict between the wishes of parents and children" existed in that case. *Yoder*, 406 U.S. at 232. If the facts suggested that the parents prevented their "children from attending high school despite their expressed desires to the contrary," the state might have had greater justification to override the parents' authority. Id. at 231. Furthermore, the Chief Justice stated that no evidence showed that the Amish children would in any way be neglected by their parents if the children did not attend school. See id. at 211-13 (reviewing adolescent education that occurs in Amish society). His conclusion suggested that the state might have additional cause to intervene on the child's behalf when the child's and parent's interests are not aligned.

C. *The Late 1900s—Separating the Interests of Parent and Child*

In the 1960s, the Supreme Court championed minors' rights in an unprecedented manner. In the leading cases of that period, however, most notably *Gault* and *Tinker*, the parents firmly supported the child[95] and, as a result, it was not clear whether minors had rights that were entirely independent from the rights of their parents.[96] Beginning in the 1970s with *Bellotti v. Baird*,[97] and later in *Hodgson v. Minnesota*,[98] the Court began addressing the value of minors' rights when juxtaposed against parental interests.[99] Both of these cases concerned the right of a young woman to make an independent decision to have an abortion. In this context, the Court finally recognized that some realm of minors' rights exists independently of parents' rights.[100]

In 1973, *Roe v. Wade*[101] ushered in a new phase of abortion rights litigation over state legislation requiring parental consent or notification prior to performing an abortion on a minor.[102] Unlike other minors' rights cases, the parental consent debate raised the issue of whether a young woman has a right to privacy and autonomy from

---

95 In *Gault* and *Tinker*, although the parents' role in relation to the state was not precisely the same in each case, the parents always supported the child. Thus, each of these cases can be understood as subtle versions of Configuration Four: state v. child + parent. *Gault* placed the parents and children squarely in opposition to the state (state v. child + parent). See *Gault*, 387 U.S. at 5-7 (noting parental appearances on son's behalf before courts). Similarly, in *Tinker*, the Court viewed the case primarily as a conflict between the minor and the state, but the parents' supportive role was still important in its decision (state v. child (+ parent)). See *Tinker*, 393 U.S. at 504 (stating that minors decided to wear armbands as result of meeting held at home with parents).

96 In *Tinker*, the parents encouraged the students to wear the black armbands; two of the students' parents were politically involved in the community and played a significant role in leading their children to protest the war. See *Tinker*, 393 U.S. at 504 (noting parents' and petitioner's previous engagement in similar activity); id. at 516 (Black, J., dissenting) (noting politically oriented professions of both of petitioner's parents). While the Court accorded protection to minors' rights, the parents' supportive role clearly influenced the decision. *Tinker* would have been an even bolder statement by the Court about minors' rights had John Tinker's parents adamantly forbidden him from wearing the armband and had the Court nonetheless upheld his First Amendment rights.

97 443 U.S. 622 (1979) (plurality opinion).

98 497 U.S. 417 (1990).

99 The cases described in this Part illustrate the structural conflict between state, parent, and child captured in Configuration Three: state v. child v. parent.

100 See *Bellotti*, 443 U.S. at 643 (plurality opinion) (requiring State to provide "alternative procedure whereby authorization for the abortion can be obtained" should parents refuse to consent (footnote omitted)); *Hodgson*, 497 U.S. at 453 (citing *Bellotti* to note "difference between parental interests and the child's best interest").

101 410 U.S. 113 (1973).

102 For example, the Massachusetts legislature passed its parental consent law on August 2, 1974, only one year after the *Roe* decision. The law was challenged immediately. See *Bellotti*, 443 U.S. at 625-26, 639 (plurality opinion) (noting challenge to statute and role of *Roe* in establishing right to terminate pregnancy).

both state control and parental interference. The stated purpose of parental consent or notification laws is to provide safeguards and guidance for minors before they make a critical decision that might deeply affect their lives.[103] The state's interest in notifying the woman's parents, however, frequently collides with the minor's desire to make the decision on her own or to keep her pregnancy secret.

In its 1979 decision in *Bellotti*, the Court struck down a Massachusetts parental consent law as an "undue burden" upon young women seeking abortions[104] and attempted to provide a structure for understanding minors' rights. The Court set forth three factors designed to evaluate when "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."[105]

Bellotti's third factor, which describes the state's responsibility to support the parent's interests, warrants special examination because it reaffirmed the traditional view of parental authority over the family.[106] The Court stated that the dominant role of parents in the family "is not inconsistent with our tradition of individual liberty . . . . Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[107] In cases where the state supported parents' interests in caring for their children, it had an added justification for treating minors differently than adults.

At the same time that the Court affirmed the importance of the parental role, it demonstrated special concern for the potential collision of interests between parent and child. The Court wanted to ensure that the law did not create a parental veto over a young woman's

---

[103] For example, the Minnesota statute struck down in *Hodgson* sought in part to facilitate a decision which would serve "'the pregnant woman's best interests.'" *Hodgson*, 497 U.S. at 428 n.9 (quoting and finding unconstitutional Minn. Stat. Ann. § 144.343(6)(c)(i) (West 1989)). Section 144.346 of the same code required notification when failure to inform "'would seriously jeopardize the health of the minor.'" *Hodgson*, 497 U.S. at 417-20 (quoting Minn. Stat. Ann. § 144.346 (West 1989)). Similarly, the Massachusetts law struck down in *Bellotti* was construed by the Massachusetts Supreme Judicial Court as stating that the parental decision to grant consent to a woman under the age of 18 to have an abortion rests exclusively on "what will serve her best interests." *Bellotti*, 443 U.S. at 630 (plurality opinion) (citing and finding unconstitutional Mass. Gen. Laws Ann. Ch. 112, § 12S (West Supp. 1979)) (reviewing Baird v. Attorney General, 360 N.E.2d 288 (Mass. 1978)).

[104] *Bellotti*, 443 U.S. at 647 (plurality opinion).

[105] Id. at 634 (plurality opinion).

[106] See id. at 637-39 (plurality opinion) (defining third "parental role" factor).

[107] Id. at 638-39 (plurality opinion). The Court's articulation of the third factor presumed that the parent acted in the best interests of the child.

decision.[108] In fact, the Court found the statute in question too restrictive because it called for parental consultation in every case, even if the woman sought approval from a court to have an abortion.[109] Mandatory parental consultation would inevitably give rise to situations where a parent would "'obstruct, and perhaps altogether prevent, the minor's right to go to court.'"[110] In regard to such a personal decision, the Court found it necessary to intervene when the state compromised the rights of the woman in its efforts to support the parent's interests. In so reasoning, the Court determined that at times a minor's interests must be treated as distinct from those of her parent.[111]

Eleven years later, in *Hodgson v. Minnesota*,[112] the Court further clarified state, parent, and child relations in deciding a similar challenge to a Minnesota notification law requiring that both parents be contacted before a minor could obtain an abortion.[113] Writing for the Court, Justice Stevens held that the two-parent notification requirement was unreasonable and explained his decision by balancing the competing interests within the family.[114] The requirement rested upon the premise that parents can help the woman make a decision that is in her best interests.[115] Envisioning a situation where consultation with one parent might assist the minor, but consultation with the other parent might threaten her well-being, Justice Stevens concluded that one parent's interest could not outweigh those of both the other parent and the young woman.[116] The state, he found, cannot favor one parent's interest in shaping a child's values and lifestyle over the

---

[108] See id. at 644 (plurality opinion) (stating that parental notification and consent procedure must not vest veto power in parents).

[109] See id. at 646-47 (plurality opinion).

[110] Id. at 647 (plurality opinion) (quoting Baird v. Bellotti, 450 F. Supp. 997, 1001 (D. Mass. 1978)). The Court required that the state provide at least some alternative procedure whereby a young woman could obtain authorization for an abortion without parental consultation. The Massachusetts law in question, the Court held, did not afford the woman the opportunity to receive an independent judicial determination that she was mature enough to make her own decision or that an abortion would be in her best interests. See id. at 646-50 (plurality opinion).

[111] See id. at 649-50 (plurality opinion).

[112] 497 U.S. 417 (1990).

[113] See id. at 423-26.

[114] See id. at 450-52.

[115] See id.

[116] See id. at 450-51. Testimony at trial presented numerous cases in which the second parent did not have custody of or participate in the upbringing of the child, or had deserted or abused the child. See id. at 437-40. Under these circumstances, the Court noted, a two-parent notification requirement would be unwise. See id. at 451.

joint interests of the minor and the other parent.[117] By comparing the interests of the different parties, the Court demonstrated the importance of understanding how child, parent, and state are allied with or opposed to each other in a minors' rights case.

Despite the Court's refusal to articulate a single framework for understanding the state's relationship to minors, the seventy years of minors' rights jurisprudence culminating in *Hodgson* has shown clear patterns of development. At the beginning of the century, minors' interests were recognized only through their parents. Gradually the Court acknowledged that minors have important rights that are distinct from the interests of their custodians. During this period, the Court also demonstrated increasing sensitivity to the tripartite structure of relationships implicated in minors' rights litigation. Yet the absence of a clear jurisprudence in this area has left minors' rights law open to continuing development and evolution. In many ways this dynamic quality has enabled legislators and courts to adopt flexible approaches to education, health codes, and other state regulations. However, as the following Part will illustrate with the case of youth curfews, the uncertainty in the jurisprudence also has rendered minors' rights law confusing and unreliable.

III
YOUTH CURFEWS

During the past fifty years,[118] the continual litigation over youth curfews has generated a burgeoning field of jurisprudence. Even with this long history courts continue to disagree about the constitutionality of these laws. In just the last five years at least nine state and federal courts heard challenges to curfews, and those courts diverged in their results: four struck down the laws,[119] and five upheld them.[120] This split in court rulings is not problematic in itself, but the decisions are fraught with contradictions and disturbing inconsistencies con-

---

117 See id. at 452. Justice Stevens distinguished between a parent who is acting for the minor's best interests and a parent acting for her interests only. See id. at 452-53.

118 One of the earliest instances in which a court reviewed a youth curfew law is People v. Walton, 161 P.2d 498 (Cal. App. Dep't Super. Ct. 1945).

119 See Hutchins v. District of Columbia, 942 F. Supp. 665 (D.D.C. 1996); K.L.J. v. Florida, 581 So. 2d 920 (Fla. Dist. Ct. App. 1991); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); Brown v. Ashton, 611 A.2d 599 (Md. Ct. Spec. App. 1992), vacated, 660 A.2d 447 (Md. 1995) (requiring that lower court make formal declaration of plaintiffs' rights).

120 See Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993); In re Maricopa County, 887 P.2d 599 (Ariz. Ct. App. 1994); In re Daniel W., 41 Cal. Rptr. 2d 202 (Cal. Ct. App. 1995); Metropolitan Dade County v. Pred, 665 So. 2d 252 (Fla. Dist. Ct. App. 1995); Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990).

cerning minors' rights. Part of the confusion is due to the Supreme Court's silence on the issue. On at least two occasions the Court has denied certiorari in cases involving curfew challenges, despite increasing awareness that these laws present issues demanding resolution.[121] In 1976, the Court refused to hear a challenge to the Middletown, Pennsylvania, curfew over a strong dissent by Justices Marshall and Brennan in which they argued that the case posed "a substantial constitutional question . . . of importance to thousands of towns" across the country.[122]

Justice Marshall also stated that the difficulty that lower courts have encountered with youth curfews was generated by the uncertain legal standards for minors' rights in general. The "question squarely presented by" youth curfew cases, he wrote, is whether the "rights of juveniles are entitled to lesser protection than those of adults."[123] Without a clear framework for understanding minors' rights, how could courts be expected to resolve the troubling problem of nighttime curfews on minors? With this question in focus, this Part critiques the methods of constitutional review that courts have employed in examining youth curfews.

A. Confusion of Judicial Standards

Absent an overarching framework for analysis, most courts have resorted to the two-tier standard of constitutional review designed to balance the state's interest against the constitutionally protected rights of minors.[124] A court's analysis begins with a determination of the value or importance of those rights the state has restricted. This assessment is followed by an application of the appropriate level of judicial scrutiny: rational basis or strict scrutiny review.[125] This analysis provides clear standards, but it was not originally designed as a test for minors' rights. As the following cases illustrate, courts have differed

---

121 See Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), cert. denied, 114 S. Ct. 2134 (1994); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd, 535 F.2d 1245 (3d Cir.), cert. denied, 429 U.S. 964 (1976).

122 *Bykofsky*, 429 U.S. at 965-66 (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari). Justice White did not join in Marshall's opinion but agreed that the case should be granted certiorari. See id. at 964 (White, J., dissenting).

123 Id. at 965 (Marshall, Brennan, JJ., dissenting). The district court in *Bykofksy* noted that: "The Supreme Court has not yet articulated the special factors that determine how existing frameworks for analyzing the rights of adults are to be applied to minors." *Bykofksy*, 401 F. Supp. at 1253.

124 See Tribe, supra note 47, § 12-2, at 789-94, § 16-2, at 1439-43 (describing multitiered framework Court has adopted for reviewing state infringement of individual rights).

125 In City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989), the Iowa Supreme Court explained that "[i]f a fundamental right is infringed, the level of judicial scrutiny is raised from a rational relationship test to one of strict scrutiny." Id. at 367.

in their assessment of both the value of minors' rights and the proper level of scrutiny to apply.

Many courts apply the rational basis standard, the most lenient form of constitutional review, in their evaluation of youth curfews.[126] Courts offer two justifications for applying this less demanding test. First, some courts diminish the value of minors' rights, finding, for example, that a minor has a lesser interest in being outside of the home at night than have adults.[127] The second reason courts apply the rational relation test rests upon the notion that the state has a heightened interest in regulating children's behavior.[128]

Under the rational relation test's relaxed standard, the state only needs to show that the means it adopted are rationally related to the ends it seeks to achieve.[129] For example, in *City of Panora v. Simmons*, the Iowa Supreme Court upheld a curfew ordinance without requiring specific evidence of the need for such a restriction; instead, the court accepted the city's assertion of the "perceived problems" associated with allowing minors to leave the home at night.[130] The *City of Panora* court stated that "it is common knowledge that drug usage among minors has reached epidemic dimensions" and therefore concluded that specific findings of such problems were unnecessary.[131] During the past five decades, many courts have similarly applied the rational relation test, demanding minimal evidence of the need for curfews or of the potential for curfews to abate the perceived

---

126 Under this standard courts accord a strong presumption of constitutionality to the state action being challenged. The state regulation will be upheld provided it is "rationally related to a legitimate government interest." Tribe, supra note 47, § 16-3, at 1443-45.

127 For example, in *Bykofsky*, the federal district court stated that the "interest of minors in being abroad during the nighttime hours" was weaker than the right adults have to freedom of movement. *Bykofsky*, 401 F. Supp. at 1256. Similarly the Supreme Court of Iowa announced in *City of Panora* that "the [United States] Supreme Court has made it clear that minors' activities and conduct on the street may be regulated and restricted to a greater extent than those of adults." *City of Panora*, 445 N.W.2d at 367.

128 A Florida appellate court evaluating the Dade County youth curfew declared that "'the well-being of children is a subject within the state's constitutional power to regulate.'" Metropolitan Dade County v. Pred, 665 So. 2d 252, 253 (Fla. Dist. Ct. App. 1995) (quoting Griffin v. State, 396 So. 2d 152, 155 (Fla. 1981)).

129 As early as 1945, a California court upheld a curfew under this test stating that the ordinance was justifiable for the "proper protection" of minors so long as it was "induced by rational considerations." People v. Walton, 161 P.2d 498, 501 (Cal. App. Dep't Super. Ct. 1945); see also *Bykofsky*, 401 F. Supp. at 1255 (applying rational basis test); In re J.M., 768 P.2d 219, 223 (Colo. 1989) (same); *City of Panora*, 445 N.W.2d at 369 (same).

130 *City of Panora*, 445 N.W.2d at 369.

131 Id.

problems.[132] Under this test courts have consistently upheld the challenged curfews.[133]

Many courts, however, have reached the opposite conclusion, finding that minors' rights in the context of youth curfews deserve treatment under the constitutional tests equal to that accorded to adults.[134] In *Waters v. Barry*,[135] a federal district court announced that a Washington, D.C., curfew implicated "the fundamental liberty interests of thousands of perfectly innocent" youths.[136] Courts that have found that youth curfews infringe upon fundamental rights have applied the strict scrutiny test, the highest standard of constitutional review.[137] To survive strict scrutiny, the state must establish a compelling state interest for the curfew and must demonstrate that the curfew is "narrowly tailored" so that it does not trample any more rights than necessary.[138]

Some courts applying the strict scrutiny test give great weight to the state's interest in combatting crime and violence. For example, the Supreme Court of Wisconsin determined that the city's interest "in protecting youths and curtailing juvenile crime is compelling."[139] Other courts have incorporated the factors of the *Bellotti* test to assess

---

132 See, e.g., *Bykofsky*, 401 F. Supp. at 1242, 1265; *J.M.*, 768 P.2d at 223; *Metropolitan Dade County*, 665 So. 2d at 254; City of Eastlake v. Ruggiero, 220 N.E.2d 126, 128 (Ohio Ct. App. 1966).

133 See, e.g., *Bykofsky*, 401 F. Supp. at 1266; *J.M.*, 768 P.2d at 224; *Metropolitan Dade County*, 665 So. 2d at 254; *City of Eastlake*, 220 N.E.2d at 128.

134 See, e.g., In re Doe, 513 P.2d 1385, 1388-89 (Haw. 1973) (according to minors same due process rights as those accorded to adults); Brown v. Ashton, 611 A.2d 599, 605-07 (Md. Ct. Spec. App. 1992) (finding that minors have fundamental right to freedom of movement), vacated, 660 A.2d 447 (Md. 1995) (requiring that lower court make formal declaration of plaintiffs' rights).

135 711 F. Supp. 1125 (D.D.C. 1989).

136 Id. at 1136. The *Waters* court could not find "the constitutional rights of minors . . . less deserving of constitutional protection than those of adults under these circumstances." Id.; see *Brown*, 611 A.2d at 607-08 (similarly criticizing view that minors' rights deserve less constitutional protection than adults' rights).

137 See, e.g., *Waters*, 711 F. Supp. at 1138-39; *Brown*, 611 A.2d at 609; City of Milwaukee v. K.F., 426 N.W.2d 329, 336-39 (Wis. 1988).

138 See City of Panora v. Simmons, 445 N.W.2d 363, 367 (Iowa 1989) (setting forth strict scrutiny standard). In other areas of law, the imposition of this stringent test has spelled almost certain doom for the state action in question. See Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (declaring strict scrutiny standard to be "'strict' in theory but fatal in fact").

139 *K.F.*, 426 N.W.2d at 339; see also Qutb v. Strauss, 11 F.3d 488, 493 (5th Cir. 1993) (finding compelling state interest in controlling crime and upholding local curfew under strict scrutiny standard); *Waters*, 711 F. Supp. at 1138-40 (striking down local curfew ordinance despite determination that it was supported by compelling state interest in crime prevention).

the state's interest.[140] With respect to the narrow-tailoring component, courts have struck down curfews that restrict too many constitutionally protected activities or that provide too few exceptions for minors who have jobs or legitimate nighttime activities.[141] In *Waters*, the federal district court declared that the curfew restriction must "bear an intimate relationship to the problem."[142] The city's statistics for violent crime, the court noted, indicated that the daytime is just as hazardous as the night.[143] "Rather than a narrowly drawn, constitutionally sensitive response, the District has effectively chosen to deal with the problem by making thousands of this city's innocent juveniles prisoners at night in their homes."[144]

Although courts frequently apply the rational relation and strict scrutiny tests to youth curfews, these tests were not designed to review state restrictions on the rights of minors. As a result, some courts have diluted minors' rights or altered the standards to accommodate the perception that minors somehow should be treated differently than adults. For example, the federal district court in *Bykofsky v. Borough of Middletown*[145] altered the method for determining whether the rights of minors are fundamental. Instead of first determining the nature of the rights being restricted and then selecting the appropriate test, the *Bykofsky* court reversed the two-step approach.[146] The court first determined that the state had a heightened interest in minors' welfare,[147] and based on that finding, reasoned that their freedom of movement was less important.[148] Courts have criti-

140 See supra Part II.C, infra Part III.B (describing *Bellotti* test). As an illustration, a Maryland court applied the *Bellotti* factors "to determine if any one of them provides the compelling interest needed to justify restrictions . . . on the fundamental rights of children." *Brown*, 611 A.2d at 608. The Superior Court of New Jersey found that the *Bellotti* test factors did not create any special state interest and therefore concluded that the governmental interest was not compelling. See Allen v. City of Bordentown, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987).

141 See, e.g., City of Maquoketa v. Russell, 484 N.W.2d 179, 186 (Iowa 1992) (citing voting at caucuses, city council meetings, demonstrations, and protests as legitimate activities restricted under statute).

142 *Waters*, 711 F. Supp. at 1139.

143 See id.

144 Id. at 1135.

145 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd, 535 F.2d 1245 (3d Cir. 1976).

146 See id. at 1256.

147 See id. at 1253-56.

148 See id. at 1256-62. For a similar example, see Metropolitan Dade County v. Pred, 665 So. 2d 252 (Fla. Dist. Ct. App. 1995). In *Pred*, the Florida court announced that children are "always in some form of custody" and accordingly "do not enjoy the same quantum or quality of rights as adults." Id. at 253. The value the court accorded to minors' rights was therefore dependent on the notion of the state's additional custody powers. By comparison, no court would assert that an adult's right to protest on the street would be diminished by the state's greater interest in protecting the adult.

cized the *Bykofsky* court for reversing the analysis and thereby devaluing minors' rights.[149]

Courts also have altered the strict scrutiny test to account for the general view that minors' rights deserve less protection. As described above, this test requires specific findings that the curfew in question furthers the purposes the government seeks to accomplish. In the 1993 Fifth Circuit decision *Qutb v. Strauss*,[150] however, the state's evidence showed that juvenile crime constituted only five to six percent of all crime in Dallas and that only twelve percent of all youth arrests occurred during curfew hours and in those public places covered by the curfew.[151] These statistics suggested that the nighttime curfews did not bear a close relation to the problem of youth crime prevention. Yet the appellate court found the limited evidence to be sufficient and upheld the ordinance.[152] Confronted with a difficult balancing task, the *Qutb* court accorded diminished constitutional protection to minors to account for the state's special custodial powers to oversee the safety of minors.

B. Reliance on the Bellotti *Three-Factor Test*

The three-factor test defined in *Bellotti v. Baird*[153] is one of the few attempts by the Supreme Court to set forth a systematic method for examining state action that regulates the behavior of youth.[154] Since *Bellotti*, nearly all courts ruling on youth curfews have applied the three-part test or at least considered its factors. The Court did not

---

149 See, e.g., City of Panora v. Simmons, 445 N.W.2d 363, 374 (Iowa 1989) (Lavorato, Schultz, Carter, Neuman, JJ., dissenting) (noting that "[t]he reasoning in *Bykofsky* was backward"); Brown v. Ashton, 611 A.2d 599, 608 (Md. Ct. Spec. App. 1992) (citing dissent in *City of Panora*), vacated, 660 A.2d 447 (Md. 1995) (requiring that lower court make formal declaration of plaintiffs' rights). The *Brown* court and the dissent in *City of Panora* determined that the state's interest in regulating children's behavior should not be factored into the assessment of the importance of the minor's fundamental right to movement. The state's interest and a minor's rights, these jurists indicated, are two independent inquiries that courts must be careful to separate. See *City of Panora*, 445 N.W.2d at 374 (noting that inquiry into minors' fundamental rights should occur before examining state interests); *Brown*, 611 A.2d at 608 (same).

150 11 F.3d 488 (5th Cir. 1993).

151 See Appellee's Brief at 21, *Qutb* (No. 92-1707).

152 See *Qutb*, 11 F.3d at 493, 496 (finding that ordinance fit state's compelling interest and employed least restrictive means for accomplishing state's goals); see also City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988). The Supreme Court of Wisconsin, in its evaluation of Milwaukee's curfew, applied the strict scrutiny test but gave no indication that it required specific showings that the city curfew effectively reduced juvenile crime and victimization. See id. at 331-40. The court reasoned that, in general, the state had "augmented authority" over children and that this authority was strong enough to justify the curfew. Id. at 338.

153 443 U.S. 622 (1979) (plurality opinion).

154 See supra Part II.C.

indicate, however, how the three-part test should be incorporated into the tests for constitutionality or if the test was even applicable to curfew laws.[155] As a result, courts have applied the test inconsistently at varying stages of traditional constitutional analysis. While some courts have deemed it proper to examine the *Bellotti* factors at the initial stage to assess whether minors' rights are fundamental,[156] others have applied them at the later stage to evaluate the state's interest.[157]

A second problem with the application of the *Bellotti* test is that laws requiring parental consent for abortions are qualitatively different than youth curfews. In *Bellotti*, the Court specifically noted that a young woman's decision to have an abortion presents distinct concerns, making comparison to other cases difficult.[158] The Court pointed out that a "pregnant minor's options are much different from those facing a minor in other situations."[159] Such a critical choice requires that the state "act with particular sensitivity when it legislates."[160] Courts reviewing curfew laws have argued that the Supreme Court intended that the *Bellotti* test be limited to situations that are comparable to a woman's decision to have an abortion.[161]

Courts that have chosen to apply the *Bellotti* test have frequently overlooked the differences between abortion cases and curfew cases, and in so doing have reached wide-ranging and contradictory interpre-

---

155 See *Bellotti*, 443 U.S. at 634-39 (plurality opinion). For an extended discussion and criticism of courts' application of the *Bellotti* test to youth curfews, see Horowitz, supra note 8.

156 See, e.g., In re J.M., 768 P.2d 219, 223 (Colo. 1989) (using *Bellotti* test to determine that minors' "liberty interest in freedom of movement does not constitute a fundamental right"); City of Panora v. Simmons, 445 N.W.2d 363, 374 (Iowa 1989) (applying *Bellotti* factors in determining that fundamental right exists).

157 See, e.g., *Qutb*, 11 F.3d at 492 n.6 (stating that *Bellotti* test affects balancing of state's interest against interests of minor "when determining whether the state's interest is compelling"); Brown v. Ashton, 611 A.2d 599, 608 (Md. Ct. Spec. App. 1992) (employing *Bellotti* factors to assess whether they provide "compelling interest needed to justify restrictions . . . on the fundamental rights of children"), vacated, 660 A.2d 447 (Md. 1995) (requiring that lower court make formal declaration of plaintiffs' rights); see also *City of Panora*, 445 N.W.2d at 374 (Lavorato, Schultz, Carter, Neuman, JJ., dissenting) (stating that *Bellotti* test presupposes that rights of minors are fundamental and should be used to determine if state action is compelling); Note, supra note 8, at 1177-80 (arguing that *Bellotti* test should be incorporated into process of determining whether state has unique compelling interest in protecting children).

158 See *Bellotti*, 443 U.S. at 642 (plurality opinion) (noting that State must act with particular sensitivity when legislating on such matters).

159 Id.

160 Id.

161 See, e.g., Village of Deerfield v. Greenberg, 550 N.E.2d 12 (Ill. App. Ct. 1990). The *Greenberg* court stated that the use of the three-part test was "troublesome outside of the particular setting of abortion rights" and examined the *Bellotti* factors only in response to the claimant's argument that the test compelled the court to strike down the law. Id. at 16.

tations of the test itself. For example, some courts have found that youth curfews support the parental role in child rearing,[162] while others have found that such laws obstruct parents' interests.[163] In *Johnson v. City of Opelousas*,[164] the Fifth Circuit stated that the principal duty of childrearing and custody rests with parents and that the curfew ordinance interfered with that role.[165] In contrast, in the Colorado Supreme Court's 1989 decision in *In re J.M.*,[166] the court declared that state control of a minor's behavior "reinforces parental authority and encourages parents to take an active role in supervising their children."[167]

The difference in the two courts' conclusions originates in their varying constructions of the third *Bellotti* factor, which accounts for the parental role in childrearing.[168] In *J.M.*, the Colorado Supreme Court viewed the state as an intervenor in those cases when "'parental control falters.'"[169] Adopting a paternalistic stance, the court interpreted youth curfews as a necessary support when parents are unable to meet their responsibilities to their children.[170] By contrast, the Fifth Circuit in *Johnson* viewed parents as adequate custodians for their children and the state's regulation as a coercive measure that removed the parents' rightful authority.[171] The court found that the rigid restrictions of youth curfews functioned in opposition to, rather than in support of, the parental role.[172]

---

162 See, e.g., In re J.M., 768 P.2d 219, 223 (Colo. 1989) (asserting that curfew law reinforces parental authority).

163 See, e.g., Johnson v. City of Opelousas, 658 F.2d 1065, 1074 (5th Cir. Unit A Oct. 1981) (finding that city's interest was insufficient to justify removal of parental discretion); Allen v. City of Bordentown, 524 A.2d 478, 487 (N.J. Super. Ct. Law Div. 1987) (finding that Bordentown ordinance interfered with parents' rights to control their children's use of streets).

164 658 F.2d 1065 (5th Cir. Unit A Oct. 1981).

165 See id. at 1074; see also *Allen*, 524 A.2d at 486-87 (relying upon *Johnson* and applying same reasoning).

166 768 P.2d 219 (Colo. 1989).

167 Id. at 223.

168 See supra notes 105-11 and accompanying text.

169 *J.M.*, 768 P.2d at 223 (quoting Schall v. Martin, 467 U.S. 253, 265 (1984)).

170 See id.; see also In re Maricopa County, 887 P.2d 599, 607 (Ariz. Ct. App. 1994) (finding that youth curfews support parental role because such laws "rest[ ] on the implicit assumption that in many cases the traditional family unit . . . has dissolved").

171 See Johnson v. City of Opelousas, 658 F.2d 1065, 1073-74 (5th Cir. Unit A Oct. 1981).

172 See id. at 1074 (stating that Opelousas's concern for minors "is not sufficient to justify the removal of the decision as to these activities from the childrens' [sic] parents"). To support its interpretation of *Bellotti*'s third factor, the *Johnson* court cited the Supreme Court's decision in Prince v. Massachusetts, 321 U.S. 158 (1944), in which a state law collided with the interests of both parent and child. See *Johnson*, 658 F.2d at 1074 (citing *Prince*, 321 U.S. at 166-67). The *Prince* Court found that the child labor statute at issue pitted the state's interests in the welfare of the child directly against the wishes of a Jehovah's Witness guardian who brought her niece with her to sell literature in public. See

The disagreement between the Fifth Circuit and the Colorado Supreme Court concerning the third factor of the *Bellotti* test illustrates the difficulty with understanding the relationships among child, parent, and state. In fact, the *Bellotti* Court, by balancing the competing interests of parent and child, treated the rights of minors very differently than have courts hearing curfew challenges. The Court was concerned that a child may have deeply conflicting interests with both the state and parent such that neither are aligned with the child.[173] In this situation, the minor's rights are structurally in conflict with the parent's interests. By contrast, courts ruling on curfews have not conceptualized the minor's right to freedom of movement in public at night as being in conflict with parent's interests. Courts reviewing curfews have not viewed the relationships involved in the same way that the *Bellotti* Court viewed the relationships implicated by a minor's abortion decision. Courts should not apply the *Bellotti* test without considering these differences.

C. *The Role of the Parent in Youth Curfew Cases*

As the preceding section illustrates, the proper application of the *Bellotti* test requires careful examination of the nature of the relationships among parent, child, and state. Acting without such sensitivity to the conflicts and allegiances among the parties, courts have reached widely conflicting interpretations of the *Bellotti* test and the constitutionality of youth curfews. Part II of this Note showed how Supreme Court decisions concerning education, child labor, and juvenile justice have seriously considered parents' roles in caring for their children and protecting their rights. Similarly, in many youth curfew challenges parents have voluntarily joined in the suit in support of their children, arguing that curfew restrictions strip them of the power to control their children's behavior and thus violate their rights of privacy and autonomy.[174] Yet courts hearing curfew cases have deemphasized the rights of parents and have often deferred judgment on the issue.

The merit of parents' rights claims has been recognized in a few decisions in which courts have found that youth curfews violate parents' constitutional rights. After assessing the validity of a city curfew law as a restriction upon both parents' and minors' rights, a New

Prince, 321 U.S. at 159. The Fifth Circuit used *Prince* to illustrate that curfews are a form of state regulation that runs counter to the basic presumption that parents' and children's interests are aligned. See *Johnson*, 658 F.2d at 1074.

173 See *Bellotti*, 443 U.S. at 637-39 (plurality opinion); see also infra Part IV.

174 See, e.g., Qutb v. Strauss, 11 F.3d 488, 495-96 (5th Cir. 1993); Waters v. Barry, 711 F. Supp. 1125, 1132 (D.D.C. 1989).

Jersey Superior Court declared that the law "unconstitutionally restricts the rights of parents in the same way that it impermissibly restricts the rights of children."[175] The federal district court in New Hampshire also struck down a curfew law as an infringement of parental rights, declaring that the curfew did "not fit within the circumstances where the state may usurp the parental role."[176]

In striking down curfews to protect the rights of parents, these courts noted that parents' constitutional right to control the upbringing of their children has a strong basis in the Supreme Court's jurisprudence.[177] The New Jersey court relied on the Court's continuing affirmation of the overwhelming importance of parental authority over children in the "'structure of our society.'"[178] The New Hampshire court cited "*Pierce*, *Yoder*, *Prince* and *Ginsberg*," noting that those cases have "contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference by the State" into family matters.[179]

Courts reviewing curfews, however, frequently bypass the question of parental rights altogether. The federal district court that struck down Washington, D.C.'s curfew noted that the parents' liberty claim "may also have some merit" but chose not to reach the issue because it already found that the ordinance violated minors' rights.[180] Similarly, the Fifth Circuit in *Johnson v. City of Opelousas*,[181] after declaring the challenged curfew unconstitutional, stated that "it is unnecessary for us to address the merits of appellants' other attacks on the ordinance," including the parents' rights claim.[182]

A few courts that have examined the validity of parents' rights claims have found insubstantial harm. In *Qutb v. Strauss*,[183] the Fifth Circuit concluded that the Dallas curfew ordinance presented only a minimal intrusion into the parents' rights: "In fact the only aspect of parenting that this ordinance bears upon is the parents' right to allow the minor to remain in public places, unaccompanied by a parent or guardian or other authorized person, during the hours restricted by

---

175 Allen v. City of Bordentown, 524 A.2d 478, 487 (N.J. Super. Ct. Law Div. 1987).

176 McCollester v. City of Keene, 514 F. Supp. 1046, 1053 (D.N.H. 1981), rev'd, 668 F.2d 617 (1st Cir. 1982) (reversing lower court on justiciability grounds).

177 See supra Part II.A-B.

178 *Allen*, 524 A.2d at 486 (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)).

179 *McCollester*, 514 F. Supp. at 1052-53 n.3.

180 Waters v. Barry, 711 F. Supp. 1125, 1132 (D.D.C. 1989).

181 658 F.2d 1065 (5th Cir. Unit A Oct. 1981).

182 Id. at 1074.

183 11 F.3d 488 (5th Cir. 1993).

the curfew ordinance."[184] The court determined that the intrusion in question did not outweigh the need for the restriction.[185] The Supreme Court of Iowa also found that a local curfew's interference with parents' authority was "minimal."[186] The Iowa court expressed uncertainty as to whether the curfew hindered parental freedom or "'promote[d] family life.'"[187] Its reasoning explains why many courts have been unwilling to recognize parental rights violations: "It is difficult . . . to determine if [the Panora curfew] forces parents to abdicate their authority over their children, or to *accept* such authority."[188]

The lack of emphasis upon parents' interests in youth curfew cases is a problem attributable to numerous courts. Yet parents unquestionably play a central role in defining the state's relationship to minors. In fact, the state's heightened custodial power over minors derives from parents' presumptive control over their children.[189] Recognizing this critical parental role, courts reviewing curfew laws that restrict minors' rights simply cannot ignore parents' interests in their analysis.

IV
A Structural View of Youth Curfews

The preceding discussion illustrated the absence of a unified theory of the state's relationship to minors in the past fifty years of decisions on youth curfews. Although courts have not set forth a clear standard, they have demonstrated an awareness of the interests of parent, child, and state in any restriction on minors' rights. This Part presents a methodological framework for adjudicating minors' rights cases based on the relationships implicated in such cases. A structural analysis of these relationships provides a simple and effective method for understanding minors' rights generally and youth curfews more specifically.

---

184 Id. at 495-96. The ordinance at issue in *Qutb* granted several exceptions to minors who had specific justifications for leaving home at night. These exceptions contributed to the court's view that the parents' rights were only minimally infringed. See id.

185 See id.; see also Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1264 (M.D. Pa. 1975) (finding that curfew ordinance "infringe[d] only minimally" on parents' interests because it did not "dictate to the parent an over-all plan of discipline for the minor"), aff'd, 535 F.2d 1245 (3d Cir. 1976).

186 City of Panora v. Simmons, 445 N.W.2d 363, 370 (Iowa 1989).

187 Id. (quoting Note, supra note 15, at 67).

188 Id.

189 See supra Part II.A-B.

A. A Structural View of Minors' Rights

This Note has set forth four major structural configurations that characterize the relationships among parent, child, and state. Configuration One embodies those situations in which the state's and the child's interests are closely allied, while the parent no longer acts legitimately for the child. Configuration Two captures those situations in which the state and the parent are more closely united in an effort to control a severely delinquent minor. Configuration Three places the minor between the parent and the state because the parent has a significant conflict of interest with the minor. Finally, Configuration Four involves state intrusion into the sphere of family autonomy when the parent's and the minor's interests are closely aligned against the state. These configurations should serve primarily as a guiding framework. They are not intended to function as pigeon-holes and, in fact, are unlikely to describe perfectly the nature of the relationships involved in a given case.

Within this tripartite structure of relationships, the state has an unusually strong justification for regulating youth behavior in Configuration One. This Configuration is characterized by extreme situations where the parent is inadequately meeting the child's needs, as in cases of parental abuse or neglect. When a parent subjects a child to severe abuse or otherwise fails to care for a child, the parent does not act in the child's best interests. Therefore, a third party must intercede on the child's behalf to prevent further harm to the child. Viewed in terms of the alliances among the parties, in these cases the parent no longer functions as the child's best advocate, and thus the state is justified in replacing the parent and taking on the role of the child's proper custodian.

Configuration One situations require careful judicial treatment because the state not only asserts that it is acting in the best interests of the child but also that the parents are incapable of so doing. The family institution is so firmly embedded in American tradition that courts should, and generally do, presume that the parents are the best custodians and advocates of their children's needs.[190] Until the state provides strong evidence showing that parents are failing to meet their basic responsibilities, courts should be very reluctant to allow the state to intervene. In neglect and abuse cases, courts have required that the state present clear evidence of parental maltreatment before it can

190 Chief Justice Burger declared in Parham v. J.R., 442 U.S. 584 (1979): "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." Id. at 603; see also supra Parts II.A, III.C.

invoke its custodial power.[191] Once a court determines that the parent cannot capably provide for her child, however, state intervention should be more easily substantiated and, in some cases, even legally enforced.[192]

Configuration Two describes those situations in which the state supports a parent in an effort to control a child who has persistent behavioral problems that the parent cannot address alone.[193] Configuration Two is well illustrated in delinquency cases, "incorrigible child" cases, and cases in which a parent seeks to commit a child to a state institution, such as a mental hospital or reform school. Frequently of his own accord, the parent in such cases has sought support from the state[194]—sometimes he is incapable of disciplining his

---

191 As an illustration, New York's statutory and common law require more than mere speculation about possible danger to the child. Section 1012(f)(i) of the New York Family Court Act sets forth a high standard of proof for a determination of parental neglect or abuse: In the absence of actual harm or impairment to a child, there must be evidence that the child's "physical, mental or emotional condition . . . is in imminent danger of becoming impaired." N.Y. Fam. Ct. Act § 1012(f)(i) (McKinney 1996). For applicable standards at common law, see, e.g., In re William "EE," 550 N.Y.S.2d 455, 455-56 (App. Div. 1990) (refusing to find child neglect even where children claimed that "respondents had hit them and their younger sister with sticks and tied them into their chairs with extension cords" and that they "'didn't get supper a lot' because there was not enough money"); In re Bryan L., 565 N.Y.S.2d 969, 972-73 (Fam. Ct. 1991) (refusing to find child neglect in absence of evidence that children were physically endangered during assaults or expert testimony regarding effect upon child of witnessing domestic violence).

192 Courts have consistently found that the state has a powerful interest in protecting the safety and welfare of a child if the parents are shown to be failing in their duty to do the same. See, e.g., In re Anna X, 539 N.Y.S.2d 524, 525-26 (App. Div. 1989) (upholding 18-month foster care placement after finding mentally retarded single mother incapable of properly caring for and feeding her child under Section 1012(f)(i) of the New York Family Court Act); In re Milland, 548 N.Y.S.2d 995, 999 (Fam. Ct. 1989) (finding that evidence of parents' alcoholism was sufficient for determination of neglect and upholding removal of child from parents' custody).

Furthermore, legislators have often required special treatment of minors who are victims of neglect or abuse. For example, the Minnesota statute challenged in *Hodgson v. Minnesota* provided an exception to the parental notification requirement if the "proper authorities are advised that the minor is a victim of sexual or physical abuse." Hodgson v. Minnesota, 497 U.S. 417, 426 (1990) (citing and finding unconstitutional Minn. Stat. Ann. § 144.343(4)(c) (1989)); see also supra Part II.C.

193 Schematically, Configuration Two can be illustrated as state + parent v. child. In these cases, however, the "paramount consideration" is still what is in the best interests of the child. In re Welfare of Snyder, 532 P.2d 278, 281 (Wash. 1975) (en banc).

194 In some "incorrigible child" and child emancipation cases, however, minors have come before a court and sought judicially mandated separation from their parents. In *Welfare of Snyder*, the parents of Cynthia Nell Snyder sought state assistance to control their daughter, resulting in her placement in a receiving home. See id. at 279. Later, however, after being returned to the custody of her parents, Snyder sought a determination from the court that she was an "incorrigible child" (defined as a child who is beyond the control and power of her parents, guardian, or custodian by reason of his or her conduct or nature), so that she would not have to return to her parents' home. See id. at 279-80.

child,[195] and other times the child presents a threat to the parent's safety.[196] Although the state may have good reason to believe that its action furthers the interests of the parent, before the state may act it must present detailed evidence showing that the parent cannot control the minor.[197] As with Configuration One, in Configuration Two a court should presume that family relationships are firmly intact until the state presents adequate evidence that those relationships have collapsed. Only after the state meets this high evidentiary burden should a court examine the case under Configuration Two.

Configurations One and Two have several important similarities. First, both involve extreme conditions in which the family structure has deteriorated, thus overcoming the presumption that the interests of the parent and the child are closely aligned. Second, both Configurations contemplate situations where the state action is directed at an individual family.[198] In this sense the first two Configurations deal with the rare cases in which internal family relations are in turmoil and the state actually becomes the ally of either parent or child, rather than the latter two having more closely aligned interests against the state. Third, in Configurations One and Two the state exercises great authority to intervene to protect the child's interests once the determination has been made that the family relationships have broken down.

---

195 Frequently minors will be adjudged delinquent, uncontrollable, or truant by independent state action to ensure that a minor does not harm others. See, e.g., Nova Univ., Inc. v. Wagner, 491 So. 2d 1116, 1117 (Fla. 1986) (describing residential program for children whose behavioral problems render their continued residence with parents or guardians against public interest).

196 See, e.g., People v. Daniel T., 408 N.Y.S.2d 214, 215 (Crim. Ct. 1978) (hearing charge against minor of third degree assault upon his mother).

197 Based primarily on constitutional due process requirements, courts have required detailed findings of the minor's misbehavior. For example, in In re Welfare of Jackson, 497 P.2d 259 (Wash. App. 1972), the court found substantial evidence in the record that Jennifer, in direct disobedience of her foster parents, regularly failed to attend school classes, used dangerous drugs, and did not inform her foster parents of her whereabouts when she remained away from home at night. See id. at 260. Her increasing disobedience established that she was out of her foster parents' control, or incorrigible. See id.

In Simmons v. State, 371 N.E.2d 1316 (Ind. App. 1978), the appellate court upheld a determination that the minor was habitually truant and incorrigible based on findings that she was absent without permission for 15 out of 45 school term days, she defied her parents' authority, and she frequently ran away from her parents' home and foster homes. See id. at 1318-19.

198 This Note describes Configurations One and Two as involving, almost exclusively, cases where the state regulates an individual family because of the high evidentiary burden required to remove the presumption that parents are the best custodians of their children. See supra notes 191-92, 197 and accompanying text. If, however, the state is able to present sufficient evidence showing that the parent-child bonds have deteriorated severely in an entire community or class of individuals, then it would be possible to imagine a broad regulatory scheme affecting this entire class of individuals under Configurations One or Two.

In Configuration Three, in which the child's interests conflict with those of both the parent and the state, the state's authority over the minor is more attenuated than it is in the first two Configurations. Here, the state has presented little or no evidence that the parent is consistently failing in her capacity as the child's custodian or that the minor suffers from chronic misbehavior. Nevertheless, in these situations the state still has good reason to question the parent's ability to advocate for the minor's best interests. Configuration Three is best understood as presenting an inherent structural tension between parent and child, a conflict of interest so critical as to compromise the custodial integrity of all parents falling within the category.[199] As a result, the state must mediate between the conflicting interests of the parent and the child.

Disagreements occur frequently, if not daily, between parents and their children, but not all of these disagreements are of sufficient gravity to warrant state intervention under Configuration Three. Courts must identify only those situations where an internal parent-child conflict requires the state to mediate between minors and parents.[200] Unlike the first two Configurations, which examine state regulation of a particular minor or a family, Configuration Three involves regulation that impacts the entire class of families in which the parents and children demonstrate this structural conflict.

If a court identifies such a structural conflict, it must determine whether the state regulation at issue adequately balances the competing interests of the state, parent, and child. In these cases, determining which policy best serves minors' interests—the position advocated by the parent or by the state—is difficult. This balancing test is likely

---

[199] Configuration Three does not assume that any parent can *perfectly* represent the interests of her child. Rather, it contemplates a structural conflict that makes it difficult for the parent to serve as the child's legitimate custodian.

[200] See supra Part II.A-B. In addition, see Parham v. J.R., 442 U.S. 584 (1979), in which the Supreme Court indicated a reluctance to remove the presumption that parents are the adequate custodians of their children: "Simply because the decision of a parent is not agreeable to a child . . . does not automatically transfer the power to make that decision from the parents to some agency . . . ." Id. at 603. In *Parham*, the Court refused to recognize a clear conflict of interest between parent and child even when the parents intended to commit the child to a mental hospital. See id. at 603-04 (concluding that parents should retain substantial, if not dominant, role in decision, barring finding of abuse or neglect). Nevertheless, the Court did require that a physician's independent examination and medical judgment be consulted prior to the commitment of the child by the parents. See id. at 604. Chief Justice Burger noted, however, that the decision to hospitalize a minor or to allow for cosmetic surgery rests with the parents even if there is disagreement between the child and the parents. See id. The *Parham* Court did not provide a standard for courts to use in determining which structural conflicts are so deep seated as to compromise the parents' capacity to advocate for the minor. So far the Court has found that only abortion cases warrant such a determination.

to place the state in a weaker position to restrict the minor's rights, as compared to Configurations One or Two, because neither the parent nor the state can serve as the minor's legitimate custodian.

Configuration Three is perhaps best illustrated in the context of parental consent requirements for minors seeking abortions.[201] In these cases the minor frequently has rejected the custodial power of the parent despite the parent's earnest concern for the minor. The state is caught between protecting the autonomy of the young woman and supporting the parental interest in controlling the child. By requiring parental notification, lawmakers exercise the state's custodial function with the principal justification that they have acted for the best interests of the young woman. The state, however, is also accommodating the interests of the parent. Unlike cases of parental abuse or an incorrigible minor, here the reasonable presumption is that the parent (in all other aspects of family life besides the abortion decision) continues to serve as the minor's proper custodian. Therefore, it is more difficult to determine what action best serves the minor's interests because the minor has rejected the parent's support.

During the last few decades, the Supreme Court has demonstrated an increasing awareness of the internal tensions within families,[202] but defining a precise standard for evaluation of such cases has proven extremely difficult.[203] From one perspective, the parent-child structural conflict implicated in Configuration Three provides a heightened justification for state regulation to protect the minor. At

---

201 See supra Part II.C.

202 Laurence H. Tribe discusses the analogous situation in euthanasia cases where the patient is unable to declare her wishes. In such cases, courts must engage in a difficult balancing of the state's interest in protecting life and the interests of family who believe that termination of life is in the best interests of the patient. See Tribe, supra note 47, § 16-31, at 1598-1600. For example, in Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990), family members of a patient in a vegetative state sought a judicial sanction to terminate artificial hydration and nutrition for the patient. See id. at 265. The Court acknowledged the difficulty involved in balancing the state's undeniable interest in protecting life and the family's belief that termination was best for the patient. See id. at 279-80. The Court upheld Missouri's clear and convincing evidence standard for the family to show that the incompetent person wished to die. See id. at 281.

203 In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), the Court applied a lesser standard of review than strict scrutiny to a parental consent requirement for a minor who wanted an abortion. See id. at 74 (requiring "significant state interest that is . . . not present in the case of an adult"). Some commentators have suggested that this lesser "significant interest" standard represents an intermediate tier of scrutiny. See, e.g., Tribe, supra note 47, § 16-31 (proposing intermediate scrutiny test set forth in *Danforth* and Carey v. Population Services International, 431 U.S. 678 (1977), as possible standard in certain minors' rights cases); see also supra Part II.C. This development is attributable largely to litigation concerning women's privacy concerns in the abortion context. See *Danforth*, 428 U.S. at 74 (invalidating absolute parental veto over minor's decision to have abortion).

the same time, however, in Configuration Three the state's regulation affects a class of families, not just a single family. Therefore, without a family-specific determination that parent-child relations have deteriorated, as required in Configurations One and Two, the state should not intrude readily into the family sphere. For the purposes of this Note, it is sufficient to conclude that Configuration Three requires the state to meet a less rigorous evidentiary standard than the first two Configurations, but the state must present substantial evidence that the structural conflict exists within an entire class.

The fourth Configuration describes those cases in which the state opposes the allied interests of both the parent and the child. The great majority of all state regulations of minors fall under this Configuration, due to the strong presumption that parents know what is best for their children and are the best advocates for their children's interests. In this way, Configuration Four serves as a default category. In such cases, when the state attempts to restrict the minor's rights, it intrudes into the family sphere where the bonds between the parent and the child are fully intact. Thus, in comparison to the first three Configurations, the fourth Configuration places the state in the weakest position to regulate, and the state must demonstrate the strongest justification for restricting the minor's rights.

A summary comparison of all four Configurations is instructive. In Configuration One, as illustrated in situations of parental abuse or neglect, the parent is almost certainly acting to the child's detriment and the state is acting for the child's interests. The state is in a strong position to regulate because the interests of the state and the child are united against those of the parent. In the second Configuration, the state is also in a powerful position to restrict the behavior of the minor because the parent is no longer able to control the child and frequently has sought state assistance. In Configuration Three, the structural conflict between the parent and the child requires the state to intercede between the parties; in such cases the state has a somewhat weaker justification for regulation because all the relevant parties have conflicting interests. Finally, in Configuration Four, where the state has intervened despite objection from both child and parent, it has the weakest claim for regulation because it must override the united interests of the child and the parent.

An examination of the full spectrum of possible relationships demonstrates in simple terms when the state is acting with greatest support or with greatest opposition. The schematic presentation of these tripartite relationships is not intended to suggest a mathematical precision to the analysis. Courts reviewing challenges will still need to carefully assess the substantive nature of the rights the state seeks to

restrict; but, in addition to a substantive analysis, courts should be aware of the alliances and conflicts of interest among the actors.

One way that courts can incorporate these structural concepts into more traditional constitutional review is to employ a two-step analysis. When analyzing a state regulation, courts should begin by determining which structural Configuration most accurately describes the relationships among parent, child, and state. Because of the strong presumption that parents act in the best interests of their children, the fourth type of relationship encompasses nearly all cases. To rebut the presumption, a party seeking categorization under Configurations One, Two, or Three would need to present evidence showing that the parent-child bond has somehow deteriorated or that a structural conflict exists.

Once the proper relationship among the parties has been determined, the court should apply a more traditional constitutional review by assessing the state's interest and the connection between the ends sought and the means applied. At this second stage of the analysis, the state should enjoy great judicial deference if parental abuse or neglect or child misbehavior is involved, less deference if a structural conflict between parent and child is involved, and little deference when the parent and child are united. Again, while the selection of the particular Configuration in step one prescribes the evidentiary standard required in step two, this two-stage process should not be applied rigidly. It is highly likely that a case cannot be perfectly captured under one of the schematic Configurations. By closely examining each case by this method, however, courts will better understand the tensions among parent, minor, and state interests that are necessarily implicated by any regulation of minors' rights.

Finally, it is important to note that Configurations One and Two generally involve state action on a case-by-case basis, whereas Configurations Three and Four concern state regulations that broadly impact a community. This distinction is helpful for understanding the proper analysis a court must apply. In the first two Configurations, the greater evidentiary showing is needed in the first step of the analysis: the state needs to bring forth specific evidence of abuse or neglect by the parent or delinquency or incorrigibility on the part of the minor to convince the court that the family's cohesive bonds have weakened. By contrast, in the latter two Configurations, the greater showing of evidence is needed in the second step of the analysis: the state must provide evidence of widespread problems affecting the regulated class with a more stringent standard required in Configuration Four than in Configuration Three.

B. *Understanding Youth Curfews Within the Structural Framework*

As the earlier Parts of this Note have demonstrated, much of the confusion in youth curfew precedent arises from the lack of attention courts have paid to the structural relations among the parties. Having set forth a methodology for minors' rights that emphasizes these relationships, the following discussion will examine each of the four Configurations in the context of youth curfews. This final section considers how courts should assess which Configuration best describes youth curfew laws and what standard of review courts should apply. The section does not reach any definite conclusion concerning the constitutionality of curfews. Rather, it attempts to provide an effective and straightforward framework for courts to apply to the cases they decide.

A court should begin by examining how the curfew law impacts the relationships among parent, child, and state. The court must determine which parties are allied or in conflict with each other. This analysis of the relationships among the parties is not a simple task. Curfew laws pose a difficult problem for constitutional analysis because they are justified by competing policy concerns and often represent the interests of different groups. Depending on the particular facts of a case, youth curfews may represent any one of the four Configurations.[204]

In order for Configuration One to apply, the state must be able to demonstrate widespread, severely abusive or neglectful behavior by parents within the community in which it seeks to implement the curfew. Configuration One requires enough evidence to overcome the strong presumption that the parent is the proper custodian of the minor and to warrant state intervention. Thus, isolated cases of abuse or statistical evidence that parental abuse occurs more frequently in a given neighborhood should not be sufficient to characterize a curfew as state protection of youth from parental harm. Due to the high evidentiary standard required, Configuration One is generally applicable only to individual family cases. For these reasons, it is unlikely that any curfew law would qualify under Configuration One as state regulation to protect minors from parental abuse or neglect.

In practice, however, local legislative bodies have used the justification that curfew ordinances protect minors from parental neglect.[205]

---

[204] See discussion supra note 194 of In re Welfare of Snyder, 532 P.2d 278 (Wash. 1975) (en banc), for an extreme example of the potential conflicts in family relations that may come before a court. *Welfare of Snyder* illustrates the difficult decision that a court may be compelled to make in determining whose interests the state serves.

[205] Section 3(a)(3) of the 1989 Washington, D.C., curfew describes its purpose as protecting the welfare of minors, in part by "[a]iding parents in carrying out their responsibil-

Perceiving increased weakness in American family structure, many local legislators have passed curfews to impose control over minors because they view parents as incapable of so doing. For example, one city justified its curfew "on the implicit assumption that in many cases the traditional family unit, in which two parents exercise control over their children's activities, has dissolved."[206] In upholding a curfew, one federal court explained that the state assumes an important role in promoting the child's welfare when the parent has been neglectful.[207] Some jurists have rejected this justification for curfews: in *City of Panora v. Simmons*[208] four justices of the Iowa Supreme Court argued in dissent that curfews could not adequately address the problem of deteriorating family structure and parental neglect even if such problems were as acute as lawmakers claimed.[209]

Courts that have upheld curfews under the rationale of parental neglect have not required detailed findings that the parents in the community failed to carry out their responsibilities.[210] In the vast majority of cases, the local legislatures presented little evidence showing neglect beyond general statements that the traditional American family has declined.[211] Instead of relying upon such assertions, a court must ask whether the evidentiary findings are substantial enough to place into question the ability of parents to advocate for and protect their children. Unless a court can reach this conclusion, it cannot

---

ity to exercise reasonable supervision of the minors entrusted to their care." See Temporary Curfew Emergency Act of 1989, D.C. Act 8-325, cited in and found unconstitutional by Waters v. Barry, 711 F. Supp. 1125, 1125 app. A (D.D.C. 1989). Legislative bodies have not claimed that curfews protect minors from parental abuse. For example, neither the Washington, D.C., ordinance challenged in *Waters* nor the Dallas ordinance challenged in Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), which are typical of youth curfew laws, mentioned protection of children from abuse by their parents as a purpose of the legislation. See id. app. at 496-99 (appending to opinion copy of ordinance); *Waters*, 711 F. Supp. 1125 app. A at 1141-42.

206 In re Maricopa County, 887 P.2d 599, 607 (Ariz. Ct. App. 1994). The Arizona Court of Appeals in *Maricopa County* seemed to accept this assumption by stating that "[c]ourts like this one, given the overview of life seen in their caseloads, know that [the breakdown of the traditional family] is undeniably true for overwhelming numbers of children in this country." Id.

207 See Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1262-63 (M.D. Pa. 1975) (noting state has interest in promoting welfare of children and best interest of community, and can take custody over child when parents have been neglectful (citing Stanley v. Illinois, 405 U.S. 645, 652 (1972))), aff'd, 535 F.2d 1245 (3d Cir. 1976).

208 445 N.W.2d 363 (Iowa 1989).

209 See id. at 373 (Lavorato, Schultz, Carter, Neuman, JJ., dissenting).

210 See, e.g., *Bykofksy*, 401 F. Supp. at 1256 (finding that general concern about "the breakdown in the social structure of the family unit" justified curfew ordinance); see also *Maricopa County*, 887 P.2d at 607-09.

211 See *Maricopa County*, 887 P.2d at 607-09.

characterize the curfew under Configuration One as state protection of children from irresponsible parents.[212]

Configuration Two, on the other hand, places curfew laws on the opposite side of the equation: here, the state seeks to support parents who are unable to control their children rather than to protect children from harmful parents.[213] Legislators have frequently justified curfew laws by pointing to polls in communities showing parental support for the measures and concluding that parents desire help with their children.[214] Indeed, legislative bodies frequently pass curfew laws in order to assist communities in which parental supervision seems inadequate. Curfews, one might argue, support parents by backing them with the authority of the state and enforcing a reasonable curfew hour for their children.

The difficulty with this argument is that a consensus concerning what is a fair curfew regulation will rarely exist among parents in the community, particularly in a diverse community. Parents almost certainly will disagree about what hours and what kinds of conditions or exceptions are acceptable. Those parents who fall into the minority and disagree with a proposed curfew are likely to feel that the law is an intrusion instead of a form of support. Courts will be confronted with the difficult choice of determining which parents' views are representative of an "ideal" or "reasonable" parent. A court must examine the evidence to determine whether the parents in an entire community require state assistance and whether the curfew law actually functions as a support system. If the evidence is insufficient, a court should presume that parents are the appropriate custodians of their children.

For this reason, the second Configuration involves the same evidentiary issues as the first: the court must be convinced that a sufficient number of parents are failing in their custodial role to such a degree that the state would be justified in imposing a curfew law on not merely one, but all families. Even if a court finds the argument

---

212 A local agency that sufficiently demonstrated parental neglect, however, would have a compelling governmental interest to intervene on the child's behalf. See, e.g., Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987) (recognizing "the compelling governmental interest in protection of minor children"); see also Bohn v. County of Dakota, 772 F.2d 1433, 1439 (8th Cir. 1985) (finding that government has "strong interest in protecting powerless children who have not attained their age of majority but may be subject to abuse or neglect").

213 See supra notes 194-96 and accompanying text. Note that many cases will involve both neglectful parents and parents who are unable to control incorrigible children. In such instances it may be difficult, if not impossible, to determine whether parental neglect is the cause of the minor's incorrigibility or vice versa.

214 See supra notes 34-35 and accompanying text.

that curfews are designed to assist parents who cannot control their children convincing, it should require very strong evidence that children are poorly behaved and uncontrollable before it interprets the case under Configuration Two.

Courts have consistently required high evidentiary requirements in cases of abuse, neglect, and child incorrigibility,[215] thereby demonstrating their unwillingness to interpret the fundamental bonds between parent and child as fractured or permanently broken. In order for Configuration Two (or Configuration One) to apply, a court must find not merely that many (or even a strong majority of) parents in the community *desire* state support, but that the parents in the community actually *need* this kind of intervention to control their children. Absent judicial imposition of such a high evidentiary standard, the state could implement regulations even though the family relationships in the community are intact. Any lower standard would undermine the existing view that parents are the rightful caretakers of their children. Thus, Configuration Two, like Configuration One, calls for a heightened evidentiary standard because it challenges accepted norms of parental custody.

The third Configuration requires a court to evaluate the necessity of a curfew law by determining whether parents and children have a deep structural conflict that requires the state to serve as an intermediary. As in the first and second Configurations, in the third Configuration a strong presumption exists that the parent-child custodial relationship is functional. A court should look for evidence that the parent and child would be unable to resolve the dispute concerning the minor's evening activity on their own. Identifying this fundamental conflict is a difficult task for courts because easily applicable standards are lacking and because courts are ill equipped to make broad sociological or psychological assessments.

As previously discussed, the Supreme Court has shown tremendous reluctance to find this kind of structural conflict, most likely because of the lack of coherent standards and the presumption given in favor of the parents' custodial role.[216] Only in the context of abortion rights has the Court recognized that the privacy and autonomy of a young woman are important enough to warrant special judicial consideration. For example, in *Parham v. J.R.*,[217] the Court required that additional protections be given to shield a minor from a parent in

---

215 See supra notes 191-97 and accompanying text.

216 See supra note 200 and accompanying text.

217 442 U.S. 584 (1979).

making an abortion decision.[218] In this way, Configuration Three draws into question the presumption of parental custodianship, but only in the very limited context of the issue at hand (such as an abortion decision). In the case of curfew laws, a court must determine whether a minor's decision to leave the home at night creates a conflict of interest that requires the state to separate the minor's and parent's interests.[219] Recognizing the limited contexts in which courts are willing to identify a deep structural conflict, it is doubtful that youth curfews can be categorized under Configuration Three.

The fourth Configuration views curfew laws as state action that intrudes into the family sphere where the parent-child relationships are intact. This last Configuration encompasses most curfew laws, except those that are implemented to address extreme circumstances (as in Configurations One and Two) or structural conflicts (as in Configuration Three). For a number of reasons, Configuration Four describes the impact of youth curfews on parent-child-state relations better than the other three Configurations.

First, Configuration Four adopts the presumption that parents are the proper custodians of their children. In most cases when the state restricts the behavior of minors, including youth curfews, there will not be sufficient evidence of family deterioration to overcome this presumption.[220] Second, courts must make an independent assessment of how a curfew affects children and parents without relying upon the majority viewpoint. Even though local councils frequently enact curfews to support parents, this does not automatically mean that curfews are in the best interests of parents. As discussed above,[221] it is no simple task to determine whether curfews support or undermine parental authority because parental opinion often will be divided.[222] Indeed, parents and minors who oppose the curfew almost certainly will be in the minority as far as the democratic process is concerned.[223] A court should afford special consideration to the inter-

---

218 See id. at 604 (describing situations in which Supreme Court accords greater or less deference to parental authority).

219 A court may want to consider whether problems of communication or autonomy make it difficult for parents and their children to come to an agreement about the minor's activities. In the context of abortion decisions, the Court determined that a young woman seeking an abortion has important privacy and autonomy concerns that separate her interests from those of her parents. See supra Part II.C. A court should consider whether similar issues would create a conflict of interest in the context of a child's evening activity.

220 See supra notes 191-97 and accompanying text.

221 See supra text accompanying notes 214-15.

222 Courts have reached contradictory conclusions as to whether curfews support or oppose the parents' interests. See supra Part III.B-C.

223 In many cases in which minors have challenged curfews, parents have joined in the suit to support the minors' action. Unsurprisingly, parents most commonly allege that the

ests of these family members when it evaluates whether curfews unfairly intrude upon the parent-child relationship. Third, most youth curfews are straightforward bans on the nighttime activities of minors and provide few waivers or exceptions to the rule.[224] The vast majority of these laws remove from parents the discretionary power to grant their children permission to go out at night.[225] Like most state regulation of minors, such as compulsory education laws and health codes, youth curfews remove from parents the power to control their children. Even if these laws are intended to protect children and to support parents, the state's action still conflicts with the interests of parents and minors.

State action in this fourth category should be held to a higher standard of review in comparison to regulation that falls into the first three Configurations. In order to uphold the curfew over the parents' and minors' interests, courts should require that local governments demonstrate sufficient need for the law and show that the curfew is likely to address these goals without unnecessarily infringing upon other rights. Legislative councils must present precise data showing, for example, that crime rates can be reduced by a curfew implemented

curfews infringe on their freedom to decide how to raise their own children. See, e.g., Hutchins v. District of Columbia, 942 F. Supp. 665, 667 (D.D.C. 1996) (arguing that curfew burdened parent's Fifth Amendment liberty and privacy interests in determining child's upbringing); Waters v. Barry, 711 F. Supp. 1125, 1132 (D.D.C. 1989) (same). When deciding whether curfews support parental authority, one court announced: "The plaintiff parent would not be here if he perceived the ordinance as an aid; rather, he views it as at least an intrusion to family autonomy and as a possible threat to family serenity and integrity." McCollester v. City of Keene, 514 F. Supp. 1046, 1051 (D.N.H. 1981), rev'd, 668 F.2d 617 (1st Cir. 1982) (reversing lower court on justiciability grounds). In his dissenting opinion in City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989), Justice Lavorato of the Iowa Supreme Court quoted at length the plaintiff father's statement to the trial court explaining why he came before the court:

> "Well, it has got something to do with the love of this country. . . . It has got something to do with freedom and rights of our young. The rights of me. Do you know there are some of us who love this country enough that we will stand up and try to keep it together? . . . How are we going to show our children this? If they are pushed over, they do not have these freedoms, how are we going to teach them?"

Id. at 373 (Lavorato, Schultz, Carter, Neuman, JJ., dissenting). Justice Lavorato concluded that the curfew opposed the parents interests. See id. at 372-73 (Lavorato, Schultz, Carter, Neuman, JJ., dissenting).

224 See supra note 25.

225 In Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court concluded that New York's pornography regulations did not usurp parent's authority over her child because it ultimately enabled a parent to purchase pornographic magazines for the child if the parent so desired. See id. at 639. The Court suggested that if New York's law forbade minors from possessing such magazines in any capacity whatsoever, the law might conflict with parental authority. See id. at 639-41. Viewed under this analysis, youth curfews might be seen as removing from parents the discretion to grant their children permission to go out at night.

during a particular time and that better methods are not available. Often community members advocate for curfews for constitutionally insupportable reasons, such as fear or dislike of young people in the neighborhood. While these are genuine concerns, they cannot justify infringement of important individual rights.

The *McCollester v. City of Keene*[226] decision exemplifies the standard of review required under Configuration Four. In *McCollester*, the federal district court declared that legislation that opposes parental interests has "received a much more limited endorsement by the Supreme Court than . . . legislation [that] is designed to support the parental role."[227] Upon determining that the curfew worked against the interests of both parents and minors, the court exacted a higher standard of review and struck down the ordinance.[228]

CONCLUSION

Courts reviewing youth curfews should demand a strong justification from the state because it is acting against the combined interests of the parent and child. Although a minor and parent may disagree about the minor's nighttime activities, it is inaccurate to describe most state-imposed youth curfews as regulations addressing conflicts within the family. The Court has carefully reserved this categorization to those cases implicating the reproductive freedom of minors. While some local councils have expressed concern about the problems in American families, such as parental neglect and abuse and juvenile delinquency, no legislative body to date has mustered sufficient evidence to overcome the presumption that parents in most cities and towns are still the proper custodians of their children. By comparing the allegiances and conflicts among the parties, courts will clarify whose purposes are served by the particular state action in question. The structural analysis proposed in this Note demonstrates that courts should treat curfews as broadly sweeping regulations infringing upon the rights of both children and parents.

Ultimately, this framework seeks to compel courts to increase their examination of the structural relations involved in minors' rights regulations. Minors' rights cases implicate relationships that are far more complex than the two-party relationships involved in constitutional rights litigation affecting adults. Careless reference to prece-

226 514 F. Supp. 1046 (D.N.H. 1981), rev'd, 668 F.2d 617 (1st Cir. 1982) (reversing lower court on justiciability grounds).

227 Id. at 1053; see also Allen v. City of Bordentown, 524 A.2d 478, 486 (N.J. Super. Ct. Law Div. 1987) (requiring greater independent showing of state interest after finding that curfew inhibits parental role).

228 See *McCollester*, 514 F. Supp. at 1051-53.

dents involving adults' rights is likely to provide only the substantive dimension of analysis that, though important, does not fully capture the tensions at issue in a minors' rights case. If courts continue to rely upon previous ad hoc methods, the inconsistency already present in youth curfew and other youth rights decisions will persist.[229] More than forty years ago, Justice Frankfurter implored the Court to define a body of law that reflects children's special place in life.[230] Other justices have joined Justice Frankfurter's plea to the Court and the judiciary.[231] Indeed, the past fifteen years of decisions regarding abortion and the autonomy of young women have compelled the Court to address the tripartite relationships involved in state regulation of minors' behavior. Now is the time for courts to meet Justice Frankfurter's challenge and actively establish a coherent framework of analysis for minors' rights.

[229] See, e.g., Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1253 (M.D. Pa. 1975) (noting lack of Supreme Court guidance in analyzing how rights of adults are to be applied to minors), aff'd, 535 F.2d 1245 (3d Cir. 1976).

[230] See May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

[231] See Bykofsky v. Borough of Middletown, 429 U.S. 964, 965-66 (1976) (Marshall, Brennan, JJ., dissenting from denial of certiorari).